MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
April 5, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 7:38 a.m., on Thursday, April 5, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

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

GUEST LEGISLATORS PRESENT:

Assemblyman Harvey J. Munford, Assembly District No. 6

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

Tony Alamo, Chairman, Nevada Athletic Commission, Las Vegas
Keith Kizer, Executive Director, Nevada Athletic Commission, Las Vegas
Joe W. Brown, Commissioner, Nevada Athletic Commission, Las Vegas
William Dean Ishman, President, National Association for the Advancement of Colored People, Nevada
Gary Peck, Executive Director, American Civil Liberties Union, Nevada
Jason Frierson, Attorney, Office of the Public Defender, Clark County, Nevada
Steve Dahl, Justice of the Peace, North Las Vegas Township, and President, Nevada Judges Association
David Kallas, Director, Las Vegas Police Protective Association, and Southern Nevada Conference of Police and Sheriffs
Ben Graham, Representative, Clark County District Attorney, Nevada District Attorneys Association, Las Vegas
John Dean Harper, Chief General Counsel, Las Vegas Police Protective Association, Nevada
Robert Roshak, Sergeant, Las Vegas Metropolitan Police Department, Nevada
Kathleen Delany, Senior Deputy Attorney General, Bureau of Consumer Protection, Attorney General's Office, Nevada
James Jackson, Representative, Nevada Attorneys for Criminal Justice, Las Vegas

Chairman Anderson:
[Meeting called to order. Roll called.] I will open the hearing on Assembly Bill 418.

Assembly Bill 418: Makes various changes relating to unarmed combat. (BDR 41-889)

Assemblyman Harvey J. Munford, Assembly District No. 6:
I am here today to introduce A.B. 418. During the past interim the Nevada Athletic Commission (NAC) created an Advisory Committee on Boxer Health and Safety after the unfortunate deaths of several boxers. I was

honored to serve as a member of this Advisory Committee. Its purpose was to find new ways or ideas to reduce the risk to boxers and improve safety measures. The Advisory Committee submitted this report to the NAC in June 2006. The report included many important reforms to address the concerns relating to the health and safety of boxers. Assembly Bill 418 addresses one of the reforms that require statutory changes. As you can see, the bill eliminates the Medical Advisory Board (MAB), which has not been active over the years and makes other changes related to the definition of unarmed combat.

In concluding my introductory remarks, I would like to note my love for boxing goes far beyond that of an ordinary spectator. For many years I have cheered on the sidelines, and now through my service on the Advisory Committee, I have a great appreciation for the effort and work that goes on behind the scenes to ensure the integrity and safety of this profession. It was an honor and a privilege to serve on the Advisory Committee and I am pleased to present this bill on their behalf today.

Chairman Anderson:
Nevada has a long history of championship boxing. We keep alive the great tradition, one that has proved entertaining for spectators. But this is also a great opportunity for some individuals in society.

Tony Alamo, Chairman, Nevada Athletic Commission, Las Vegas:
I would like to testify regarding the provision for the dissolution of the MAB. Last year our health advisory panel, which was created by a previous chairman, convened for nearly nine months. It came out with numerous helpful recommendations regarding the health and safety of our fighters. One of the recommendations was the removal of the MAB. I have the current privilege of chairing the NAC, and I have acted as a commissioner for nearly six years. Prior to that, I was a ringside physician and was appointed by former Governor Kenny Guinn to actually be the chairman of the MAB—the board in question today.

The MAB was first created after the tragic death of Duk Koo Kim nearly 25 years ago. At the time, it was felt that the MAB could and did help with the health and safety of our fighters. However, with what has occurred with the complexity and technology of medicine, the MAB, cannot give our current and future commission a level of expertise that is needed. The current make-up of the MAB is by gubernatorial appointment and the only requirement is that they be a licensed physician in the State of Nevada. There are no requirements for the type of medicine, level of expertise, or commitment that those physicians should have.

In boxing, as well as in martial arts, there have been specific questions that must be addressed regarding individual fighters. Those questions are better answered by experts who could be hand-picked by the Commission when needed to address specific issues. For example, if the Commission wants to address issues of new ocular refractor surgeries, which are currently being done on fighters, we would quickly create a subcommittee of ophthalmologists and corneal specialists who can address the technology—a technology that was not available 20 years ago. Fighters now are coming before us with different types of refractive surgeries, and it is going to be a problem that we will have to address. Depending on the type of surgery, some can predispose them to permanent eye damage. The MAB, in its current form, is inadequate to give insightful advice.

The MAB rarely met as an organized body. There had been a physician who was appointed for nearly six years and never participated in the meetings that did occur. The MAB was a great idea and fulfilled a need for nearly 25 years. The ability to form an organized panel of specialized experts at a moment's notice—of course within the parameters of the Open Meeting Law—can help address medical issues. It will also continue to keep our fighters safe and healthy, which is our number one concern.

Assemblyman Horne:
Dr. Alamo, I always have a concern when we are asked to eliminate something before we are asked to fix it. I would like to know exactly why the MAB cannot be fixed or modified to do what we need it to do instead of jettisoning it. As we have seen, when we eliminated something we were later asked to bring it back.

Tony Alamo:
As I mentioned before, the MAB did serve a purpose. Today, medical technology is becoming so specific in terms of sub-specialties that there is no way, statutorily, that a MAB can be appointed or created to fit the needs of every particular problem that has come before us. During my years as a ringside doctor and now as the commissioner, those medical issues coming before us are issues that you need specialized experts to address. This is something that the MAB cannot do. I agree with you; we are asking to remove something, but we are also putting a better procedure in its place. That is to give the Commission the ability to put together small, sub-specialized expert groups to deal with the daily individual problems.

Assemblyman Carpenter:
Is it in the statutes now that you can appoint this special committee of experts to take care of a certain problem?

Keith Kizer, Executive Director, Nevada Athletic Commission, Las Vegas:
We would use the Commission's inherent powers to form the committee, put it on an agenda, open the meeting, and discuss the issues, for instance, a heart issue. They can debate it openly and the five of them would create a committee of cardiologists. That committee would then comply with the open meeting law and hold meetings thereafter. The main point is the flexibility—one issue may deal with the heart, another with the eyes, and maybe the next issue would be the brain. Right now, the MAB is made up of a retinal specialist, a cardiologist, a neurosurgeon, a neurologist, and I cannot remember the fifth specialist. It is a hodgepodge, and one size definitely does not fit all in this case.

The other issue that this bill addresses is professional wrestling, which is in Section 1. Professional wrestlers are pro athletes, but they are not unarmed combatants. It is more akin to shows where there are acrobats such as "O" or "Mystére." Nobody is saying that they are not athletic, entertainers, or performers, but they are not unarmed combatants. They are not throwing legitimate blows in the ring. This would have no tax consequences for the State. Instead of being taxed as unarmed combat, it would be taxed as live entertainment. There may be extra revenue coming to the State, but it would be a loss because we do not have that many pro wrestling events. It is more of an issue of form over substance. It is not a good idea to inform the public that it is truly unarmed combat when we all know that it is not. I have talked to Vince McMahon, chairman and promoter of World Wrestling Entertainment (WWE), about this and he has been trying to get this done for about 15 years. Most other states have, in fact, taken away pro wrestling because it is not real armed combat, nor is it advertised as such, like it was 20 years ago.

The second part of the bill would expand the amateur boxing fund to encompass the fast growing sport. The State, through the Commission, would be able to help amateur clubs, such as mixed martial artists and kickboxers, in the manner it has helped thousands of amateur boxers over the years. The fund would allow financial help to these amateur mixed martial art and karate studios. As we all know, martial arts teach mental discipline, physical fitness, manners, respect, and it has worked well for kids and adults over the years—the 20 plus years that we have had clubs for amateur boxing. It would be great for kids who take more of the martial arts approach, rather than studying boxing.

We are also trying to get money for Computed Axial Tomography (CAT) and Magnetic Resonance Imaging (MRI) scans, as well as random drug testing for post fights. One big difference between boxing and baseball or track athletics is the outcome of steroid use. In baseball, one would hit a ball farther and in track

one would throw a javelin farther. If a boxer uses steroids, then they would be punching another human being in the head harder. The Safety Committee is very proactive and came up with that. The Commission, despite having a good reputation, has always dealt with issues. They have always tried to be proactive. An example would be the creation of the Health and Safety Committee when Raymond "Skip" Avansino was commissioner.

Joe W. Brown, Commissioner, Nevada Athletic Commission, Las Vegas:
Dr. Alamo and our Executive Director Keith Kizer have capably explained the objectives of the bill.

Chairman Anderson:
Mr. Kizer, will the dollars be going to a broader group of amateurs? As you indicated, the change in definition could take into consideration the smaller amateur sports and the contests that they participate in. You are not trying to regulate, but want to promote funding for amateur clubs and provide supervision? I want to understand the change in the definition and what that affect would be.

Keith Kizer:
The mixed martial arts and, to a lesser extent, kickboxing worlds, have grown in popularity over the years. In fact, our first mixed martial arts event happened in September 2001. The net was $818,000, which was large at that time. We had an Ultimate Fighting Championship (UFC) event on December 30, 2006, where the net was almost $5.4 million. The only boxing event that even surpasses that is when Oscar De La Hoya fights. But, mixed martial arts was the number two event for the entire State, including all other boxing.

We have a great resource from which to get the funds, and it would not affect the budget at all. The money comes straight from the promoter as it does with the boxing promoters. If the Committee passes this bill, we would be taking the money from the other sports as well. It would be great to give money to other amateur sports instead of just boxing like the Commission does now. There would be Tae Kwon Do and other martial arts that engage in full contact amateur contests. Again, martial arts is strictly regulated under the auspices of amateur boxing. Regulation has been helpful and we have seen great results over the years. So we want to help them with trips, or buy safety equipment—head gear, mouth pieces—anything related to ensure that these kids do not get hurt. It is a dangerous sport. The way the amateurs have it set up, it is done as safely as possible.

Chairman Anderson:
Is this more of a general definition? Does this mean that those smaller places are going to become aware of the need for gaining some approval from you before they put on such events?

Keith Kizer:
They would have to inform us. We have a grant process through the statute, and regulations that the clubs come to us for grants, for safety equipment or help fund their travels to regional or national tournaments. We use the exact same process for the amateur mixed martial arts and kickboxing club as we do for the amateur boxing clubs.

Chairman Anderson:
Without the costs?

Keith Kizer:
Correct.

Assemblyman Munford:
I learned a tremendous amount about boxing while serving on the Commission, in terms of the preparation for fights, and how they develop new protections and safety measures for fighters. I did not know the procedures for preparation of fights, which occurred at various gyms where the boxers actually trained. I toured a few of the gyms to get information about what was going on. To me, it was really an education and I enjoyed it. I urge the Committee to see the real matter of this entire bill.

Chairman Anderson:
I agree with you. I am happy to see boxing expand, particularly to the youthful. I know the Reno Police Department (RPD) hosted a benefit program for the Mighty Mite boxers. It was for kids to learn coordination, which is an important function for boxing, such as by using a speed bag. There is a great deal of skill needed for boxing.

I will close the hearing on A.B. 418.

We have one member who wants to check on information relative to the bill, so as soon as he is satisfied we will put this to the work session.

I will open the hearing on Assembly Bill 436.

Assembly Bill 436: Makes various changes concerning conducting a coroner's inquest. (BDR 14-1331)

Assemblyman Harvey J. Munford, Assembly District No. 6:
Assembly Bill 436 requires a coroner's inquest to be held when a death occurs while an officer is in the process of arresting a person. The measure provides the families of the deceased an opportunity to provide testimony at the inquest. Last spring, the Las Vegas Metropolitan Police Department (LVMPD) apprehended and handcuffed a suspect in a homicide investigation—his name was Swuave Lopez. The 17-year-old tried to flee custody, but was then shot and killed by a LVMPD police officer.

Under current Nevada law, such a situation would not mandate the holding of a coroner's inquest to determine whether the shooting was justified. Assembly Bill 436 will require the inquest and a district attorney or district judge cannot stop it. The measure will also allow a representative to speak on the family's behalf at the inquest. In Mr. Lopez's case, negative evidence about his character was brought up; however, there was nobody to be his advocate and refute what was being said. Assembly Bill 436 gives the family an opportunity to protect the good name of the deceased.

A summary of the bill states:

> ...requires an inquest to be conducted any time that a person dies as a result of the use of deadly force by an officer to effect the arrest of a person. Section 3 requires the justice of the peace who presides over a coroner's inquest to allow any family member of a person who died as a result of the use of deadly force by an officer to effect the arrest of a person to provide testimony at the inquest.

The public needs to be assured that when people die while peace officers are risking their lives that there is a proper determination as to what caused the death. A decision to hold a coroner's inquest will not be determined by a prosecutor or judge, because they may work with the law enforcement agency on a daily basis. Finally, the guarantee for family members to speak at the inquest provides a voice for the deceased. That voice has the right to be heard. I encourage your support of this important and worthwhile legislation.

William Dean Ishman, President, National Association for the Advancement of Colored People, Nevada:
I am in favor of the introduction of the bill. It requires two amendments to make it an effective bill.

Chairman Anderson:
Do you have your amendments in writing? And have you shared them with the chief sponsor of the bill?

William Dean Ishman:
Yes sir. I truly believe this bill is necessary. The issue I want to address is the part that deals with the escaping suspects, like the Swuave Lopez situation. I am concerned about the use of deadly force as it applies to escaping suspects, more specifically, as stated in the *Nevada Revised Statutes* (NRS) 171.1455. I speak to you as a retired police officer, one who fully understands that this proposed amendment should in no way hinder any good and righteous police officer in the execution of his duties. I also know that a properly handcuffed and monitored prisoner should not be able to escape.

First and foremost, this proposed amendment is the right thing to do, and that is to include an immediate threat of danger clause. The purpose of this would be to protect lives from the immediate threat of danger, especially in the case of Swuave Lopez. Here was a young man who was disarmed, arrested, handcuffed, put in a car, and escaped because of the lack of monitoring. His reward was death. That is a crime in itself and should not happen. If my explanation is not enough to convince you that we need to add this clause, then I want to bring to your attention *Tennessee v. Garner*, 471 U.S. 1 (1985). The Supreme Court ruled and made this immediate threat law, so it already exists as federal law. The same immediate threat of danger exists in LVMPD's policies. It does not exist in our NRS 171.1455.

We need to address this if for no other reason, than the fact that it would leave this State open to the possibility of a major lawsuit. I want to urge your support for an amendment of A.B. 436 to include "immediate threat of danger" as it relates to an escaping suspect. I use the word "suspect" because, until they are tried in court, they are not the felon yet. Please take a serious look at this and think about the financial burden that this might put on the State should this be challenged.

Chairman Anderson:
Do you feel that the language is too vague as stated in Section 1? That part of the bill states "to prevent escape, an officer may, after giving warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person," and subsection (b) states, "poses a threat of a serious bodily harm to the officer or to others." Is that what your contention is, sir?

William Dean Ishman:
I am saying that there needs to be an immediate threat of danger. Again, we use the Swuave Lopez case as an example. This young man was not in fight mode, his was in flight mode. There was no immediate threat of danger which

justified shooting a man who was handcuffed and running. In my opinion, he should have been chased down.

Chairman Anderson:
Does the Committee have this amendment in writing?

William Ishman:
I sent it to Assemblyman Munford. He has the revised language.

Chairman Anderson:
Mr. Munford, do you have language that you want to submit for an amendment?

Assemblyman Munford:
I do not know the language right off the top of my head, but it is in my office. I will make that available to the Committee.

Gary Peck, Executive Director, American Civil Liberties Union, Nevada:
In general, I am supportive of what Assemblyman Munford is trying to accomplish with this bill, but I have serious concerns about the way it is currently written. I do not have prepared amendments and there is a reason for that. First of all, I support Mr. Ishman's proposed amendments because, as he suggested, they would agree with the current Supreme Court doctrine and LVMPD policy—the State statutory provisions regarding the use of deadly force by officers. That would be a good thing in its own right. It would also establish the proper standard to be used when coroner's inquests are conducted, and juries are given instructions about making a determination regarding the use of deadly force by police officers.

Coroner's inquests that are properly conducted with the right set of rules can enhance transparency and accountability. With respect to officer-involved homicides, we have been advocating for a process that would be fair, and designed to get at the facts of what happens in any particular incident. I do not believe, however, that coroner's inquests improperly designed are a good thing at all. If coroner's inquests are rigged or a sham, they really are not worth much at all in terms of inspiring public confidence or holding officers properly accountable.

With that in mind, we have been working with the Las Vegas Police Protective Association (LVPPA), district attorneys, and representatives from county government here in Clark County for the better part of the last six months. They have been trying to develop a set of rules that the American Civil Liberties Union (ACLU), NAACP, and other stakeholders are comfortable with. Thus far

we have had a difficult time coming up with those rules. Hence, if this Committee is trying to develop a bill, with respect to coroner's inquest proceedings, I would urge that you bring some of the stakeholders together from around the State. I would ask that we be included in that mix as well, to see if we can come up with rules that would ensure that inquests have institutional integrity.

Finally, what is troubling to me, is the notion that members of the deceased's family will be allowed to testify any time they want to. From my perspective, any testimony or statement that is allowed should be probative in nature. Those testimonies should go to the actual facts of the homicide or pertinent facts that have been raised during the course of the inquest, in which case, the testimony or statement is relevant. But to simply let family members or the representative make statements that might be highly prejudicial to police officers, simply because the family is upset, is highly inappropriate and not acceptable. We would oppose that language and ask that the stakeholders work together to come up with language that would ensure the testimony is actually probative and not prejudicial. Absent those kinds of changes, we would not be supportive of the legislation in its current form.

That is why I did not bring proposed amendments because it would be presumptuous of me to provide amendments that I know others may take issues with. I am not suggesting that Mr. Ishman's amendments are not appropriate, because they are; however, they do not address the coroner's inquest issue. Given the six months deliberations and negotiations we have been involved in, I think fairness requires that the stakeholders be brought together if the Committee is going to try to move this legislation so we can find some common ground.

Jason Frierson, Attorney, Office of the Public Defender, Clark County, Nevada:
I want to concur with both the previous speakers regarding the intent of this bill. We support the concept addressing the inquest process and the amendments suggested by Mr. Ishman. I have also been involved to some extent with the local process of trying to develop ways to address the coroner's inquest. I am not going to repeat what Mr. Peck said, but I do want to acknowledge that there is a concern that this process can turn into a circus, with a mourning family taking their frustration out on an officer. That is a valid concern and is not the intent of this amendment. The intent is to come up with an effective fact-finding process, and we support that under these circumstances.

Chairman Anderson:
The tragic death of anyone is of concern to the Committee. The particular circumstance that took place in Clark County is unacceptable to the law enforcement community and to anyone who values life. The officers who I have spoken to, do not like to use deadly force. However, it is the reality of their job and we all rely on their discretion. It is human behavior that is unpredictable and which may lead others to the use of force. We are all sensitive to the overall issue.

Steve Dahl, Justice of the Peace, North Las Vegas Township, and President, Nevada Judges Association:
The part of the bill that causes us problems is the last paragraph dealing with the statements or testimonies of family members. I find myself agreeing with Mr. Peck. It opens up all kinds of problems. First of all, I would suggest that the paragraph is unnecessary because the paragraph before says "the justice of the peace shall summon and examine as witnesses every person who, in his opinion or that of any of the jurors, has any knowledge of the facts." That would include any family member who has something relevant to say about the facts, not just wanting to speak because they are upset or wanting to get something off their chest.

Second, the paragraph as written is overbroad. It says "the justice of the peace shall allow any member of the family of a person who died..." We have had some volatile coroner's inquests in Clark County. It has not been a great process and lots of people are showing up unhappy. If the deceased person has 30 family members show up, then under this statute the justice of the peace will be required to allow all 30 to stand-up and speak. That is way overbroad and it would really affect the proceedings.

It also opens up other issues. If family members can testify about their deceased family member, then should we allow the family members of police officers to testify about what a swell person the police officer is. If the family testifies about what a nice person the deceased was, then the other side would be able to testify that he was not such a nice person. All of those things may be interesting, but they are not relevant to the proceedings. It is a legal proceeding and it needs to be confined to legal matters. That final paragraph does not help that out.

Mr. Peck did talk about the process. We are engaged in a serious process, at least in Clark County, of coming together to try to come up with a better way of doing these inquests. The Committee will also be well advised to let us proceed to see what we come up with.

David Kallas, Director, Las Vegas Police Protective Association, and Southern Nevada Conference of Police and Sheriffs:
The LVPPA and Southern Nevada Conference of Police and Sheriffs represent all the law enforcement officers in Clark County except for Mesquite and Boulder City. We have officers who have been unfortunate enough to have had to use deadly force that caused the death of another human being and have experienced a coroner's inquest. Certainly, we are in opposition of this bill. The stakeholders in Clark County have been meeting for several months trying to agree on resolutions that would address concerns of the community in southern Nevada. I would like to emphasize that a small amount of the community have raised concerns about the inquest process. You have heard statements that the process needs to be more effective. I am here to tell you that those statements are pretty subjective because it comes down to a point of view.

Does the process do what it is supposed to do? Historically, and sometimes today, the district attorney's office reviews a death caused by a police officer in the course and scope of his duties. In Clark County when it would happen it would go to a grand jury. People criticized the grand jury because the public did not know what was going on inside the four walls. We brought it out into the light and created a transparent procedure by putting it into a courtroom. Today proceedings are broadcast on television. To say that it is not transparent or effective enough is subjective.

Without going point-counter-point about the background of the individuals involved, whether it was a murder suspect who executed an 18-year-old or it was the officers themselves who were involved in the shooting, I would ask the Committee to allow Clark County to continue dealing with this issue. I realize that this legislature will end, hopefully, around June 4. I hope you would not be pressed into making a decision that could impact Clark County and the rest of the State in the interim of the Legislature. Give us the opportunity and chance to continue with our conversations. Just because there are parties who do not agree with the direction of those conversations, does not mean that they are not going in the right direction.

Chairman Anderson:
I appreciate Judge Dahl and others indicating to me that there is a good faith effort to solve this issue. However, that does not lessen the concerns Mr. Munford brought forth with this issue, which is the concern of transparency. That is why our meetings are broadcast live on the internet everyday. We want people to come and testify because transparency is what we are all about. We have another bill that reflects our concern about the question of transparency and courts. We are all deeply concerned. The taking

of a human life under any circumstance concerns me, and I want to make sure that there is not a rush to judgment.

A police officer has a difficult job in terms of being on the street and dealing with various situations. His judgments should not be questioned. However, the public needs to be assured that he is not going to use deadly force just so he can demonstrate that he can use deadly force. A coroner's inquest is an opportunity to verify that there was a real threat and we want our law to reflect that. Also, just because this is happening in Clark County, does not necessarily mean this is occurring everywhere else in the State. That is what state laws are all about. The law is not being set for a particular community, but rather a standard is being set for every justice court and coroner's inquest. So I can appreciate that.

Assemblyman Horne:
I did not quite hear your opposition to the proposed amendment on the standard of using deadly force. Oftentimes, I want to provide law enforcement with the tools they need to do their job. The Swuave Lopez incident was one that gives me concern. It sends a message that we will not investigate the death of a fleeing suspect who was handcuffed and killed because it may have been a legitimate shooting under our current laws. Is that going to be the policy that we want to set for the State of Nevada, or should the standard be higher? Even with my titanium knee, I think that I can catch a handcuffed suspect who is fleeing. I do not know the exact details—if he was handcuffed in the front or back of his body—but from what I understand there were two officers present and there was not an attempt to apprehend him. I think the status quo tells us this is okay, but this is a policy question of whether or not it should be okay.

David Kallas:
I was called out to the scene that morning and I could spend the next half hour explaining it. I know there were statements made that Swuave Lopez's hands were behind his back. I can tell you that Lopez's hands were not behind his back when he was shot. I can also tell you that it was not just about a fleeing felon. There was much more going through those officers' minds regarding events, which started about six or seven o'clock the night before. The officers were looking for a missing teenager when witnesses began to call the station stating that they were being threatened by an individual with a gun. This was the same gun that the individual used to execute that missing teenager in the desert and then burned the teenager's body. Without getting too emotional and getting into the details, there is a lot more to it than the public knows. During the course of another's testimony, it was stated that this bill was to try to repair the reputation of the individual involved. Well, it works both ways. If the information came out about the entire set of circumstances surrounding this

incident, I do not think that the individual's reputation could ever be repaired. I am talking about the facts of the case, not the reports or second hand information that we heard.

So there is a concern when deadly force is used. But even if we add the word "immediate" in the bill, it still becomes subjective because "immediate" may mean different things to different minds. That morning those officers really believed if that individual left that parking lot, witnesses' lives were going to be threatened. What would have happened if he did escape? If he would have hurt one of those witnesses, then the family would come to the police department and ask how could you let him escape. What do we say to them? I have had my hand on the trigger many times over 28 years and, after what I have seen in a coroner's inquest over the last 10 years, I thank god everyday that I never had to pull the trigger. I would not want anybody to sit in judgment of me, having made a decision of what I thought—based on my training and experience—I needed to do because I had no other alternative. That is really what the basis of this entire proposal is and what the conversations over the last six or seven months are in Clark County. All we are doing is adding another word to NRS 171.1455, but it is still subjective because "immediate" in whose mind? How do we make that determination?

Chairman Anderson:
People do not recognize how difficult an officer's job is unless one has been on a ride-along or watched an officer perform his job. I am happy that I have not chosen police work as a career path. They hold a great deal of responsibility in terms of force and we do rely upon their good judgment to legally use that force. While we can put words on paper, in reality we need officers on the street who understand and respect life. The officers that I have met, clearly showed those characteristics 24/7. I would not want there ever to be a doubt that the public has confidence in an officer's judgment. At the same time the loss of a human life, or any other tragedy, is not one that will weigh forever on that officer's mind. He recognizes and justifies the tragedy by the fact that he was using his best judgment, which apparently a coroner's inquest did uphold.

Assemblyman Mortenson:
You mentioned many times that "if only the public knew." How come the public does not know? Is there a reason that this information is not available to the public?

David Kallas:
I cannot speak for the policies of all law enforcement agencies throughout the State. During the coroner's inquest process, one would not want to go in and besmirch the name of anybody involved, whether it is the suspect who died or

anybody else. A coroner's inquest is a fact finding process. It is an opportunity for the officers, who appoint voluntary witnesses to come in with other witnesses, to explain what happened in the officer's mind. The officers are the only ones who knew what was going through their mind, in regard to incidents that may have lead up to that incident. Those incidents are contained in reports—officer or incident reports—throughout the law enforcement agencies. The facts are even in statements that are voluntarily given by the officers and other witnesses through the homicide details right after the incident occurred. I am sure that is a question that a representing agency could answer for you. I would imagine those are public documents that one could obtain, if he wanted. That is what the coroner's inquest process is intending to do and we believe that is what it does.

Assemblyman Mortenson:
It seems to me that when police receive bad publicity they would want to be transparent and tell the public exactly what happened, so that the police are not criticized.

Chairman Anderson:
That is a fair question concerning policy, but it may be a matter of procedure and case law. Maybe somebody from the district attorney's office might be better able to answer the question of why certain information is not available right away when the issue is hot in the media.

Ben Graham, Representative, Clark County District Attorney, Nevada District Attorneys Association, Las Vegas:
This is a difficult and emotional situation that Officer Kallas did an excellent job of trying to explain. I have great respect for journalists, but sometimes the other side of the story does not sell newspapers as well as other information. There are reports that are kept confidential and are not relevant to a coroner's inquest. Those reports are, basically, attacking the victim who was killed as a result of an incident. I was not present at the Lopez inquest, but I could find out if there was information that would have been helpful to the case. From time-to-time reports are not available and the discovery process is pretty open for the attorneys involved, but not necessary for the public.

Assemblyman Mortenson:
I understand what you are saying, but I do not understand why. It seems to me that transparency would help in those situations.

David Kallas:
During the inquest, all the information about the events leading up to the arrest and confinement of the individual who fled police custody that morning were

presented. It was important for the presiding hearing officer and, especially, the coroner's inquest jury. The jury had to understand what was going through the officer's minds that caused them (officers) to believe that shooting the suspect was the only option available to them that morning. The officers will discuss, in great detail, all the information that they had available to them over that eight-or-ten hour period. Law enforcement can only present the information and testimony as we know it in a public setting. It is up to the reporters and television stations to decide whether it sells papers and sometimes that is what it really comes down to.

Assemblywoman Gerhardt:
For the people who are not familiar with the coroner's inquest, how are the members chosen?

David Kallas:
It is no different from how any other jury is picked. The only difference is that seven jurors sit on a coroner's inquest jury panel. They are selected from the same pool of jurors for a civil or criminal case—they are just assigned to the coroner's inquest that day.

Assemblywoman Gerhardt
What were the findings on the Swuave Lopez case?

David Kallas:
They found it justifiable.

John Dean Harper, Chief General Counsel, Las Vegas Police Protective Association, Nevada:
The opposition has made their position known and I agree with that and I also agree with Mr. Peck. The process of conducting an inquest should be left to the county commission. This particular provision, especially Mr. Ishman's proposed amendment, has gone a little too far. What is currently in the statute is adequate. It properly apprises the officer that he is entitled to use deadly force.

Robert Roshak, Sergeant, Las Vegas Metropolitan Police Department, Nevada:
We support the concept of the coroner's inquest. It is not the intention of LVMPD to deceive the public or hide what has occurred. We do have concerns with this particular bill and those have been mentioned. Many of our concerns do parallel what we have heard from Mr. Peck and others.

Gary Peck:
I did attend the inquest and it is important to know that the finding was not justifiable in the Lopez case. It was excusable, which means the police made mistakes, but they were not criminal mistakes. Much more important, regarding Mr. Ishman's proposed amendment, is a profound misunderstanding on the part of some representatives from the LVPPA. The standards for determining whether or not the use of force was appropriate are not entirely subjective and are not meant to be. They are the reasonable police officers standard. The question is whether or not the standard will be based on whether the officer behaves in a reasonable manner. Did he reasonably believe that there was a threat, which is the current statutory standard, or should the standard be in agreement with the Supreme Court and the LVMDs own policy? Did the officer reasonably believe that the victim was an immediate threat rather then simply a threat? The standard is not and should not be purely subjective. Police officers do have a tough job. They have immense power and indeed the power to take a life, which should only be used in appropriate circumstances.

Lastly, the question is whether or not the coroner's inquest is transparent or if the public gets the information. The public does get the information. The process is transparent. The disagreement is whether or not the public believes that the process is fair and actually reports the facts. It is our belief that there is a significant segment of the public who do not believe that, and that is why the ACLU is working on fixing that process.

Chairman Anderson:
I will close the hearing on A.B. 436 and return it to Committee. I received the proposed amendment from Mr. Ishman (Exhibit C). Mr. Munford, I apologize for not asking for any closing comments from you, but is there anything else that you would like added to the testimony.

Assemblyman Munford:
I am satisfied. Thank you.

Chairman Anderson:
I will open the hearing on Assembly Bill 521.

Assembly Bill 521: Revises provisions relating to the crimes of fraud and racketeering. (BDR 15-500)

Kathleen Delany, Senior Deputy Attorney General, Bureau of Consumer Protection, Attorney General's Office, Nevada:
On behalf of Attorney General, Catherine Cortez Masto, and consumer advocate Eric Witkoski, I am here to introduce A.B. 521. This bill tries to do a simple

thing, but it may be difficult to explain, so hopefully we can get this understood today. Right now we deal with cases under the Deceptive Trade Practices Act. This deals with consumer fraud cases, civil or misdemeanor, or if the facts did not prove theft, then we could go after the larger schemes with a felony. The problem is the sophistication of these schemes—creating websites, having storefronts, or advertising in a certain way. Ultimately, the whole scheme is with the intent to defraud, but it may not be possible to prove theft, which requires a different type of intent—to permanently deprive the person of their money or property at the time of the solicitation.

We are trying to create an appropriate felony crime, where the actual enterprise is put together for the purpose and intention of defrauding consumers. The changes sought are necessary to better protect consumers, and it deters significant fraud schemes committed by offenders. The offenders pose as legitimate businesses that are used to perpetrate fraud upon Nevada consumers. The small fines and misdemeanor criminal convictions are just not sufficient. Before I continue, I would like to make a disclosure. I primarily practice in the area of civil law. I have handled some criminal cases, and have worked closely with my colleague—the senior deputy. He handles the criminal and security fraud prosecutions. We drew this bill from the existing security fraud statutes, which require certain intent levels, but do not necessarily require the intent for theft. That is the distinction that we are making with this bill.

An example would be a case where a company was set up by an individual who created a website and phonebank to solicit folks for what we call a grant scheme. You might have heard of a grant scheme because they are becoming more prevalent. This offender will tell folks that anybody can get a grant and can use it for anything—pay school loans or whatever. The offender will solicit the money from the consumer to engage in a grant writing proposal. In some cases, he will guarantee that there will be a grant receipt. What happens is a proposal is written, but we know and so does the offender that there is no grant at the end of this proposal. The difficulty in front of the jury is how do you say there is theft? How do you prove the intent to deprive the person of their money at the beginning of the solicitation, when there have been certain things that appear to have been done in furtherance? The way the scheme works is there appears to be something done in furtherance of a legitimate enterprise, which would then ultimately deprive the person of their money or property.

We have an amendment to propose, but we think this bill currently achieves that goal. The bill creates a felony crime for business enterprise that has been put together with the purpose and intent to defraud multiple victims with large scale losses for consumers. A loss for an individual consumer may not be that large scale. We were not aware, until today, that there had been an opposition

filed in writing and may also be verbally stated here today from the Nevada Attorneys for Criminal Justice (NACJ). There are some statements in the NACJ's memorandum that are not accurate in terms of how the bill is drafted. One thing that I do see from their concerns is that the bill may, in fact, read more broadly then what was intended by our division. The intent element and the intent to defraud seems to be a subpart, rather then the overarching goal that we would seek to amend. We want to make clear that the true intention of this bill can be summarized by the following: the "person shall not, in the course of an enterprise or occupation, knowingly or intentionally," defraud. The way the bill is currently worded it seems that it could apply more broadly, for instance to somebody who has the intent to make an untrue statement and somehow defraud somebody. We are not going after these smaller cases. That is not our intent. We want to affirmatively propose an amendment. We would like to move the language from page 2, lines 38 and 39 to Section 2, subsection 1, and clearly state that it is the intent of the business scheme to defraud and list the facts that we want to charge to that crime. We would also like to have the appropriate felony attached to the section as well.

There may have been issues that I could or should have covered, but the guts of the bill are in Section 2. The remaining sections are simply to incorporate this particular crime appropriately to the racketeering and money laundering statutes, so that if a crime is proven and it meets the criteria to elevate it to racketeering, we can charge those things as well.

Chairman Anderson:
We have heard other pieces of legislation that deal with the criminal intent of a group to defraud a store, by what appears on the surface to be shoplifting, but the aggregate total reached a higher degree. Under our current statutory scheme, would you be able to charge somebody with racketeering in that scheme? If we were to pass this, would we be giving store owners an opportunity to solve their problem of people using an organized theft ring?

Kathleen Delany:
I do not know if this would apply in that circumstance. I would like to say yes because that would provide additional support for the bill, but I want to be honest with you. Racketeering is an enterprise that requires two underlying felonies to reach that level. We are talking about situations where it could be an individual person, not necessarily a group. What happens is a business creates the illusion of a legitimate operation. They defraud consumers out of small or large amounts of money in an aggregate that is quite large at the end of the day. The net result is that people are deprived of their money and property.

The bill would be used by our unit to address the schemes that are not appropriate for misdemeanor prosecution because they are too large. Clearly, there was intent to defraud, there were many victims, and there is a large amount of harm, but it would be difficult to prosecute as theft. I do not know if it would be utilized by shopkeepers because it could be an individual person. What we are talking about is somebody who actually employs devices to create what looks like a legitimate business, but does a few things in furtherance of that enterprise like the grant scheme that I described. At the end of the day there is not a true benefit, but the intent was there to defraud people of their hard earned money.

Chairman Anderson:
Is the category B felony consistent, in terms of value, with similar exploitation of older or vulnerable persons?

Kathleen Delany:
We primarily drew the idea for this statute from securities fraud. The category B and the results are in keeping with the statute of limitations and other components. We are trying to create something parallel to securities fraud, but these schemes do not involve security itself. There is simply a defrauding of consumers. Other examples include auto subleasing, grant schemes, and typical pyramid and ponzi schemes. Although, they do not quite meet the definition of pyramid and ponzi because, of course, we have that existing statute that could be applicable there. We see so many of these criminal enterprises come through, whether a group or an individual, that is why enterprise or occupation is so necessary in the language. We want to be able to stand in front of the jury and, in good faith, argue there was an intent to defraud, people were defrauded, here are the facts, this was a business scheme. An unintended defense for this is that it may be a legitimate business, but at the end of the day it was just bad business. Bad business decisions would explain why they did not actually deliver the product or people were harmed. It is simply not the case. With theft, there is a certain level of intent to deprive permanently at the time of the solicitation. There is one opposition, and I would be happy to come back and address it. I just want to be clear for the record that we have a broad-based goal. This is the best language we could come up with. I see now, in terms of the concerns expressed, how we can easily amend the bill to hopefully alleviate this concern. We are committed to do that; to make sure we achieve our broad goal and not offend the sensibilities that are on the other side of the coin.

Chairman Anderson:
We have a memorandum in opposition to A.B. 521 from the NACJ on behalf of Ms. Lisa Rasmussen (Exhibit D). Mr. Jackson is going to try to explain it to us.

James Jackson, Representative, Nevada Attorneys of Criminal Justice:
This BDR appears to be somewhat overbroad in its scope, as Ms. Rasmussen has stated in her memorandum. I certainly do not intend to sit before the Committee as an expert in this field. There seems to be some agreement that there is a lack of statement in the bill as to the mens rea required—the mental state required for this fraudulent conduct that the Attorney General's Office is trying to curtail. I also heard the comments of Ms. Delany that there is a desire to try and correct those problems. As pointed out in the memorandum there is a recognition that this needs to be done. Also indicated in the memorandum is the NACJ's position that fraudulent conduct is currently covered under our racketeering statutes, so this would be somewhat repetitive of those statutes.

One of the issues that I also noted, which is not contained in the bill, is the threshold for getting to the class B felony. As I understand, in current statute, a deceitful business act is a misdemeanor, so we are talking about a series of misdemeanor acts that could end up being caught under this statute. Also, with respect to the class B felony threshold, the value of harm needs to be addressed as well.

Assemblyman Segerblom:
In Ms. Rasmussen's letter, she states that enterprise crimes are covered by existing law. Can you clarify?

James Jackson:
As Ms. Rasmussen has indicated under point number 1, it is her position that fraudulent crimes are covered under NRS 207.380. That may be the point that Ms. Delany disagrees with.

Kathleen Delany:
What the Attorney General's Office is trying to address is in no way, shape, or form covered by racketeering. Maybe what we are trying to address is something that there is not an appetite for right now, and I hope that is not the case. Racketeering is a specific thing. Again, it involves two underlying felonies and requires an enterprise. We are trying to address something that is felonious conduct and that can be an individual person or a group; therefore, you can not charge racketeering because you need an enterprise for racketeering.

I agree with Mr. Jackson and, in principle, what is in the memo. The Attorney General's Office does want to go after schemes where there is a significant number of victims and a significant amount of loss. How to word that and how to do that was one of the issues we had when putting this together. Ultimately, there has to be more than one transaction, they have to

be similar, and there has to be the intent to defraud with these actions. The primary concern is the intent to defraud, which appears to be limited to a subpart when, that is not the intent of the Attorney General's Office. Also you are hearing from the Attorney General's Office because we are the only enforcement agency that is currently prosecuting these types of business frauds.

Chairman Anderson:
We are trying to answer Mr. Segerblom's question.

Kathleen Delany:
It is not currently addressed by racketeering statutes. I have to believe that and Ms. Rasmussen would agree with that assessment, based on what I have explained today.

Assemblyman Segerblom:
Does this bill cover the underlying crime that is not a felony? Is that why this does not fit into racketeering? Secondly, could you give me another example of this type of crime?

Kathleen Delany:
Correct, the current schemes that are being perpetuated by these operators are only going to be felonies if we can prove theft. The conduct is identical to securities fraud, without security, and theft, without necessarily the proof to show intent to deprive at the beginning of the solicitation. At the end of the day, things are done in furtherance that make the crime appear as if there was not intent at the time of the solicitation.

When I first started with the Office I was assigned a case involving a company that appeared to be providing tours for graduating seniors from high school. The offenders went to the school, passed out flyers, had a store front, took in monies, made some reservations, and they made all the appearances to actually be providing the tour. We determined that it was all a scheme. The offenders took as much money as possible from these groups of seniors and nothing was done in furtherance to make this tour happen. The money was gone, the people were gone, there was around $400 to $500 in loss per individual person. The argument and the decision that we had to make was how are we going to prove theft? Are we going to stand in front of a jury and say these facts prove theft when there were certain things done in furtherance of a legitimate business practice? We charged misdemeanor deceptive trade, which is available for certain schemes. We really felt that the size, the scope, and the harm perpetuated should have been a felony. We were deterred from pursuing it as a

felony because we were not sure we could make theft, which is currently the only felony that is available to us.

That is an example that I am more familiar with than the grant scheme example because I have not been the lead council on those cases. But the grant scheme example is a much larger and more egregious enterprise. It is clear that there is no ability to actually provide a benefit or a service for the victims. But the amount of harm and amount of loss is so significant that fraudulent crimes are not appropriate, in our opinion, to be prosecuted as a misdemeanor. Deceptive trade is felonious, but there is no felony to apply to it.

Assemblyman Segerblom:
Are you saying that under the Racketeer Influenced and Corrupt Organizations (RICO) statute when those criminals tried to sell a ticket to a high school senior, that ticket was under a value of a felony theft? If there were ten seniors, you cannot aggregate the total to a felony? Sounds like a RICO issue to me.

Kathleen Delany:
You have now reached the extent of my expertise, when it comes to prosecuting racketeering. My colleague certainly could have addressed that question. Our decision to charge misdemeanor deceptive trade, in my example, was because the charges did not meet the RICO standards. We did not have an aggregate to make the felony and we did not have the enterprise standard that was needed because it was an individual who was carrying out this scheme. No, it was not RICO in the estimation of the prosecutors and the investigator involved at the time.

James Jackson:
Mr. Segerblom, you have underscored exactly the point that Ms. Rasmussen was trying to make in the memorandum. Also, I did some research in the Deceptive Trade Practices Act and those are misdemeanor acts. We are going to take what are currently misdemeanor acts and turn those into felonies. This is why there needs to be a financial threshold, so that we are not clogging up courts with class B felony cases when they are misdemeanor frauds.

Assemblyman Horne:
If the high school senior scenario had been an enterprise conducted by one person, even if the monies totaled a felony or RICO, you could not charge under RICO because there is one person acting. Your testimony sounds like it is just one person acting and it would not be covered under an enterprise. That is the hole that you are trying to fill. Theoretically, I could do the same thing. I could hire people to sign-up high school seniors, and my "employees" would not know

my intent, which is to defraud. If I am one person acting, then I cannot be charged for RICO? Is that correct?

James Jackson:
You are probably correct in that analysis. If it is an act of a single person, then that is a hole that might need to be filled. I would defer to somebody on the prosecution side who might be able to answer our own wonderment as to whether or not there could be an aggregation of things. It seems to me, if a person conducting themselves in a continuous course of conduct and is getting $500 a person, he is entering felony land pretty quickly.

Kathleen Delany:
The actions are not felonious in the scenario because the current statutes do not make them felonious. But because of the nature and the size and scope of the scheme, we believe they should be felonious. You cannot get to racketeering unless the underlying actions are felonious. It is not just a matter of a certain amount of money or people.

We have two holes to fill. We have large scale business scheme deception and the intent to defraud, which is not a felony because the current Deceptive Trade Practices Act only allows for misdemeanors. You cannot get racketeering without the felony. If there is a felony, but only an individual carrying it out, the crime is not going to fall within the racketeering. Ultimately, we are trying to create a felony for fraudulent crimes, so we are not clogging up courts with small category B crimes, but actually addressing those big business schemes. We originally titled this bill Business Fraud for that reason.

Chairman Anderson:
Mr. Segerblom, I know that you have continuing questions and we will get those on the record if it is going to further the understanding and the intent of the bill. I would be happy to make you the facilitator of this bill.

Assemblyman Segerblom:
That would be great.

Chairman Anderson:
Ms. Delany, let me try to understand this from a different point of view. A senior citizen may receive a telephone call from a person who is soliciting a fraudulent loan. This is to prevent individuals from making those calls to take advantage of seniors who might be vulnerable to fraudulent solicitation. We do not have a way of protecting seniors from this kind of fraudulent activity because the venture is not a physical invasion of a home or a business

enterprise; rather it is simply the taking of a financial resource. That is what we are trying to reason with.

Kathleen Delany:
Absolutely, that is the ultimate broad scope of what we are trying to do.

Chairman Anderson:
Let me close the hearing on A.B. 521. It will return to Committee. Mr. Segerblom, I would ask for you to work with the Attorney General's Office through Ms. Delany, and the NACJ.

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

RESPECTFULLY SUBMITTED:

_____
Doreen Avila
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 5, 2007 **Time of Meeting: 7:38 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance roster
A.B. 436	C	William Dean Ishman, President, National Association for the Advancement of Colored People, Nevada	Written amendment to A.B. 436
A.B. 521	D	Lisa Rasmussem, Representative, Nevada Attorneys for Criminal Justice	Written amendment for A.B. 521