MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
March 2, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:07 a.m. on Monday, March 2, 2009, 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/75th2009/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 Tick Segerblom, Vice Chair
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Heidi Gansert, Washoe County Assembly District No. 25

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Katherine Malzahn-Bass, Committee Manager
Sean McDonald, Committee Secretary
Nichole Bailey, Committee Assistant

OTHERS PRESENT:

Tom Roberts, Lieutenant, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Vincent Cannito, Captain, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Kristin Erickson, representing the Nevada District Attorneys Association, Reno, Nevada
David W. Clifton, Chief Deputy District Attorney, Washoe County District Attorney, Reno, Nevada
Ellen Clark, Chief Medical Examiner and Coroner, Washoe County, Reno, Nevada
Nancy Hart, representing Nevada Network Against Domestic Violence, Reno, Nevada
Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada
Cotter C. Conway, Alternate Public Defender's Office, Washoe County, Reno, Nevada
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada
Lee Rowland, Northern Coordinator, American Civil Liberties Union of Nevada, Reno, Nevada
Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys

Chairman Anderson:
[Roll called. Opening remarks on protocol on testifying before the Committee.]

We will open the hearing on Assembly Bill 164.

Assembly Bill 164: Revises certain provisions concerning the crime of battery. (BDR 15-251)

Assemblyman William C. Horne, Clark County Assembly District No. 34:
Assembly Bill 164 deals with strangulation. It was brought to my attention that Nevada law needed to specifically address domestic violence perpetrators using strangulation. As you are aware, Mr. Chairman, Ms. Gansert and I submitted identical bills, and she was gracious enough to cosign with me on this bill, and I appreciate that.

To my right is Lieutenant Roberts from the Las Vegas Metropolitan Police Department (Metro) who presented me with the suggestion on this piece of legislation. Also, for the Committee's edification, there are some issues with the bill, particularly with some definitions and its intent: what we are trying to achieve with the bill. The defense bar, particularly Mr. Frierson, approached me with some concerns, as did, later, the American Civil Liberties Union (ACLU). They did not provide me with written amendments, but the amendments that were suggested in our conversations seem to be something we can work with. I did not have much concern about them at all.

Assemblywoman Heidi Gansert, Washoe County Assembly District No. 25:
Assemblyman Horne and I did have the same bill, and I was able be a primary cosponsor, which I appreciate, on his bill. I think this is a very important issue. I can tell you that everybody has been touched somehow by domestic violence. I have a member of my family who had a relationship with a man who was very violent, and what he always did was strangulation. A lot of times you cannot see it. It does not leave marks. Suffocation and strangulation are very threatening, and that is why this bill is so important. It happens so frequently, and a lot times the individuals get away with it. This bill was brought to me by someone from the Attorney General's Office. I did talk to different organizations who work with people who have experienced domestic violence, and I realized how critical it was. I am in full support of this bill, and I trust Assemblyman Horne with the amendments that will be coming. Again, domestic violence by strangulation is very prevalent, and we need to make sure that we capture this in our law.

Assemblyman Horne:
Mr. Chairman, as you know, in my other life I am a criminal defense attorney, primarily, and am in a position of representing those who are charged with battery and domestic violence. However, that has never stopped me in past legislative sessions from bringing bills addressing the problem of domestic violence. I do so today. There is an expert down south whom I believe

Lieutenant Roberts will introduce to more thoroughly outline the need for this legislation.

Tom Roberts, Lieutenant, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
I would like to thank Assemblyman Horne for bringing this bill forward. It was the idea of our domestic violence unit with the Metro and a joint effort with the Attorney General's Office. Down south we have Captain Vinnie Cannito, who is a bureau commander for our crimes against youth and family bureau, and he is going to present some statistics on why we felt there was a need for this bill, and give you a little history on domestic violence and how it led to almost one-third of our homicides last year in our jurisdiction. I will turn it over to Captain Cannito.

Vincent Cannito, Captain, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
I thank you very much for this opportunity. There has been extensive research conducted on the topic of domestic violence-related homicide and, in particular, strangulation. One of the things that I would like to do this morning is, very briefly, explain the situation here locally and how it relates to the entire state of Nevada.

First of all, when we look at our calls for service over the three-year period from 2006-2008, our calls for service reached nearly one million every year. Of that number, 8 percent were responses to people asking for help and were related to domestic violence, specifically. That is upwards of 63,000 calls for service each year.

Now, when we look at the homicide statistics for those three years, we had 113 domestic violence-related homicides. Of that number, 59 homicides were committed by intimate partners—women murdered by men in this community. The balance of those domestic violence-related homicides not only is intimate partners but also child abuse, love triangles, old boyfriends, new boyfriends, ex-husbands, and so forth.

There was a study completed for 2003-2005. There were 437 homicides within our jurisdiction over that period. Of that number, 71 were domestic violence-related; 41 were committed by intimate partners. We see the trend that these homicides are increasing, and this is very consistent with the nationwide studies. As you will see through the nationwide studies, during 2003-2005, 12 percent of those intimate partner-related homicides were committed by strangulation.

More telling, during the same three-year period, and we see that in 2006-2008 as well, out of the 104 attempted homicides, 58 percent (61) were committed by nonlethal strangulation, meaning that the attacker failed to complete the act for one reason or another. That is a vitally important point that we need to keep in mind because when you look at strangulation, there is no control over the act itself to try and bring people out, put them out and then bring them back, as, unfortunately, many people do.

It is important to note what strangulation is and is not. First of all, people mistakenly confuse strangulation with choking. They are two different things. Choking is when you have something stuck in your airway, such as food, restricting your ability to breathe. Strangulation is intentionally impeding breathing, by preventing oxygen from getting into the lungs or interrupting circulation of blood, by applying pressure on the throat or neck or by blocking the nose or mouth in a violent action. Strangulation is about power and control, plain and simple. It is an extremely violent act committed by a violent individual. It has been shown through these homicides that it takes just eight pounds of pressure maintained for 30 seconds to cause death.

With regard to A.B. 164, we are looking to increase the penalties from a misdemeanor to a felony when the domestic violence act involved is strangulation. Why is this important? As I stated, there is an extensive amount of research that has been conducted in this area. Every year, a nationwide study titled *When Men Murder Women* is completed by the Violence Policy Center. For 2004, the State of Nevada ranked number five in the category of women murdered by men in 2004. In 2005, we ranked number one. In 2006, we maintained the number one spot. In 2006, of females murdered by males, Nevada had 3.27 homicides per 100,000 population, when the national average was 1.29. Nevada was more than 2 1/2 times the national average, certainly a distinction that none of us wants.

Nationwide in 2006, there were 1,836 women murdered by men, single-incident, single-offender incidents. Of that number, 92 percent, or 1,572, were murdered by someone they knew. And of that number, 60 percent, or 949 women, were the wives or intimate partners of their killers. Twelve percent of all those victims were murdered by bodily force, strangulation. As I indicated earlier, nationwide statistics are very consistent with our local statistics.

Currently, there are six states that have a felony strangulation law on the books: they are Connecticut, Indiana, Minnesota, Nebraska, North Carolina, and Washington. As I indicated, the Violence Policy Center ranks the states in order of per capita murder. Interestingly enough, none of the states that have a

felony strangulation law on the books are listed in the top 10. In ascending order, the top ten states are: Tennessee, Arizona, Arkansas, Texas, Vermont, Louisiana, Oklahoma, Alabama, South Carolina, and—to reiterate, the most violent state for the year 2006 of women murdered by men in domestic situations is—Nevada.

How will this bill help reduce domestic violence homicides caused by strangulation? This bill will help to enhance education and public awareness regarding the seriousness and lethality of strangulation. First-time offenders who strangle will be brought to the system's attention sooner. It will enhance victim safety and offender accountability. Though all forms of domestic violence are serious and none are to be minimized, strangulation cannot be lumped in with every action that is considered domestic violence. It is much more serious because of the lethality of the action. That is what we have to bring attention to by elevating it to felony status.

An increase in classification from misdemeanor to felony affords the courts greater leverage for future violations, greater restrictions, and greater offender accountability. Each year people die as a result of domestic violence. Misdemeanor charges do not sufficiently address the action of strangulation, the violence of strangulation. Every domestic violence incident has the potential to be our next homicide.

In closing, I realize that simply elevating this crime to a felony is not going to resolve the issue. There are a number of different factors, and we have to take a very comprehensive approach to domestic violence. Speaking on behalf of the Las Vegas Metropolitan Police Department, we recognize that. However, this is a very critical part in the overall, global approach that we are taking to address domestic violence. Just to give you a couple of brief examples, we are currently—the crimes against youth and family unit working with our patrol division—in the process of completing a domestic violence lethality assessment pilot program in two of our patrol substations. This is a program that was initiated in Maryland several years ago. It was based on a three-year study which was based on 25 years worth of homicide data. The lethality assessment program looked at all of the different domestic violence homicides in that state. As a result, they identified 11 critical factors that were present in the majority, if not all, of those homicides. Strangulation was one of the top factors in those homicides. That is now one of the key eleven factors in the lethality assessment program. We have taken that program and adopted it in this pilot for our department.

We are looking at domestic violence from a very global, comprehensive perspective. This felony strangulation aspect is a very critical part in helping us

to ensure the safety of the victims in our community, and certainly as we look at it from a statewide perspective.

I am happy to take questions.

Chairman Anderson:
You believe that by raising strangulation to the felony status it will aid law enforcement in getting convictions through the district attorneys' offices? Is that the essence of what you are telling us, that it will make it easier to charge this crime?

Vincent Cannito:
Yes, sir, that is an aspect of it. What this will do is help us with our prosecution. It will bring these individuals to the attention of the system sooner. With regard to the felony, it gives the district attorneys greater latitude to work with this case and greater latitude to apply restrictions. It gives overall greater latitude in dealing with offender accountability, and that is just one very critical element of the process which we are trying to accomplish.

Assemblyman Carpenter:
My question might be for Assemblyman Horne. In regard to the proposed amendment, if we put in there "if it causes physical injury," and Assemblywoman Gansert said that a lot of times there are really no marks, how are we going to be able to prosecute these cases?

Chairman Anderson:
Which amendment are you looking at?

Assemblyman Carpenter:
The amendment mentioned by Assemblyman Horne in his testimony, and we also have a memorandum from Mr. Frierson.

Assemblyman Horne:
I was going to leave the amendments for the proponents to present them. A partial answer to Mr. Carpenter's question: injury does not need to be physically viewable, in nature. You can strangle someone and cause internal injuries to the throat and neck without having outward, visible injuries that would appear on the skin, such as bruising or handprints around the neck, et cetera. I believe it is possible to do that.

Chairman Anderson:
I do not have something from Mr. Frierson, and I do not believe that anything has been distributed yet.

Assemblyman Horne:
The amendments proposed to me in discussions were conceptual in nature. Nothing has been mocked-up yet.

Assemblyman Carpenter:
I thought that Assemblyman Horne mentioned that in his testimony, so I was just asking. And Assemblywoman Gansert mentioned that in a lot of these cases it leaves no mark, so I was just asking how we were going to handle this?

Assemblyman Horne:
Would you like me to highlight each section and the changes made?

Chairman Anderson:
Yes.

Assemblyman Horne:
Section 1 of the bill adds battery by strangulation to the list of felonies that a judge is prohibited from granting probation or a suspended sentence.

Section 2 says that a person who is convicted of battery with intent to commit a sexual assault shall be punished as a category A felony if the crime is committed by strangulation.

Section 3 is the definition of strangulation, which I believe the bulk of the amendments will address.

Sections 4 and 5 add battery by strangulation to the battery in domestic violence statutes.

Section 6 adds strangulation to the list of violent or sexual offenses for the purpose of certain offenses against children.

That roughly outlines the bill.

Kristin Erickson, representing the Nevada District Attorneys Association, Reno, Nevada:
With me today is Chief Deputy District Attorney Dave Clifton, who is a 25-year career prosecutor, to answer any of your questions and give a statement regarding the prosecutorial aspects of this particular bill. Also with me is Dr. Ellen Clark, Chief Medical Examiner and Coroner of Washoe County, who is a forensic pathologist with many years of experience. She is here to explain the physical aspects of this piece of legislation.

David W. Clifton, Chief Deputy District Attorney, Washoe County District Attorney, Reno, Nevada:

I would like to clear up something about A.B. 164 that I have seen troubling a few people. This bill was never intended to make strangulation a crime. I think that is a very important distinction. A lot of people think that this bill makes strangulation a crime in and of itself; it does not. It takes battery and makes a battery that includes intentional strangulation a more severe offense than simple misdemeanor battery. You first have to have battery, and then it has to include intentional strangulation before you will get to the felony status.

It is entirely consistent with what this Legislature has previously done with substantial bodily harm, and what has been done before that with deadly weapons. If you commit a battery that involves a deadly weapon, it becomes enhanced to a felony. If you commit a battery that includes substantial bodily harm, it enhances to a felony. And now with this bill, it takes strangulation and does the same thing: if you commit a battery and it includes intentional strangulation, it enhances it from a simple misdemeanor battery to a felony.

Why is it so important to make clear that the bill makes battery, which includes strangulation a felony, the same as deadly weapon and substantial bodily harm? We are seeing a lot of amendments being proposed to this bill to include other things, such as more intent, more substantial bodily harm, or more physical injury. With all due respect, the point is being missed: the act of strangulation itself is what is dangerous, not just the physical injury.

The opponents, if there are any, to this bill are suggesting that it is too broad: it should not include, as they think it does, horseplay, wrestling, consensual conduct, or when you shush somebody by putting your hand over his mouth and nose. What is being missed, with all due respect, is the fact that it still has to be a battery to start with. Battery is defined by the *Nevada Revised Statutes* (NRS) in NRS 200.481 as "willful and unlawful." Further, it has to be "forceful or violent." We propose that strangulation involves a violent act. So, it already has to be a battery. It already has to be violent or forceful. If you leave the definition of battery out, then these proposals for these amendments might make some sense. But we do not. We look at intentional strangulation along with the definition of battery.

You have unlawful and willful conduct. It would not include horseplay or accidents, and it certainly would not include consensual conduct. That is ridiculous; no battery is consensual. We already have the elements of battery, and now we are adding intentional strangulation to make it a felony.

There has also been a suggestion that if somebody gets into a fight with a sports official and gets him in a headlock, that would be felony strangling under this bill. That is not true at all, for many reasons. We will get to what strangling is and the dangers of strangulation when we have Dr. Clark speak. The distinction between strangulation and battery which includes strangulation, I think, is being lost.

Next, the definition of strangulation in this bill also includes the word "intentional"—intentionally impeding somebody's oxygen or somebody's circulation and blood flow. The act must be intentional. It would not include accidental conduct.

Assemblyman Carpenter had a very good question earlier about how a prosecutor would prove strangulation when we do not have physical signs in almost half of the strangulations. From the statistics I have read, approximately 42 percent of the cases of strangulation would not leave signs. Sometimes even on homicide cases we do not know if strangulation was involved. I had one case myself that I worked on with Dr. Clark, and we did not know if strangulation was involved until the autopsy was conducted and we saw the internal signs in the neck.

What we look for, Assemblyman Carpenter, as a prosecutor is some way to corroborate what the victim is telling us. If I were to prove strangulation and battery as a felony or a misdemeanor, I would look at if there is anything corroborating what the victim is telling us. Certainly, the victim's statement is enough as a matter of law in court; however, as a practical matter as a prosecutor, I would always look for more to make sure somebody is not framing somebody. We would then look for any red marks on the victim's neck that may be some physical sign of injury. But even if we do not have red marks on the neck, there are many other things you can look for to corroborate the victim. Some examples: difficulty breathing or swallowing, raspy voice or coughing, dizziness or headaches—these are signs that the officer and prosecutor can see and use as evidence, even though there is no physical sign of injury. You can have urination or defecation. That is very consistent with someone who has been strangled. Vomiting and neck pain are all consistent. So, even if there are no physical signs, there are a lot of ways we can corroborate what the victim is telling us.

As you will see when you hear from Dr. Clark, the reason we need this bill is because of the dangers inherent in strangulation. This is another important distinction: it is not the injury that strangulation causes, because that can be secondary—you can have strangulation that can cause death and leave no signs of physical injury. What we are looking for is not substantial bodily harm. Not

being able to prove substantial bodily harm is one of the reasons we cannot make strangulation a felony right now. If you look at the definition of substantial bodily harm in NRS 0.060, it says it has to be "bodily injury which creates a serious risk of death." That is the problem the prosecutors are having, and why we are trying to follow many other states—I count a lot more than the 10 that the captain was mentioning. Idaho and Minnesota are the two that I think this bill is following, and I am very supportive of their approach.

As a prosecutor, in order to prove substantial bodily harm, you have to prove that it is an injury that creates a substantial risk of death. The problem is we may not have that injury. The act of strangulation is what is causing the serious risk of death. We are going to hear about that from Dr. Clark. It is not a secondary injury that is causing the substantial bodily harm or the substantial risk of death. That is the critical distinction and another thing that I think is being lost.

In Idaho statute, which is Penal Code 18-923, it says, in subsection 2, that no injuries are required to prove it. Second, the prosecution is not required to show that the defendant intended to kill or injure the victim. The only intent required is the intent to choke or the intent to strangle. Again, a problem with the prosecution in Nevada, right now, is we cannot prove strangulation as a felony because it does not meet substantial bodily harm. If we have to prove, as some opponents of the bill are saying, that the suspect intended harm to the victim we might as well charge attempted murder. If you have to prove that the person in his mind attempted to harm, when we know that it does not always harm or it does not always leave physical signs of harm, it is tantamount to having to prove attempted murder. Those are the two problems we have in Nevada right now.

The definition of strangulation in this bill is based substantially on the definition used in Minnesota, one of many states that include strangulation in their laws. We urge you to adopt this bill entirely. We do not think that there is anything unnecessary or overbroad in this bill whatsoever. It is certainly needed to assist the prosecutors of the State of Nevada. For victims and prosecutors, we urge you to adopt this law.

Chairman Anderson:
I think we heard in the original testimony that there are six states that have this law?

David Clifton:
The captain said 10, Mr. Chairman. I have many others. He did not include Idaho or Minnesota.

Chairman Anderson:
I was under the impression he did.

David Clifton:
My information is from 2006, so maybe his information was a little bit older than that.

Ellen Clark, Chief Medical Examiner and Coroner, Washoe County, Reno, Nevada:
I am here today to speak in support of A.B. 164, which seeks to increase the penalty for battery committed by strangulation from a misdemeanor to a felony. As a medical doctor specializing in forensic pathology, I have for many years recognized strangulation as a particularly violent, and potentially lethal, form of injury. Strangulation produces occlusion of the blood vessels and potentially occlusion of the airway that causes severe asphyxia, or breathlessness, that is lack of oxygen to the brain. As an injury, we recognize in forensic pathology that this is particularly a silent form of trauma that produces lethal and serious life-threatening injury. The injury is produced by inflicting pressure of force upon the neck that potentially obstructs or restricts the flow of blood via the jugular vein or the carotid arteries to the brain. Even over a course of approximately 5 to 10 seconds, this type of injury produces loss of consciousness, abnormal vision, seizure, collapse, and loss of sphincter control, resulting in urination and defecation. The injuries reported by survivors include similar symptoms and may produce no external physical signs. In fact, for the forensic pathologist, one of the challenges of these cases is they very often do not have external trauma or physical injury signs, and it takes a rather extensive, detailed, and persistent examination to identify, even internally, the physical injury that has caused death.

In brief, this is a trauma that we often see accompanying domestic violence and battery cases that may be very difficult to document based upon physical injury, but that we well recognize causes death.

Chairman Anderson:
Has the advent of any new tools changed this particular crime or the potential for it? Obviously, several states have moved in this direction. Is there a willingness to recognize this particular aspect of domestic violence?

Ellen Clark:
In forensic pathology, we have long identified strangulation as a potentially lethal form of trauma. One of the things that has changed within the clinical setting, because we find cases that have minimal evidence of trauma externally but profound injury internally, is that clinical physicians, emergency room

physicians, and trauma specialists are now conducting entirely different workups when they encounter survivors of strangulation. It can be exceedingly difficult to identify internal injury, and it makes the investigation and evaluation of the circumstances of trauma even more important. We also are utilizing to some extent newer technologies, such as DNA analysis based upon swabbings of the neck or body areas potentially touched by an assailant, and this process has achieved some amazingly good and productive results in identifying perpetrators in such cases.

Chairman Anderson:
Mr. Clifton, I want to make sure, have you been able to charge strangulation, but only in the most grievous cases where you have had an opportunity for a pathological examination because of the invisible nature of this particular crime?

David Clifton:
Yes. I have prosecuted strangulation cases and homicides where we often do not see any physical signs until the internal injuries are detected at autopsy. Sometimes, a case is not even investigated as a homicide or strangulation. I had one case where we thought it was an overdose on drugs and, days later at the autopsy, the pathologist determined it was homicide by strangulation.

Another need for this bill is when we do not have death but we still have strangulation. The person may not have intended to kill, but the act was just as potentially lethal by strangling and cutting off the oxygen or blood flow to the brain. We rarely could charge that as attempted murder, so there was a hole there.

Assemblywoman Dondero Loop:
I am just curious. It seems to me if somebody was holding somebody that firmly by their neck, it would leave a mark. Why does it not leave a mark?

David Clifton:
There are a lot of holds you can do around the neck that would not leave any marks and could even kill. I will let Dr. Clark describe the severity of some of these physical acts.

Ellen Clark:
There are many forms of strangulation, and you, Ms. Dondero Loop, make reference primarily to manual throttling or placement of the hands around the neck. In fact, a good number of the cases that we see are strangulation by ligature. Ligature can range from a very small cord, a shoelace, an electric cord or rope, all the way up to what we refer to often as a soft, or broad, ligature, such as a sheet. It is relatively easy to put a sheet, for example, around

someone's neck, obstruct blood flow, impede breathing, and produce death, and then remove the sheet and leave no evidence of injury.

Often at autopsy, we identify the injury once we begin examining the tissues underneath the neck and find evidence of deep soft tissue bruising, as the muscles or the vessels are compressed by the object, which may be a soft ligature, a hand, or other object, and there is a crushing effect against the bony and cartilaginous structures of the front of the neck. But there may be no external injury.

Nancy Hart, representing Nevada Network Against Domestic Violence, Reno, Nevada:

The Nevada Network Against Domestic Violence (NNADV) is the statewide coalition of domestic violence programs. I have a letter that is being distributed (Exhibit C), and I will let that stand for most of my testimony. I will just emphasize a couple of points from that testimony.

There have been quite a few percentages and numbers thrown around this morning. I wanted to focus on the fact that the definition in this law is identical to a definition used in Minnesota, which is a state that has been at the forefront of addressing this serious crime. The proposed definition is also similar to others that have been adopted in a majority of the states that have passed strangulation laws. At this point, I would say there are about 15 laws that criminalize acts of strangulation. The six that the captain referred to earlier have felony laws. The other laws are, perhaps, misdemeanors. The distinction between 6 and 15 is that the 6 are felonies. The Minnesota definition, that we are following exactly, is substantially similar to the ones that have been passed in five other jurisdictions: Nebraska, Idaho, Indiana, Washington, and Alaska. There is some overlap of references, but I think our numbers are consistent.

The fact that 15 states have, in some form, criminalized strangulation is recognition that strangulation is dangerous, reckless violence that should be specifically criminalized. As Mr. Clifton said so eloquently, it is not the physical harm but the act itself that warrants criminal consequences.

When batterers use strangulation to silence their victims, this is a form of power and control that has a devastating psychological impact on victims and a potentially fatal outcome.

As you have heard, it is particularly dangerous in the context of domestic violence, and we need to address this more effectively in our communities. This legislation enacts an essential tool for responding to the crime and will

contribute to a stronger community response. The Network wholeheartedly endorses this legislation and urges you to pass it unamended today.

Assemblyman Ohrenschall:
A question about the 15 states that have adopted laws: are there statistics that show that there have been fewer strangulations, that people have realized how serious this is?

Nancy Hart:
The enactment of these laws has been, for the most part, over the last decade, or perhaps 15 years. I do not think there is a tremendous amount of data from the last decade. I do have one study from Minnesota, which is one of the earliest states to enact it—and I would be happy to provide that to you—that evaluates the impact of the strangulation laws that were passed there in the early 1990s. I cannot give you any statistics across the board, and I do not know if they exist.

Assemblyman Ohrenschall:
Minnesota has had good results? They have found that there have been fewer strangulations since they passed the law?

Nancy Hart:
As I say, I am not sure what the numbers show, but I think that the effectiveness of the law has been demonstrated in Minnesota in the sense that there has been a much more effective ability to prosecute the cases that involve strangulation. I think it may be a different question whether it actually reduces the number of strangulations that occur. It simply means that we are able to hold people who do strangle accountable for that act.

Vincent Cannito:
Keeping in mind the comments that were already made, out of the rankings for the states in the last Violence Policy Center report, Minnesota, which has an extremely effective and strong law on the books, is ranked 36 in the nation in regard to women killed by men through the act of domestic violence. I think they send a very clear statement that they take the act of domestic violence, as we all do, very seriously. There is a lot of power behind what they have established. This is primarily what we are attempting to accomplish here, as well.

Assemblyman Hambrick:
To Ms. Hart, a point of information more than anything else: does your group keep statistics on whether this violent crime is more adult-to-adult or adult-to-juvenile? Are there statistics available?

Nancy Hart:
To my knowledge, within the state of Nevada there are no statistics available along those lines. Certainly, the Network does not maintain them. Perhaps Mr. Clifton would be able to say whether the Washoe County District Attorney's Office would know, of the cases that they have prosecuted, how many have been adult-on-adult versus adult-on-child. As you have heard, a lot of these cases have never been prosecuted because the injuries have not been identified. It has been a hidden crime.

Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada:
It is not often that, when there is proposed legislation increasing penalties and, in particular, increasing the number of felonies, we can collectively agree it is a valid concern, but this is one area where we can agree that it is a valid concern.

Our concern does not lie with the seriousness of the act of strangulation; it lies with how you apply it and how broadly it impacts the system. We have concerns about A.B. 164 in its original form. I have communicated those concerns to the sponsors of the bill, as well as members of the law enforcement and prosecution communities, to try to come up with some language that narrows this so we can focus on trying to go after those individuals that engage in the most dangerous behavior.

I believe Assemblyman Carpenter mentioned physical injury in the context of conversations that I have had with the sponsors of this bill. Part of our concern was eliminating the more innocuous conduct and focusing on the truly dangerous conduct. The amendment that Ms. Rowland is going to speak about later addresses those concerns. It does not require an actual physical injury, but it does require that an individual intends to cause bodily harm. I cannot imagine, in my years as a defense attorney, any situation or case where there was strangulation and there was not intent to cause some level of bodily harm. Our concern is that brothers who live together get in a tussle, which brothers do, and one carries the other out in a headlock, somebody sees it and calls law enforcement, they fall under this statute, and we have a felony. That is not intended to be the case in this bill, but it happens. In particular in the domestic violence arena, there are a lot of cases that we see that are not intended to be included in this type of legislation but end up becoming included.

The things we are expressing concerns about are not isolated and are not new. There are other states that have addressed these issues in a similar way. Oregon has a strangulation statute that is almost verbatim what A.B. 164 says, and in Oregon it is a misdemeanor. In Montana, they have a strangulation bill that requires that the individual attempt to cause or knowingly cause physical injury to a victim. In North Carolina, there is a requirement of not just

attempting but actually causing physical injury. The language that is proposed by Ms. Rowland, on behalf of the American Civil Liberties Union (ACLU), actually goes beyond what North Carolina did and requires that there either be injury or an attempt to cause physical injury. I cannot imagine a single scenario where it could not be proved that, by committing strangulation, an individual was not attempting to cause some level of bodily injury. Not attempting to cause scratches or bruises, not attempting to leave external evidence of an injury, but attempting to cause some type of bodily injury. With the amendments proposed by Ms. Rowland, and based on our discussions with most of the proponents of the bill, we would not be in opposition to A.B. 164, as it would focus on the truly dangerous behavior and avoid focusing on some of the less dangerous and innocent behavior that would unintentionally fall within the purview of this bill.

Cotter C. Conway, Alternate Public Defender's Office, Washoe County, Reno Nevada:

I echo Mr. Frierson's concerns. It is not the intent of the bill, and I agree with it, it is the unintended consequences that worry me.

Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada:

I will add the "me too." I have certainly seen my share of circumstances, especially in domestic battery cases, where strangulation was alleged, but the testimony revealed that it was more like somebody pushing somebody away on the upper portion of their chest, which they had initially described as the neck. This is a case where it could easily go to a felony, where it should not be a felony, and where substantial injustice could be done.

Like Mr. Frierson said, certainly there is nothing that causes more squeamishness than reading a police report where actual strangulation is involved, and we absolutely respect the intent of this bill.

Lee Rowland, Northern Coordinator, American Civil Liberties Union of Nevada, Reno, Nevada:

Mr. Frierson did, indeed, lay out the intent behind my proposed amendment (Exhibit D). The proposed amendment is to add to the definition of strangulation "without that person's consent and with intent to cause bodily harm." The first part of it, "without that person's consent," is redundant in the sense that it has now been made clear on the record that every action of strangulation included in this bill will be included under the larger umbrella of battery. Battery does include, per definition, an unlawful touching. The first part is less of a concern for me now that that has been made clear on the

record. The most important thing is to make clear that strangulation does not stand apart from battery in any way.

The second part of my proposed amendment is "and with intent to cause bodily harm." The reason I have submitted this amendment, as Mr. Frierson noted, is largely due to conversations with defense counsel. I am not a criminal defense attorney; however, in speaking with many of them they have told me that they do find that strangulation and domestic violence issues can frequently, frankly, be overcharged. These issues can be used to threaten someone with a higher charge; they can be used to stack on top of existing charges. Our concern is that this not be available in situations where there is not really strangulation—we have, I think, a general conception of what is strangulation. The referee example is not at all meant to be inflammatory. It is the plain language of the bill, if you read it. This is an automatic category B felony if you commit strangulation on a person who is a sports professional. With respect to the definition of strangulation that is currently in the bill, all it does take is a momentary blockage of the nose or mouth. What I am trying to be clear about, by putting in the intent to cause bodily harm, is to separate those issues where these is a tussle or a struggle and someone is momentarily on top of someone's mouth, or has a quick headlock, from actual, intentional strangulations.

With respect to the testimony of some of the proponents that intent is already included under the battery definition, we respectfully disagree in the sense that that intent is a much broader intent. It just means that the action has to be intentional. Clearly shushing someone would be considered a battery if you did not have that person's permission, if you just said "Shush!" and put your hand over someone's mouth, because you are intentionally putting your hand there. What we are also trying to make clear is that there must be an intent to harm, so for little momentary issues like that there is no possibility of a district attorney (DA) threatening that charge. We do believe, right now, under the plain language of the bill, "shushing" could be included.

I do echo Mr. Frierson in that our intent does not differ so much from the proponents of the bill in terms of getting at those really serious instances; we are just worried that the definition is overbroad as it stands now.

Assemblyman Mortenson:
I heard "unwanted touching." Did you say that is domestic violence or battery?

Lee Rowland:
That is the general definition of a battery: it is an unlawful or forceful touching. Strangulation is now a type of battery. So, in the general battery definition that exists in Chapter 200 of NRS, which is outlined in your bill, all that is required is

an unlawful touching. If you touch someone without their consent, that is a battery. Any time that touching someone without their consent would include a blockage of their nose and mouth, under this bill, it would be an automatic strangulation felony. Our solution is just to insert some more intent language so these momentary incidents do not all of the sudden count as strangulation.

Assemblyman Mortenson:
Unwanted touching is a crime? I mean, if you walk up and slap somebody on the back and say, "Hi, Joe," he can put you in jail?

Lee Rowland:
There is a body of law that addresses those issues. What the courts have determined in those kind of areas is, usually, that there is a constructive consent. For instance, if you are on the subway and somebody jostles into you, that is generally not a battery because by going on the subway you consented to that. Similarly, if you walked up to a friend with whom you have a relationship, you might generally be able to slap them on the back in a friendly way. You can say you have constructive consent. Issues like that are generally not going to be criminalized, and, obviously, there is a degree to which we have to rely on the good faith of our DAs in not charging situations like that. But, as far as the overall definition of a battery, yes, it is an unlawful touching.

Chairman Anderson:
I agree.

Assemblyman Carpenter:
In the amendment, you say "without that person's consent." Would that not be just, "I said, you said"? How does that add anything to the situation other than making it more difficult?

Lee Rowland:
The requirement that there be no consent is included in every form of battery: you cannot charge as a battery an action that occurs with someone's consent. The actual problem with this, as I noted earlier, is that it is redundant. With respect to the consent, that is a requirement all over the criminal law to make sure that we are not charging actions that are not criminal because that person allowed that behavior. The consent should be here. I think the only question is whether it is adequately covered in the battery definition. As I noted, I think this is a less important piece of my amendment. We just wanted to be clear because there is consensual conduct, for instance horseplay, that may fall into the definition of strangulation as currently written. I take the proponents at their word that, because it is included under battery, it will never be charged when there is a consensual situation. I think, here, your concerns are dealt with

in the sense that battery is already defined as lacking someone's consent. That is necessary, otherwise the jails would be full of people who were roughhousing or something like that, but fit the definition of crime, and they would end up in jail. So, a lack of consent is part of the criminal intent for almost every crime.

Chairman Anderson:
I will close the hearing on A.B. 164.

It is the intention of the Chair to place this bill in a work session. We will see if we need to make any changes given the materials from Mr. Frierson and Ms. Rowland. Mr. Horne, is that acceptable?

Assemblyman Horne:
That is acceptable to me.

Chairman Anderson:
Mr. Frierson, please put your concerns into writing, and Ms. Rowland, if you need to submit any additional materials, please get them to Ms. Chisel by Thursday of this week.

We will take a five-minute break.

[The Committee stood in recess at 9:27 a.m., and was called back to order at 9:39 a.m.]

Mr. Mortenson, you had indicated a desire to speak to the Committee for a moment. For the purposes of your testimony, let me open the hearing on Assembly Bill 161.

Assembly Bill 161: Revises provisions relating to domestic violence. (BDR 14-490)

Assemblyman Harry Mortenson, Clark County Assembly District No. 42:
The genesis of A.B. 161 occurred in the past Interim. In my district, I witnessed, with great detail, three incidents where male spouses were arrested in instances which I thought were totally unwarranted. Even some of the policemen there thought it was totally unwarranted. In all three cases, there was no battery. In fact, in two of the cases, I think the wives were more robust than the husbands and could have taken care of them pretty easily. In all three cases, the male spouse was put in jail for 24 hours, and it resulted in an incredible amount of anger between the spouses.

We have heard lots of anecdotes about the unintended consequences or the broadness of the way the laws are right now. There is the story of the two sisters. One inebriated sister wanted to go move her car, and the sober one tried to prevent her and ended up in jail. We have one of our very longtime lobbyists here who gave me an instance where two conventioneers in Las Vegas were sharing a room, had come back after a long day of being at the convention, and got in a tussle over the remote control. Someone heard them from outside, called the police, and they both went to jail. Fraternity brothers wrestling around or sorority sisters wrestling around can end up in jail. These are instances that should not result in jail. That was the reason I brought this bill forward.

I started searching for people to testify on the bill, and the first 11 people that I talked to liked the bill and supported it, but when I asked them to testify, they said no. I considered calling this the chicken bill because I could not get anybody to testify. Finally, I found Mr. Johnson and Mr. Frierson, the public defenders from Washoe County and Clark County, respectively. They agreed to testify that they felt the laws as they are were overbroad. I was advised by a gentleman whom I highly respect that if I bring this forward, it will be like standing in front of a freight train. I have to say that in 13 years of being in the Legislature, I have stood in front of a lot of freight trains, and that was not going to deter me. Then I talked to Mr. Sprinkle, the vice chair of the Council for the Prevention of Domestic Violence. Mr. Sprinkle did a good job of convincing me that, if I push this bill and if I were to prevail, maybe I would set back the situation and cause more wives to be battered. That is the last thing I wanted to do.

So, I studied this bill very carefully over the weekend, and I came to the conclusion that the way it is written could do more bad than good. Mr. Sprinkle volunteered to sit with me—and so did the two attorneys from Clark County and Washoe County—and maybe craft a bill that would accomplish what I wanted to accomplish, or maybe get a little closer, and still not cause additional batteries of women. I am not going to support this bill. With your permission, Mr. Chairman, I will not proceed any further with it. I hope to come up with something. As a term-limited legislator, I have five more bills that we can do in 2010. I will try and work with these gentlemen and come up with something better.

Chairman Anderson:
Mr. Mortenson, as you well know, the question of judicial discretion is one that we have dealt with for some time, regarding this and other issues. Generally speaking, the reason that we have reached the conclusion that we have is because of the hard work and continuing discussion relative to bringing

domestic violence to the attention of the Legislature as early as the 1980s. This issue is one we have heard several times and I think we all feel very strongly about. We are going to allow you to withdraw the bill.

Assemblyman Segerblom:
In support of Mr. Mortenson, I do think the law itself, while well-intentioned, can be looked at again. I get lots of involvement in cases which just do not seem to warrant taking one person to jail, so I understand why you brought it, your frustration. I understand why you are withdrawing it, and I do hope that at some point we can look at it and try to tweak it a bit so that the unintended consequences, which a lot of us have experienced, do not happen.

Assemblyman Mortenson:
Perhaps I can also work with Mr. Segerblom.

Assemblyman Gustavson:
I was wondering that, instead of withdrawing this bill or putting it back in the desk, we might be able to use it in connection with some other bill. Domestic violence is a tough issue. I know many things do come up on this all the time. Could we use this as a vehicle for another, particular, similar issue?

Chairman Anderson:
I really have not decided whether we will have time to deal with the full ramifications of it. I was not planning on taking a motion one way or another on it.

There are several of you who have indicated you desire to speak on this issue. In light of the fact that Mr. Mortenson has requested that the bill be withdrawn, it is the intention of the Chair to close the hearing without further testimony. If there is something that you feel is absolutely essential that you need to have submitted for the record in writing about the bill, I would ask that you give that to Mr. Mortenson so that in the event he finds a solution to his problem, your position would be included.

I will close the hearing on A.B. 161.

Let us turn our attention to the last bill of the day, Assembly Bill 33.

Assembly Bill 33: Revises provisions governing subsequent convictions of battery which constitutes domestic violence. (BDR 15-261)

Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys:
I appreciate the opportunity to speak to the Committee this morning in support of A.B. 33. [Written testimony (Exhibit E).] This bill would amend NRS 200.485, which is the domestic battery statute, to provide that once a person is convicted of a felony for a battery which constitutes domestic violence, any subsequent violation is also treated as a felony.

Statistics on domestic violence nationwide have been cited this morning, and in Nevada they are very disturbing and reveal that domestic violence continues to be a significant health and criminal justice problem. The statistics demonstrate that the public has a critical interest in reducing the number of incidents of domestic violence because, if left unchecked, domestic violence can increase in severity. It represents a pattern of behavior that can escalate and lead to serious bodily harm or homicide.

Prosecutors follow their responsibility to prosecute domestic violence cases as aggressively as other violent crimes. Currently, pursuant to the statute, a third conviction for battery which constitutes domestic violence within seven years is elevated to a category C felony. However, because of this seven year window, repeat offenders can be convicted of misdemeanor domestic violence every 3 1/2 years for a lifetime, and that is even if they have a prior felony conviction. This cycle of violence can continue and possibly result in serious injury or death.

Assembly Bill 33 would amend NRS 200.485 to make a violation, once a person has been convicted of a felony for battery which constitutes domestic violence, under the statute, a category B felony punishable by 2 to 15 years in the state prison, and by a fine of not less than $2,000 and not more than $5,000, after three or more prior convictions. This bill provides that once a repeat offender has eclipsed felony status for domestic violence offenses, and only domestic violence offenses, any subsequent offense will remain a felony.

The bill is modeled on Assembly Bill No. 421 of the 73rd Session. That bill amended Chapters 483 and 484 of NRS, which are the driving while under the influence (DUI) statutes, to provide that once a person had been convicted of a felony for operating a vehicle while under the influence of alcohol or a controlled substance, any subsequent offense would be treated as a felony. In looking at the legislative history for that bill, it was noted that for each instance in which a chronic drunk driver is caught by law enforcement, there are most likely multiple instances where that individual drives drunk without detection. The purpose in that instance was to provide that subsequent DUI violations after the first felony would continue to remain as felonies in order to capture repeat offenders who continue to drink and drive, and to impose an appropriate penalty before they injure or kill someone. That same rationale applies to the crime of domestic

violence. It is significantly underreported due to the nature of the relationship between the batterer and the victim and the power and control that the batterer maintains over the victim. For each instance in which domestic violence is reported and the batterer is arrested and prosecuted, there are most likely multiple instances where the pattern of violence goes undetected.

With the Chair's permission, I will invite Dave Clifton, who testified earlier today, to speak further to the purpose and effect of A.B. 33. In closing, I would like to note that support for this bill has been indicated from the Nevada Sheriffs' and Chiefs' Association, the District Attorneys Association, the Domestic Violence Prevention Council, and the Nevada Network Against Domestic Violence. In terms of fiscal impact, this bill would have a minimal fiscal impact because it affects a small group of repeat offenders. But we are talking about offenders who have been to prison, and to counseling, and they do not get it. They continue to perpetrate violence in their relationships, on their families, and in their homes.

Chairman Anderson:
What happens when you and your brother are wrestling, it gets out of hand, and for whatever reason someone calls the police; now you have your first domestic violence conviction, because it is with a family member?

Brett Kandt:
You are correct. In that instance, if that was the first incident where it has been charged, that would be the first.

Chairman Anderson:
So, this would be the first, and assuming you are over 18 years old, if you get in a fight with someone, but you are not living together, that would not count, right? Because it is not a domestic relationship.

Brett Kandt:
Yes, you are correct, because that is outside the scope of the statute we are talking about.

Chairman Anderson:
If I am in a relationship with a young woman, we have a disagreement, and, for whatever reason, she says that I slapped her and there was a bruise on her, then that would be the second domestic violence conviction if it took place within seven years, correct?

Brett Kandt:
Correct.

Chairman Anderson:
Because there is a relationship. Now, if we are talking about the same person and there is a fight between a him and his wife, and it happens within the seven years of the previous events, that would be his third, right?

Brett Kandt:
If I am following you correctly, I believe that would be correct.

Chairman Anderson:
So now we would be at a felony because it is his third, right?

Brett Kandt:
Just to clarify, if we are speaking under the current operation of the statute, the third offense within a seven year window would be a felony.

Chairman Anderson:
Okay. Under this new law, his next one, regardless of when, would also be a felony?

Brett Kandt:
Correct.

Assemblywoman Dondero Loop:
What would happen if you have a girl and a boy, and one of them is interested in the other, and the other one is not interested, is that domestic or is that considered outside the scope?

Brett Kandt:
With all due respect, in this instance I would defer to the frontline prosecutor, and perhaps you could address that question to Mr. Clifton. After 25 years of prosecuting these cases, I think he has learned how to discern, in reviewing the totality of the circumstances, the facts, and the evidence available, what is appropriate to charge. I would defer to him.

David W. Clifton, Chief Deputy District Attorney, Washoe County District Attorney, Reno, Nevada:
Assembly Bill 33 is intended to fix a legal problem in Nevada's domestic violence laws dealing with repeat or serial offenders. It mirrors what the Legislature did with the DUI laws in 2005. It is often referred to as "once a felon, always a felon." Our current repeat offender law can be a prosecutor's and a victim's nightmare. Presently, if a third-time felony offender gets out of prison and reoffends a fourth or fifth time, the new offenses can only be charged as misdemeanors if his priors are more than seven years old. So, after

our current law takes a third offense and makes it a felony, then it goes back to misdemeanors for fourth, fifth, and sixth offenses if that time limit of seven years has gone by. What this bill does, like the DUI law did, is say, wait, we gave you your chances as a first and second offender. Now, we told you a third offense is going to be a felony. We are not going to give you a fourth chance and a fifth chance and make those misdemeanors; we are going to make the fourth and fifth convictions felonies. Once a felon, always a felon. That is exactly how it works right now with Nevada's law in all other crimes. If somebody gets an armed robbery, does their prison time, and comes out and gets another armed robbery, we do not say, oh, we will treat you less severely. The judge and the prosecutor hit them more harshly and severely. He gets more of a sentence on the subsequent armed robbery or any other crime. You can list any crime you want. The judge is going to give them a harsher sentence if he sees he is a repeat offender. Here, this loophole in NRS 200.485 actually lets a repeat offender, or a habitual offender, get less of a sentence, get a lower crime, a misdemeanor, for fourth, fifth, and sixth offenses, just because seven years have gone by.

This bill changes subsections 2 and 4 of NRS 200.485. There is a slight change in subsection 1, but it is very minute. The two have to work together. You cannot have one without the other, as you will see. Subsection 2 says what the Legislature used to provide in 1997 when they devised a domestic battery bill: a third or subsequent offense is a felony. I think this was the actual intent of the Legislature to begin with in 1997. However, they had language that said within seven years as still applying to any subsequent offense. We have separated that out. A third offense has to be within seven years of the first two, but with respect to any subsequent offense after the third, we do not care about the time anymore. The seven years is now moot. It is the fact that you are a repeat offender: you just keep doing it. After you have already done your one-year mandatory prison sentence, you got out and did it again. I do not care whether it is a day later, one year later, or seven years later, it should stay as a felony. Subsection 2 breaks it down by the felonies that are within seven years, which means subsection 1 applies there and has to be a first and second offense within seven years. Then subsection 2(a) says that if you already have that felony in Nevada, your next domestic battery charge will stay a felony regardless of the time limit. Subsection 2(b) says we are not going to let somebody skate just because they have three, four, or five Colorado or California prior convictions Then they come to Nevada and expect to get a misdemeanor for their fourth offense because Colorado's offense was in 1999. The same applies to our out-of-state batterers who come to our state and commit another offense. That offense is going to be treated as a felony also.

Then, if you get to subsection 4, it is perfectly worded and not redundant and not unnecessary, if you read it carefully. It says a third offense is a felony, where you have the two priors within seven years. That is referring to priors under subsection 1(c). The second sentence is our amendment. It says "any offense which is listed in paragraph (a) or (b) of subsection 2 that occurred on any date preceding the date of the principal offense." That has to be in there. If you get rid of that sentence, as has been proposed by Nevada Attorneys for Criminal Justice (NACJ), you gut the entire intent of this bill. You have to work with both sentences together; they mean two different things. One is for the seven-year priors, the other one is for the fourth- and fifth-time offender, we do not care how old your priors are. That is a critical distinction. We would ask that you adopt the bill as proposed.

Chairman Anderson:
Would you address Ms. Dondero Loop's question?

David Clifton:
It was covered in previous legislation. When we drafted the domestic violence bill back in 1997, we defined "dating relationship" because all prosecutors and defense attorneys knew that was going to be a legal gray area. From memory, a dating relationship includes expectation of sexual relations. I cannot tell you exactly what that is, but I can tell you that if two people are on their first date, they are going to a bar or a restaurant, and she had no expectation of sexual relations, we probably would not charge that as domestic. The issue sometimes comes up, what if one of them expected sexual relations—say the guy—and the other did not? Prosecutors generally will not prosecute that. We are looking at when both of them are in a relationship long enough to be domestic. If they both had expectations of sexual relations, or if the victim gets up and testifies that they have had sexual relations before, then it would be a domestic.

Assemblywoman Dondero Loop:
Although we know it is not always male, I am concerned that someone would not fit under this statute just because it was a first date or just because sexual relations were not intended by one of the parties, and they can batter over and over again. Could that happen?

David Clifton:
I am certainly willing, as a prosecutor, to look at every case's circumstances and facts. If they were nondomestic all three times, whether it be the same victim or not, they would still be prosecuted as nondomestic misdemeanor battery, and that judge could give that person up to six months in jail on a third offense. But yes, the Legislature has made only domestic battery enhanced to a felony for a third offense. If the prosecutor cannot prove domestic relationship

on any of those priors, yes, it would have to either go back down to a misdemeanor domestic battery or a misdemeanor simple battery. It could happen.

Assemblyman Manendo:
For clarification, would domestic violence priors count toward people out of state, as well?

David Clifton:
Subsection 2(b) does apply to out-of-state convictions, and three or more out-of-state convictions, at any time, would then escalate the person up to a category B felony. It would be a category C felony anyway, if it was a third offense within seven years. This bill escalates it from a C to a B.

Chairman Anderson:
So our record is clear, Mr. Clifton is referring to paragraph (b) of subsection 2 of section 1 of the bill, which is on page 2 at lines 30 and 31 of the bill.

Assemblyman Manendo:
You said that this would not have a huge fiscal impact. Are you saying that there are not many people in Nevada currently with two on the record where this would not apply to them on a third?

Brett Kandt:
I asked the district attorneys' offices and the city attorneys' offices to give me some estimates of how many cases would be affected if this bill were passed. The best estimates were that in Washoe County there may be as many as 10 cases a year. Clark County had a little more difficult time quantifying it. Suffice it to say, it would be more than 10 because of the population. In the rural communities, those prosecutors indicated they may see an occasional repeat offender who does not get it. That was the basis for my saying that we are not talking about a large number in terms of fiscal impact, but we are talking about some dangerous people.

Assemblyman Manendo:
I did not know if it was 10 or 110, and I appreciate a little data.

Chairman Anderson:
Mr. Clinger's office indicates that the effect on future bienniums is $315,119. It is not part of the budget. Cost is not the concern of this Committee.

Assemblyman Segerblom:
I am concerned about bringing in convictions from other states. Where you plead guilty to a misdemeanor, do you not have to be told that that might lead to a felony down the road? I know that is how it is in our DUI laws. What if they plead guilty to a misdemeanor in another state but were not told that the guilty plea might result in a felony?

David Clifton:
It is actually a misunderstanding. Many people believe because we do it, that it is a legal requirement. There is no legal requirement that we notify you that your third offense, or even your second offense, will have enhanced penalties. The only legal requirement, when you plead guilty to a domestic battery first or a DUI first, is that we tell you about the direct consequences of your plea: you could be sentenced up to $1,000 and six months in jail. However, when we devised the plea negotiation memorandums and the guilty plea canvassing, we said we might as well put this notice in there in Nevada. Immediately after we did that—when we notified people that the second offense could be mandatory 10 days in jail instead of mandatory two days, and a third offense is a mandatory prison sentence of one year—we got questions from people that had out-of-state prior convictions. They said, well, nobody notified me that a third offense in Nevada is a felony. When we did the research, we found out that we were not required to give notice; we just did it to be complete or to be nice because our intent was to try to keep people from committing repeat DUIs and repeat domestic batteries. There is no legal requirement, even though we do it.

Assemblyman Segerblom:
Would it be your intent in Nevada, when someone pleads guilty to one of these misdemeanors, that they would be advised that the consequences down the road could be a felony?

David Clifton:
Yes, we do that in our guilty plea memos. The problem is, as I think I have alluded to, imagine somebody that got a Nevada first or second conviction and then goes to New York, and, there, a second offender gets a felony. He tells the New York judge that the judge in Nevada did not tell me about New York's law. There is no way we could ever inform them what the laws are in every state and what the judge is going to do. In Nevada, we do it just out of the goodness of our hearts to try to prevent further repeat offenders or further domestic or DUI cases. There is no legal requirement. We will continue to do it, though, in my opinion, for that very reason: to prevent people from reoffending. It is a deterrence factor.

Chairman Anderson:
So, if I am to follow the argument from Mr. Segerblom, we can only control the actions of the courts here in Nevada. We could put in a requirement at canvassing, if we wished. However, that also creates a potential question about the past. If I am to understand in section 1, subsection 4, you will be reaching back in time so that this bill would apply to convictions prior to the effective date of the bill. This is a retrospective bill. That is somewhat unusual.

Assemblyman Segerblom:
My concern is a lot of times people plead guilty to misdemeanors, they do not have an attorney, and given the domestic violence laws, they pled without knowing the consequences. So, I would like to figure out a way, if possible, to make sure that people, when they have these kind of convictions on their record, knowingly did the crime and they deserved the punishment.

Brett Kandt:
If you refer to the proposed new section 2, I wanted to make a clarification because the discussion involved out-of-state convictions and then priors in-state. The way the section is written, they would not be combined. You would either have three out-of-state priors that could subject you to a felony conviction for a fourth or subsequent offense in Nevada, or you would have your priors here in Nevada, but the way the bill is written they would not be combined.

Chairman Anderson:
So our record is clear, Mr. Kandt is referring to paragraph (b) of subsection 2 of section 2 of the bill, lines 19 through 21 on page 5 of the bill.

Assemblyman Horne:
Mr. Segerblom touched on one of my questions. This deals particularly with the priors in our state. Mr. Clifton, you mentioned that there is no legal requirement in this state to do this; however, we have formal admonishments that the attorneys have to read and go over—every section of that admonishment—with the client, and we focus on the enhancements for subsequent convictions for domestic violence. The client has to sign that, as well as the attorney—at least in Clark County—and then the judge asks the defendant, did your attorney go over it with you? do you understand it? do you understand subsequent convictions and the penalties that come with them? et cetera, and they state on the record that they do. The judge will not even move forward until all of this is done. Even assuming that there is nothing in statute saying that we are required to do that, over the years that I have been practicing, we have been doing it. Is there not an argument that we have created a legality because now these persons in our jurisdictions have been told by a judge that this is what

your future holds. Now, they come back and they are told that it is something different. I would say that there is at least that argument that these people, to mix civil and criminal, have an expectation. It seems to start getting murky. I just want some clarity on why this is not going to be a legal fight down the road.

David Clifton:
I can answer your question a couple of ways, and think it will make sense either way. One way is to take the flip side and show you what happens: a defense attorney gets up and argues that the client was convicted in Colorado of two prior offenses, and he was not told that the third would be a felony in Nevada because in Colorado it is not, hypothetically. You would lose that argument as a defense attorney because it is not a due process requirement to be told the collateral effects of your guilty plea. It is a due process requirement to be told the direct effects of your guilty plea.

Another way to answer your question is: I have an armed robbery, a grand larceny, and a burglary conviction, and on none of those three guilty plea canvassing or admonishments did they ever tell me that habitual criminal could be a life sentence for me if I commit it again. You know that as a defense attorney. You have never seen that notice in a guilty plea memo or admonishment because we could not possibly admonish a defendant about every collateral consequence. What you are talking about is clearly collateral consequences, not direct consequences. This is the same as the right to vote, the right to carry weapons, and all of these things. We keep throwing them into our guilty plea canvass little by little just to be nice, to have a good heart, to help the defendant with some kind of notice, but it is not required. All it does is create more problems because then, like you are saying, a defense attorney comes up and says, "My client was not warned of this." Bull! He was warned of it by the statute, just like every other crime. You have a statute telling you what your collateral consequences for future conduct are going to be. So, when he is canvassed, he is only required, by constitutional due process and by the statutes, to be told what the direct consequences are. However, back in the 1980s, we did the same thing with DUI. We do not put in collateral consequences in the guilty plea memo, or we should not. When we started doing it, like we have done with DUI and domestic battery, we have this same argument that you are making, but it is an expectation that you are arguing, not a legal requirement. It is not a detrimental reliance.

Assemblyman Horne:
Also, one of my concerns is that it takes away that discretion from the judges at the end, for the fourth conviction on, regardless of time. I had a client whose daughter and her boyfriend were living with him, falling on some hard times,

and the boyfriend got a little more aggressive toward his daughter, which my client did not appreciate. He threw the boyfriend out on his ear. The boyfriend called the police from his cell phone, and my client got arrested for a battery domestic violence. He was concerned because he had a prior one about a decade before. I told him it was beyond the seven years and did not matter, but it was a concern of his at the time. I think of a situation like that where he had actually been in no trouble at all over that 10-year period, and the circumstances changed in his home. If it had been a third or a fourth under this law, he may be going away for a very long time. I am concerned about those instances.

David Clifton:
It would not apply in Nevada unless he already had the seven-year felony third offense. If he stayed in Nevada all that time, he would not have a problem because he could never get to the third offense unless he had two priors within seven years. Even under this bill, if he gets a fourth, then it becomes a category B felony. Even without the bill, it would still be a category C felony unless the priors became too old. But he has to have the first felony.

Assemblyman Ohrenschall:
Let us say you have John Smith, who had been a very violent husband, and within two years he managed to become a category C felon. He serves his time, he and Mrs. Smith get divorced, he seeks treatment, and he has a decade of being pretty good at controlling his anger and not having any subsequent convictions. Eleven years later, he is in a new relationship, and there is an argument, a fight. The police come. There is no substantial harm, but let us say there was a shove or a push, and he gets taken away. Would he be a category B felon under this bill?

David Clifton:
Yes, absolutely, and rightfully so. If he had three prior burglaries from 10 or 20 years ago, and the judge and the prosecutor now get him on a fourth, he is not going to get less of a sentence than he got on the third one; he is going to get more. The judge will hear the arguments from the defense counsel that he was clean and sober and did well for 10 or 20 years, but it is still his fourth offense.

Assemblyman Ohrenschall:
I remember some of the hearings back when Attorney General Del Papa started the council, and I remember one of the hearings where this gentleman, who was a batterer, came and talked; he went around talking to other men who had been convicted of battering their wives and girlfriends; he talked about the treatment and all that. One of the things I recall is that I thought the seven years was put

in there as a carrot to batterers to try to get treatment and not recidivate. Do you think this still works as a carrot, or is there new data that shows the treatment does not really work, that if you have those tendencies you will continue being a batterer forever?

Brett Kandt:
I think you are correct. I think that was part of the concept behind the Legislature's decision to impose the seven year window. I just wanted to clarify, once again, even if you pass this bill, for the purpose of that third offense rising to a felony, it would still have to happen within the seven year window. You still have, in essence, the carrot, as you put it, for an individual to get treatment and to understand that battering in intimate relationships is wrong. And if they have not figured that out after being in the court system and convicted three times in seven years, our concern is they are not getting it, and at that point in time the carrot has not worked.

Assemblyman Carpenter:
On the situation that was just described, is it mandatory that the person be charged with this other offense, and if he was found guilty, would he then have to be classed as a category B felon, or could the judge give him a lesser offense?

David Clifton:
Certainly, this statute and this bill only apply to subsections 2 and 4. We have not changed anything dealing with prosecutorial ability to use their discretion to plea bargain. The same plea bargaining rules would apply. My answer is, no, there would be no discretion allowed to prosecute the case. We would prosecute as a category B felony. However, it should not be plea-bargained down if we can prove that it is a fourth offense and that he did domestic battery. The police have some limited discretion under Chapter 171 of NRS to arrest the primary physical aggressor. When they look at it, they will have to determine that he was the primary physical aggressor. If he was, and he committed domestic battery, and he had at least the three priors, either in Nevada or some other jurisdiction, we would charge it as a category B felony. And it should not be plea-bargained down if we can prove the case. If the facts go south, or one of the priors looks like it was not constitutional, then it would be plea-bargained down. And by facts going south, I mean a victim that may be recanting. That might hurt my case enough to where I feel I have to plea bargain it. I try not to do that. We know victims can recant, but there can be other proof problems with the case, and we will look at the totality of the circumstances to determine whether we can plea bargain it down or not so we do not violate the requirements that were put into the domestic battery law years ago, taking away some of our discretion to plea bargain.

Chairman Anderson:
Ms. Hart, you did not indicate a desire to speak, but I do know there is a writing from you. Did you wish that submitted for the record? We will ask that Ms. Hart's writing be distributed and made a part of the record (Exhibit F).

Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada:
We are opposed to the bill. We understand the thrust of it, but the realities of domestic violence, as it is prosecuted in the statutory scheme that currently exists, makes it very problematic. The analogy here, of course, is to drunk driving: once a felon, always a felon. It is a bad analogy to draw between drunk driving and domestic battery. The primary reason is that for drunk driving there is a clear standard: like the ads say, if you are over the limit, you are under arrest. Period. You are over a 0.08 blood alcohol content (BAC), that is a DUI. There are no ifs, ands, or buts about it. For other common drugs it is the same thing. There are *per se* limits. There is no question that it is a DUI. Domestic battery, as some people alluded to earlier, escapes that clear definition. What is a dating relationship? What amount of force constitutes domestic violence? Was there self defense? Is it a mutual affray? These are the questions that we deal with all the time in domestic battery, and this is why it is very difficult. Because of those unfortunate loose definitions, there are the problems of a potential substantial injustice, where even though something is a crime and probably ought to be punished, it is not necessarily a felony where somebody ought to go to prison for years and years, under the circumstances.

In all the time that I have done this as a public defender—and even before where I dealt with people being accused of domestic violence when I was in the Navy—I can count on one hand the amount of times that the domestic violence, actually perpetrated, fit the stereotype of the power and control issues. Far more often it was a dating relationship, even a casual dating relationship, where a couple of people had too much to drink and there was a little bit of shoving going on. Oftentimes, that situation absolutely fit the definition of domestic violence under the statute. If the domestic violence statutes only caught the stereotypical wife batterers that everybody thinks about when they think about domestic violence, we probably would not have an issue. Unfortunately, because that net has been cast so wide, and because so many more people get caught up in it, we are very concerned that people are now going to sit in our prison system, spending our money, who do not deserve to go to prison. That results in the injustice.

Several people, including the Chairman, referenced these minor cases, brothers scuffling and that sort of thing. Sometimes it is even more than that. When I was in the Navy, I had a sailor who served about 12 years in the Navy. His

wife was about twice his size—and I am being generous—and she was very aggressive and dominant. One day, she shoved him. He shoved her back. He left. She called the police. He was arrested. Fortunately, in Washington state where this took place, the prosecutor had more discretion than they have here in Nevada, so his prosecution was deferred so long as he went to domestic violence classes. A year later, on the night before Thanksgiving, she started throwing things at him. He kicked over a garbage can and left the house. He was arrested once again. Because no judge was working on Thanksgiving day, he spent Thanksgiving night in jail. Fortunately, the prosecutor did not charge because the wife later recanted. The idea that this sailor, who had spent 12 years of his life in dedication to his country and intended to make a career out of it, would have lost his security clearance and would have been looking at a felony had he gotten into a scuffle with a roommate another six years down the road, is very troubling. Unfortunately, these are the cases that we often see and that we need to protect against. That is why we oppose, with the broad language, these particular amendments.

Something that Ms. Dondero Loop brought up is the dating relationship. All too often because these cases are misdemeanors, they are actually charged by the least experienced DAs because that is where the stakes are a little bit lower. That is fine, they do a great job, they are conscientious folks, but they are new and they sometimes are overzealous. The definition of dating relationship is a fairly broad one. It is NRS 33.018(2): "As used in this section, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context." You can also see that on a first date, where there is an expectation, the definition would apply. I have seen cases prosecuted, and even people found guilty, where they had not been dating all that long. It was a fairly casual relationship, and those are the things that do not fit the rubric and the stereotype that we all are concerned about: the actual repeat offenders who ought to go to prison. Those are the ones that get dragged in there along with the rest of them.

Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada:
I will be brief, and I will spare the Committee from my reiterating the points that Mr. Johnson has made. I agree wholeheartedly with him. Some things that were brought up on the presentation of the bill, comparisons to armed robbery and burglary, and the fact that subsequent offenses do not get treated lighter than the original offenses, those are felonies to start with, so they are treated as felonies in subsequent offenses, unlike the current battery domestic violence which is not originally treated as a felony.

There was a lot of discussion about out-of-state convictions. Currently, we consider out-of-state convictions. That is not a deviation from the current law. We consider them for the purposes of reaching the third offenses for enhancements.

Mr. Johnson brought up a few examples. I think some concerns were expressed. Some of the types of cases that I have had concerned defendants that had some battery domestic violence convictions in their 20s, and a subsequent event occurred much later on. I literally had an 80-year-old client who used a tree switch on his 83-year-old wife, and that was charged as a battery domestic violence. I do not think that is the kind of conduct that the sponsors of the bill are targeting for the purposes of mandatory prison and felony treatment, yet those, as a practical matter, are the kinds of things that end up being engulfed in such a broad and sweeping bill as this one.

I think that Mr. Johnson has made all the points that we have as far as our concerns about this. We have discretion right now with respect to prosecutors and how they treat their offenses. They are not allowed to deviate from battery domestic violence, but they are allowed to look at the facts. I think the ability to look at the facts at that level is appropriate, and they certainly are harsh in treating people who are the traditional batterers. But they have the opportunity after seven years to avoid subjecting those, who are not the typical and traditional batterers, to mandatory prison and felony treatment.

Cotter C. Conway, Alternate Public Defender's Office, Washoe County, Reno Nevada:

We do oppose A.B. 33 for many of the reasons that Mr. Frierson and Mr. Johnson spoke about. My concerns, specifically, deal with what I call the fringe cases. I was before this Committee two sessions ago dealing with the civil compromise statute, where we were denied that right to use civil compromise to deal with some of those fringe cases, which was my concern back then. It is still my concern. One example: I have a case pending for trial in May involving two brothers. They were involved in a fight. My client is alleged to have simply thrown a beer bottle, and he is now facing a felony. I heard the proponents of this bill talking about domestic relationships, the dating relationships, the husband and wife, and if that was as broad as the net was, I would probably be more willing to consider this piece of legislation. I am still concerned about the fringe cases involving brothers, distant relatives, in-laws, roommates. I think it was broad when it was passed, and I am concerned that, as we continue to pile on additional penalties and take away some of the tools that were available, we are going to be catching a lot of people that should not

be treated as felons and should not be treated as domestic batterers under the law.

Chairman Anderson:
We will close the hearing on Assembly Bill 33.

We will submit a letter received from Ms. Rasmussen, dated February 26, 2009, on behalf of Nevada Attorneys for Criminal Justice as part of the record (Exhibit G). [After the meeting, a letter from the Nevada Council for the Prevention of Domestic Violence, dated February 18, 2009, was ordered to be made a part of the record (Exhibit H).]

[Discussed Committee's schedule ahead.]

We are adjourned [at 10:55 a.m.].

RESPECTFULLY SUBMITTED:

_____
Sean McDonald
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE:_____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 2, 2009 Time of Meeting: 8:07 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Guest list
A.B. 164	C	Nancy Hart, Nevada Network Against Domestic Violence	Letter dated March 2, 2009
A.B. 164	D	Lee Rowland, American Civil Liberties Union of Nevada	Proposed amendment
A.B. 33	E	Brett Kandt, Office of the Attorney General	Letter dated January 30, 2009
A.B. 33	F	Nancy Hart, Nevada Network Against Domestic Violence	Letter dated March 2, 2009
A.B. 33	G	Lisa Rasmussen, Nevada Attorneys for Criminal Justice	Letter dated February 26, 2009
A.B. 33	H	Mike Sprinkle, Nevada Council for the Prevention of Domestic Violence	Letter dated February 18, 2009