MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 14, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:08 a.m. on Thursday, March 14, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. 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 Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Lucy Flores, Clark County Assembly District No. 28

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Thelma Reindollar, Committee Secretary
Gariety Pruitt, Committee Assistant

OTHERS PRESENT:

Steve Yeager, Deputy Public Defender, Clark County Public Defender
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender
Kristin Erickson, representing Nevada District Attorneys Association
John T. Jones, Jr., representing Nevada District Attorneys Association
Brian O'Callaghan, Government Liaison, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Laurel Stadler, Rural Coordinator, Northern Nevada DUI Task Force

Chairman Frierson:
[Roll was called. Committee protocol and rules were explained.] Good morning, everyone. We only have one bill on today. Assembly Bill 202 was on this agenda and was moved at the request of the bill presenter. It will be placed back on calendar for Tuesday of next week. Today we have Assembly Bill 159, so I will open the hearing on A.B. 159 and invite Ms. Flores to introduce her bill.

Assembly Bill 159: Establishes a diversion program for certain defendants. (BDR 14-669)

Assemblywoman Lucy Flores, Clark County Assembly District No. 28:
Thank you, Mr. Chairman and members of the Committee. It is good to see you all again. Assembly Bill 159 is based on a very simple premise. It is far less expensive to monitor and supervise an offender than it is to incarcerate him in prison. According to the Pew Center on the States, on average it costs about $79 a day to incarcerate an inmate versus $3.50 a day to monitor that same person. It is a very large difference.

The bill provides a mechanism by which a judge can sentence someone who has been convicted of a nonviolent felony or a nonsexual offense to an alternative sentencing program or probation. In the bill itself, it does not specifically state

what program they need to be sentenced to. It is open, and the purpose is for it to be flexible for judges. It also applies to veterans. Generally, this would apply to felonies that have mandatory prison times, such as drug or theft-related charges.

When I was researching for this bill, I found a study that was sanctioned in 1987 by Speaker of the Assembly Joe Dini about what the states were talking about starting around 2007 when they began taking seriously the hundreds of millions of dollars it cost to keep folks incarcerated. They finally started to see that this may not be the best public policy and was not fiscally prudent despite the fact that we had that information for many years already. Speaker Dini commissioned this study back in 1987 when Nevada's prison population was 4,500; now we are close to 13,000. We were number one in the nation for incarceration rates from 1986 until about 2007. In 2009, a study was released where Nevada's incarceration rates were finally down. It was not until we put policies in place and allowed folks the opportunity to go into alternative sentencing that incarceration rates improved.

In 2007, the Legislature passed Assembly Bill No. 510 of the 74th Session, allowing people on probation to earn credits for the reduction of their sentence. The legislation also established a series of graduated sanctions for violation of the terms of parole in order to prevent the immediate return to prison. This was around the same time that many states started to realize the impact these tough-on-crime policies were having on their state budgets. By way of comparison, the budget that has been proposed for fiscal years 2014 and 2015 is over $200 million. In fact, it is $290 million for fiscal year 2014 and $297 million for fiscal year 2015. That is a lot of money to keep an average of 12,746 people per year in prison.

The interesting thing about this 1987 study was the recommendations that came from it: determining which felony offenders should be incarcerated and those who should be placed on probation, providing restitution, fining or punishing by some alternative sentence, and allowing judges to depart from guidelines for compelling reasons. Twenty-five years later, here I am again with the same bill. It is a huge public policy concern for us, and we need to start moving in that direction the same way that many other states in the country have. Texas, being the primary example, started in 2007. By 2012 they realized they would need 17,000 more beds which would require building eight more prisons costing a billion dollars. Many other states were experiencing the same effects of their policies. Now they have achieved cost savings in the hundreds of millions of dollars because of the different policies that they put in place, including options for alternative sentencing.

I think that is about all the background information that I will give on this. I will say that this is certainly not the answer. It is not going to reduce our incarceration rates; it is not going to save us hundreds of millions of dollars, but I believe it is a good first step in moving Nevada in that direction. You are going to hear from prosecutors that this is not a good idea, that it affects their ability to do their job. Their job is to convict people of crimes. I would not expect them to support the idea that someone is convicted of a crime, but then can be sentenced to something different from what the criminal law says regarding that crime, which is basically mandatory prison time. As policymakers, we need to continue taking these important first steps, as many other states have, in order to create a statutory scheme and a policy scheme that supports something smarter. All this does is give the judges the flexibility to sentence what they believe is appropriate.

Given the limited amount of laws that this would apply to, those being nonviolent and nonsexual felonies, I do not anticipate that this is going to affect that many people. A very large percentage of cases already get plea-bargained down and never make it to the trial level. The last statistics I saw on cases that never make it to trial were in the 70 to 80 percent range. They get plea-bargained down, and that is obviously done in the negotiation process with the prosecutors.

This also covers pleas of *nolo contendere* and guilty but mentally ill, so in those situations, a *nolo* plea would make it to a judge as well. If there is a situation where we have a young person or first offender who gets caught up in this type of situation, it will get plea bargained down anyway, but that is not necessarily always true. There are definitely cases out there where someone was caught with drugs that are considered high-level enough that they sought prison time. It could have been a situation where it was a young person who got caught doing it the first time. Do we need to put that person in prison and cost the state $30,000 to $40,000 a year just to keep them there, or is it better to figure something else out? That is what this bill does—it allows the judge to figure something else out.

Assemblywoman Cohen:
I have a question on page 2, section 1, subsection 3. [Ms. Cohen read that paragraph.] And this is someone who has gone through the program, correct?

Assemblywomen Flores:
Yes.

Assemblywoman Cohen:
I was confused because *Nevada Revised Statutes* (NRS) 193.140 is punishment of gross misdemeanors. I thought the program was the punishment. Are we saying we are adding something on at the end of the program?

Assemblywomen Flores:
Yes, this allows for the reduction of the conviction to be entered in as a gross misdemeanor.

Assemblywoman Cohen:
Is the person still receiving punishment on top of going through the program? Did I misread that?

Assemblywomen Flores:
Yes, this just allows for the conviction to be entered in that way, but they would not be subject to more penalties. At least, that is not my intention. If someone interprets it in that way, that is not what this is intending to do whatsoever.

Chairman Frierson:
For the benefit of those who are not practicing criminal law, I think diversion programs generally have a contractual nature to them, and the defendant would agree to do certain things in order to get the benefit of a lesser charge. The program would not necessarily be a punishment, but it would be an opportunity for a defendant to have the option of something less than a felony.

Assemblywoman Diaz:
Do the judges already have the discretion to use diversion programs for defendants?

Assemblywomen Flores:
Yes, they do in some instances. That is why this applies to nonviolent and nonsexual felonies that currently have mandatory prison time. There are other courts available—drug treatment courts, veteran courts, family drug courts, and juvenile drug courts. There are a series of courts which have all been established in the last several years when we started to finally come to the understanding that these polices were costing us a lot of money and having some very negative social effects in our communities. The short answer is yes, there are currently other alternatives. This applies to situations where those alternatives do not exist.

Assemblywoman Diaz:
Who are the people we are missing? Can you shed some light on potential defendants who would benefit from this bill moving forward?

Assemblywomen Flores:
One of the examples I gave earlier was someone caught in high-level trafficking with a large amount of drugs. Generally, that offense would not allow him not to serve any kind of prison time. That would be the end of going to prison, but there could be situations where it is a first-time offender who was caught with a large amount of drugs and the judge thinks that person is better suited to go elsewhere, even though the law says that there is a mandatory five to ten years on that particular offense. It would be in situations like that where the judge would have the ability to say, "You know, maybe this person should go here instead of going to prison for ten years."

Assemblyman Hansen:
Under NRS 200.364, is pandering or being a pimp a sexual offense? The reason I ask is that I do not want them to be able to use this to get out of going to prison. I want to make sure that we are safe with this if we go forward.

Assemblywomen Flores:
I do not know the answer to that, but I will find out. If it is not considered a sexual offense, I would be open to talking about adding that.

Assemblyman Hansen:
You brought this last session or something similar to it, correct?

Assemblywomen Flores:
It was probably something similar, but no.

Assemblyman Hansen:
I liked the idea then. I like the idea now. Obviously we are talking about reducing the number of people incarcerated. We elect our judges and if, in fact, there is a judge who is soft on crime, he is going to be kicked out. I think this is a pretty reasonable solution, or at least a partial solution that would save some money.

Chairman Frierson:
I did want to clarify that I do not believe pandering is considered a sexual offense under existing law. I believe that may be proposed under Assembly Bill 67, Assembly Bill 113, or one of the other bills on the same subject.

Assemblyman Wheeler:
I like the idea of bringing local control to a local judge. Like my colleague, I do not have a lot of problems with it, but I need to understand this. You get a large drug trafficker who is assigned by the judge to one of these programs because the prison happens to be full. Normally he would be guilty of a class B felony, but we are going to enter a plea of gross misdemeanor. Is that what this says?

Assemblywomen Flores:
Yes, and that is, as the Chairman mentioned, the way that diversions usually work. The person agrees to do these various things, such as go through an educational program and agree to supervision for however long they assign it in exchange for a lesser sentence. That lesser sentence would include gross misdemeanor. So yes, it is an agreement to abide by all of these conditions and not be a cost to the state. If this person does not successfully complete the program, then much like probation with a suspended sentence, they do end up in prison.

Assemblyman Wheeler:
I understand the cost to the state, but it is troublesome that someone convicted of a felonious offense will have a misdemeanor on his record for the rest of his life; that has always bothered me. I just wanted to let you know that is something I am going to have to work out.

Assemblywomen Flores:
I certainly understand that. It is a public policy decision that we all have to make as we consider cost savings and, potentially, the positive impact it is going to have on our community. In addition, there are already certain situations in which they can motion the courts to have their conviction records sealed, and they do not have to disclose that they were convicted of something.

Assemblyman Ohrenschall:
Assemblywoman Flores, I want to compliment you for bringing this bill. As much as we want to be tough on crime, a lot of us are realizing there are some criminals who will never change their ways, but there are many for whom we cannot jail our way out of this crime problem. After working in the criminal defense field, many individuals who are caught up in the system have drug addiction, mental health issues, or both. I serve on the Uniform Law Commission Study Committee reviewing the Veterans Court Act. One of the discussions was the difference between Texas, which allows veterans to enter the therapeutic program regardless of whether there was a crime of violence in the past, and other states, where veterans who might benefit from that therapeutic program are denied that option.

My question to you is what knowledge do you have on the therapeutic programs that we have? Do you feel they have been successful? Would it be wise to open them up so more people might get a chance at the therapy provided in these programs, whether it is drug treatment, mental health treatment, or maybe job training?

Assemblywoman Flores:
This tough-on-crime notion is something we are dispelling. It is not about being tough on crime; it is about being smart on crime. Texas has truly done a phenomenal job in leading the way on this. They have generally had the reputation of "lock them up" and "we are tough on criminals here." Texas was one of the first states that said this is costing a lot of money, and that being smarter on crime actually leads to a reduction in recidivism and crime. We started to realize that these policies were not working. The benefits have been achieved—we actually have evidence and something to point to. It is not just Texas; it is other states that have also implemented various alternative sentencing schemes and reentry programs.

Coincidentally, in Nevada with the various treatment courts available, I actually just heard the courts' budget yesterday and there was plenty of testimony given about the efficacy rates. Because of the testimony also given on the success rates, we were very concerned about a reduction in the veterans' court funding. It has proven to save the state a large amount of money.

Assemblyman Ohrenschall:
That is good to hear. Thank you.

Chairman Frierson:
I have a question along the same line as Assemblywoman Diaz's question on whether the court has discretion. Does the district attorney not have discretion to do this already? Is the issue, in your opinion, whether the district attorneys are doing it?

Assemblywoman Flores:
The district attorneys absolutely have discretion to decide what they want to prosecute. I have not worked in a criminal setting, but it is my understanding that they can negotiate and enter a plea bargain for a lesser crime. My concern is definitely the situation where they decide not to plea-bargain down, or the person decides not to take the plea. There could definitely be that situation so, you are also allowing the judge's discretion in certain cases to voice an opinion. Yes, the district attorney has the ability to prosecute or not on whatever charge they are working on.

Chairman Frierson:
Are there any other questions for Ms. Flores? I see none. I will invite anyone here and in Las Vegas to come forward who wishes to testify in support.

Steve Yeager, Deputy Public Defender, Clark County Public Defender:
Good morning, Mr. Chairman, and members of the Committee. I am certainly in support of this piece of legislation, and with the Chairman's indulgence, I just wanted to take a few moments to address some of the concerns and questions that were brought up by the Committee.

In terms of Assemblywoman Cohen's question about section 3, what happens in a criminal case is the judge imposes a sentence on somebody, and then there is a document called a judgment of conviction which spells out the offense he is convicted of. The idea in section 3 is to say, "Although you might have pled guilty to a felony offense, or you may have been found guilty of a felony offense, if you complete this diversionary program, I, the judge, am going to convict you of a gross misdemeanor." The judgment of conviction would have to say the statute under which he was convicted. I do not anticipate a judge would impose any additional punishment. The judge would probably say, "Here is a gross misdemeanor and credit for time served," and I believe that is what that provision seeks to do. Technically, you are not going to have pled guilty or have been found guilty of a gross misdemeanor. You are going to be under a felony, which is in another statute. So I think that is just a mechanism for the judge to do that.

In response to Ms. Diaz's and Chairman Frierson's questions, with some crimes the judge can currently say, "I will give you an opportunity to do a diversion program and you will get a reduction." For instance, first-time drug offenders who have mere possession charges can participate in a program where they complete the drug treatment, and a judge actually has the authority to dismiss the case entirely with no conviction. Currently under the law, a judge typically does not have the ability—if somebody is either found guilty of a felony or pleads guilty to a felony—to allow an offender to do a diversion program and upon completion charge them with a gross misdemeanor. Typically, whatever it is that you plead to, or are found guilty of, that is what you are going to be convicted of. A judge right now, absent the district attorney agreeing, does not have the ability to allow someone to participate in a program and then reduce the charge.

With regard to Mr. Wheeler's question, I do think the statute would allow a judge, in cases such as high-level trafficking, to say, "I will give you a chance to do this," but keep in mind that it would be the judge who decides. Obviously, it would be a very factual determination. I see this as coming into

play perhaps more in the property crimes arena. It could be people charged with burglaries at Walmart, or perhaps writing bad checks. If there is some scenario where an agreement cannot be reached for reduction, this would allow a judge to give him a chance to not have a felony on his record. Certainly, the district attorneys are free to offer this, and I will tell the Committee that it is pretty common in negotiations with the district attorneys to structure an agreement whereby somebody pleads to a felony upfront, does probation, and, if successful, gets a gross misdemeanor. That does happen quite a bit and judges do tend to respect that negotiation, although they are not obligated to; a judge can always do what he wants to do.

In response to Mr. Hansen's question, pandering is currently not a sexual offense, although keep in mind that this statute would not allow you to take advantage of this program if your crime involves force or the use or threat of force, so that may be a provision which would limit who could take advantage of this program.

With respect to Mr. Ohrenschall's question about veterans, I would be somewhat remiss if I did not comment and say that we need to recognize the impact of excluding crimes that involve the use or threatened use of force or violence when it comes to our veterans. Obviously, when veterans come back from combat situations, it has a profound impact on them. Sometimes the crimes they commit involve force, or the threat of force. This statute has a categorical exclusion for veterans as does, I believe, Assembly Bill 84, which is the veterans court. Maybe now and maybe this session is not the time, but sometime in the future let us ask if we should open up these kinds of programs to veterans even though the crimes do involve force or threatened force. Keep in mind in this scenario, this is not an automatic program; a judge would always make the determination.

With that, I will answer any questions the Committee members might have.

Assemblyman Hansen:
My question is more from a financial perspective. When you take the negotiated plea down, I understand that one reason is the substantial increase in the cost to prosecute somebody on a full-blown felony. Is there a potential savings if the judge has this kind of discretion?

Steve Yeager:
I do think there is. In cases where a negotiation cannot be reached and the defendant either decides to plead guilty to something or a trial happens, this would allow the judge to say, "Instead of sending you to prison at a cost of approximately $65 or $75 a day, I will give you a chance at probation."

This would give the judge leeway in situations where the district attorneys and public defenders or defense attorneys might not otherwise see eye-to-eye.

Assemblyman Hansen:
You said that right now the judges have a certain amount of discretion. In other words, the offender can be sentenced on a gross misdemeanor even though he is technically guilty of a felony.

Steve Yeager:
That is correct. The plea agreements that we work out are essentially contracts where the defendant agrees to plead to a felony and the district attorney agrees to recommend probation and give a reduction. Generally, the judges will respect that negotiation if the parties agree to it.

Assemblywoman Diaz:
My question is on the word "discretion." Judges have discretion to use this mechanism or program. My question is, are judges applying discretion correctly and uniformly the way the language currently permits? For example, you were referencing a mere drug possession. One thing I do not want to see is that we catch someone with lots of drugs and it is the first time he was caught so we are lenient, but it does not necessarily mean it is the first time they have been doing it.

Steve Yeager:
Maybe it would help to step back and look in terms of when a judge would do this. A judge would make this determination after a plea is entered, or after a jury finds somebody guilty. What typically happens is a formal sentencing date is scheduled and on that date both the district attorney and the defense attorney, as well as the defendant, have a chance to speak to the judge to lay out their position. If the district attorney did not believe this kind of program was appropriate, I would expect him to advocate and tell the judge why it is not appropriate. Similarly, the defense is going to look into mitigation and what makes this defendant different from other defendants. In addition, the judge is going to have in front of him a pre-sentence report that has been prepared by the Division of Parole and Probation. I do not want to give the impression that it is a snap judgment on the part of the judge. Typically, there is a good amount of information that is put into that process. We can also submit what is called a sentencing memorandum if we want to put that in writing to a judge. I do not anticipate judges using this where the cases are outliers. It is going to be in cases where it is appropriate, at least that is the hope. But absolutely under this statute, it would fall to the judge to make that informed decision.

Chairman Frierson:
Are there any other questions for Mr. Yeager? Oftentimes those that are practicing criminal law have a practical idea of how it actually works that is not always apparent. Under existing law, a district attorney could do this very thing without statutory direction or authority to do it. What are some of the ways that a district attorney could allow this as an outcome?

Steve Yeager:
Mr. Chairman, to answer your question, what happens is you have someone who comes in with a felony charge and you start negotiating. Usually what happens is the district attorney, in certain circumstances, wants a felony out of the case when the defense attorney says that this is a first-time offender and asks for a gross misdemeanor. You get into a kind of impasse but sometimes the resolution is everyone gives and everyone takes. Essentially, it is the idea that you earn your way down from a felony to a gross misdemeanor, which entails a probation period of somewhere in the range of three to five years, staying crime free, and whatever conditions a judge feels appropriate. The other side, of course, is if you mess up you will be convicted of a felony and in all likelihood will go to prison.

Where I see this making a change is in certain crimes right now which have mandatory prison terms under the statutes. Neither the district attorneys nor the public defenders currently have the ability to structure an agreement in those cases, because the statute does not allow probation.

Chairman Frierson:
In those cases though, the district attorney could offer a lesser charge. For example, 28 grams of drugs, high-level drug trafficking, mandatory prison where the district attorney could offer a wobbler for a conspiracy. Could you address that?

Steve Yeager:
That is definitely true. In cases with a mandatory prison term, a district attorney and a public defender or defense attorney can always agree that the defendant will plead guilty to a lesser felony that would allow this type of structure to an agreement where they could reduce it to a gross misdemeanor. If we are talking about a large quantity of drugs, that is probably not going to be a likely outcome. If we are talking about someone who is just over the threshold of the minimum level for trafficking, I will say there is a wide range of discretion right now among the defense attorneys and the district attorneys about how to structure an agreement.

Chairman Frierson:
You mentioned the negotiation and the contract as a recommendation. In your experience, how frequently is it that judges do not follow that recommendation, and do you think this bill will have any impact on that either way?

Steve Yeager:
Judges do tend to follow those types of negotiations, especially when we are talking about felony up front and probation with a reduction. Even in my experience, I do not know if I recall any judge, absent really extenuating circumstances, not following that type of negotiation. I do not think this statute would really have any effect on the judge's willingness to give deference to the district attorney and to the defense attorney about what is appropriate.

Assemblywoman Spiegel:
As I read this, it appears to me that once somebody completes the program, their conviction would be a gross misdemeanor. If they subsequently have another felony arrest, would they then be able to go back into this program, or would they be exempted from it because they then would not have been convicted of a felony offense?

Steve Yeager:
Thank you, Assemblywoman Spiegel. That is a very good question. I think you are right; if somebody completed the program, received the benefit of a gross misdemeanor, and then committed another crime that did not involve the use or force of violence, technically speaking, they would be eligible to participate in this program again. However, the first thing out of the district attorney's mouth is probably going to be that he already had his chance at the program. I think a judge would be pretty unlikely to give someone a second chance at the same type of program. That would be possible under the statute.

Chairman Frierson:
Are there any other questions for Mr. Yeager? I see none.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender:
On behalf of the Washoe County Public Defender's Office, I also want to add my support to A.B. 159 and echo the sentiment and comments made by my colleague, Mr. Yeager. Initially when looking at this bill, my concern was that there may be certain district attorneys that may stop agreeing to give gross misdemeanors on those tougher cases. After listening to all the thoughtful comments today, I do believe this is a good tool for judges to adjudicate a person on those tough cases where the parties may be at an impasse.

I do want to touch briefly on comments by Assemblyman Hansen and Assemblywoman Diaz concerning the judges' discretion. A tough case like the ones we have been talking about could be presented to the judge at the arraignment stage and a judge could hear arguments and facts to support or reject the negotiation. The judge could weigh whether he would be inclined or not inclined on those tougher cases. At the sentencing phase, the judge would hear the arguments as well. Other than that, we support A.B. 159 and I certainly appreciate Assemblywoman Flores for bringing this piece of legislation forward. Thank you.

Chairman Frierson:
Are there any other questions? I see none. Is there anyone else here in Carson City or Las Vegas to testify in support of A.B. 159? [There was no one.] I will come back to Carson City for those in opposition to A.B. 159 and invite them to come forward, as well as those in Las Vegas.

Kristin Erickson, representing Nevada District Attorneys Association:
Thank you, Mr. Chairman and members of the Committee. We are strongly opposed to this bill for several reasons. There is simply no need for this. Currently, we have the following diversion courts: drug court, family drug court, driving under the influence (DUI) court, veterans' court, mental health court, gamblers court, the Chapter 453 diversion drug court, and the Chapter 458 diversion drug and alcohol court. In each of those courts, you are allowed to participate in this program, and if you successfully complete it, your case is dismissed. It is not reduced; it is dismissed. We have those options available and we utilize them quite often. We recognize the goodness in people; it is very difficult to send someone to prison. We realize the impact of felony conviction on a person's life and we try to help them get the help they need. We send as many people as we can to these courts. We also have the ability, when we see someone who is on the edge, to let him plead to the felony, complete boot camp and the treatment program, then withdraw his plea to the felony and enter a plea of a gross misdemeanor. We do that already; we do not need this statute.

The statute would apply to crimes such as residential burglary, selling drugs to minors, drug trafficking, and credit card fraud. If you commit a residential burglary, you can come in and go through an appropriate education program, and have the charges reduced to a gross misdemeanor. There are some crimes that simply should not be reduced to a gross misdemeanor, like selling drugs to minors. Each crime is looked at individually on its facts and, if a person deserves a break, that person will have the opportunity to get it.

This bill will also apply to someone with an extensive criminal history. I could have five felony convictions for residential burglary. I get another one and I could apply for gross misdemeanor. Now, the argument is the judge certainly would not do that, but the judge certainly could do that. Remember, at a sentencing hearing, the defendant is there—cleaned up, off drugs, looking good—but who is not there is the victim. Can the victim be there? Absolutely. Typically, the victims are not there because they have to work. They have families to support, and cannot take time off to sit in court all morning; or they are scared. They are scared of this person who broke into and ransacked their homes, who went through their most intimate belongings, and stole their most important possessions. They are scared of them; they do not want to see them. But this law would allow that person who broke into your house and destroyed it to go through an educational program and have the charge reduced to a gross misdemeanor.

It is also circular in that you do not have a felony conviction, but you have a residential burglary or an extensive drug trafficking—level 3 which is the highest level of drug trafficking. You complete the program and you get your gross misdemeanor. Two months later, you commit another burglary, or another drug trafficking offense, or you sell drugs to kids. You are right back where you started from, applying again for another gross misdemeanor. This statute allows you to do that. How many times can that go on? Again, if you are a well-spoken defendant, you have a good attorney, and you convince the judge that there is no victim, this could go on and on.

Furthermore, given my 20-plus years in the criminal justice system, I have to respectfully disagree that it will rarely apply. This will lead to a substantial increase in litigation and court time primarily because, if I am a criminal defense attorney and my defendant does not have any crimes of violence, I am going to ask for this diversion program every single time. As a district attorney, our responsibility is not to convict people. Our responsibility is to do justice whether that is to give someone who made a stupid mistake a break, to dismiss the case, reduce the case, or to send a rapist to prison for the rest of his life. Our obligation is to do justice. It is not to convict people.

So now these people who do not have a violent felony will apply for this program every single time, and we will oppose it if they have extensive nonviolent criminal histories because that is who this will apply to. We will oppose it; there will be constant litigation. It will increase court times and costs. We do not see this as a cost-saving measure. The bottom line is that we can already do that and it is not necessary. Thank you.

Assemblyman Duncan:
I have a few questions: (1) Are the diversion courts at the discretion of the judge, or does the district attorney have to agree with the defense in order to go through those programs? (2) Do you anticipate the increase in litigation will look like a hearing, and how much time will this take up? (3) Do you have an idea what that will do to your caseload or how many cases that will apply to?

Kristin Erickson:
For the most part, there are many drug courts. The district attorneys do not always have to agree. Most of the time we do agree, but there is somewhere we can go when we oppose them, then it is up to the judge. With regard to the litigation increases, I do believe that it will greatly increase litigation costs because you have serial property offenders, such as residential burglars and the prolific car thieves. They steal cars and that is how they make their living. These are nonviolent offenses. They can have several felony convictions on their record and still ask for this program, which we would oppose in that situation. We will end up litigating this in a hearing in front of the judge. A significant part of our practice would increase because of this.

Assemblyman Duncan:
You talked about the worries of a revolving door, that someone can apply for this program, then go out and commit another crime. In section 1, on line 29, if the language there that says, "The court shall enter a judgment" was changed to "the court may enter a judgment," would that ameliorate your concerns, or are your concerns the same? Maybe the interplay is that, if it is a felony, there might be mandatory jail time. Would you comment on that as well?

Kristin Erickson:
It would not alleviate our concerns. We would still be in the same position of arguing against allowing the same criminal property crimes defendants to argue for participation in the program.

Assemblyman Hansen:
Essentially, if you have been convicted of a felony offense and as long as it did not involve use or threat of force, would you be more acceptable to it if lines 6 and 7 in section 1 were eliminated?

Kristin Erickson:
That would be better; however, we would still have concerns with crimes such as residential burglary, where victims have been absolutely devastated. We would have issues with substantial drug traffickers, panderers, and other very serious crimes that this would apply to. Another issue is what if a person is brought up on three charges of burglary, or three charges of possession of

a stolen motor vehicle? Does this apply to all three counts on a criminal complaint, and then they ask for this if it is their first three felonies and they get three gross misdemeanors? They could potentially steal ten cars and get ten gross misdemeanors.

Assemblyman Hansen:
Bottom line with this is we are hoping it would be a cost-saving measure. In your opinion, there is no cost-savings in this at all.

Kristin Erickson:
That is correct. It would increase cost. We already have the ability to do this, and we exercise our judgment fairly. We take our obligation to do justice very seriously.

Chairman Frierson:
If I can clarify one point regarding the example just given about multiple felonies in one case, my understanding is that under habitual those would be treated as one felony in one case.

Kristin Erickson:
Thank you, Mr. Chairman. I believe you are correct.

Chairman Frierson:
I have a question about the gross misdemeanor provision. It did not dawn on me until just now listening to everybody, what gross misdemeanor? I think it potentially could be resolved with some clarification. Conspiracy is often a gross, but what gross misdemeanor would you imagine this actually becoming?

Kristin Erickson:
There are very few true gross misdemeanors. In the vast majority of gross misdemeanors and plea bargains, we change it from a legal fiction to basically a conspiracy to commit—burglary or possession of a stolen motor vehicle. For the most part, conspiracy turns any crime into a gross misdemeanor, and that is what is most commonly used in plea bargains.

Chairman Frierson:
How do you believe this would impact negotiations in general?

Kristin Erickson:
There are many cases right now where we look at their criminal history. If they have minimal criminal history, we will charge it to felony, give them a gross misdemeanor, and they get credit for time served. If it is a gross misdemeanor,

they pay a fine, agree to probation, and they are free to go. This bill could potentially impact those negotiations where they would have to earn their gross misdemeanor now instead of it being automatically given to them, so it would increase litigation costs and would stall plea bargaining and plea negotiations.

Chairman Frierson:
Are there any other questions? I see none.

John T. Jones, Jr., representing Nevada District Attorneys Association:
What I want you to know is that the Nevada District Attorneys Association (NDAA) does not view this bill as a cost-saving measure. What we view this bill as is the ability for a defendant to ask from a judge something that the prosecutor was unwilling to give them. I loved what Ms. Erickson said about our job is to do justice. If we did not give that person a gross misdemeanor, there is generally a reason for it: the facts were so egregious, or quite frankly, they did not warrant it. For our agreement to be undone by a judge when it is our job to determine specifically what they are charged with is a major problem for us. Additionally, the scope of this bill is large. There are many crimes that you could argue are not crimes of violence—child neglect or lewdness with a minor that simply involves touching. Those are two examples that are extremely serious offenses for which the argument could be made that they do not involve violence. For somebody to perform a lewd act on a child and end up with a gross misdemeanor just belies logic.

Also, we do have numerous diversion courts that generally work, and they work because they are narrow in scope. In other words, if you have a drug problem, you go to drug court and they focus solely on the drug issue. If you have mental health concerns and you go to a mental health court, they have therapists and providers who help you deal with those issues. The scope of this bill is so much larger than that. It is our position that you will not have the same success with this program as with the more focused and tailored diversion programs.

It was brought to my attention that when you have a crime with mandatory prison time, it is not specifically about putting a particular person in prison. It is also about a general deterrent effect—"don't commit this crime because you could go to jail for ten years minimum." This bill wipes away that deterrent effect.

Finally, there is no one from the Department of Public Safety here, but I would anticipate that this could be an administrative nightmare in terms of record keeping. You have high-level trafficking, and beside it a gross misdemeanor. How is that going to work? So quite frankly, we have numerous issues with

this bill and we urge you not to support it. Thank you. I am available for any questions.

Chairman Frierson:
Thank you, Mr. Jones. I think we have gone back and forth a little bit about whether this is a cost-saving measure. I think that everyone would agree, in general, that diversion programs save money. Are you saying that it is your position that this particular bill does not further that, but you would agree that diversion saves money?

John Jones:
We are in support of diversion courts but again, it is for the reason that I articulated earlier: generally, diversion courts are narrow in scope and they deal with a particular issue that the defendant may have such as drugs, alcohol, or gambling. Those are the courts that are generally successful and are able to help defendants not come back into the system.

Chairman Frierson:
Are there any other questions for Mr. Jones?

Assemblyman Martin:
What is your opinion on Assembly Bill 159 giving the judges in these cases much more discretion or less discretion? Does it force their hand? Is that what your concern is?

John Jones:
I am not quite sure what the question is. It is not a matter of discretion. Part of our concern is that you are taking away from prosecutors what our natural job is—to evaluate cases and then determine what appropriate crime it is that they can admit to. That is generally where our problem lies. In other words, our job is to look at a case and to do justice. We find high-level trafficking is an appropriate charge for a defendant to admit to in this case, and that can be completely undone by a judge in the back end.

Assemblyman Martin:
I do think you got the scope of the question because the concern that I was raising was whether you believe, as a prosecutor, the judge would possibly undo what you are trying to do, and whether you thought it an expansion of judicial responsibilities or authority, allowing the judge more or less discretion. So I think you did answer the question. Thank you.

John Jones:
Mr. Chairman, if I might add that in terms of the cost-saving measures, the NDAA has always been willing to have the conversations surrounding current charges, categories of offenses, maximums, and minimums. We are willing to do that on a charge-by-charge basis. If there is a charge that people think is too high, we are willing to work with them in terms of the potential punishment, but when you start overlapping layers of bureaucracy and try to pass it as a cost-saving measure, we are going to oppose that.

Assemblyman Wheeler:
I want to go back to the deterrent argument that you were making. For about 149 years now, this body has been imposing mandatory sentencing on different laws. Do you feel that those mandatory sentences would be usurped by this?

John Jones:
Potentially. For example, lewdness with a minor has a ten-year minimum attached to it. In this case, potentially, you could end up with a gross misdemeanor and not have to serve any prison time at all. It is our position that it potentially could eliminate the deterrent effect of crimes of lewdness with a minor.

Assemblyman Wheeler:
In your opinion, would this extra layer make a perpetrator less likely to plea bargain with you knowing that this was available somewhere on the other end?

John Jones:
Potentially, and you could also make the argument that it would make us less likely to want to plea bargain with the defendant. In many instances, we offer a wobbler which could be treated as a gross or a felony, or we will give the defendant an outright gross misdemeanor if it is a low-level felony or they do not have a serious record. This could really hinder that negotiation tool.

Assemblyman Hansen:
What is a wobbler?

John Jones:
I apologize. A wobbler is a category E felony that can be treated either as a felony or a gross misdemeanor.

Assemblyman Ohrenschall:
I think I can understand where the district attorneys are coming from in terms of the trepidation with expanding eligibility for these therapeutic programs. Do you feel the judges have currently made prudent decisions in terms of who they

have allowed to participate in those therapeutic programs? If that answer is a yes, then what is the rationale behind the fear and trepidation with allowing those same judges to continue making those decisions?

John Jones:
Currently, there has to be some demonstration of a therapeutic need. This bill, at least in the opinion of the NDAA, does not really provide for that therapeutic need. That is one reason why we feel the diversion courts have been successful; you have a need, and they address that specific need.

Assemblyman Duncan:
Mr. Jones, can you take me through the argument again how this will possibly be a deterrent for you to offer lower crimes in the plea bargaining process?

John Jones:
Let us say we have someone who is charged with a felony that, in the past, we have been willing to give a gross misdemeanor to because he does not have a significant criminal background, and it does seem to be a mistake, for lack of a better word. What we could do, and I am not saying we will, is if you can ask for a gross misdemeanor from the judge, then admit the felony, and ask the judge for the gross. That is potentially what could happen under this legislation.

Assemblyman Duncan:
In areas where judges have discretion, do you find that the judges typically follow the recommendation of the district attorney?

John Jones:
Generally, it is the negotiation of the parties when you are dealing with a plea.

Assemblyman Duncan:
I am sorry. I was not talking about the plea bargaining process; I was talking about whether it is the sentencing or something else.

John Jones:
Quite frankly, it does vary. It is really a case-by-case determination depending on the case.

Chairman Frierson:
Are there any other questions for Mr. Jones? I see none.

Brian O'Callaghan, Government Liaison, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
We are going to voice the same concerns, but our biggest concerns are the repeat offenders that our detectives are picking up. For repeat offenders, it is not the first time they have been arrested, and not just on the drugs, but also property crimes, burglary, forgery, and ID theft. Those are really serious crimes but they are not violent; it is a high financial gain. We oppose the bill because of that and, we also have to look at the victim. If you have ever been a victim of a burglary, which I have, you are violated. To go back through this program the way it is written, they can get back out again and could be a repeat offender. So we adamantly oppose this.

Chairman Frierson:
Are there any questions for Mr. O'Callaghan? I see none.

Laurel Stadler, Rural Coordinator, Northern Nevada DUI Task Force:
I am also opposed to this bill. A lot of the definitions in statute are not always clear, and I want to focus on the violent crimes. Felony DUI causing death or substantial bodily harm has never been identified as a violent crime. I am sure you have all seen crashes on television where bodies are strewn on the highway because someone has chosen to drive drunk. Those that are charged and convicted of felony DUI causing death or substantial bodily harm could be eligible for this diversion program by the definition of what a violent crime is and what it is not. That is just one example in statute, so what you may be passing—thinking that certain crimes would be exempted—may not be because of the definition in statute. Also, with the felony DUI statute, we already have a diversion program for three offenses within seven years and that actually is nicer, so to speak, than this because that gives the felony offender a second misdemeanor if he properly concludes the diversion program. As the district attorney said, there are lots of other appropriate diversion programs for crimes in statute that are already successfully implemented. A couple of people have mentioned the cost to the system versus the cost to future victims. A lot of times, those future victims are victims of other crimes that may not fall under one of these categories, but are indeed violent crimes.

Chairman Frierson:
There has been testimony that what is proposed in this statute is already an option, so when I hear testimony about the cost I am a little concerned. It seems that this is already happening in court and what this bill is proposing is to put language in statute that encourages or reminds folks that this is an option, but it is not new. I am concerned what the additional burden or cost would be when it is an option already. I think the one thing that Ms. Erickson testified to

about litigating the issue is one, but that is generally an oral argument at sentencing.

Correct me if I am wrong, but in your specific area in DUIs and domestic batteries, it is pretty much precluded to negotiate. Could you provide some insight on that?

Laurel Stadler:
I think this bill is unclear because felony DUI cannot be plea-bargained down and there is no probation. If they plead to the felony or are convicted of the felony, this bill may take precedence over that and then they would fall into the possibility of being reduced to a gross misdemeanor for felony causing death or substantial bodily harm. It is my fear with this current bill, that although we have the tight language in the existing statute, if there is a conviction, this may preempt all of that hard work to get our felony statute to be effective.

Chairman Frierson:
Thank you for making that point. Are there any other questions? I see none. Is there anyone else here in Carson City or in Las Vegas to oppose A.B. 159? [There was no one.] Is there anyone here or in Las Vegas to testify in a neutral position to A.B. 159? [There was no one.]

Assemblywoman Flores:
Nevada has been number one in incarceration rates as far back as 1986. It was not until 2009 that these incarceration rates went down. Why? Because this body created policies and diversion courts, and started to pass these bills in 2007. It is very easy to have a knee-jerk reaction. It is a lot harder to actually look at the facts, the numbers, and the costs—not just to our state, but to society—in having these types of policies in place. I do think that this bill is very important in continuing the success and effectiveness of the diversion courts, and that alternative sentencing works. It is important to remember the policy—there are judges in place and there is a structure in place. Keep in mind this also applies to situations where there are no alternatives. It is not just about the fact that the district attorneys have the opportunity to negotiate, and it should only be them. It is also the situations where there is no opportunity to negotiate because mandatory prison time is involved. Why should there not be an opportunity for a judge to decide, after all the evidence has been presented? It makes better sense to have a person pay restitution, be on probation, and follow all the other things that are required, and if they do not, then they would go to prison.

I think this is smart policy and it is the direction that Nevada needs to continue going in. We need to join the rest of this country in this smart policy approach

in dealing with crime and incarceration. Studies have shown that increasing prison time is not a deterrent; look at three-strikes in California. The three-strikes law in California did not preclude people from committing crimes; their prison population ballooned. I will leave it at that.

I am certainly open to working with folks in trying to address concerns in this bill. I do not believe that any bill is perfect every single time, and I look forward to working with this Committee and having all of your support in passing this bill. Thank you.

Chairman Frierson:
Thank you, Ms. Flores, and with that we do not have any other matters on the agenda. I will close the hearing on A.B. 159. I will open an opportunity for public comment if anybody has any to offer. Is there any public comment here in Carson City?

Assemblyman Ohrenschall:
Thank you, Mr. Chairman. I want to thank Assemblywoman Flores for being so passionate about this bill. If I see someone who has a felony conviction, is working, is able to support his family, has beat his drug habit, and is getting mental health treatment if he needs it, I feel a lot safer than if I see someone with a felony conviction who is possibly getting into the same old habits and likely to fall back into the system. I really hope this Committee will consider this bill and all the testimony.

Chairman Frierson:
Thank you, Mr. Ohrenschall. Are there any other public comments here or in Las Vegas?

Assemblyman Martin:
I am not sure if this is the appropriate segment to say this or not. Based on my professional experience dealing with nonviolent criminal cases, and in all the studies and all the years that I have been doing fraud work, the major deterrent to committing crime is not the sentencing, it is the likelihood of getting caught. I think they are mixing up the deterrent effects of sentencing versus the likelihood of getting caught. I stand very firm in my belief that the likelihood of getting caught is more the issue, and the diversion programs need to be considered separately from that point. Thank you.

Chairman Frierson:
Thank you, Mr. Martin. Is there anyone else on the Committee that would like to comment?

Assemblyman Wheeler:
I would like to take exception to the comment that district attorneys feel they are the only ones who can make a judgment. I believe that any plea bargain is brought before the judge, an elected official, who actually makes the plea bargain, not the district attorney.

Chairman Frierson:
I see no other public comment, so I thank you all. I would encourage folks to sit down and talk. There are several bills dealing with diversion this session, from veterans' courts to nonviolent offenses, as well as the bill before us today. With that, I thank you all and I will now adjourn today's Committee on Judiciary. Meeting adjourned [at 9:38 a.m.].

RESPECTFULLY SUBMITTED:

_____
Thelma Reindollar
Committee Secretary

APPROVED BY:

_____
Assemblyman Jason Frierson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 14, 2013 **Time of Meeting: 8:08 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster