MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
March 6, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Friday, March 6, 2015, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Janet Jones, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Wesley Duncan, Assistant Attorney General, Office of the Attorney General
Jacqueline Bluth, Chief Deputy District Attorney, Juvenile Division, Clark County District Attorney
John T. Jones, Jr., representing Nevada District Attorneys Association
Brigid Duffy, Chief Deputy District Attorney, Juvenile Division, Clark County District Attorney
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff's Office
Marlene Lockard, representing Nevada Women's Lobby
Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association
Scott Coffee, Deputy Public Defender, Clark County Public Defender; and representing Nevada Attorneys for Criminal Justice
Amy Coffee, representing Nevada Attorneys for Criminal Justice
Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office
Steve Yeager, Deputy Public Defender, Clark County Public Defender's Office
Shaquita Hill, representing the Nevada Teen Health and Safety Coalition
Robyn Mazy, Private Citizen, Reno, Nevada
Elisa Cafferata, President and Chief Executive Officer, Nevada Advocates for Planned Parenthood
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General

Chairman Hansen:
[Roll was taken. Committee protocol and rules were explained.] We have one bill today which is a continuation of the testimony on Assembly Bill 49.

Assembly Bill 49: Revises provisions governing crimes. (BDR 15-158)

Wesley Duncan, Assistant Attorney General, Office of the Attorney General:
We are here to continue our testimony on Assembly Bill 49 since we did not complete it at the February 13, 2015 meeting. There is a lot of information in this bill, so I appreciate the Committee members reviewing this bill at the first meeting. Jacqueline Bluth will be finishing the presentation today.

Mr. Chairman, just as a housekeeping matter, I would request that we have the opportunity for a rebuttal at the end of the hearing in order to address some concerns. I know there will be some opposition to parts of the bill. We have tried to work with some of the parties on amendments, and I know there are some disagreements on parts of the bill. We have done our best to attempt to allay some of the concerns.

Chairman Hansen:
Since the Attorney General is the bill sponsor, I will give you the opportunity to address any concerns or questions at the conclusion of the hearing.

Jacqueline Bluth, Chief Deputy District Attorney, Juvenile Division, Clark County District Attorney:
The two sections I will be addressing today are section 10, child abuse with substantial bodily harm, and section 26, child abuse (Exhibit C). I had not completed my presentation on section 10 at the hearing on February 13, 2015. To review *Nevada Revised Statutes* (NRS) 200.508, section 1 says, "A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect." The cases I deal with in the Special Victims Unit add the second element of substantial bodily harm which is defined in NRS 0.060 as (1) Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or (2) Prolonged physical pain."

When I joined the Special Victims Unit, the child abuse cases ran the whole gamut. The cases included children with broken arms, broken legs, teeth knocked out, and who were permanently burned. The cases have escalated into a whole different class of injuries which are occurring at an alarming rate. These are children with traumatic brain injuries. The current penalty of 2 to 20 years in prison with the opportunity of probation is appropriate for the broken arms and legs. However, this is not adequate for the traumatic brain injuries where these children are left blind, deaf, or paralyzed.

I felt by just listing traumatic brain injuries in the language of the bill that it would be too vague. I met with Dr. Sandra Cetl, who runs the pediatric abuse and neglect program at Sunrise Children's Hospital in Las Vegas. She speaks at conferences across the country on child abuse and traumatic brain injuries. We reviewed the type of brain injuries and the long-term injuries that were caused by this type of trauma. From that research, I put together a delineated list. I did that to provide defendants notice of what we are talking about because if we just say traumatic brain injury, it provides too much leeway.

Last time we were here, you heard testimony from Dr. Robert Rothfeder who testifies for the defense at trials for children with traumatic brain injuries. He testified to this Committee that some of these injuries can be caused by other means. Of course, a broken arm or leg can be caused by other means. As a prosecuting attorney, I still have to prove beyond a reasonable doubt that the defendant was the person who caused those injuries. This list does not relieve me of my burden to prove beyond a reasonable doubt that the defendant is the person who caused the injury. I just wanted to make sure that was clear.

In the two weeks since I was before this Committee, our unit received three more traumatic brain injury cases. I have an update on baby Illy who is one of the children I spoke about at the meeting of February 13, 2015. Illy had been shaken and beaten by her mother. Illy's father called me yesterday to inform me that baby Illy is going back in for another brain surgery. The bone on her skull that was left after the emergency craniotomy is disintegrating. They will remove two ribs from Illy and use them to replace the bone that is disintegrating. Illy's father asked me how much we were going to make her mother pay for this. I told him the maximum penalty Illy's mother could receive was 8 to 20 years in prison. His words to me then were, "Illy is paralyzed and blind at 4 months old and you tell me her mother just has to do 8 to 20 years in prison?" That is why I am asking you to send the message that probation is not an option for someone who causes a child to suffer a traumatic brain injury. It is wrong that someone can make a child deaf, blind, or paralyzed, and receive probation. Under the new statute, it would be a mandatory prison sentence. However, the judge would still have discretion and the penalty would be a minimum of 5 to 15 years, or 5 years to life in prison.

Of the three cases that I presented at the last meeting—baby Illy, baby Juliana, and baby Joel—only one of those cases is now closed. For Joel, who was the child in the wheelchair, his perpetrator was sentenced to 6 to 15 years in prison. There was a plea negotiated in this case. Joel had an older sister, who was six at the time, and we did not want her to testify in front of her mother. Baby Juliana and baby Illy's cases are still in the preliminary hearing stage and no negotiations have been made. The maximum sentence their perpetrators

could serve for causing these injuries is 8 to 20 years, and they could receive probation if the judge found it applicable or appropriate.

That is the end of my testimony on section 10. Are there any questions specific to section 10 before I move on to section 26, which is the negligent or maltreatment definitions of child abuse?

Assemblyman Elliot T. Anderson:
What would happen to someone who is put into a situation where the child is injured but they did not willfully cause the injury?

Jacqueline Bluth:
Most of the traumatic brain injuries I am discussing are children who have been severely abused, shaken, beaten, or slapped in the head and face. These young children do not have strong neck muscles which is why the shaking back and forth causes the brain, for a lack of a better word, to slosh around. The only other situations I have seen this type of injury happen with is when a family member or friend is taking care of the child and they do not pay attention to the child. An example of this would be the child who goes out to the swimming pool and falls in. In those types of situations, the traumatic brain injuries usually result in death. I am addressing the cases where the perpetrator willfully causes the child's injury. If a child is put into a car without being put in a car seat, and receives a traumatic brain injury from an accident, that would probably fit the elements of the statute, although those are not the type of people we are looking to prosecute. If you keep carving out exceptions, we will be left with an ineffective statute. If a mom gets in the car drunk, and she fails to put the child in a car seat, that would be a situation where we would prosecute.

Assemblyman Elliot T. Anderson:
I appreciate that. I just always like to tie things up the best I can because lawmaking is the only power we have.

Jacqueline Bluth:
Absolutely, and I appreciate that.

Chairman Hansen:
There are no further questions, so please proceed, Ms. Bluth.

Jacqueline Bluth:
Section 26 defines child abuse. Currently, there has been a lot of discussion regarding what the term abuse or neglect means. Abuse is currently defined in four different ways: (1) a physical or mental injury of a nonaccidental nature,

(2) sexual abuse, (3) sexual exploitation, and (4) negligent treatment or maltreatment of a child under the age of 18.

I am going to focus on the definition of negligent treatment or maltreatment of a child under the age of 18. *Clay v. Eighth Judicial District Court* [305 P.3d 898, 904 (2013)] was a case regarding Mr. Clay who broke into a family's home and sexually assaulted the mother and a child, then killed most of the family but left the two younger boys alive. Mr. Clay also had a prior case where he impregnated his girlfriend and beat her. When the case was taken to the grand jury, child abuse was defined but not physical injury. If you go back to NRS 200.508 it says, "A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect."

After the *Clay* decision, the Nevada Supreme Court agreed the Legislature's intent was that there should be a punishment even if you do not cause actual physical injury but you place the child in a situation where they could have received physical injury or mental suffering. What the Supreme Court said was you have to plead it with specificity in these child abuse cases. You have to either say there has been nonaccidental physical injury, nonaccidental mental injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment. Currently, the definition is not sufficient. *Nevada Revised Statutes* (NRS) Chapter 432B.140 reads, "Negligent treatment or maltreatment of a child occurs if a child has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so."

I know all these words are great, but sometimes it helps to put real cases in front of you to help understand where I am coming from. In the last year, I have had two cases where negligent or maltreatment really needed to be made more solid. The first case is *State v. X*. There were three children who were adopted by a foster mother who wrote a book on how to foster children. There became a toileting issue in the house. She would force the three little girls who were 9, 11, and 12 years of age to sit naked from the waist down on Home Depot buckets all day from the moment they woke up to the moment they went to bed. They would be forced to go to the bathroom in these buckets. As punishment for the toileting issues, she would force them to take cold showers and she would dump buckets of ice on them. She would also force them to eat their feces and drink their urine. She forced them to sleep

naked in the winter with cold fans blowing on them and sometimes forced them to sleep naked outside. This is not physical injury but it is torture.

The next case is *State v. Y*. These were two little boys that were 4 and 5 years of age. The mother and her boyfriend would force the children to eat their own vomit. They would take the 4- and 5-year-olds out to the desert, force them into caves, block up the cave with rocks, then tell them there were monsters and clowns in the back of the cave that were going to kill them. When it was night time, they would pull the boulders out, jump in the car, and tell the children they were leaving them overnight. They thought it was funny to have the 4- and 5-year-olds run after their truck. They would also force the 4-year-old to watch horror films and when he tried to close his eyes, they would hold his head and peel his eyes back and make him watch these movies. While they may not have been physically abusing this child or causing the injuries I have shown you in the other cases, these children were in such awful and horrific shape they could not even testify at the preliminary hearing. Their psychologist wrote to the judge and said these children cannot come and testify before these people. The current statute protects children who have been physically injured, but it does not protect children from being victimized through the use of terror. I ask you to look at the negligent or maltreatment theory.

I have met with the defense since our meeting in February and removed the battery language that they had a problem with. They also had issues with some of the language we proposed, and we have tried to firm up the language to apply to the specific situations I am talking about in this testimony. The change we made was, "Negligent treatment or maltreatment of a child occurs if the child is subjected to harmful behaviors that communicate rejection, are threatening, intimidating, disparaging, or terrorizing, or humiliating, or if a child has been subjected to painful, or abusive conduct." We believe this language shears up the statute and makes it more solid, provides definitive language, and puts defendants on notice. I do not even think that bullying is an appropriate word to describe what these children are going through. These children are urinating and defecating on themselves, and defendants need to be responsible for the trauma they have caused these children. No child deserves to go through that every day. I think negligent or maltreatment defines that we are going to protect children who are not necessarily receiving the physical scars but have the emotional and mental scars. That is what this statute does. Are there any questions?

Chairman Hansen:
Thank you for your testimony. Are there any questions from the Committee at this time? Seeing none, we will now open the hearing for those in support of A.B. 49.

John T. Jones, Jr., representing Nevada District Attorneys Association:
You have heard from three of our best prosecutors in the state when it comes to these types of issues, and they outlined for you reasons why we need the changes proposed in A.B. 49. Based on their experiences and on the demonstrated need, I am here in support of A.B. 49.

Chairman Hansen:
Thank you. Are there any questions for Mr. Jones? Seeing none, we will go to Las Vegas for testimony.

Brigid Duffy, Chief Deputy District Attorney, Juvenile Division, Clark County District Attorney:
I am here on behalf of the Clark County Department of Family Services (DFS). We are in support of A.B. 49. The proposed legislation will assist DFS to further protect children who are too vulnerable to speak for themselves. As the result of a recent spotlight thrown on DFS in Clark County, parties convened to address our shortcomings, which made the protection of children a priority in our state. I would urge you to pass A.B. 49.

Chairman Hansen:
Thank you, Ms. Duffy. Are there any questions at this time?

Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
On behalf of the Las Vegas Metropolitan Police Department, we are in full support of this bill.

Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff's Office:
Washoe County Sheriff's Office is also in support of this bill.

Marlene Lockard, representing Nevada Women's Lobby:
We are also in support of this bill.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:
On behalf of the Nevada Sheriffs' and Chiefs' Association, we support this bill.

Chairman Hansen:
We will now invite those who are in opposition to A.B. 49 to come forward. We will start with Las Vegas testimony.

Scott Coffee, Deputy Public Defender, Clark County Public Defender; and representing Nevada Attorneys for Criminal Justice:
I am here representing the Clark County Public Defender's Office and Nevada Attorneys for Criminal Justice. I have been involved in the defense of these sorts of cases for the better part of my career. Today, I want to address section 10 of A.B. 49.

You have heard from some zealous prosecutors today, and I will tell you from having done this for a long period of time, there are no prosecutors more zealous than those involved in baby injury cases, and that is understandable. No one thinks someone should hurt a baby intentionally. While you have been shown a few cases where there were traumatic injuries to the children which may have been intentional, I am not familiar with those particular cases. I want to talk about the reality of day-to-day practice.

The concept of shaken baby syndrome has been called into question. There are entire countries that do not recognize the concept of shaken baby syndrome. Canada and the United Kingdom have moved away from it. Cases are routinely overturned. When I started defending these cases, we used to hear something called a triad of injuries consisting of subdural hematomas, retinal hemorrhages, and a third component which slips my mind. This was the diagnostic for abuse. If you had these injuries, it must be the result of abuse and someone must be responsible. By and large that has been debunked.

The first case where this really came to national attention was about twenty years ago with the case of Louise Woodward, a nanny in the Boston, Massachusetts area. The state's key prosecution witness was Dr. Patrick Barnes, an Ivy League-educated doctor and professor of radiology at the Stanford University Medical Center. He was a radiologist who testified for the prosecution that the injuries had been consistent with a shaking injury. Dr. Barnes has since said he would not testify the same way today. The fact of the matter is, the scientific literature does not support this diagnosis for shaken baby syndrome, even when the triad of these injuries are present.

We have submitted a letter with a list signed by about 15 to 20 professionals showing their concerns regarding section 10 of this bill (Exhibit D). Included in these signatories are clinical professors from various law schools and associate professors. Some of the contributors are Dr. John Plunkett, who is a leading doctor and researcher in the field and Dr. Patrick Barnes, who was

a prosecution witness in the Woodward case. The prosecution said a few moments ago that they included this list of injuries so the defense would know what they are talking about and to make the language less vague. With all due respect, I do not believe that. I think they have included the list to make it easier to prosecute, and to make it an automatic finding if any of these injuries are present. Let us look at the list of skull fractures: depressed skull fractures, cerebral lacerations, cerebral contusions, subarachnoid hemorrhages, retinal hemorrhages. The problem is, there are a number of nonabuse causes for any of these injuries, and particularly in isolation. This is one of the things the submitted letter addresses (Exhibit D). Some other causes may include congenital malformations, childhood stroke, metabolic disorders, infectious disease, cancers, poisons, toxins, complications from birth injuries, and genetic conditions. The point is, any of these injuries, in isolation, can be caused by accidental means.

I understand that the prosecutors have to prove beyond a reasonable doubt that somebody is responsible, but they also tip their hand a bit as to how this actually works in practice. Initially, direct abuse will be charged. Inevitably, when someone starts to question science during a defense case, the approach is shifted, similar to what Assemblyman Anderson mentioned. The prosecution's accusations shift to say, if there was no actual abuse, the defendant knew what happened and someone had responsibility. The prosecution will say the defendant was not watching the child closely. The defendant is placed in a situation where "should have, could have known" is enough for the prosecutor to get a conviction, even if there was no direct abuse.

The cases that have been shown here are no doubt horrendous. If someone intentionally tortures a child, intentionally breaks a child's arm, or intentionally causes a skull fracture, more power to this Legislature for adding more time to the sentence. However, most cases do not fall into that category. In the Woodward case, the sentencing judge reduced the conviction from second degree murder to manslaughter. It was characterized by confusion, frustration, immaturity, and some anger, but not by malice. The fact of the matter is, most cases I have defended can be characterized the same way. For every horrible case that we have mentioned, there are five cases where you have well-meaning parents who may not have been paying attention and children are injured, but it was not their intention to cause that result.

I would like to give two specific examples. One is a case where I defended a 19-year-old Hispanic gentleman named Jose Rubio whose daughter was brought into the hospital with a skull fracture. When it was noticed that her skull was bulging, the treating physician automatically decided it must be some

kind of abuse. Child Protective Services (CPS) was called in. How CPS works is they approach the family and tell the family that someone caused these injuries. This family says they do not know what happened. The family explains that they noticed the child's head was bulging and called 911. Child Protective Services believes someone knows what happened. The interview goes on for hours. During the course of the interview, CPS workers make threats and essentially say, "Here is what is going to happen. If we do not have an explanation, we will take your children from you." This 19-year-old young man and his girlfriend go home and decide that in order to get the children back home with their mother, Jose will take responsibility saying that he accidentally dropped the child on a table. Otherwise, the child is going to the care of CPS, and then foster care. We have seen how that has worked out recently in Clark County. Jose is scared to death and tells CPS, "I dropped the child twice on a table." His story was laughable; it made no sense. What happens then is that he is charged with multiple counts of child abuse and neglect. Instead of 8 to 20 years in prison, Jose is facing 16 to 40 years in prison because two drops equals two counts of child abuse. Luckily, the jury understood what was going on. Here was a man with no history of violence. God forbid if he had anything in his background, any kind of character flaw or defect, the jury might not have come to the right decision on that case. The jury acquitted the young man. They saw that he did not know what happened but was trying to protect his family. But again, we had a nonspecific injury and a zealous state moving forward.

The Victor Fakoya case in Las Vegas had a similar result as the Rubio case. Victor Fakoya, a Nigerian man described as the gentlest man anyone had ever met, was charged with causing skull fractures to the child he was babysitting. The baby in that case died. However, he was ultimately acquitted in the case.

There is no case that weighs heavier on me as a defense attorney than a child abuse and neglect case. After being acquitted, Jose Rubio could not return home for several months. He had to go through parenting classes because even if you are acquitted on these kinds of charges, it stays with you. Child Protective Services is involved, family services is involved, and the families are torn apart. What scares me most, on top of everything else, is that the prosecution is asking to take discretion away from the judges. You have been told, "My God, this case is horrible and somebody can get probation for this act." I have yet to see a judge in Clark County give probation to somebody responsible for the injuries caused in the photos you were shown. It just does not happen.

If this Committee wants to make torture or sadistic injury to a child an enhanced punishment, we suggest a sentence of 5 to 15 years in prison, or 5 years

to life. When you have a statute that has cast such a broad net causing well-meaning families and people with no criminal record to be torn apart and subjected to life sentences, it is not good law. We heard a moment ago that we should trust prosecutors to exercise discretion and if somebody did not put a seat belt on a child, they would not be charged. To that I would reply, maybe. Prosecutional discretion does not limit how these cases are charged. Discriminating between abuse and nonabuse is very difficult. These cases are always a roll of the dice. I urge you not to take away judicial discretion. I urge you not to pass section 10 the way it is currently drafted.

Chairman Hansen:
Are there any questions for Mr. Coffee? Just out of curiosity, did they ever determine what did cause the baby's skull fracture in the Rubio case?

Scott Coffee:
They did not, and that is part of the problem. In a number of these cases you have two parents who are potentially responsible; for example, the parents will shift the care of the child. The mother may take care of the child in the evening, the father during the day, and you cannot time these injuries. I do not mean to be too graphic, but if you have a child who lives, these injuries are very difficult to time. If a child has died, an autopsy can show iron deposits and other things to determine the time the injury took place. When the child survives, it becomes a guessing game as to who caused the injuries, and that is a really dangerous situation. I will tell you the vast majority of the time, the male is charged, right or wrong. The general assumption is that the male is responsible. I do not think that is always the case, and that is one of the dangers involved. Someone is chosen to pay, and it is not always the right person.

Chairman Hansen:
I guess the question I had in my mind was that you talked about discretion for judges. In the case you discussed, there were doctors and CPS involved, and there must have been preliminary hearings. You must have had a whole series of people with a reasonable level of discretion. The impression I get about the testimony of CPS representatives is, they will do everything possible for the best interest of the child. I am wondering why you have confidence in the judges, yet you seem to want to remove the discretion from doctors and others? It seems reasonable to me that a doctor would go to extraordinary efforts to find out how a child received a skull fracture, since the individuals who are harmed cannot speak for themselves.

Scott Coffee:
I agree that extraordinary measures should be taken, but some of the time the answers are not there, and sometimes science is faulty. These are emotional situations, and this is the place where juries are most likely to get it wrong. I will tell you that a lot of treating physicians are 10 to15 years behind the times on research regarding this matter. I think we need to be able to trust judges to do the right thing in those situations.

Assemblywoman Diaz:
As a school teacher, I see that sometimes accidents happen to children who sustain these kinds of injuries. However, the children do not know how to articulate how these injuries occurred, especially when CPS gets involved. That is a very difficult situation for children to navigate. I remember clearly an incident where a second-grader in my class had a cooler fall on her head. We sent her to the nurse who questioned how the injury occurred. I realized that this benign situation could easily be taken out of context and someone could say the parents are guilty for the child sustaining this injury. If we pass this laundry list of injuries, do you see that happening more than it is right now?

Scott Coffee:
Absolutely, I see it happening more than it does currently. I think that is exactly the concern I am trying to express. I will give you an example of this. When Dr. John Plunkett did his initial articles on short-distance falls, he was ostracized to some extent. People said short-distance falls cannot cause cerebral hemorrhages, but the fact of the matter is they can. This laundry list is not always diagnostic for abuse. There are all sorts of ways for these injuries to be caused that we do not contemplate. To say that if these injuries are present, we must give a life sentence or a minimum 5-year sentence is dangerous.

Assemblywoman Fiore:
In section 10, it does not state that we have to have strict liability, correct? The state still has to prove intent?

Scott Coffee:
The problem is the statutes themselves are so poorly drafted that the attorneys have an impossible time walking through the minefield of what is abuse and neglect. For example, regarding the language stating, "placed in a situation where it could happen," you are a better person than I if you can tell me what that means. What we do not have here is specific intent. If it said specific intent to cause a cerebral hematoma, that would be one thing, but that is not what we are talking about. It is an intent to commit abuse, and it can be as simple as intent to commit neglect. If I let my four-year-old child crawl on a stool at home and the child falls off the stool because I am cooking and not

paying attention, I could be charged for this accident; that is a problem. This is wide open, and to apply mandatory sentences is severe and dangerous.

Assemblyman Gardner:
You were talking about shaken baby syndrome, so I did a little bit of research. I looked at the Mayo Clinic and some other hospitals, and they are still using that term. I was wondering if you could share with this Committee the evidence on where that is not being used or how that is old science?

Scott Coffee:
It began with the articles that Dr. Plunket wrote on short-distance falls, and there has been substantial research since. There was a letter provided to the Committee signed by a list of professionals in the field that talks about the research (Exhibit D) and a number of articles are cited. I have personally done interviews with *Discover* magazine regarding this very issue of moving away from shaken baby diagnosis. The charge in every case I see now is shaken impact. The state has moved to the term "shaken impact" as it is more scientifically supported. I have not seen a prosecutor charge a strict shaken baby case in years. I think that is a telling fact.

Assemblyman Wheeler:
You said this list of injuries is not diagnostic for abuse. I would have to agree with you on that. Is it not the point of this list that the prosecution will have to still prove beyond a reasonable doubt—which is an incredibly high bar as you well know—how these injuries were caused. Also, does it not give the judge and jury the discretion to say yes or no? You said discretion is being taken away. After there is expert testimony, they are still going to have to prove the charges beyond a reasonable doubt. You are giving them the discretion to say whether it was caused by this person or not. I am getting two different signals from you.

Scott Coffee:
The discretion I am talking about is in sentencing, and not discretion to convict or acquit. The point is the intent to abuse, and not to cause a specific injury. For example, let us say you take a different approach to child care than I do. You think spanking is appropriate and you misapply a spanking, or a child moves away and falls from a stool and cracks his skull open while trying to get away from the spanking. You have the intent for abuse but the result was unintended. It is still going to be a sentence of 5 to 15 years, or 5 years to life in prison. The sentence is not something the jury is aware of. They may think that the result was entirely accidental, but the parent did go a little further than they should have, so it was abuse. It may be justified for a shorter prison

sentence, but there is no ability to give a shorter sentence. The sentencing will be 5 to 15 years or 5 years to life in prison.

Assemblyman Wheeler:
I think I see what your point is, but I am not an attorney. Maybe you can explain it in a little more detail. Do you really believe that someone who is found guilty of abusing a child with one of these heinous injuries should be put on probation?

Scott Coffee:
We are not always talking about probation. We also have the option of 6 to 15 years in prison for one single count. I do not know many judges who would give probation in cases with these injuries. Some of these injuries, retinal hemorrhages, for example, can be a result of birth trauma. There is a situation called a rebleed in head injuries. When a child comes out of the birth canal the head contracts, thus you can have bleeding inside the brain during birth. This is why you have to leave some of the discretion to the judges.

Assemblyman Elliot T. Anderson:
I think we need to get past the phrase "specific intent" for this question. I think my concerns are the same as yours and have to do with purpose. Would you feel better if it said, "with a purpose to cause those injuries," something to tighten it up?

Scott Coffee:
Maybe we could use possible wording such as "with sadistic purpose," meaning someone who is intentionally trying to cause some kind of significant harm to the child. I have not sat down and given much thought to changing the language as I have been concerned more with the laundry list of injuries.

Chairman Hansen:
I am picturing a mom with a baby that will not stop crying. The husband or boyfriend gets frustrated and starts slapping the crying child while telling the child to shut up, causing severe damage to the baby's head. Would his defense be that he did not know that kind of slapping could cause a retinal hemorrhage, brain damage, or a skull fracture? At what point do you say, even though he willfully caused the act, he did not know it could cause an injury? Could this be a defense?

Scott Coffee:
Right now that would fall under the substantial bodily harm section in the statute which would be punishable by 6 to 15 years or 8 to 20 years in prison. The flip side of your scenario is a single slap, and not a hard slap, causing

injuries such as retinal hemorrhages. However, there are no long-term problems for the child. With this scenario, we are looking at a sentence of 5 to 15 years or 5 years to life for a simple slap, even though there were no long-term problems for the child. Another thing to consider is adding some kind of long-term disability language. If we are going to create this extra significant substantial bodily harm language, we might also look at some kind of long-term impairment language which might also help tighten things up.

Assemblyman Nelson:
What is the current state of the law regarding the discretion of the judge with respect to admission of evidence and sentencing?

Scott Coffee:
My experience with the admission of evidence in these cases is that it is wide open in regard to expert testimony. Both sides can hire experts, and they are very expensive. As far as sentencing discretion, right now a child abuse case with substantial bodily harm can have a sentence of probation or 2 to 20 years in prison. In my experience, if there is more than one injury, there usually is more than one charge. The sentence may be doubled in this case. It usually comes down to the past record of the defendant. Although we are not to be judged by what we have done in the past, to some extent we are. If someone has a long record and he or she is convicted of some kind of abuse, he or she would probably get a substantial sentence. If the person comes in and it is a one-time situation, the sentence will be substantially less. I think a sentence of probation is always difficult to get if there is a significant injury to the child. It does not happen that often. Another part of the problem is when you charge these sentences of 5 to 15 years or 5 years to life in prison, you have upped the stakes and have made it impossible to try these cases because of the risk.

As an attorney, I am an actuary and I perform risk analysis for my clients. If I know my client has no record and what happened was inadvertent, I might be willing to risk going to trial with the understanding that we can show the judge what had happened, and the sentencing will be appropriate. With a sentence of 5 to 15 years or 5 years to life in the balance, I may tell that client to plead guilty to avoid the possibility of things going wrong. It raises the whole level of what happens and makes these cases much more dangerous.

Assemblywoman Fiore:
I just want to be clear that the point is you still have to prove intent. Am I correct?

Scott Coffee:
Like any good lawyer, I am going to say yes. But intent to do what? Again, you do not have to prove intent to injure or abuse. However, there could be abuse without injury, and intent could also be neglect It is a nebulous area. There is a debate in every case that I am involved in about what intent has to be proved. As a defense attorney, I am going to say, of course you have to prove the defendant intentionally abused the child. The state is going to say that you have to prove the defendant intentionally placed the child in a situation where these injuries could happen. Yes, although you have to prove intent, the statute is not clear what that intent is.

Assemblywoman Fiore:
Okay, so you have to prove intent.

Assemblyman Elliot T. Anderson:
I want to follow up on that last question. When it comes to placing someone in harm, that could apply to a car accident. If you put someone in a car with a bad driver, maybe it would be okay to charge him. However, if it was a drunk driver, that would definitely bring charges. Is it not just intent but purpose that you are designing to commit these injuries on a child, and that it is not some sort of mistake? Would that help tighten it up?

Scott Coffee:
Yes, absolutely. The language should include some type of purpose to injure.

Assemblyman Ohrenschall:
We have been talking about babies, but regarding section 10, subsection 2, can it be extended to 15- or 16-year-old children? What if a 16-year-old boy is going to a party where there are drugs being used and the dad tells him he cannot go. They fight over the keys and, unfortunately, the kid has to go to the hospital. Could you see a charge happening even in that kind of a scenario?

Scott Coffee:
Absolutely. If someone is fighting over keys and is pushed and they fall over a curb, that could possibly lead to the definition of abuse of a child under 18. Yes, it could be charged that way if he has retinal hemorrhages, loss of vision, or a permanent disability. It depends on how creative and motivated the district attorney is. In my experience, these are some of the most creative and motivated district attorneys because they think they are doing God's work. With all due respect, I do not disagree that people who purposely abuse children should be punished. The problem is that due to zeal, we can overcharge people, and they can go away for a long time.

Chairman Hansen:
Thank you, Mr. Coffee. We can now hear from the person sitting next to you.

Amy Coffee, representing Nevada Attorneys for Criminal Justice:
I have been a public defender for 15 years. I have done prosecution and defense. I am here today on behalf of Nevada Attorneys for Criminal Justice and not on behalf of the Clark County Public Defender's Office. I am going to address some of the other sections of the bill.

Chairman Hansen:
Forgive me for interrupting, Ms. Coffee, but as a disclaimer, are you related to Mr. Coffee?

Amy Coffee:
Yes, he is my husband. I am going to defer to my colleagues in the north after my testimony to discuss the first part of the bill regarding imaging defense. They have been working hard on some language for that portion of the bill.

I want to address section 8. James Sweetin, Chief Deputy District Attorney, testified about this at the last hearing on February 15, 2015 (Exhibit E). Right now a sexual assault can be committed in two ways. The first way is if an adult or child is forced into a sexual act. The second way usually applies to a child, and is a sexual act not necessarily forced. It is done knowing the victim is incapable of consenting. Our law provides that if the victim is under the age of 14, the perpetrator does not get the chance for probation. The perpetrator goes to prison for 35 years to life. I would point out that first degree murder carries a 20-year sentence. If the victim is between the ages of 14 and 16 years old, it carries a sentence of 25 years to life. If the victim is an adult, the sentence is 10 years to life. These are very serious offenses with very high penalties already.

What the state wants to do by this amendment is something a little bit different. They want to say that if the victim is under the age of 14 and there is an act of penetration committed, it is automatically a sexual assault. In other words, there is no issue of consent. We have seen cases where there has been consensual sex involving children between 11 to 13 years old with the perpetrator as young as 19 to 21 years old. No one wants to talk about this, but the fact of the matter is a lot of young girls today put themselves out there. Sometimes they are deceptive about their age, and we have people caught in these scenarios. If you have consensual sex with someone under the age of 16, it is a different crime right now. It is the crime of statutory sexual seduction. They used to call it statutory rape. Essentially, it is a 1- to 5-year prison sentence.

If this bill passes, it takes away that offense. I know Mr. Sweetin said something to the effect of "well, we would not charge it." However, the fact of the matter is, there really would not be much discretion. If a 13-year-old girl is having consensual sex with a 19- or 20-year-old, that person would go to prison for 35 years to life instead of 1 to 5 years. We know that a child cannot consent and the person knew or should have known the child was incapable of consent. Those people do go to prison, and they do a lot of time. This additional language is simply not necessary. I would say we could all agree that someone under 10 years of age cannot consent. If we added language that made it clear the act was without consent, we could all agree to that. The fact of the matter is, we do have cases of 12- or 13-year-olds consenting; it does happen. It is a crime to have sex with an underage person, and the penalty adequately and fairly punishes perpetrators under the current law. I worry that these proposed changes could capture some people who do not deserve a sentence of 35 years to life.

Assemblyman Gardner:
We have talked in some of our other meetings about a child's brain development and that is one of the reasons we do not allow children to sign contracts until they are 18 years old. You are saying that at 11 to 13 years of age they have the capability to understand the full consequences of what they are doing?

Amy Coffee:
That is actually a very good point. As a parent and from a scientific standpoint, no, I do not think our children have any capability to do this. However, looking at a scenario where the child says she is older and engages in sex with a young man 19 or 20 years old, it appears from all the outward manifestations that he is engaging in consensual sex with someone older. Right or wrong, whether the younger person had the brain capability to consent, the question is what is the punishment for that? Is it the same as the person who intentionally manipulates a child, and who is a true pedophile? We want to put the real pedophile in prison for the 35 years to life.

Assemblyman Elliot T. Anderson:
I would like your opinion on something we heard at the February 15, 2015, meeting. There was a possible change suggested to make the law apply to someone over 21 years of age who is engaged in a sexual act with someone under the age of 14. Then you get that wider age range and maybe that is more what we are getting at. Children cannot consent, but we all know what happens in high school, and it is not the district attorney's intent to regulate and go after kids in high school. Is there room to fix this type of situation and change it a little bit?

Amy Coffee:
Certainly if the perpetrator is over 21 and the victim is perhaps 11 to 12 years old, I think we are then really capturing the sexual assault scenario. As long as the language is capturing those people, I think it is something we could agree to.

We support the change in section 9. Sections 12 and 23 are similar, and I will address them both at the same time. These sections statutorily say that certain experts are admissible in every case. Section 12 involves experts that would talk about pimp culture and section 23 talks about grooming experts. Expert testimony, whether it is admissible or not, is a huge function of the Judicial Branch. It is a big deal because people who were experts in some fields 10 to 20 years ago are not now recognized as experts. There is a reason we have judges decide this particular area. Judges have a really important role as gatekeepers. Judges are in the best position to decide if the expert is the right expert, if the expert is qualified, if the subject matter is relevant, if the testimony is something that may confuse the jury, and if it is something prejudicial to the defendant. These two sections will take the discretion from the judges and put it with the Legislature. That is very dangerous because one advantage is that judges can decide what is right for the case at hand. When the Legislature makes these broad sweeps at this kind of rule, it takes the discretion away from the judge in deciding whether the expert is qualified, is the right expert, or whether the testimony is appropriate. There are reasons why some things are better to be left for the Legislature and some things better left to the judges.

In regard to the grooming expert mentioned in section 23, the Nevada Supreme Court recently addressed this issue and was split 4 to 3 as to whether a grooming expert should be admitted. That case was *Perez v. State* [313 P.3d 862 (2013)], which said, "As a general matter we hold that whether expert testimony on grooming behavior is admissible in a case involving sexual conduct with a child must be determined on a case-by-case basis considering the requirements that govern the admissibility of expert testimony." That is a quote from the majority that allowed it and that is the key here. It should go on a case-by-case basis. That is the reason I would ask that you not pass this part of the bill. It is for that reason we oppose sections 12 and 23.

Chairman Hansen:
Have you and your husband coordinated this with Sean Sullivan of the Washoe County Public Defender's Office and Steve Yeager of the Clark County Public Defender's Office? I would not wish to have redundant testimony. We have been going on for a while, and I want to make sure it was coordinated. [Chairman Hansen receives an affirmative from a testifier.]

Amy Coffee:
Section 21 involves the bad acts. This situation is similar to the situation with the experts. Federal courts and courts in every state deal with the issue of bad acts all the time. This is a very serious issue in the law. If a defendant has something bad in his past, should it be admissible in the present case? There is a natural inclination for a juror to feel if someone has a prior record of doing something bad, he is most likely guilty of committing the crime and deserves to be convicted. The law says we have to be very careful that our jury does not get sidetracked or so emotional that they do not decide a case on the facts only. These are concerns that have been around for a long time; the case law is very old. The Nevada Supreme Court has addressed this for many years. There was a court rule stating that in a sex case, any prior sex act or sexual offense could automatically be admissible for what they called propensity. However, in 2002 the Supreme Court decided that was not a good law. I think we need to look at each charge on a case-by-case basis. Our judges are very generous in admitting this kind of evidence. If this bill is passed, all discretion will be taken away from our courts, making testimony automatically admissible. It seems more fair to look at each on a case-by-case basis.

Ledbetter v. State [122 Nev. 252 (2006)] said bad acts could be brought in to show motive. As recently as 2012, the Nevada Supreme Court noted a case known as *Bigpond v. State* [270 P.3d 1244 (2012)], which points out the whole history of bad act evidence. It was said that the history dates back to the English common law. It is very important that a jury decide a case on the here and now and the evidence before them.

The last section I want to address is section 24 involving examinations of victims of sexual offenses. We are neutral on this section.

Assemblyman Ohrenschall:
I would like to go back to sections 12 and 23. I wonder what effect you think it will have to take away the discretion from the judges in terms of the expert testimony. Testimony can be valuable, but there are times when it is not appropriate. Are there any other examples currently in NRS that take that discretion away from our judges?

Amy Coffee:
I believe there is a similar statute regarding abuse. When these types of statutes are passed, it creates a confusing hybrid situation. I believe our courts still say the judges have some discretion, but it is always unclear. It does muddy the water when statutes of this type are passed.

Assemblyman Ohrenschall:
This type of situation has the potential to drag out the entire process and become a toll on the judicial resources, correct?

Amy Coffee:
Certain things are just best left to the Judicial Branch, and certain things are better being statutes. I believe this is an area that would be better to stay under the Judicial Branch.

Assemblyman Elliot T. Anderson:
Have you had a chance to look at the District Attorney's amendment (Exhibit F)?

Scott Coffee:
I have not.

Amy Coffee:
I have not. Regarding what section?

Assemblyman Elliot T. Anderson:
There are quite a few sections included in the amendments.

Chairman Hansen:
Are there any other questions at this time? [There were none.] I have a question regarding section 23. You mentioned there was a 4 to 3 decision by the Supreme Court; specifically that there was confusion created by the current statutes. It seems to me the Legislature should step in and hopefully clean up some of the possible confusion. Also, there is a section that says, "is admissible for any relative purpose." Would the judge not be able to determine at that point whether or not the expert testimony was relevant?

Amy Coffee:
I do not think passing this bill will settle the confusion. What I was trying to say is, when certain laws are passed that overlap judicial discretion, it creates confusion. Oftentimes there are challenges to the statute, and it becomes unclear what the Legislature's intent was.

Assemblywoman Diaz:
Is everything not relevant under the rules of evidence?

Amy Coffee:
As a defense attorney, sometimes it seems that way. Whether something is relevant is a loaded question. Obviously it is often fought out in the courts.

Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada:
I am here to discuss sections 2 through 6, which contain the "intimate images" language. We have been working with the Attorney General's Office on a number of amendments (Exhibit G) and (Exhibit H). I also submitted a letter for the record (Exhibit I). Page 2 of that letter refers to section 3, subsection 1. The definition of "intimate image" includes reproductions such as drawings and paintings. This is a broad term that encompasses a lot. This could include images that a child draws in class from memory or an artist who takes a picture of her painting and posts it on her website. The Attorney General's Office has agreed, at least in theory, to remove this from the statute.

There is language in section 3, subsection 1(a), regarding pictures of buttocks and that sort of thing. In theory, the Attorney General has agreed to eliminate that line as well. There is a section referring to images of female breasts which is also being reworked. We are concerned with this language because it is applicable to children. We already established that children do a lot of things that are not so intelligent. With the category C felony this charge currently carries, we want to make sure the language is not too broad.

If the child is under 18 years of age, it will be considered a juvenile adjudication. However, the juvenile justice system is not something to be dismissed lightly. Depending on the child's representation, he or she could end up in a juvenile detention facility. The child could lose a driver's license or his or her job. The child could get kicked out of school. We are asking the Attorney General's Office to make this section effective for those 18 years of age or older. Our request has not yet been acknowledged.

Section 4 contains the definition of sexual conduct. This section's language is also broad. We have been talking to the Attorney General about tightening up this definition and linking it to another statute.

Chairman Hansen:
Does everyone have copies of the proposed amendments from the Attorney General's Office (Exhibit G) and (Exhibit H) that are on NELIS?

Vanessa Spinazola:
I am sorry, but I do not have a copy of the amendments.

Chairman Hansen:
I apologize; I did not mean to interrupt your testimony.

Assemblyman Elliot T. Anderson:
Mr. Chairman, is it submitted amendment 1 or 2? I see two amendments on NELIS from the Attorney General's Office (Exhibit G) and (Exhibit H).

Chairman Hansen:
I see amendment 1 and 2, but they are both undated and that creates a bit of a problem because some of what you are going through may be already changed.

Assemblyman Wheeler:
Mr. Chairman, there are actually 15 amendments from the Attorney General's Office on NELIS with 14 of them in a package labeled amendment 2.

Chairman Hansen:
Thank you for the clarification on that. Ms. Spinazola, I apologize. Do you want to continue with your testimony at this time, as apparently there is an amendment showing that the Attorney General's Office has agreed to the section 4 changes?

Vanessa Spinazola:
Yes. I have appreciated working with the Attorney General's Office. There is someone here from the Nevada Teen Health and Safety Coalition who will speak briefly about how this affects the children. We will look at the amendments and will address any further questions to the individuals personally.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
I thought Mr. and Mrs. Coffee did an excellent job at highlighting a lot of the issues. Mr. Yeager from the Clark County Public Defender's Office and I submitted a letter yesterday. I want to be sure that the Committee received it and that it was on NELIS (Exhibit J).

Chairman Hansen:
It is on NELIS and will be considered by the Committee.

Sean B. Sullivan:
For the record, the Washoe County Public Defender's Office is neutral on sections 2 through 6 in light of the Attorney General's amendment. I appreciate working with Mr. Brett Kandt concerning that amendment.

Sections 13 and 14 deal with individuals who have committed past open and gross lewdness misdemeanor or indecent exposure gross misdemeanor and amplifying the charge to a felony. Many of our clients have significant mental

health issues. They may have had an open and gross misdemeanor or an indecent exposure gross misdemeanor prior conviction, and we had concerns about that. In addition, we are concerned about the term "vulnerable person." We think the language regarding a person's physical disabilities was too broadly constructed.

We have a concern with section 17 regarding certain misdemeanor crimes being captured and then put into the registry per *Nevada Revised Statutes* (NRS) Chapter 179D. To my knowledge, there are no misdemeanors referenced in that chapter. I know there are gross misdemeanors, and obviously felonies, that would be captured in NRS Chapter 179D. Also, using the term "lewd" in section 17, subsection 8, causes us some concern. There are certain misdemeanor vagrancy statutes that use the term "lewd conduct," and these are misdemeanors that would not be captured under NRS Chapter 179D requiring the person to register as a sex offender. With the addition of the lewd language within section 17, subsection 8, it may capture certain misdemeanants requiring them to register.

Regarding sections 18 and 19, we believe this penalty is too severe. This changes it from a category C to a category B felony with sentencing of 2 to 20 years. As you know, the sentence for a category B felony usually ranges from 1 to 20 years. Therefore, the increase to 2 to 20 years is quite a significant jump from a 1- to 5-year prison sentence. We feel that a 1- to 6-year or 1- to 10-year sentence for a category B felony would be a more reasonable sentence.

Regarding section 26, I understand the district attorneys from the south have presented negligent treatment or maltreatment language, but I have not had a chance to look at it and digest that type of language. We had concerns with the terms "painful" and "unhealthy." I will look at the language being proposed, but this language is too broad.

In section 28, if any portions of this bill are passed, we ask for an effective date of October 1, 2015. We will need adequate time to educate the members of the defense bar on any significant change in the law.

Chairman Hansen:
Are there any questions for Mr. Sullivan at this time? [There were none.] Mr. Yeager, would you please begin your testimony.

Steve Yeager, Deputy Public Defender, Clark County Public Defender's Office:
I will not repeat anything already covered here today, but I did want to make a couple of comments on the bill. I commend the Committee for considering

this bill as it is a very large bill with a lot of sections. Anyone who presented here today would be happy to discuss any further questions from the Committee members.

With respect to the amendments presented by the Attorney General's Office (Exhibit G) and (Exhibit H), we did know about the amendments to the first section of the bill, and we are okay with those. I did not know there would be any additional amendments until we arrived this morning. Unfortunately, we cannot comment on any of those changes.

Regarding sections 18 and 19 of this bill seeking to increase the penalty for student or volunteer sexual conduct, there is a Senate bill currently being discussed this session which addresses the same issues. It would seem to make those individuals register as sex offenders, which is not currently required by the law. It would also include 18-year-olds which may change the calculus in terms of this Committee. If that bill from the Senate makes it over here, this Committee will have a chance to vet that bill.

There have been a few cases during the course of my career that keep me up at night, and I would just like to touch on one of them which I think will address Assemblywoman Fiore's question regarding intent. I defended a case where a woman who, by all accounts, was a wonderful mother of two young children. Her adult son was living with her, and he was doing some things he should not have been doing on the Internet. The federal government executed a search warrant to search the house. This woman was a hoarder, her house was a mess, and there were boxes everywhere. If you have seen the television show about hoarding, you can envision what I am talking about. Regardless of what her adult son was doing, the agents decided to charge her with three counts of felony child neglect under the theory that if a fire were to break out in the house, the children might not be able to get out of the house. Therefore, she intentionally put them in a situation where they could have suffered physical harm. That is an actual case; it was prosecuted on three counts. She was a wonderful mother, a volunteer, a coach, and just a fantastic lady. We were able to negotiate that case, but it negotiated to two gross misdemeanor counts of child endangerment. This woman can never be around children, she cannot volunteer, and she cannot go to a school. The reason we negotiated it like that is because we had no chance at trial given how the language reads in that statute. She asked me how to justify that she be charged with this offense when there are parents who do not put seat belts on their children in the car. Those parents get away with it and they are not charged. All I could do is shrug my shoulders and say I did not know what to tell her, other than the law is not being applied accurately. That is a situation where the language needs to be tightened up in some way.

I hope the Committee remembers the presentation given by Director Greg Cox, with the Nevada Department of Corrections. He said with the current prison population projections in this state, we would probably have to reopen the Southern Nevada Correctional Center, which would cost $6 to $7 million to open and $18 million annually to operate. Whenever we talk about creating new crimes or increasing sentences for current crimes, we would be remiss if we did not look at the fiscal impact. If we are going to consider increasing penalties, which might be appropriate, we may want to look at penalties being reduced in other areas of the law to balance that out.

Finally, you have heard a lot about judicial discretion and that some of these proposed amendments take that discretion away. In conclusion, this is an attempt to take power away from the Judicial Branch and give it to the Executive Branch, which is the district attorneys. There is no systemic problem that would justify that transfer of power. We have heard isolated cases here where maybe a judge did not get it right, but there is no systemic problem that would justify the shift of power that multiple sections of this bill try to accomplish.

Chairman Hansen:
Thank you, Mr. Yeager. Mr. Nelson, you have a question?

Assemblyman Nelson:
I have questions regarding section 10. I want to make certain that I understand exactly what the state must prove with regard to intent. Section 10 says "A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering...." I want to make sure what the state needs to prove. In the shaken baby cases, does the state have to prove the defendant intended to shake the baby or slap it? Does the state additionally have to prove that harm was intended? I think I am reading it properly, but I wanted to know your position on that.

Steve Yeager:
There are two different ways the state can proceed under this NRS Chapter. One is if there is actual injury and another is if the child is placed in a situation where injury might occur. In the case I told you about, the allegation was that my client intentionally had these boxes and items in her house and because of that, the children were put in a situation in which they could have suffered physical harm or mental suffering—not did, could have. I do not read this statute as requiring the intent that harm actually occur. It is simply the intent to do whatever the act is that could place the child in a situation of harm. Somebody who does not put a seat belt on their child in the car does not intend for something bad to happen. However, it can still be charged under the statute

as it is currently written. That is how it is charged currently, and the language is incredibly broad.

Assemblyman Nelson:
In section 10, subsection 4, it describes abuse or neglect and uses the language "of a nonaccidental nature," which makes me think they had to prove it was on purpose. However, a couple words further on it says, "negligent treatment or maltreatment." That is where I am a bit confused. That language seems to me to be inconsistent. What is your experience there?

Steve Yeager:
I agree with you, Assemblyman Nelson. I think it is inconsistent and puts the defense in a very difficult position. In the case I told you about, our options were to go to trial on three felony charges or try to negotiate a compromise to a lesser charge where the facts really did not warrant any conviction of any kind. These are the real-life situations that people are put in because of the way the statute reads.

Assemblyman Elliot T. Anderson:
Regarding Assemblyman Nelson's question, I do not think the reading of that section is contested by anyone here. In Ms. Bluth's example of the drunk driver, it would get you liability. As a lawmaker, I do not want to leave it to discretion. I want to know what I am voting on and what the consequences are when we talk about category A felonies. There are a couple of cases that stand out to us, but in general, what is your experience with discretion? Is it normally utilized well?

Steve Yeager:
I commend the prosecutors who sit behind me; I think they do a difficult and fantastic job. Generally speaking, I think discretion is used appropriately, but we are not talking about the cases in the middle. We are talking about the fringe cases. Even for those few cases, to put somebody in that situation is very difficult. Most individuals exercise discretion appropriately, but there are cases where certain district attorneys or defense attorneys will get into situations where an outside observer will not agree the law was applied as the statute intended. Nonetheless, the case will proceed to trial or negotiations.

Assemblyman Gardner:
There are some judges who are more lenient than others. Is there a concern with the current leeway given that some judges will give a lesser sentence than other judges, even on horrendous crimes?

Steve Yeager:
I will answer that in two parts. There is a statute that requires an evaluation of a defendant. If the evaluation determines the defendant is at high risk to reoffend, then he or she cannot qualify for probation. I do not disagree with you; judges can be all over the map on all sorts of issues. It can be extremely frustrating for me to counsel my clients on what might happen. In the examples that we have been presented with today and the last hearing, the prosecutors have admitted that the one negotiable case involves a 6- to 15-year sentence. Frankly, I would be shocked if the person were to get probation in any of those cases we talked about. Whenever we are in the sentencing phase, and most of the courtroom is crying, it is not going to go well for the defendant, nor should it. If someone is aware of a case that the sentence was so disproportionately lenient based on the facts, I would love to see that case. I am not aware of it in this context of child abuse with substantial bodily harm, although maybe in another context.

Chairman Hansen:
I do not see any further questions for Mr. Yeager. I assume you have dealt with thousands of cases as a public defender. As a nonlawyer, I am looking to deter a crime. We have been talking about what happens to the people after they have been convicted. You mentioned a case that keeps you up at night, where the judge did not get it right. It would be really interesting to have Ms. Bluth tell her side on the cases that keep her up at night. You see isolated cases where somebody is given a stricter penalty than he should have been given. On the other hand, I suspect the prosecution sees cases that they cannot prove beyond a reasonable doubt even though they know the individual was guilty. If I am going to err, it is going to be on the side of protecting the potential victims. We are trying to create a deterrent to crime, not just tack on additional penalties. We are trying to protect the innocent people, especially children. The Rubio case stands out in my mind, where there was a baby with a skull fracture. Somebody was set free because no one can prove who caused the fracture.

Thank you both for your testimony. Because the amendments were dropped in your laps today, all interested parties can meet in my conference room, at your convenience, to iron out these issues. I want you to understand that this is an extremely serious law we are dealing with, and I do not want to have any loose ends that can be avoided.

Shaquita Hill, representing the Nevada Teen Health and Safety Coalition:
I am a student at the University of Nevada, Reno. I am here with the Nevada Teen Health and Safety Coalition. I would like to thank the Attorney General's Office for the changes that they have made. The most important thing I came

to say is that the focus should be on education instead of punishment in regard to the intimate images. Instead of focusing on punishment, Nevada should require the youths to receive medically accurate sex education that covers sexting, healthy relationships, consent, dating violence, sexual assault, and Nevada law. I believe education would help to prevent some of these cases from happening. [Ms. Hill also submitted written testimony (Exhibit K).]

Chairman Hansen:
Thank you for your testimony. Are there any questions at this time?

Robyn Mazy, Private Citizen, Reno, Nevada:
I appreciate the amendments, although I have not been able to read them today. I am a native Nevadan, parent, student, teacher, and was once a foolish teenager. In reading A.B. 49, I was delighted that many were taking notice of the excess media availability our children are privy to and the intent of keeping children safe from the consequences of overexposure and holding those responsible accountable. However, after reading through it several times, I am afraid if this bill were to pass as it is written, the intent to protect people will instead make them criminals.

A high school student sending a racy selfie to a boyfriend or girlfriend could subject them both to prosecution for child pornography if the picture makes its way around the social circles through online and direct sharing. Anyone who receives or distributes the photo could find himself open to charges. I recently heard an example of this. A female student at Reed High School found a very intimate image of her boyfriend's ex in his phone. Although the boyfriend had never intended for it to be disseminated, he was in possession of the picture. Since the girl in the picture was under 18 years of age, it is considered child pornography. The jealous girlfriend printed 100 copies of the picture and passed it out around the school. This act counts as 100 counts of distribution of child pornography. This was an act of maliciousness stemming from jealousy. I agree that she should have been punished; however, under current federal law, a first-time offender convicted of producing child pornography of a child under the age of 18 would face fines and a statutory minimum of 15 to 30 years in prison. Two students could have been in prison for up to 15 years and the jealous girlfriend may have spent the rest of her life behind bars.

As a teenager, I made many mistakes. I stayed out past curfew, ditched school for a few days, and even bought cigarettes for many friends who could not. I did not know at the time I could be fined $500 for distributing the cigarettes because no teacher or parent had told me. I made the mistake and, thankfully, I did not have to face a criminal charge. Assembly Bill 49 would increase the penalties without providing the education of this law. This is like placing a plate

of hot cookies in front of a toddler and saying if you eat too many your tummy is going to hurt, and then walking away. The child would then get punished for eating the cookies, and would also have a tummy ache.

Nevada law does not require real sex education. Many youths are not given the tools and full information to understand the dynamics of healthy relationships and safety. Nevada should provide youths with the tools and information needed to make responsible decisions instead of punishing them for making a mistake. Nevada should require that youths receive medically accurate, age-appropriate, and inclusive sex education that covers sexting, healthy relationships, consent, dating violence, sexual assault, and Nevada law. I ask you to think about the mistakes you made as a teenager and a young adult. Think about mistakes your children may one day make, and your grandchildren's future mistakes. It is better to educate than to incarcerate.

Chairman Hansen:
Thank you, Ms. Mazy. Are there any questions for Ms. Mazy at this time?

Elisa Cafferata, President and Chief Executive Officer, Nevada Advocates for Planned Parenthood:
I am speaking on behalf of the 28,000 patients that we see in our three health centers throughout Nevada. I have had a brief chance to look at the additional amendments, and we would like to be on the record for supporting the amendments regarding the intimate image section of the bill. We offer several sex education programs throughout the community. Sometimes when we are talking with young people, it is our intent to alarm them. We want them to make these choices responsibly. We do convey images to them that could fall under some of these definitions. We do support the change the Attorney General is proposing which would take out the word "alarm" making it less likely that someone could fall into the statute of committing a felony. This will allow us to continue to offer our medically accurate, age appropriate sex education.

The second amendment that we have been discussing on this bill has to do with the language in section 7, subsection 5 where it defines sexual penetration. There is a sentence that says, "The term does not include any conduct for medical purposes." We ask that this be amended to say "a valid medical purpose" or "a bona fide medical purpose." We have seen legislation in other states basically step into the examining room by requiring medical procedures that health care providers may or may not have otherwise recommended. It becomes a legislative mandate rather than a medical standard of practice. We would like it on the record that there is no intention for the Attorney General or the Legislature to later come in and propose medical procedures that should

be left to the health care professionals. We asked for the change and it has not yet been made. Therefore, we would like to be sure it is on the record. [Ms. Cafferata also submitted written testimony (Exhibit L).]

Chairman Hansen:
Thank you. Basically section 8, subsection 1 reads, "A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct, or who commits a sexual penetration upon a child under the age of 14 years or causes a child under the age of 14 years to make a sexual penetration on himself or herself or another, or on a beast, is guilty of sexual assault." You are telling me that the state prosecutors are going to use that statute to go after a doctor or somebody in the medical community?

Elisa Cafferata:
I was actually talking about the addition in section 7, subsection 5, defining "sexual penetration," and it also says "The term does not include any such conduct for medical purposes."

Chairman Hansen:
Would that not cover what you are talking about then?

Elisa Cafferata:
My concern is not that the district attorneys would use this to prosecute doctors; my concern is that there would be policy proposals that would be asking for medical procedures that are not indicated by health care professionals and that are just purely for political reasons.

Chairman Hansen:
Honestly, that seems an extreme stretch but we will take note of it. Thank you very much for your testimony. Is anyone else here to testify in opposition to A.B. 49? [There was no one.] Is there anyone in Las Vegas who would like to testify in opposition? [There was no one.] Is there anybody from Carson City or Las Vegas who would like to testify in the neutral position? Seeing none, I will ask Mr. Duncan to come back up.

Wesley Duncan:
Mr. Kandt is going to first briefly talk about some of the changes and then I will bring Ms. Bluth and the rest of our district attorneys up, and then I will have some closing statements.

Chairman Hansen:
I would like to wrap it up in 15 minutes, so can we get it done by 10:30 a.m. with three to four attorneys coming up?

Wesley Duncan:
We will try to be brief, although I know it is hard for us sometimes.

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
I apologize to our defense colleagues for the confusion with the amendments. There are a lot of people trying to make this the best bill possible, but we wanted to try and get some amendments (Exhibit G) and (Exhibit H) before you today that we felt improved the bill. Regarding the proposed amendments to sections 2 through 6 of the bill, I negotiated carefully with the ACLU and the defense bar. I believe all of their concerns were substantially addressed. I do want to clarify that with these amendments, the intimate images provisions only apply to instances where the victim in the images is over the age of 18. If you are talking about a minor victim, this would fall within the parameters of our child pornography laws. I just wanted to clarify that for the record.

Jacqueline Bluth:
There seems to be some confusion over section 10, and I just want to clear that up. In regard to the traumatic brain injuries, I think most of the confusion is about someone who willfully does that. The second part of the statute is about being placed in a situation where it could occur. I want to separate those for just a second. In regard to the traumatic brain injuries, the Supreme Court has said that in order to find someone guilty of substantial bodily harm, the substantial bodily harm actually has to occur. You have to willfully do something to a child to get to these sentences that we are talking about, and not by just placing the child in a situation. To receive a sentence of 5 to 15 years, or 5 years to life, substantial bodily harm has to occur. This is purposeful conduct to a child.

Mr. Coffee talked about the day-to-day reality. With all due respect, Mr. Coffee deals with the babies that do not make it. He deals with the children who are murdered. I deal with and fight for the children who have made it, although they may have made it paralyzed, blind, or deaf. This is what I do day to day and week by week. I just want to make sure that everyone understands that these sentences I am asking for—5 years to 15 years and 5 years to life—are for the perpetrators of the children who were purposefully shaken, beaten, and slammed. Mr. Coffee and I will have to respectively agree to disagree about shaken baby syndrome, because I completely disagree and do not think it has been debunked at all. And whenever we go to trial, we disagree about that, and it becomes a battle of the experts.

I do not want anyone to think that discretion is taken away, or if you have one of those injuries I discussed, that it is automatic strict liability and you are going to prison; that is not the case. I have a huge burden; nobody knows that burden more than I do in these cases. These are children, and they cannot come up here and tell you what happened. I have to prove that the defendant caused those injuries beyond a reasonable doubt. Mr. Coffee says children can be born with different types of brain bleeds or their brains can close later. An expert would come in and say this child was born with these kinds of things. I have to show that these individuals caused these injuries. Unfortunately, some of my cases have received probation on these sentencings. I think the child you saw, Joel, deserves to have his abuser sentenced to much more than 6 to 15 years in prison. Joel is paralyzed and blind, but the abuser received an 8- to 20-year sentence, which was the most that could be given. Sometimes negotiations have to happen for other children involved in these cases. If you do not think these types of cases are getting probation, you are wrong. This is what I do; I fight at sentencings. Sometimes I lose, and the defendants get probation.

Regarding Assemblyman Anderson's questions, we can see when someone has shaken the baby, slammed the baby into something, or hit the baby in the face. I just have to prove that the person's conduct caused that injury. If I had to prove what was going on in someone's head—I am going to shake this baby and give him retinal hemorrhages, or give him an optic nerve injury—that would be impossible. I cannot get into these people's minds, but I have to prove that the conduct was willful and caused injury. If you purposely punch a child in the face so many times that it causes a traumatic brain bleed, I have to prove that you caused the traumatic brain bleed.

In regard to the negligent treatment or maltreatment, that is completely different and has nothing to do with any of the injuries we are talking about. Negligent treatment or maltreatment is the mental terrorizing that I was discussing earlier. It has nothing to do with the brain bleeds or substantial bodily harm and would be covered under the current penalties. I just wanted to clarify this in terms of the causation of the injuries; it is not strict liability. I have a huge burden because I have to protect these kids who are not going to be able to tell you what happened to them. The sentencing is still at the discretion of the judge who can still order a 5- to 15-year sentence. It does not ultimately have to be a 5 year to life sentence.

Chairman Hansen:
Thank you, Ms. Bluth. In the interest of fairness, I have invited Mr. Duncan to come back up to conclude everything. We are not going to reopen the

opponent side of the hearing at this time. I will invite Mr. Yeager back if he wants to present any additional testimony.

Assemblyman Elliot T. Anderson:
I just wanted to say that I appreciate the process so far on this bill and wanted to put it on record that I have also appreciated the district attorneys' and attorney generals' willingness to work with the defense bar and everyone taking the time to get this right.

Chairman Hansen:
Yes, it is a horrendous issue, and we have given it as much time as we possibly can. Hopefully, we can make a very good decision as a committee in relation to this bill. We actually should be thanking those of you who have to deal with this day in and day out. For us, we see some horrible pictures, but this is your every day job. Frankly, I really respect your willingness to show up to work every day.

At this point we are going to close the hearing on A.B. 49. Is there any Committee business at this time? We will have a work session on Monday. It will start at 9 a.m., and the bills we are going to discuss are posted now so you will have a chance to look at them. Is there any public comment at this time? [There was none.] The meeting is adjourned [at 10:22 a.m.].

[(Exhibit M) and (Exhibit N) were submitted on NELIS but not discussed and will become part of the record.]

RESPECTFULLY SUBMITTED:

Janet Jones
Recording Secretary

RESPECTFULLY SUBMITTED:

Lenore Carfora-Nye
Transcribing Secretary

APPROVED BY:

Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 6, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 49	C	Jacqueline Bluth, Chief Deputy Attorney General, Office of the Attorney General	PowerPoint Presentation
A.B. 49	D	Scott Coffee, representing Nevada Attorneys for Criminal Justice	Letter in Opposition
A.B. 49	E	Amy Coffee, representing Nevada Attorneys for Criminal Justice	Power Point Presentation by Jim Sweetin
A.B. 49	F	Nevada District Attorneys Association	Proposed Amendment
A.B. 49	G	Brett Kandt, Special Deputy Attorney General, Office of the Attorney General	Proposed Amendment #1
A.B. 49	H	Brett Kandt, Special Deputy Attorney General, Office of the Attorney General	Proposed Amendments #2 through #16
A.B. 49	I	Vanessa Spinazola, ACLU of Nevada	Letter of Opposition
A.B. 49	J	Sean Sullivan, Washoe County Public Defender's Office	Opposition and Suggested Amendment
A.B. 49	K	Shaquita Hill, representing the Nevada Teen Health and Safety Coalition	Letter of Opposition

A.B. 49	L	Elisa Cafferata, President and Chief Executive Officer, Nevada Advocates for Planned Parenthood	Written Testimony
A.B. 49	M	Brett Kandt, Special Deputy Attorney General, Office of the Attorney General	Omnibus Crime Letter from Attorney General Laxalt
A.B. 49	N	Amy Coffee, representing Nevada Attorneys for Criminal Justice	Letter of Opposition