MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
February 13, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Friday, February 13, 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
Laura Tucker, Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General
James Sweetin, Chief Deputy District Attorney, Special Victims Unit, Clark County District Attorney's Office
John T. Jones, Jr., representing Nevada District Attorneys Association
Lisa Luzaich, Chief Deputy District Attorney, Special Victims Unit, Clark County District Attorney's Office
Jacqueline Bluth, Chief Deputy District Attorney, Clark County District Attorney's Office
Lisa Rasmussen, Member, Nevada Attorneys for Criminal Justice
Robert Rothfeder, Physician, Sandy, Utah

Chairman Hansen:
[Roll was taken. Committee protocol and rules were explained.] We will be taking agenda items out of order and will begin with the work session. We will start with Assembly Bill 8.

Assembly Bill 8: Revises provisions relating to children. (BDR 11-191)

Diane Thornton, Committee Policy Analyst:
As legislative staff, I cannot advocate or oppose any of the proposals that come before you. I am here to assist the Chairman and the Committee members with questions concerning policies that may arise.

This bill prohibits a person or organization from advertising the adoption of a child through a computerized communication system, including electronic mail, an Internet website, or an Internet account. [Read from work session document (Exhibit C).]

Chairman Hansen:
I would entertain a motion to pass Assembly Bill 8 as amended in our handout.

ASSEMBLYMAN ARAUJO MOVED TO AMEND AND DO PASS ASSEMBLY BILL 8.

ASSEMBLYWOMAN FIORE SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The floor statement will go to Assemblyman Araujo. We will now move onto Assembly Bill 68.

Assembly Bill 68: Revises provisions relating to the Commission on Judicial Discipline. (BDR 1-494)

Diane Thornton, Committee Policy Analyst:
This bill provides that the Commission on Judicial Discipline's determination or finding is not required to be in writing unless otherwise expressly provided by law. [Read from work session document (Exhibit D).]

Chairman Hansen:
I will entertain a motion on Assembly Bill 68 with amendments as recommended by Chief Justice Hardesty and Mr. Deyhle.

ASSEMBLYMAN WHEELER MOVED TO AMEND AND DO PASS ASSEMBLY BILL 68.

ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The floor statement will go to Assemblyman Wheeler. We will now go to Assembly Bill 69.

Assembly Bill 69: Revises various provisions relating to the Judicial Branch of State Government. (BDR 1-497)

Diane Thornton, Committee Policy Analyst:
Assembly Bill 69 provides that each court shall recycle to the extent reasonably possible. [Read from work session document (Exhibit E).]

Chairman Hansen:
At this time, I will entertain a motion on A.B. 69 with amendments as recommended by Chief Justice Hardesty and Ms. Sweet.

ASSEMBLYMAN O'NEILL MOVED TO AMEND AND DO PASS ASSEMBLY BILL 69.

ASSEMBLYMAN GARDNER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The floor statement will go to Assemblywoman Diaz. The next proposal is Assembly Bill 108.

Assembly Bill 108: Revises provisions governing victims of sex trafficking. (BDR 14-750)

Diane Thornton, Committee Policy Analyst:
This bill authorizes a trial court to vacate a judgment of conviction for trespassing if the defendant's participation in the offense was the result of having been a victim of sex trafficking or involuntary servitude. [Read from work session document (Exhibit F).]

Chairman Hansen:
Mr. Anderson, would you like to go through the amendment or have Ms. Thornton proceed?

Assemblyman Elliot T. Anderson:
I would rather have Ms. Thornton go through the technical provisions, but I will say that I spoke with the District Attorney and with his guidance and support I put these offenses in the bill along with trespassing. This was to ensure that we do not make the same mistake as the last time—to ensure that the statutes are broad enough to really strike hard at the problem and fix the lives of the women that are victimized.

Diane Thornton, Committee Policy Analyst:
An amendment was proposed by Assemblyman Elliot T. Anderson. The amendment adds two other instances of convictions: Include any county ordinance that prohibits loitering for the purpose of prostitution; and, include NRS 463.350: Gaming or employment in gaming prohibited for persons under 21. This is commonly referred to as Minor in a Gaming Establishment (Exhibit F).

At this time, I will entertain a motion on Assembly Bill 108 with amendments as recommended by Assemblyman Anderson.

ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS ASSEMBLY BILL 108.

ASSEMBLYMAN GARDNER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The floor statement will go to Assemblyman Anderson. Last on the work session is Assembly Bill 125.

Assembly Bill 125: Revises provisions relating to constructional defects. (BDR 3-588)

Diane Thornton, Committee Policy Analyst:
This bill revises the construction defect laws as set forth in Chapter 40 of the *Nevada Revised Statutes.* [Read from work session document (Exhibit G).]

Chairman Hansen:
The amendment was originated by comments from Senator Ford, which I agreed to and it removes the penalty of perjury for a homeowner in those circumstances. I would like to entertain a motion on Assembly Bill 125 as amended.

ASSEMBLYMAN NELSON MOVED TO AMEND AND DO PASS ASSEMBLY BILL 125.

ASSEMBLYWOMAN SEAMAN SECONDED THE MOTION.

Is there any discussion regarding this bill?

Assemblyman Elliot T. Anderson:
In 1995 and 2003, we did have some bipartisan bills. In the 77th Session, I did support some bipartisan elements of this bill. Personally, I am a bit worried that this bill comes at the expense of homeowners and the middle class. I believe access to justice is an extremely important consumer issue. I am not convinced that NRS Chapter 40 led to the housing market declining. I think it is tied into the banking industry and the great recession. I also wish we could have spent more time getting comfortable with this and working through the provisions. For those reasons, I will be opposing this bill.

Assemblywoman Diaz:
We recognize that there are issues with the construction defect law in our state. We also realize that the subcontractors have had many issues because of the

laws and that is why during the interim our leader worked with all stakeholders to come up with section 2 of this bill. However, many more changes have been made and at this point, I cannot tell if there is an expedited recourse for the homeowner in order to rectify any construction defect problem. For those reasons, I am voting no on this bill.

Chairman Hansen:
Are there any other comments?

Assemblywoman Fiore:
I am so excited about this bill. This is a total yes.

Chairman Hansen:
I have a couple of quick comments. As Assemblywoman Diaz pointed out, section 2 is Assembly Bill 1 in its entirety included in the bill. The rest of the bill is composites of previous bills that came from Senator Terry Care, Senator Allison Copening, Senator Michael Schneider, and one of my own bills from 2011. Most of this has been thoroughly vetted in previous legislative sessions.

Assemblyman Gardner:
I have actually litigated these cases and have seen many of the abuses that have happened in these kinds of NRS Chapter 40 cases. I think this fixes those and, therefore, I am a big supporter of this bill.

Chairman Hansen:
The internal workings of this bill are truly bipartisan. I would now like to call for a vote. Would the secretary please give us a roll call vote on that and then provide us with that count?

Janet Jones, Committee Secretary:
Five no votes, eight yes votes.

Chairman Hansen:
The motion passes with eight yes votes and five no votes.

> THE MOTION PASSED. (ASSEMBLYMEN ANDERSON, ARAUJO, DIAZ, OHRENSCHALL, AND THOMPSON VOTED NO.)

The floor statement will go to Assemblyman Nelson.

At this time, we will close our work session and open the hearing on Assembly Bill 49. [Chairman Hansen left the room and Assemblyman Nelson assumed the Chair.]

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

Wesley Duncan, Assistant Attorney General, Office of the Attorney General:
I want to talk briefly about different sections of Assembly Bill 49 and what they will do. It is a large bill, and I believe it can be broken up into four main parts (Exhibit H).

It makes it unlawful to disseminate or distribute an intimate image, otherwise known as revenge pornography. This is covered in sections 1 through 6. Other parts of the bill revise the sexual assault statutes to include sexual penetration of a child under the age of 14 without regard to the child's consent. It changes the lewdness with a child, the open or gross lewdness, indecent exposure, and sexual contact with a pupil statutes.

There is a statute to provide for expert testimony to describe the prostitution subculture. As this body knows from past legislative sessions, this is certainly key to human trafficking cases. It also provides for expert testimony as to how grooming efforts are used in preparation for sexual abuse.

It adds to the statute to prevent victims or witnesses in a criminal action from being required to submit to a psychological or psychiatric examination. It amends the other bad acts statute to provide for the omission of prior sexual offenses in sexual offense prosecutions.

And finally it makes needed changes to the child abuse statute to provide for increased penalties for specific injuries done to children as well as amending the abuse or neglect definition and other changes in regard to that portion of the statute.

I would like to introduce our presenters: Laura Tucker, Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General. Ms. Tucker was very involved in putting together sections 1 through 6. Ms. Tucker is a member of a multistate committee that deals with privacy and cyber security issues and, therefore, very familiar with this statute. James Sweetin, Chief Deputy District Attorney, Special Victims Unit, Office of the Attorney General. Mr. Sweetin has been with the District Attorney's Office for 20 years and has tried over a hundred jury trials. He has dealt with thousands of these types of cases. Lisa Luzaich, Chief Deputy District Attorney, Clark County Office of the District Attorney. Ms. Luzaich has been with the

District Attorney's Office for 21 years with 15 of those being in the Special Victims Unit. Ms. Luzaich has also tried hundreds of these types of cases. These were my colleagues when I worked at the District Attorney's Office and they try these cases daily. Jacqueline Bluth, Chief Deputy District Attorney, Special Victims Unit, Clark County Office of the District Attorney. She has been with the District Attorney's Office for 8 years and works in the Special Victims Unit. She has tried over 30 of these cases. She will be talking specifically about the child abuse definition. Mr. Sweetin will be dealing mainly with the sexual offense statutes as they deal with children. Ms. Luzaich will be addressing the section regarding evidentiary issues, the expert witness issues, and the section that speaks on forcing victims to undergo psychological or psychiatric examinations. We have about 50 years of prosecutorial experience dealing with thousands of these cases. We are here to present to you how these laws are failing the people and the victims.

We have added an amendment to eliminate section 20 of this bill (Exhibit I). The Attorney General's Office is accepting the amendments from the Nevada District Attorneys Association. During part of Ms. Bluth's testimony there will be some graphic photos. We felt it was important to show what these prosecutors see every day, and the type of crimes that are being perpetrated. I will now turn our presentation over to Laura Tucker who will be dealing with sections 1 through 6 of A.B. 49.

Laura Tucker, Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General:

I am here today to talk about sections 1 through 6 of A.B. 49 and will be available for any questions you may have.

Sections 1 through 6 of the bill establish the crime of unlawful dissemination of an intimate image of a person, commonly known as revenge pornography. Nevada currently has no law to protect victims of revenge pornography, which occurs when a sexually explicit photo or video is shared online without the consent of the individual appearing in the image. A person commits the crime of unlawful dissemination of an intimate image and is guilty of a category C felony when, with the intent to harass, annoy, alarm or terrorize the victim, the offender disseminates sexually explicit images of the victim without the victim's consent, and when the victim had a reasonable expectation that the image would not be shared. Constitutionally protected activity, such as media reports, images taken in a public setting, images being disseminated for a public interest, and photos taken for law enforcement purposes, are not subject to the provisions of this section. Furthermore, if the target was intended for the image to be disseminated to the general public, the act would not constitute a crime (Exhibit J).

Assemblywoman Diaz:
Why are we establishing this act as a category C felony?

Laura Tucker:
The reason for making it a category C felony was to create a strong deterrent for this crime.

Assemblywoman Diaz:
My concern is that we all do not mature at the same time. We may do things at times that are inappropriate. I have just had a situation with a friend's son who sexted once, was pulled out of school, and sent to a behavior school; he was treated as if this was pervasive behavior. I feel that if this was a one-time occurrence, a mistake that they have to learn from, I do not agree the penalty should be this harsh. I definitely believe there should be consequences, but I think we need to consider the ramifications for our youth when they act out more on emotion than thinking through their actions.

Laura Tucker:
The Legislature has already addressed teen sexting in previous statutes. This proposed statute is supposed to address actions that happen between adults. The teen sexting statute would already address anything that is happening between two minors as in the case you just presented.

Assemblywoman Diaz:
I think the punishment is too harsh for a one-time occurrence. My concern is that we are considered an adult at 18; however, our brains are not fully matured until around 25 years of age. We need to think seriously about this and the possible repercussions. I would not want to see my students have their records tarnished for something that they did when they were 18 or 19 years old, and that would affect them for the rest of their life.

Laura Tucker:
That would be true of any crime.

Assemblyman Araujo:
I share the same concerns as Assemblywoman Diaz in regards to the harsh category C penalty for such an offense. We live in a generation where everything goes viral. It could be by accident or on purpose, but there are many factors that can play a role in how something can potentially be leaked. Hypothetically, if a person breaks up with someone and then that person texts a picture to a friend who ends up leaking it, who then becomes liable? If the person who originally had the picture would be liable, do you really think a category C felony would be appropriate?

Laura Tucker:
Again, the reason for the category C felony is to provide a strong deterrent for this crime.

Assemblyman Elliot T. Anderson:
I want to address the intent element of this offense in the statute. Could you specify what is meant by the wording "harass and annoy" in section 5, subsection 1?

Laura Tucker:
The word harassment has been defined in other statutes. These words were chosen because they address individual instances when we believe a person would be harmed by the dissemination of an intimate image. These terms were also based on other statutes that have proven to be successful in other states.

Assemblyman Ohrenschall:
It is common to have kids who are 18 years old still in high school. What is the possibility these actions were committed with no evil intent but could be swept up in this statute?

Laura Tucker:
The intent statute was narrowly tailored to avoid such occurrences being considered as criminal. The prosecutor would have to prove beyond a reasonable doubt that the person acted with the intent to annoy, harass, terrorize, or alarm the person in the photo.

Assemblyman Ohrenschall:
Have there been past issues with the term annoy in Supreme Court cases? If this bill did end up in the Supreme Court, would it pass constitutional muster?

Laura Tucker:
We welcome any amendments that would be brought in to make this a stronger statute.

Assemblyman Thompson:
Because we are dealing with the Internet, my question is in regard to determining the point of origin. If the point of origin was from a state other than Nevada but the receiver was here in Nevada, how would you determine the point of origin? Would you subpoena Internet protocol addresses or records of text messages?

Laura Tucker:
These are all things that would be used in the investigative process. It would be similar to any other Internet-related crime.

Assemblyman Thompson:
If I am hearing you correctly, the intent is to go after adults in juvenile offenses or anyone overall? Whom are we targeting?

Laura Tucker:
This statute is meant to address crimes between adults. As stated earlier, there is already a statute that addresses teen sexting. The reason for the teen sexting statute was to address issues such as two 15-year-olds exchanging text messages so they would not be considered child pornographers or sexual offenders. This statute is focusing on a different type of intent. This statute is supposed to address a situation where a photo is taken and then given to another person with the intent that the photo would remain private, but then it is disseminated to a public place without the consent of the person in the photo with the intent to harm this person.

Assemblywoman Diaz:
Generally, when there is a breakup the couple are not on good terms. They could have consented to those photos when they were together but not authorize them to be disseminated. Where is the responsibility on the other party who let the person take the pictures to begin with?

Laura Tucker:
No assumptions can be made about the person in the photo. Photos can be taken with the consent of the person in a consensual relationship with the understanding that these photos would not be shared with anyone else. There are also cases where the person is asleep or not aware that the photo is being taken. It could also have been an abusive relationship. Sometimes a photo might appear to be a consensual photo but actually was taken against the other person's will. Additionally, even if the photo was consensual, there was not consent given for it to be shown to anyone outside of the relationship.

Assemblyman Araujo:
I guess I am just trying to wrap my head around all the new language and the potential scenarios where someone could be found guilty. For example, if someone from Nevada has a relationship with someone out of state and that person posts a picture, would the person in the photo be able to file a claim against the other person? What about people who enter dating sites and do not make the relationship official but exchange pictures, how does that play out?

Laura Tucker:
In the scenario of your second question, it does not matter if there was a past relationship between the victims; what matters is what the intention was when the photo was exchanged. Was the intent that it would be kept private, or did the person believe if they sent it out that it would be distributed to the public? That is what we are looking at here, the intent not the relationship. Someone could have hacked into another's computer, found the photo, then put it online.

In regard to your first question, if it was from a Nevada computer, then you could be charged here in the state.

Vice Chairman Nelson:
Have you had a chance to read the exhibits with objections to this bill posted on Nevada Electronic Legislative Information System (NELIS)?

Laura Tucker:
Yes, I have.

Assemblyman Nelson:
When I was in high school kids did crazy things, just as they do now. If someone does something on purpose in a public area and they may not have explicitly agreed to be photographed, does the bill address that?

Laura Tucker:
Yes, it does address that. The bill says that if someone voluntarily exposes themselves, they would be exempt under the statute. In addition, if the exposure happens in a public setting, presumably on the street, it would be considered in a public setting.

Assemblyman Nelson:
That would be section 3, subsection 2, paragraph (b), correct?

Laura Tucker:
Yes, that is correct.

Assemblyman Elliot T. Anderson:
The way I read section 3, subsection 2, paragraph (c), if Paris Hilton had someone do this to her she would not fall under the protection?

Laura Tucker:
You are asking if someone were a public figure, would he be excluded? That provision was meant to be directed as in the example of a politician exposing himself and sending photos to his constituents; that would be a matter of public

concern. If Paris Hilton was doing it in the privacy of her home with her boyfriend and did not intend for it to be made public, then that would be analyzed on an individual basis.

Assemblyman Elliot T. Anderson:
Thank you for the clarification. I do not think we should get protection under this bill because it is a First Amendment type of issue. However, I want to make sure that people who are quasi-public figures but not subject to the public interest have that protection in the bill so they will not be prosecuted.

Vice Chairman Nelson:
Thank you Ms. Tucker. Are there any further questions?

James Sweetin, Chief Deputy District Attorney, Special Victims Unit, Clark County District Attorney's Office:
I would like to go through the bill and explain some of the changes that we are proposing. I will be using PowerPoint as part of my presentation (Exhibit K). I will then turn it over to Ms. Bluth who will finish up our presentation.

Section 8 pertains to sexual assault. In order to prove a sexual assault there would have to be certain elements present. One element would be that sexual penetration of a person had occurred. We must prove that one of two things happened. First, that it was against that person's will. Second, that it was under conditions that the perpetrator knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of that contact.

What about an elementary student who is 13 years of age or younger? It is not unusual to have cases where individuals this age have been victims of sexual abuse. It is also not unusual for the sexual abuse of a child to be perpetrated by a parent, family friend, or someone who is in authority. Children are taught to listen to those in authority over them; many times they follow what they are told. Therefore, they voluntarily commit these acts. You have a situation where essentially the state has to prove that the child, by virtue of their age, was not able to understand or consent to the activity.

For example, in a case where the perpetrator was about 40 years old, and was the boyfriend of the 11-year-old victim's mother, the boyfriend started acting as a father figure to the victim. He started to take her places, spend time alone with her, and buy her things. He then began having her do things for him and told her that he would give her gifts for committing sexual acts. In this particular case, the defendant was arrested when he was observed at a park, in a car with his legs out of the car, and the 11-year-old child kneeling outside the

car performing fellatio on him. This victim was performing these acts voluntarily; she knew that by performing these acts she would get a toy. The state had to show that because of her tender years she was not capable of making that decision. It was then up to the jury to accept or not accept that decision.

I would submit to you that this is a hole in the law. The Legislature has already recognized that a child under the age of 14 cannot consent to sexual contact. The lewdness with a child statute has been around for years. In that statute, *Nevada Revised Statutes* (NRS) 201.230 it lays out specifically what needs to be proven. "A person who willfully and lewdly commits any lewd, lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child."

Nowhere in this statute does it say that it has to be against the child's will. The child's consent to the act has nothing to do with it, because the Legislature has long recognized that a child under the age of 14 cannot consent to sexual contact. As amended, the law would not require the state to show that a child under the age of 14 consented or did not understand the conduct in order to prove the sexual assault. The mere sexual penetration of a child under 14 is enough. The bill specifically lays out what the existing requirements are to prove sexual assault. An individual is guilty of sexual assault if he commits sexual penetration upon a child under the age of 14, or causes a child under the age of 14 to make a sexual penetration on himself, or herself, or another, or on a beast. The definition of penetration was changed to exempt a penetration done for medical purposes.

What about a situation where you have a 16-year-old perpetrator who has consensual sex and penetrates a 13-year-old child? In this statute that person would be liable. However, that 16-year-old is a juvenile, so that case would come under the juvenile court. The juvenile court judge would make a determination as to whether it would be adjudicated in the juvenile court system, or due to other reasons or causes, to have the case sent up to the adult system. The second point is that the sexual assault statute does have heavy penalties, which could be up to life in prison. Lewdness with a child under the age of 14 also has a penalty of up to life in prison. That statute has been around for a long time and there is no age restriction on the lewdness statute; therefore, a 16-year-old child sexually touching a 13-year-old child would be covered under the lewdness statute as a lewd act and would progress just as I described. We also have some proposed amendments to section 15, which is lewdness with a child.

Vice Chairman Nelson:
I think Assemblyman Anderson has a question before you go on to section 15.

Assemblyman Elliot T. Anderson:
I talked with Mr. John Jones regarding a potential amendment changing section 8 to say, if the perpetrator is 21 years old or older to parcel it out more as bad conduct versus kids being kids. A 16-year-old can be certified, as you said, to proceed in adult court and that concerns me. I do not think high school students should be category A felons for doing what high school students do. I want to be very clear that I am not saying they should be doing some of these things, but we were all kids once and we know what happens in high school.

James Sweetin:
I understand what you are saying but the focus of the bill, or my focus of the bill, is to protect children. As a legislative body, we previously recognized that children under the age of 14 need to be protected and cannot consent to sexual contact.

In regard to the repercussions to a 16-year-old, this would be directed to the juvenile court. We have a protected class and if someone acts upon that protected class, there have to be repercussions. If the juvenile court resolves and adjudicates it in juvenile court, he is not going to be a category A felon. However, if there are other reasons, maybe there is a history of this type of conduct, or other circumstances which would require the juvenile court judge to determine that society needs to be protected, and he needs to be punished, then it would go to adult court.

Assemblyman Elliot T. Anderson:
It is going to be difficult for me if we cannot amend the language. However, thank you for answering my question.

James Sweetin:
Regarding section 15, we know that the penalty for touching is currently 10 years to life. When a child turns 14 years old and he or she is touched in a sexual manner, it is no longer lewdness with a child under the age of 14; it is now an act of open and gross lewdness, which is defined as an indecent, obscene, or vulgar act of a sexual nature. This is a gross misdemeanor punishable by up to one year in jail.

When a lewd, lascivious act is committed on a child the day before the child's 14th birthday that is punishable by up to life in prison. However, if it were done on the child's 14th birthday, it would only be punishable by a maximum of

a year in jail. This creates a situation that is not fair or just, but in prosecuting these cases it is a situation we often see.

The proposed change creates a more phased approach to this issue. The existing penalty for lewdness with a child would continue; however, the proposed law addresses acts that are committed against children ages 14 and 15. A person who is at least 21 years of age and commits lewdness with a child under 16 years of age is guilty of a category B felony and shall be punished in prison for a period of 2 to 20 years. The reason we raised it from 18 to 21 years old is that we are now dealing with children 14 to 15 years old. We wanted to have a space of at least 6 years between the perpetrator and the victim; therefore, in this case the perpetrator's age range would be 21 years old and the victim 15 years old.

Offenders younger than 21 will continue to be guilty of open and gross lewdness per this statute. This would be a gross misdemeanor for the lewd or lascivious act committed on a 14- or 15-year-old child.

The Legislature has determined that 21 is the age when felony charges are appropriate for the crime of statutory sexual seduction. At any rate, there is some consistency with the 21 years of age. We recommend changing the penalty from lewdness with 10 years to life to a step down in the sentencing guidelines making it a 2- to 20-year felony.

The changes also provide a way to remove repeat offenders from society. If an individual has previously been convicted of lewdness with a child or another sexual offense, then the penalty for the current lewdness offense can be augmented by up to life in prison without the possibility of parole. It gives the state the ability when it recognizes an individual who is habitually perpetrating children that person should be taken out of society so they cannot continue to perpetrate these acts.

I would now like to move on to section 13, the open or gross lewdness portion of the bill.

Vice Chairman Nelson:
Assemblyman Wheeler has a question regarding section 15.

Assemblyman Wheeler:
The way I see this is, if you have a 17-year-old young man who has a 15-year-old girlfriend, could he be guilty of a gross misdemeanor?

James Sweetin:
That is correct.

Assemblyman Wheeler:
Even if they were in a relationship or what they consider to be a relationship at that age?

James Sweetin:
Yes, for the touching.

Vice Chairman Nelson:
Has the statute changed regarding someone under 14 to the age of 15 not being able to give consent?

James Sweetin:
Essentially, with the lewdness statute, if you were over the age of 21, then that is correct. Regarding open and gross lewdness, offensive touching is a lewd act. That is how it is defined and the act would have to meet those criteria in order to satisfy the statute.

Assemblywoman Diaz:
In the scenario that Assemblyman Wheeler referred to of a 17-year-old with a 15-year-old, the 17-year-old could have some legal consequences for those actions. Will this individual have to register as a sex offender for the rest of his life?

James Sweetin:
This is not a change; it is current law. We are just not elevating an individual who is under 21 to these additional penalties.

Assemblyman Jones:
I personally started going to parties in junior high where we would be kissing, and other things like that. What happens if 13- or 14-year-olds are participating in these activities?

James Sweetin:
Again, there is no limitation to age in regard to offensive touching. If the elements are met in that scenario, this is not a change but the current law, that is lewdness with a child. As I indicated, the juvenile court has jurisdiction over those crimes until someone is 18 years old. In addition, they are normally resolved in juvenile court. If there are other circumstances, they might go to adult court.

Assemblyman Jones:
So then all kids that go to these parties and are making out are committing gross misdemeanors?

James Sweetin:
I would not say as we are talking about children under the age of 14.

Assemblyman Jones:
The 14-year-old male is essentially committing a felony or at least a gross misdemeanor?

James Sweetin:
Under the current law, there is no age limit in regard to lewdness with a child under the age of 14.

Assemblyman Jones:
Are we pretending these things do not happen in junior high school?

James Sweetin:
A child under the age of 14 cannot consent to sexual contact; that has been recognized by the Legislature in past statutes. That is the protective class and the reason the law is there. The situation you are laying out is probably an extreme situation, and I do not know if it is something that happens all the time. If in fact it did happen, there are other courts and measures to deal with that. We are talking about the juvenile court; we are not talking about them being prosecuted for a life offense.

John T. Jones Jr., representing the Nevada District Attorneys Association:
I was the sexual victims deputy in the Clark County Juvenile Court. While Mr. Sweetin is correct that technically any touching of a juvenile under the age of 14 is by definition a felony, we did not prosecute other juveniles who engaged in consensual sex if they were within a few years in age. Therefore, if you had two kids who were 13 years of age and engaging in consensual sex at a party, we did not prosecute. We do, however, if one of them has mental issues or other issues of that nature that would keep them from being able to truly consent. We are not in the business of prosecuting for consensual sex with kids around the same age with no other factors involved.

Assemblyman Elliot T. Anderson:
Mr. Jones, I certainly understand what you are saying. I am not accusing the District Attorney's Office or the Attorney General's Office of wanting to throw the book at high school kids. We have to be comfortable with the language we are putting our stamp of approval on. Obviously, we do not have any control

over what the District Attorney's Office or the Attorney General's Office does. If we are going to make a policy change, we want to make one that we will be comfortable doing.

John T. Jones, Jr:
I think it is important to point out that your questions have been regarding law that is currently in effect. Right now, it is illegal to sexually touch a child under the age of 14. That is currently the law and this statute does nothing to change that law.

Vice Chairman Nelson:
Let us keep all of our questions and comments to the bill at hand.

James Sweetin:
I am going to continue with section 13, regarding open or gross lewdness. The phased approach I mentioned is going to continue into the proposed changes to this statute. Under the proposed framework, a lewd or lascivious act committed upon a person 16 years of age or older would be open or gross lewdness. Open or gross lewdness in itself is a little broader than that given scenario and defined as indecent, obscene, or vulgar action of a sexual nature.

The current law makes open or gross lewdness punishable as a gross misdemeanor, which is a sentence of up to one year in jail. Under the current law, if the perpetrator has previously been convicted of open or gross lewdness, the penalty will be increased to a category D felony punishable by up to 1 to 4 years in prison. The proposed law attempts to do a couple of things; (1) better protection for children and vulnerable people and, (2) identify and provide additional protection against prior sexual offenders. The proposed law increases the penalty from a gross misdemeanor to a category D felony in the case where the perpetrator had previously been convicted of open or gross lewdness. That is the only case in which it would be increased under the current law. It includes when the perpetrator has previously been convicted of any sexual offense, not just open or gross lewdness. If he was previously convicted of a sex crime, then he is going to get an augmentation for an arrest for open or gross lewdness.

The second augmentation is when the crime is committed in the presence of a child under the age of 18 or a vulnerable person. A vulnerable person is identified in NRS 200.5092 as a person 18 years of age or older who suffers from a condition of physical or mental incapacitation because of a developmental disability, organic brain damage, or mental illness. It is someone who suffers from one or more mental or physical limitations that would restrict their ability to perform normal activities of daily life. This is

meant to protect that class of people. You might say that mentally ill people commit many of these crimes, so is an increase in the penalty appropriate? I have been prosecuting these cases for a long time; they are across the board and not just mentally ill people that are committing these crimes. In fact, if an individual is mentally ill and committing these crimes, there are remedies already available in the court system. That person has to be competent to be prosecuted. The idea is to protect this class of people from this conduct. If we have someone acting out sexually, many times, in my experience, that leads to other crimes, and you certainly do not want that situation presented in regard to the weakest members of our community.

I would like to move on to section 14 if there are not questions.

Vice Chairman Nelson:
Assemblyman Anderson has a question before you proceed to section 14.

Assemblyman Elliot T. Anderson:
The vulnerable definition seems broad to me. If I play basketball, sprain my ankle, and now have a limitation of what I can do in daily life, that is not your intent, is it?

James Sweetin:
No, it is not. We were trying to identify the class of people that would be more readily subject to perpetration than others—people who are not able to fully understand or defend themselves as others would be able to in society.

Section 14 concerns indecent or obscene exposure of a perpetrator's person or a person of another. The framework of punishment for this is currently identical to the punishment for open and gross lewdness. The amendments in the proposed law are meant to change the framework of the charges to mirror the changes proposed for open and gross lewdness.

I would like to go on to sections 17, 18, and 19, which pertain to sexual conduct with pupils. These sections address sexual conduct committed upon a pupil who is under the age of 18 by a person 21 years or older who holds a position of authority, such as a teacher or coach, whether a hired employee or a volunteer at a public or private school. The proposed law changes the definition of sexual conduct. Under the current law, sexual conduct covers only sexual acts such as sexual penetration and contact with unclothed genitals. This definition applies only to this section of the statute. This would not cover a teacher fondling a student. In prosecuting these cases, I have seen this come up more than a few times. You have a teacher, whether it is in the classroom or in a car where they are transporting a child somewhere, that is fondling

the child. The fondling or touching of body parts is not covered in the current definition of sexual conduct. Therefore, we are proposing that section 17 amend that definition to include "Any lewd or lascivious act upon or with the body, or any part or member thereof of another person." This would capture the situation that I am addressing.

Next, the proposed law removes the application of the law to pupils aged 14 or 15. The proposed amendments to the lewdness with a child statute, which creates the penalty of 2 to 20 years in prison for sexual touching of a child ages 14 or 15 so long as the perpetrator is over 21 years of age, would fill this gap in the law to protect students 14 to 15 years of age. However, the statute would still apply to pupils aged 16 and 17, and we are asking that the current penalty for that be changed. The current penalty is a category C felony punishable by up to 1 to 5 years in prison. We are asking that the penalty be changed to a category B felony punishable by 2 to 20 years in prison, which would then be consistent with the changes to the lewdness statute. I know from prosecuting these cases that parents expect their children are going to be safe when they go to school. Teachers are held to a higher standard in protecting children, and I would submit that a penalty of 2 to 20 years is appropriate based upon the status of a teacher in committing these crimes even on children 16 or 17 years of age.

I would like to move on to section 23 regarding expert testimony to show grooming efforts in preparation for sexual abuse. Under the proposed statutory framework, to prove a sexual assault was committed on a person under the age of 14 we must show that sexual penetration is against the person's will or under conditions that the perpetrator knew that the victim was mentally incapable of understanding the nature of the conduct. This is still going to be the requirement with regard to victims who are 14 years of age or older.

Expert testimony regarding grooming in many cases is necessary to prove sexual assault. I have had a number of cases where children 14 or 15 years of age have been groomed by an individual who is an authority over them. This could be a parent or family friend who slowly develops a relationship with the child and gets the child to agree to some innocent conduct. They then move forward with the grooming eventually getting to a point where they are actually perpetrating sexual acts upon the child. Without a grooming expert who is qualified to discuss the effect that this has on a child, it is difficult to describe to a jury how a child cannot capably make a decision. Their lack of worldly experience due to the tender age and their relationship they have with this person are all the things that affect the child's ability to understand what is happening. This includes the effect of creating a physical or emotional relationship, various grooming activities that aim to reduce resistance to sexual

activity, and the possibility that the victim will report the abuse. Having an expert explain this to the jury will help them understand so they can make a decision whether or not the state has met its burden of proof. The court still has to determine that given the facts of the case this particular evidence would be relevant. This is not unprecedented; we have statutes currently on the books such as NRS 50.345, which states, "In any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault." We are asking for this provision in the statute to provide the jury with all the testimony they would need to make a proper decision in a case.

Vice Chairman Nelson:
Assemblyman Ohrenschall and I have questions regarding this section.

Assemblyman Ohrenschall:
Has your experience been that the courts have not allowed this expert testimony? In addition, does there need to be a statute that takes away the court's discretion? If section 23 passes as is, what would the qualifications be for these experts? Would they be psychologists, psychiatrists, counselors, bachelor's degree holders, master's degree holders or doctors?

James Sweetin:
This statute does not necessarily take away the court's discretion. What it does do is show the court the legislative intent to present all the evidence that is appropriate in a case, including the grooming evidence. As a prosecutor, I would like to be able to say the Legislature has recognized the importance of this evidence. However, the court still has the ability to make those evidentiary determinations in regard to relevance, the appropriate value, and whether it is prejudicial. The experts would have to be the caliber of psychologists and psychiatrists. They are only testifying to describe what grooming is, how grooming happens and what the effects are on the child. The jury can then understand what grooming is and the prosecution and defense can make arguments based upon what the relevant elements of the crimes are.

Assemblyman Ohrenschall:
Has it been your experience that trial judges do not allow you to present expert testimony regarding grooming?

James Sweetin:
Yes, this issue has been fought. The defense and state have valid arguments.

Assemblyman Ohrenschall:
This has been fought and lost on your side?

James Sweetin:
Yes, it has been fought and lost on our side. We feel a statute that lays out the Legislature's recognition of the importance of a grooming expert similar to the sexual assault expert section in the statute that has been on the books for years is very important.

I would like to continue with section 9, battery with intent to commit sexual assault. When this section was drafted there was a provision laid out that the jury would determine the punishment, if the jury were available. The choice of sentencing in this particular offense would be life in prison without the possibility of parole or 10 years to life in prison. The current law, however, does not provide guidance for a jury to render that decision. The new law proposes that the sentencing decision be left to the court. That would resolve the current issue at trial as it becomes a problem as how to address this. This change will clean that up and allow the court to impose the punishment.

Assemblyman Elliot T. Anderson:
Is anyone else going to be handling any other sections of this statute? I wanted to ask about the bad acts.

James Sweetin:
Actually, I am going to turn the time over to Ms. Luzaich, and she will address the bad acts portion.

Assemblyman Ohrenschall:
Section 9, subsection 4, lines 27 and 28 concerns the deletion of the jury's involvement in determining if there is going to be a life without parole or life with the possibility of parole decision. With NRS 200.400, could there be a scenario where a juvenile has been certified up to the adult system and is potentially facing a life without possibility of parole or life with the possibility of parole. Are you asking us to make a policy judgment to take this away from the jury? That is a big decision, and I would like a little more background as to why you believe the Legislature should make that policy. Historically we have been hesitant to take that away from juries.

James Sweetin:
My interpretation of the statute as laid out was that this is something that was left hanging. There was some discussion on this, but there was no resolution whether this would be taken to the jury or to a judge. My position would be that if it were to go to the jury there would have to be some kind of procedure

set up on how that was going to happen. Whether there would be a penalty hearing or how it would be handled, the statute does not provide for that currently. In my experience in regard to this particular crime, I feel a judge would be qualified to make that determination. Normally these kinds of crimes are dovetailed in with a number of other crimes. I think a judge could capably analyze and weigh many of the other crimes and make a more appropriate sentencing decision. That is my personal feeling, but I certainly do not have a problem if the Committee wanted to lay out parameters for the jury to decide.

Assemblyman Ohrenschall:
Under NRS 200.400, in your experience have you seen a judge send it to the jury for a decision of life with or without parole? If so, were you satisfied with the results? Have you ever felt the jury did not act competently?

James Sweetin:
I have not personally had that situation happen, but I know that it has happened in our office. I cannot specifically tell you the outcome.

Vice Chairman Nelson:
I have a question on the definition of battery in section 9. What are you typically looking at when talking about battery?

James Sweetin:
It is unwanted touching, so it could be a shove. Typically, with battery we have to show intent to commit a sexual assault; therefore, it has to be something connected with the case to show that the battery was for that purpose. Typically, it would be ripping someone's clothes off, pushing them down prior to raping them, or hitting them in the head to subdue them.

Vice Chairman Nelson:
Let us go to our next presenter.

Lisa Luzaich, Chief Deputy District Attorney, Special Victims Unit, Clark County District Attorney's Office:
I am an attorney with the Clark County District Attorney's Office; I have been there for 21 years. Fifteen years of my career have been prosecuting for the Special Victims Unit, so I have a little bit of experience in this matter.

I would like to first comment on battery with intent to commit sexual assault. The life with or without parole only applies if the battery with intent to commit sexual assault also results in substantial bodily harm.

I would like to address section 24, the psychological evaluations of victims. I recognize that it is important to protect the rights of defendants; however, it seems we are forgetting to protect the victims of these sex offenses, especially the children. The children who are victims of sex offenses are the ones who are the most vulnerable in society and need the most protection. The Special Victims Unit is seeing more and more motions by the defense to compel our children to undergo psychological evaluations. We always thought our goal was to protect these children, not to revictimize them by forcing them to undergo a psychological evaluation at the hands of a defense expert. When these children finally find the courage to tell somebody what happened to them, they first have to talk to the police and describe what has happened to them over the course of time with the intimate details. Once they have talked to the police they probably will have to talk to a forensic interviewer, then they are given a physical examination. So little eight-year-old Susie has to go to a doctor and undergo a vaginal exam which grown women probably do not enjoy and a child should never have to go through. The case is then submitted to the district attorney's office and the child has to come in and describe these instances to a deputy district attorney who is going to handle the case. The deputy attorney then takes the child to court and the child has to testify in front of the perpetrator, which I am not saying is inappropriate, but she has to describe these intimate details in front of the perpetrator and then is subject to cross-examination. She will then be revictimized by being forced to go through a psychological evaluation, which there really is no call for.

Our Supreme Court seems to feel that it is okay to do that; however, I must point out that there is no statute that allows that to happen. Many of the states that do not have statutes allowing or disallowing it have case law that says you cannot force a child to undergo this examination. They have jurisdiction over me, the state of Nevada, and the defendant who is charged with committing the crime, but they have no jurisdiction over these children. Although there is nothing that allows them to make a child do that, unfortunately they still do it. Remember, these children are not parties to these events; they are merely in court because they had the misfortune of having been abused by a perpetrator. Therefore, what we are asking you to do with section 24 is to tell the courts that they cannot force these children to undergo evaluations.

We recognize that there should be some sort of a level playing field. There are situations where the state of Nevada wants to have a therapist come in and testify about six-year-old Susie and how this has affected her. We encourage victims of sexual offenses to get counseling; they need to get on with their lives and one way they will be able to do that is through counseling. There are times that a counselor will say, "I have seen little Susie on 26 occasions and she is

acting out, and it seems she is suffering post-traumatic stress, and it could be consistent with being sexually abused." These experts can never say, "This child was sexually abused." That is the ultimate decision for the jury to decide.

Pursuant to the statute that Mr. Sweetin quoted to you earlier, an expert can say, "In my opinion this child is exhibiting behavior that is consistent with someone who has been abused." We rarely call a therapist to testify in our cases, but the proposal that we have put forth recognizes if that were to happen and the defense asks a psychologist to testify, it will allow the court to make a determination if there is a compelling need for an additional evaluation. If the victim refuses to have that evaluation, then we could not call the doctor either. Currently, the courts are saying it does not matter if you are going to call one in or not, we are going to give them an opportunity to have this child undergo an examination.

The defense motions often say the child has made six different statements and there are inconsistencies in their statement. That is not a reason to undergo a psychological evaluation, and that is why the court will cross-examine. All of the statements a child makes are open to cross-examination. When a child has been subjected to abuse over a course of months or years, sometimes events blur; however, the defense gets to cross-examine and point it out in argument. The defense also brings up in their motion that we need to have an independent evaluation to see if the witness is competent. There is a statute that says as long as the child can perceive facts and relate them accurately, they are a competent witness. If the child can describe what she did while playing after school yesterday or why she likes a particular toy, it is clear she is a competent witness.

Assemblyman Ohrenschall:
Section 24 applies to the victim who is a minor; however, does it also apply to witnesses that are adults? Theoretically, there may be a scenario of a messy divorce and children are involved and you might have an ex-spouse that the defense believes might be coaching the child. Under section 24, as it is written, is it not true then that an evaluation of that witness would have to pass more difficult hurdles?

Lisa Luzaich:
It does if you look at the witness aspect of it, but I still think under your scenario that an evaluation of that witness is not going to reveal anything. Cross-examination is going to do more to reveal any biases, coaching, and things of that nature.

Assemblyman Ohrenschall:
I just take issue with your term describing the psychologist or psychiatrist revictimizing the child in this evaluation. In reviewing the events with the child is that not also revictimization?

Lisa Luzaich:
I am not suggesting that the actual therapist is the one revictimizing the child, it is the system. The child has to talk to me because I cannot take a child to court without talking to that child first. I need to prepare that child for what is going to happen so they know what is going to be asked of them. An evaluation does not have to happen in the course of a criminal trial.

Assemblyman Ohrenschall:
You will agree that the psychologists or psychiatrists are licensed and they are neutral and are not defense attorneys, correct?

Lisa Luzaich:
They are not defense attorneys, but they are hired on behalf of the defendant. It is a defense-oriented experience.

Assemblyman Ohrenschall:
Through the code of ethics, they certainly would not be allowed to cross-examine or revictimize any child.

Lisa Luzaich:
I am not suggesting that they are victimizing the child; it is just an unnecessary extra layer. Currently when the courts are ordering these evaluations there are no parameters set up whatsoever. This proposal requests that the court would have to set forth those particular findings and set up parameters.

Vice Chairman Nelson:
Under current law, if a judge orders a psychiatric evaluation and the victim refuses, is contempt of court the only remedy?

Lisa Luzaich:
We have a situation right now in California where a victim is currently living and our court ordered the evaluation. In California there is a statute stating you can never force a victim to be evaluated. The California authorities have refused to allow the child to be evaluated. I do not agree that the court should be able to charge a victim with contempt of court because they refuse the evaluation.

Assemblyman Jones:
I support what you are doing, however, I have a problem with psychological evaluations. They are so variable and they are not like a test that can be used to prove as there is for strep throat. With psychological evaluations, it is all over the board and one person can have a prejudice and lean one way. Therefore, I agree 100 percent with what you are trying to promote here.

Vice Chairman Nelson:
Let us now move on to section 21.

Lisa Luzaich:
Section 21 talks about evidence of other crimes, which we call bad acts. We are asking you to legislate in sex cases where the perpetrator has committed a sex offense in the past, that this crime can be presented to the court. How this would be handled in courts is we would bring in the victim of the past sex offense. The ability to do this can be very relevant in our cases.

Sex offenders are different from people who commit robberies, burglaries, or identity theft. Sex offenders often repeat their offense. We know that because with victims in our cases, sometimes the abuse goes on for years and years. The fact that someone is convicted of an offense, goes to prison, gets out, and does the crime again, demonstrates how serious they are about these offenses. I know that the defense bar's concern is that the language we have put in the proposal takes the discretion away from the judge but, in fact, it does not do that. All it does is put this evidence on the same footing as everything else. There is a statute that says all evidence must be relevant and all evidence must be demonstrated to be more probative than prejudicial. Therefore, the court will still get to weigh this evidence. All evidence in a trial is prejudicial. In these cases, the probative value of a prior sexual offense is tremendous.

Vice Chairman Nelson:
Section 21, subsection 3, seems inconsistent with the current subsection 2.

Lisa Luzaich:
It adds to it; it does not make it automatically inadmissible. What subsection 2 says is other acts are automatically inadmissible unless they fall into one of those categories. Subsection 3 makes it admissible if the court finds that the probative nature of the evidence is more than the prejudicial. In every case where we have requested to bring in other acts, and the court has allowed it, there is an instruction given to the jury at the time the evidence is heard as well as in closing arguments that says they can only consider this evidence for its stated purpose. You cannot look at the evidence and say he is a bad person because he did that, therefore, he must have done this.

Assemblyman Elliot T. Anderson:
I am trying to understand the reason you want to use the evidence. It sounds like you are saying sexual offenses are different, so we want to introduce it for propensity. Subsection 2 already allows you to put it in for other purposes. If you are talking about propensity, that is going to inflame a jury. I have always been told if you have a bad act, it just destroys the other evidence in the minds of the jury. Are you trying to introduce it for propensity evidence?

Lisa Luzaich:
It is not necessarily for propensity evidence. I will give you an example. I tried a case last year where many years ago the defendant met up with a woman who had a child. He sexually abused her child. He was caught and pled guilty and went to prison. When he got out, he met another woman who had a young girl. He abused this woman's young daughter. He was caught and went to prison for a long time. He got out and met another woman who had a son and daughter. He sexually abused the daughter from the age of 7 to the age of 15; he physically abused the boy and girl for years. I took the case to trial on multiple accounts of sexual assault and lewdness and multiple accounts of physical abuse. The jury was not able to hear any of the prior sex crimes and they found him guilty of one sex count and multiple physical abuse counts.

Assemblyman Elliot T. Anderson:
If you are trying to get the person for intent you can already do it, but as to propensity, that is what the rules of evidence are designed to avoid because in most cases that is all the jury will focus on.

Lisa Luzaich:
I was asked about the limiting instruction. We have to propose it every time not just if the defense wants it. Several states legislate in sexual offenses for propensity. In this situation, it is extremely powerful evidence, and that is what we are asking this body to do.

Finally, section 12, concerns the expert testimony to show the prostitution subculture. In our trials, it is vital for an expert to talk about the subculture of prostitution for several reasons, including one that the language used between pimps and prostitutes is unique and unknown to the layperson. If you walked down the street and talked to any of your neighbors, none of them will know what the terms choosing Susie and out-of-pocket mean. Those words have very significant and important meanings for the people involved in the subculture.

The experts that we would like to use, who are for the most part detectives, are the ones who have the experience in day-to-day conduct and contact with the

individuals who are the pimps, panderers, and sex traffickers. The subculture overall is a different world that most people know nothing about. The control measures, the manipulation, and the violence are all on an unprecedented level that the people who are going to sit on our juries have just never experienced before.

We want to call in these experts to describe the dynamics of the relationship between pimps and prostitutes. These experts, who are detectives, have received training over the years and the contacts that they have and what they see is invaluable. In every case where we file our intent to use an expert such as this, the defense either files a motion to strike our expert or to have the court find that the testimony would constitute vouching. I know the defense bar says there is no indication that the judges are not letting us call these experts and that is not true. In fact, one judge has said on the record that she would never let an expert testify in this field.

I tried a case last year that was a fairly high profile case and the judge allowed us to use the detective, but she specifically said that the only reason she would allow us to use that detective was because he had a degree. The fact that the detective had a degree is really of no consequence; it was that he spent years in the field watching these individuals. We had also noticed four other experts, as we were not sure who would be available, and the judge did not let us use any of the others who had more experience in this field because they did not have a degree. There is no consensus between the courts, and it is a vital piece of information.

This statute, as we have proposed, closely tracks the domestic violence statute where the Legislature has already said that a domestic violence expert is somebody who should testify in cases. Unfortunately, the Supreme Court has not given us any guidance in this area. Right now there is a very high profile case on appeal and this is one of the issues on appeal.

The Ninth Circuit Court of Appeals has upheld the use of an expert in this area in the past, and they have made two very interesting quotes: "By and large the relationship between prostitutes and pimps is not the subject of common knowledge," which is the reason we want to use this. Additionally they said, "A trier of fact who is in the dark about the relationship may be unprepared to assess the veracity of an alleged pimp, prostitute, or other witness testifying about the prostitution." Our point is that the jurors have no idea what these terms mean and why a girl would subject herself to this kind of lifestyle. The reason she does is because the pimp comes in and abuses and manipulates her and that is what she is used to and, therefore, she does it. Without the better

explanation from the person who is seeing this day to day, the juries will not understand, and it will be hard to get a conviction in these very serious cases.

Unless anyone has any other questions, I would like to turn this over to Ms. Bluth.

Jacqueline Bluth, Chief Deputy District Attorney, Clark County District Attorney's Office:
I prosecute cases of sexual assault and lewdness committed on minors, but a good portion of the cases I prosecute deal with very severe child abuse, notated as child abuse with substantial bodily harm. Many of these cases are children who suffer from traumatic brain injuries. A large portion of my testimony today will deal with these types of cases.

The applicable sections that I will be speaking about are section 10, child abuse with substantial bodily harm and section 26, which deals with definitions of the terms regarding child abuse (Exhibit L).

Section 10 is regarding the crime of child abuse with substantial bodily harm. The current statute states that a person who causes a child to suffer unjustifiable physical pain or mental suffering is guilty of the crime of child abuse and neglect. I want to focus on injuries that fall under the statute of child abuse resulting in substantial bodily harm. Currently, when we take these cases to a jury, in order to be able to prove that the child has suffered from substantial bodily harm, we have to show that the bodily injury falls under one of these subsections. The abuse had to create a substantial risk of death, serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or prolonged physical pain.

If someone is found guilty of this crime under the current statute, they are penalized as a class B felony. This penalty is 2 to 20 years in prison or there is eligibility for probation. The penalty is appropriate when the defendant beats a child and knocks out their teeth or beats them with a whip or belt and it causes the skin to be broken to the point of scarring. Obviously, these are horrific injuries in themselves, but the District Attorney's Office believes that the current statute is appropriate for these types of injuries. However, where I am talking about the gaps in the current statute, they are the types of injuries which are traumatic brain injuries. The penalties you see right now are still under the class B felony. It is not adequate for children who are being beaten to the point that they are blind, need immediate brain surgeries and craniotomies, or are beaten to the point where they are paralyzed. I have been getting one to two of these cases a week. I am between 35 to 60 jury trials for this year alone. I want you to know how serious this is and how it is impacting so many

children in our communities both in the north and the south. The only way for me to do that, I believe, was to bring you real cases. These cases are not meant to frighten, shock, or anger you. They were important to me and to the families that I am about to speak on. I brought in three cases that I am currently working on. I spoke to each of these families and was given permission to bring their stories to you. I had to discuss the penalties with each of these families when I met with them. It was very hard for me to discuss with the parents that the person who did this to their child could possibly get probation, or go to prison for only 2 to 20 years.

The first case is of baby Juliana. Baby Juliana was 21 months old when her mother's boyfriend beat Juliana. She was severely shaken and had evidence that she had suffered from blunt force trauma. When she arrived at the emergency room, she was immediately taken into surgery and given an emergency craniotomy. She was suffering from severe subdural and subarachnoid hemorrhaging, which is bleeding of the brain. In fact, her brain was swelling so fast that they had to perform the emergency craniotomy to release the pressure on her brain. Unbelievably, she is one of my somewhat success stories. Just three or four months later, she is doing quite well. She is actually walking and talking but her eyes are a little shifted. The doctors are hoping they will be able to readjust them so that they are both straight. She seems to be on point in the developmental delay milestones. It will still be a little while before we can fully assess where she will be, as sometimes you do not see the developmental delays until further milestone tests, such as speaking whole sentences. However, for right now she is doing as well as can be expected.

The next child is baby Joel. Joel was shaken when he was two and a half months old, but also shaken again when he was two and a half years old. He had made a full recovery between two and half months and two years but he could not recover after the second shaking and beating. When we found baby Joel he suffered from severe subdural and subarachnoid bleeding and severe swelling of the brain. He also had divots missing in the skin from both of his ears and pinch marks to his penis and testicles; he was pretty severely beaten and abused. They did not believe Joel was going to survive so they called most of his family to the hospital to say goodbye. However, Joel has proven to be quite a fighter. Joel is almost six years old and he is a very happy little guy, but he does not have very much to be happy about. He is paralyzed; he does have the use of his left arm, which he can move up and down. His right arm flops around but he is not able to use it. Both of his legs are completely paralyzed. The part of his brain that was severely injured dealt with his ability to see, hear, and speak. He is also legally blind in both eyes, he cannot hear out of his right ear, and he cannot speak. He cannot eat or drink

normally; he is fed through a tube in his stomach. He requires care 24 hours a day, 7 days a week.

Baby Joel is an interesting story. The foster mother who cared for him after his injuries at two and a half months old raised him until he was two and a half years old. He was then given back to his family and after a short period of time, he was abused again. This foster mother has now formally adopted Joel and his sister. I wrote to KSNV News 3 in Las Vegas and asked them to do a story about the foster mother. The outpouring of support from this story on her and baby Joel was so strong that the television station contacted me the next day and asked to do a special on child abuse and the effects it has on the children in our community.

When I did the sentencing on this case for baby Joel's mother, the person who had abused him, I brought baby Joel into the courtroom. His foster mother spoke about Joel at this hearing. When I looked up, the defense attorneys, the prosecutors, and the judge were all crying. However, the most astonishing thing to me was when I looked into the box where all the inmates were sitting, they were all crying. It was a very powerful day, but it was not enough. How can I argue that a minimum of 2 years and a maximum of 20 years is okay for someone who did that to baby Joel. Joel is the one serving a life sentence.

My last case is baby Illy. She was four months old when she was severely beaten by her mother. Baby Illy was taken to the hospital with very severe injuries. The doctor had to do an emergency craniotomy as well; however, she had multiple fractures in parts of her skull. Baby Illy is not going to be as lucky. She is now six months old; she is blind and paralyzed. Because she is only six months old, we do not know the complete detriment that she will face because she has not reached the milestones where she would crawl, roll over, or speak. She is trying to roll over now but without the use of her legs or lower body, she may not be able to accomplish this milestone. She suffered from retinal hemorrhaging in both eyes, an optic nerve injury which caused the blindness, but she also had injuries to the T4 and T8 areas of her spine due to the brain injury which caused the paralysis.

I recognize these pictures are hard to look at, but with the volume of these cases that are coming into my office and the fact that I have to tell the families what penalties these people are facing, it has to change. We cannot have a child with a broken arm or broken leg and the three children that you have seen in these pictures have their perpetrators receive the same level of punishment.

When I was helping write this bill I felt we had to send a strong message. That message is the punishment must fit the crime. The current punishment for a class B felony, 2 to 20 years with the option of probation, no way fits these crimes. These are very young children. They are the most vulnerable individuals in society, and they have no voice. I am asking us to be their voice and tell individuals thinking about doing this that they had better think twice before they do.

While preparing to work on section 10, I spoke with a pediatric physician, Sandra Ceti, who works in the emergency room at Sunrise Hospital in Las Vegas. She also speaks on a national level regarding traumatic brain injuries. She specializes in abuse and neglect; therefore, not only does she treat children in the emergency room, but children are taken to her who are suspected of being abused. She examines the child from head to toe and looks at the patterning of the injuries, et cetera. I asked to speak to her regarding traumatic brain injuries and the type of injuries that create paralysis, loss of sight, loss of speech, and loss of hearing. We sat down together and delineated each of the injuries that cause the types of ramifications that you saw in these three babies.

This crime can no longer be probational. If you paralyze a child, you should not receive the opportunity of probation. I always use this example when I am arguing sentencing in front of judges. As adults we do have a voice, and I have seen so many sentencings when an adult victim has suffered a stabbing or gunshot wound, they can go before a judge and tell how this has impacted their life and their road to recovery. It has such an impact on a judge, they will usually decide on a much harder punishment. In the case of baby Illy, who is six months old, although I can show pictures and have her mom speak about it, the impact is so much harder to illustrate. I ask this Committee to change the penalty for this type of class B felony to a mandatory prison sentence. There would be no opportunity for probation for those individuals who cause this kind of harm or injury to children. In addition, we would leave the sentencing up to the judge, but we would change the sentencing scheme. Instead of 2 to 20 years and probation, it would be mandatory prison, and then the judge would have the discretion of sending the perpetrator to prison for a minimum of 5 years and maximum of 15 years, or a minimum of 5 years and a maximum of life. Then the defense attorney and the prosecutor could argue what they feel is relevant. This is the same sentencing scheme for kidnapping. Someone can take a child, and no harm comes to that child, and they go to prison for 5 to 15 years or life.

This is my last section before I move on to a different area of child abuse so if there are any questions, I would be happy to answer them now.

Assemblyman Jones:
As a father of a one-year-old daughter, I find these pictures horrific and I cannot even imagine this even happening. You mentioned earlier that you had 35 to 60 trials this year. Were they for similar cases?

Jacqueline Bluth:
They have run the whole gamut. As I said before, I also handle sexual assaults on children so some of my caseload concerns sexual assaults, but many of my cases are on child abuse with substantial bodily harm. I also have some very severe burning cases where people burn their children on purpose. The brain injuries you are seeing here, I and another attorney handle these cases. These children survived. There is a separate unit for children who do not survive their injuries.

Assemblyman Jones:
So the very common cases are what kind of numbers?

Jacqueline Bluth:
I could go back and look at our caseloads and give you specifics, but Mr. Sweetin is the one who assigns them to us. I do not know if he has an exact number. I usually get one or two a week or every two weeks of child abuse with substantial bodily harm.

Assemblyman Thompson:
First, I have to say this is very disturbing but it is reality in our communities. Can you give us an estimate of how many are parents committing these acts versus boyfriends?

Jacqueline Bluth:
It is rare for me to see a situation where it is actually a biological parent. The majority of the time I am seeing someone not biologically related to the child but who is in the home, such as a boyfriend or stepfather.

Assemblyman Thompson:
What are we doing as a system for preventative type of work? We want to make the penalties stiffer, but what are we doing with the perpetrator while they are in prison? Are we trying to really assess why they acted the way they did so maybe on the front end there are some things we can do as a community to hopefully prevent these acts?

Jacqueline Bluth:
We are failing as a system, and I think your question was more geared to what are we doing to prevent this from happening, and help the perpetrator from

doing it again. We are failing the children in the system because by the time they have gotten to me it is too late. We are working through different news avenues to get the word out about child abuse and how it is not going to be tolerated. We also work closely with the Children's Advocacy Center in Las Vegas about bringing awareness to these issues.

Regarding people who commit these types of crimes, what we generally do before they are sentenced, per the statute, is have them go through what is called a danger evaluation where they meet with a psychiatrist or psychologist. There we find out about their childhood, whether they suffered abuse, things that they saw in childhood in regard to marital relationships, and any other issues such as that. If they go to prison, we can assess what type of counseling or therapy they need. Unfortunately, I am finding when it gets to this point it is not the first time the child has been abused.

Vice Chairman Nelson:
Before we get to Assemblyman Anderson's questions, it is obvious we are not going to complete this today and will have to schedule another hearing.

Assemblyman Elliot T. Anderson:
Thank you for allowing more time for this later because I agree we have to do our due diligence here. Assemblyman Ohrenschall and I are glad to see Boyd School of Law students up here obviously doing well and being very passionate in giving a good presentation.

The thing that concerns me is section 10, subsection 1. The existing law, which ties into the new proposed language would say "or to be placed in a situation... ." That is referring more to recklessness and negligence. Mr. Jones and I talked about some examples where it would be proper to prosecute someone for a category A felony, potentially where you put them in the same category as a drunk driver. Is there any way to recognize if it is more of recklessness versus intent? Is there a way to tighten that up?

Jacqueline Bluth:
Case laws have already been established that address your concerns. Currently in case law when we have substantial bodily harm, we actually have to show that there was willful contact that occurred and created the harm.

Assemblyman Elliot T. Anderson:
Do you interpret that "willfully" provision to apply to or be placed by "in a situation?" I know willfully means with knowledge of fact and intent to actually doing the act. Would that be your understanding of the statute as well?

Jacqueline Bluth:
I think your concerns are about subsection 2, where you are willfully placing a child in a dangerous situation?

Assemblyman Elliot T. Anderson:
They would have to have knowledge that they are putting the child in danger for category A to attach?

Jacqueline Bluth:
Correct. It has to be willful and intentional.

Assemblyman Gardner:
I was wondering how you determined the 5 to 15 years or 5 years to life. Why a minimum of 5 years? Why not longer? In these types of cases, would these perpetrators be able to be charged with other crimes such as attempted murder?

Jacqueline Bluth:
Yes, there are a host of charges you can add, attempted murder is one of them. Domestic violence types of charges are appropriate. Concerning the 5 to 15 years, I looked at other statutes and tried to find something that I felt fit the crime. I wanted to give the judges discretion. I also compared it to previous legislation under the kidnapping statute.

Vice Chairman Nelson:
Ms. Bluth, are you finished or do you have more testimony?

Jacqueline Bluth:
I have a bit more, but I could come back.

Vice Chairman Nelson:
I think what I would like to do is excuse you. We are going to go out of order as we have Dr. Rothfeder who has flown up for the hearing. Those of you in Las Vegas, I apologize that we have not gotten to you yet. We will be scheduling another hearing on this in the future.

Lisa Rasmussen, Member, Nevada Attorneys for Criminal Justice:
I am an attorney in private practice in Las Vegas. I asked Dr. Rothfeder to come and talk about some of these issues. He has to leave at 10:40 a.m. so he can make his flight. I would like to have him address the problem with the enumerated symptoms that were listed in section 10 because there are other things that could cause those symptoms that are not criminal.

Dr. Robert Rothfeder, Physician, Sandy, Utah:
Just by way of background, I am a physician in Salt Lake City and I specialize in emergency medicine. For the past 20 years or so I have served as an expert witness in child abuse cases dealing primarily with head and brain injuries.

I have come to Nevada 12 to 15 times to testify as an expert witness. I am here specifically to answer questions for the Committee and to give you a little background of the specific medical conditions that are enumerated in this proposed bill. The ones I would particularly like to address would be the skull fractures, the subarachnoid and subdural hemorrhages, epidural hemorrhages, fractures, and retinal hemorrhages.

In most of the cases I am asked to give testimony, the accusation of child abuse is based almost exclusively on the medical findings. There are rarely situations where the active abuse has been witnessed, or there is circumstantial evidence that is in support of the allegations. The allegations stem specifically from the nature of the injuries.

The problems that arise are that these specific injuries are not specific to abuse. That really becomes the point of debate in these cases. For instance, in the most classic cases where there are allegations of what used to be called "shaken baby syndrome" and is now referred to as "abusive head injury," it was contended that the presence of three specific findings, subdural hematoma, retinal hemorrhage, and cephalopathy (means brain dysfunction) was specific to abusive shaking. This has come under wide dispute over the last 10 or 15 years in which research has been done showing these particular injuries are not specific to abuse but can be caused by accidental injury or by medical conditions.

I am not here to discuss any of the legal issues or the sentencing issues but to simply try to give the Committee some perspective on the medicine. The problem is that of the nonspecificity of these types of findings. I would invite questions at this time.

Assemblywoman Fiore:
What kind of doctor are you?

Dr. Rothfeder:
I am an emergency physician. I have practiced emergency medicine for 30 years.

Assemblywoman Fiore:
Do you testify for the prosecution or the defense?

Dr. Rothfeder:
I testify for both. When I was in practice, I would testify primarily for the prosecution on patients where I was the treating physician. More recently I testify primarily for the defense.

Assemblywoman Fiore:
In addition, are you paid to testify for the defense?

Dr. Rothfeder:
I am.

Assemblyman Gardner:
I am not a doctor; I am an attorney by trade, and it is my understanding that these injuries can come from other causes. Am I correct in assuming that these are all serious injuries?

Dr. Rothfeder:
Very much so.

Vice Chairman Nelson:
Are there any other questions?

Lisa Rasmussen:
Thank you, for letting me bring Dr. Rothfeder to testify. I have extensive follow-up on the issue, which obviously I will address at another time. I believe Nevada Attorneys for Criminal Justice has many other responses to other sections of the bill proposed today.

Vice Chairman Nelson:
Ms. Bluth, how much do you have left to present?

Jacqueline Bluth:
It should be under ten minutes.

Vice Chairman Nelson:
I would like the opponents to work with the Attorney General's Office and District Attorney's Office to work out any amendments that can be brought back before this Committee.

Assemblyman Jones:
On the section that the doctor was just talking about, it just says abuse or neglect, which is broad. I know my mother-in-law fell down, and my child hit her head, and it was not my mother-in-law's intention to have that happen. My child also went off the edge of the bed once and busted her lip open. It was not my intention to allow that to happen either. Obviously, the examples you showed were horrific, and they cannot just happen from a simple occurrence. Is there some way to differentiate that?

Jacqueline Bluth:
There has to be intent; this has to be a purposeful action where you are committing an unlawful contact with the child that is creating that injury.

Assemblyman Jones:
That subsection does not say that; it just says abuse or neglect.

Jacqueline Bluth:
The definition of abuse and neglect are part of my next presentation; however, it is in section 10, subsection 4, paragraph (a). The person has to cause the child to suffer unjustifiable pain or mental injury. You have to purposely cause the conduct, such as slamming a child into something, or slamming something into the child's head.

Assemblyman O'Neill:
I worked child abuse crimes for a solid ten years, but I want to tell you I never saw one injury where they just fell. They never just fell and chipped a tooth, they also perforated their eardrums, and there were even severe beatings to the buttocks where you could actually read the baseball bat emblem. I cannot think of one time when I have ever seen just a one-time injury. There was one case where a child allegedly fell down the stairs and the injuries were such that the child would have had to have gotten up, run back up the stairs and fallen down again, and they would have needed to do that about 20 to 30 times to substantiate their injuries. Have you ever seen a prosecution where it was just a one-time fall or incident where there was only one injury?

Jacqueline Bluth:
I would say it is very rare. I can think back to one. Usually there are some sort of associating injuries.

Assemblyman O'Neill:
Would it be that the child was thrown against a wall?

Jacqueline Bluth:
In that case, it was alleged shaking because there was no evidence of blunt force trauma.

Vice Chairman Nelson:
I think we are going to wrap it up at this point. I know there are people in the audience here and in Las Vegas who are in support and opposition to the bill. I apologize that we have run out of time, and we will have to reschedule.

Wesley Duncan:
If there are other parties who would like to reach out to me for possible amendments, the Attorney General's Office is always interested in entertaining those recommendations.

Vice Chairman Nelson:
We are going to close the hearing on A.B. 49 subject to reopening it later. Is there any public comment? [There was none.]

The Committee on Judiciary is adjourned [at 10:41 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janet Jones
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 13, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 8	C	Diane Thornton, Committee Policy Analyst	Work session document
A.B. 68	D	Diane Thornton, Committee Policy Analyst	Work session document
A.B. 69	E	Diane Thornton, Committee Policy Analyst	Work session document
A.B. 108	F	Diane Thornton, Committee Policy Analyst	Work session document
A.B. 125	G	Diane Thornton, Committee Policy Analyst	Work session document
A.B. 49	H	Wesley Duncan, Attorney General's Office	Letter of support
A.B. 49	I	Wesley Duncan, Attorney General's Office	Proposed Amendment
A.B. 49	J	Laura Tucker, Attorney General's Office	Testimony read
A.B. 49	K	James Sweetin, Carson City District Attorney's Office	Presentation
A.B. 49	L	Jacqueline Bluth, Carson City District Attorney's Office	Presentation