

## Juvenile Justice

# CERTIFICATION NIGHTMARE

***When should a juvenile be tried as an adult? In Nevada, the answer is simple: When he uses a gun... or when his friend uses a gun... or when somebody he hardly knows uses a gun. Welcome to the world of Certification, where childhood ends at the age of 13.***

HEAT INDEX = 1

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### WARNING

THIS ISSUE CONTAINS NO NUDDITY, NO VIOLENCE, NO PROFANITY, NO SEXUAL INNUENDO, VERY LITTLE SARCASM AND NO PERSONAL ATTACKS ON COURT EMPLOYEES. RATED PG. SORRY!

BY GLENN CAMPBELL

Nevada law sucks.

On this point, there seems to be broad agreement in Family Court. State law, called the Nevada Revised Statutes (NRS), provides the basic structure for

everything done in court, but it often seems to have been written by monkeys on typewriters. If a monkey scratches an itch and types the wrong word, then a whole class of vulnerable people gets further abused.

One of the populations that the law treats poorly are defendants who fall into the cracks between the juvenile justice system and the adult criminal system. When should a juvenile defendant be tried as an adult? The rules given us by the legislature don't always make sense. Not only hardened gangbangers are sent to the adult system but also first-time offenders who are otherwise redeemable.

Youth are transferred to criminal court through a process called "certification." We will explain how certification works and what is wrong with it, but first we need to tell you why Nevada law sucks so bad.

### Yes, It Really Does

In Nevada, all state lawmaking is crammed into a single four-month legislative session every two years—which is nowhere near enough time. The monkeys are state legislators, mostly non-lawyers, who ran noisy campaigns a few months earlier based on an emotional vow to "fix the law." This they do with disturbing regularity and with little comprehension of the consequences.



The legislation proposed in each session is often a knee-jerk reaction to whatever the media hysteria was the year before. In the latest session, for example, child welfare was the hot topic, following a string of well-publicized child deaths and shelter overcrowding in 2006. The fact that these problems had largely been brought under control by the start of the session didn't prevent the legislature from "fixing" them anyway.

The trouble with any fix is that it is often crude and simplistic and may create a whole new set of problems as bad as or worse than the original one. For example, the "get-tough-on-crime" mandatory sentencing bills of the 1990s have ended up overloading the prison system, diverting state resources from social programs and destroying the motivation of offenders who might otherwise be reformed. In other words, getting "tough on crime," without a wider perspective, has promoted exactly the societal conditions that encourage more crime.

In the chaotic four-month session, there is rarely enough time to think through all the ramifications of a proposed law. The public has an opportunity to comment at the first committee hearing on a bill, but only in response to the existing draft. The language that emerges in the last frantic days of the session may be significantly different and is not usually subject to comment. The final bill may be a caffeine-fueled fantasy that seemed okay at the end of a late-night session but that may not look so appealing in the light of day.

String a bunch of these hasty, ill-considered bills together, and you have the Nevada Revised Statutes. Our law may look reasonable on the first reading, but the more you parse the words and realize their implications, the more upsetting it becomes. It is not fine-tuned "surgical" law, but crude "sledgehammer" law without much depth or subtlety. "What were they thinking?" you ask yourself. The answer is, they weren't thinking much, because they were frantic, overloaded and desperate to produce some kind of legislation before the constitutional deadline.

One of the most dangerous words in the hands of these sleepwalking

legislators is "shall." It is like giving them an atomic weapon to play with. "Shall" implies a mandatory action that a judge or other person applying the law *must* take, regardless of their own observations and judgment.

Example: "Persons found guilty of Crime X *shall* be sentenced to forty years in state prison." Even if the judge disagrees, he is powerless to hand out anything else. In complex fields like child welfare, "shall" may tell administrators how to do their job even if they know a better way. "Shall" often implies legislative micromanagement of things that could be handled more efficiently at the local level.

"May," on the other hand, is a useful, happy and productive word that usually encourages creative problem solving. "May" gives permission but doesn't create an obligation. For example: "The court *may* sentence persons guilty of Crime X to up to forty years in prison." "May" gives judges or administrators the ability to look at the unique circumstances of a case and craft a practical and effective solution from all the options available.

One of the dubious gifts the monkeys have given us is our juvenile certification law. NRS 62B.390 was created during the mandatory sentencing wave of the 1990s. By means of a "shall," it creates a conundrum wherein youth can be prosecuted as adults even when they haven't been given a chance in the juvenile system..

### **Certification and Why it is Needed**

"Certification" is Nevada's term for the transfer of juveniles under the age of 18 to adult criminal court for trial and sentencing. It is the awkward intersection between the relatively compassionate and reparative juvenile delinquency system and the generally harsh and punitive criminal justice system. Certification is supposed to happen when an older juvenile is so hardened in his criminal ways that the delinquency system can't do anything more for him.

Let's say a youth is 17 and has had many prior "adjudications" (or convictions) for stealing cars. He has already served time at a correctional youth camp and on youth probation. If he continues to steal cars anyway, the District

Attorney may say, "Enough is enough," and move to certify. We have tried to reform this kid, the D.A. says, but nothing has worked and we have run out of options. Maybe what he really needs, for his own benefit as well as society's, is to experience the full adult consequences of his actions.

It goes without saying that virtually every kid who returns repeatedly to juvenile court has been somehow abused or neglected in his earlier years. Public Defenders often sob about this in court, and you have to agree with them that nearly every case is tragic. The adults in this kid's life let him down, and society failed to protect him. But the fact that the kid suffered horrible abuse in his past doesn't necessarily mean that the juvenile delinquency system has a solution for his behavior in the present.

Juvenile services are expensive, and funding and manpower will always be in short supply, so you have to make some triage decisions about where you are going to direct those resources. Do you devote your limited energy to an older youth who has already blown through all of your services or to a younger one who has more of a chance? From a systems perspective, if you can't adequately serve everyone then you have to have a way to bleed out the less promising candidates.

Juvenile court usually adheres to a principal of "graduated sanctions." For the first offense, you try a mild punishment; for the second, you try something harsher, etc. What do you do, however, when you get to the top of your scale of sanctions and the bad behavior continues? How can you give the youth any meaningful correction if he has already experienced the worse you can met out?

In theory, that's when you certify him and turn him over to the adult system.

### **The Law**

Under Nevada Law, transfer to criminal court is handled in one of three ways: "discretionary" certification, "presumptive" certification and "direct file." All of these actions take place after the youth has been taken into custody but before he has had a chance to enter a plea. For the sake of

determining where the trial will be held, the youth is assumed to be guilty of the charges.

Discretionary certification in Nevada is relatively rational and is consistent with the law in other states. It is limited to youth who have been adjudicated on earlier crimes, and it is intended to respond to the sort of scenario laid out above, where the D.A. believes that the youth has descended so far into a criminal lifestyle that he will not respond to juvenile services.

There is a “cert” trial in juvenile court where the D.A. tries to show the judge that the kid is beyond redemption in the juvenile system. The public defender, in turn, tries to show that there is still hope and that the kid’s special circumstances make him appropriate for another chance. A judge listens to both sides then makes a decision based on the youth’s history, the seriousness of the charge and the probable impact on public safety if he goes either way.

“Direct file,” on the other hand, takes all jurisdiction away from juvenile court. If a youth of any age is accused of murder or attempted murder, his charges are automatically filed in adult court downtown. Discretion lies solely in the hands of the D.A., who can still decide how a youth will be charged. If a he is charged with manslaughter, for example, then he will go to juvenile court. If he is charged with murder, then there is no option under Nevada law: he must be tried in adult court and be given an adult sentence.

(You may recall that Bart Simpson experienced the direct-file system or something similar to it. In one episode, he is accused of murdering Principal Skinner and is placed on trial. Reading about the trial in the newspaper, the evil Mr. Burns remarks to his sidekick Smithers: “Thank God we live in a country so hysterical over crime that a 10-year-old can be tried as an adult.”)

“Presumptive” certification is something like a hybrid between the two other methods. There is a trial in juvenile court, just like a discretionary cert, but the D.A. holds most of the cards. Certification is “presumed” and can only be denied under limited circumstances. Both the judge and defense counsel have very little power.



Direct-file cases can be tragic. Losing control of one's emotions is an inevitable feature of adolescence. If a youth happens to have a gun in his hand at the time and pulls the trigger, he will be treated exactly like a 30-year-old adult who commits the same offense. Being only 14 is no defense under the law unless the D.A. chooses to downgrade the charges.

However, it is presumptive certs that create the real legal and moral conundrum. The outcome can sometimes be as tragic as a direct file, but more often these proceedings are merely farcical, leading to less punishment for the youth and nobody's interests being served.

Some juvenile delinquents *want* to be certified as adults, and with good reason. In criminal court, bail is allowed, and the kid can sometimes be back on the streets sooner and with fewer restrictions than in juvenile court. Thus, certification doesn't necessarily improve the public safety.

### Presumptive Certs Under 62B.390

Regarding presumptive certification, NRS 62B.390 reads:

2. Except as otherwise provided in subsection 3, upon a motion by the district attorney and after a full investigation, the juvenile court **shall** certify a child for proper criminal proceedings as an adult to any court that would have jurisdiction to try the offense if committed by an adult, if the child:

- (a) Is charged with:
  - (1) A sexual assault involving the use or threatened use of force or violence

against the victim; or

(2) An offense or attempted offense involving the use or threatened use of a firearm; and

(b) Was 14 years of age or older at the time the child allegedly committed the offense.

Notice the “shall” in the first paragraph. “Shall” means that the judge is absolutely obligated to do it, regardless of any other circumstances. The only possible exception is whatever is contained in “subsection 3.”

Notice also the word “involving” in the two numbered paragraphs. That is a very broad word that could encompass a lot of things. The threat of violence can be vague, and the defendant himself doesn't have to touch a gun.

In an extreme example, let's say that 60 high school kids, acting as a pack, crashed a rock concert at the Thomas & Mack Center by breaking down a gate and overwhelming security. If one of them had a gun and threatened a security guard with it so the others could get through, then the crime “involved” a firearm, and all 60 would be subject to presumptive certification.

Under NRS 62B.390 there would have to be a “full investigation” for each of those kids. This is an extensive review by the probation department of each kid's background and family circumstances, resulting in a written report. This has to be done separately for each juvenile and can take hours of a probation officer's time.

Then each kid has to be given a certification trial in juvenile court, singly or en masse. Each juvenile is entitled to legal representation during this trial. Due to conflict rules, the Public Defender's office could handle only one of these 60 kids, so the other 59 would be assigned private “conflict attorneys” at the county's expense. The D.A., of course, would also have to assign manpower to the case. The certification process alone would cost the county thousands of dollars (probably \$100k+ for 60 kids) and tie up the juvenile court for months.

If these are all “normal” kids, not subject to any exceptions in Subsection 3, then “shall” prevails, and they will all be certified. The funny thing is, once they reach adult court, the punishment they receive would probably be trivial,

most likely less than what they would get in juvenile court. The major impact for these kids is they would have a criminal record and would be forever excluded from the juvenile system.

The only safety valve to prevent this kind of nightmare is the intelligent discretion of the D.A. “Upon motion of the District Attorney” implies that the D.A. has the discretion to not seek certification in every instance. He has permission from the legislature to apply some common sense.

At least that is what you would think when reading the law. The D.A. apparently has a different view—that he must always seek presumptive certification whenever the charges allow it.

### The Exceptions

There are only two allowed exceptions to the “shall” in NRS 62B.390. There are contained in subsection 3:

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3. The juvenile court shall not certify a child for criminal proceedings as an adult pursuant to subsection 2 if the juvenile court specifically finds by clear and convincing evidence that:

(a) The child is developmentally or mentally incompetent to understand his situation and the proceedings of the court or to aid his attorney in those proceedings; or

(b) The actions of the child were substantially the result of the substance abuse or emotional or behavioral problems of the child and the substance abuse or emotional or behavioral problems may be appropriately treated through the jurisdiction of the juvenile court.

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Note the phrase “specifically finds by clear and convincing evidence.” This represents a reversal of the usual presumptions of criminal justice. In this situation, the juvenile is essentially “guilty until proven innocent.”

The D.A. hardly has to put on any a case at all. He doesn’t have to “prove,” at this point, that a gun or threat of violence was used in the crime. All he has to show is “slight or marginal” evidence of this. In essence, the mere fact that the D.A. has charged the kid is evidence enough to support the cert.

It is the defense’s burden to put on an active case to prove—essentially “beyond a reasonable doubt”—that one of those two exemptions apply. The judge is also hamstrung. He can’t just

“believe” that the child had behavioral or drug problems leading to the crime; he has to have the explicit evidence in hand.

In practice, these trials are pathetic and embarrassing to anyone who knows the law. They are almost like political “show trials” where one side has all the power and the outcome is known before the trial begins.

The defense counsel is usually reduced to the desperate argument of, “Honest, your Honor, my client was doing drugs.” This is one of the rare circumstances when drug abuse counts in someone’s favor, but proving it is surprisingly difficult. It isn’t sufficient for the kid to have a drug problem; the defense has to prove by “clear and convincing evidence” that the drugs actively contributed to the alleged crime.

The absurd message of the law is, “If you are going to commit a gun crime or a violent sex crime, you better do drugs first!”

What makes a cert defense even more difficult is that the kid may not have admitted the crime. Under criminal law, he doesn’t have to; his guilt is the state’s burden to prove. He hasn’t even entered a plea yet, and his position may be, “I wasn’t there; I didn’t do it.” If he is charged with robbing a convenience store with a gun and he claims that he was someplace else at the time, it is difficult for the defense to provide evidence at a cert trial that drugs directly contributed to the crime he says he didn’t do.

“Emotional or behavioral problems” may sound useful at first. By definition, if a kid is involved in the juvenile court system, then he’s got “behavioral problems.” This obviously wasn’t what the legislature intended, however. What constitutes an emotional or behavioral problem? Since the legislature itself provided no guidance, the court has interpreted this according to a very high standard, akin to the insanity defense. There has to be “clear and convincing evidence” in the form of reports and testimony. A clinical diagnosis of schizophrenia might block a cert but proven trauma in the child’s past apparently won’t.

Defense counsel cannot argue the

facts of the incident or the special personal circumstances of the juvenile, because these are not relevant under 62B.390. If the juvenile was only a minor player in the crime, that is also irrelevant.

The law’s tough-on-crime message is: “If you use a gun, you’re going to go to adult prison.” But are there any juveniles listening to this message, and does the message even make sense?

### A Recent Case

A nice illustration of the cert conundrum happened last Monday (7/2). Two brothers, Peter and Martin, were the subject of a certification trial in Courtroom 18.

At the time of the alleged crime, Martin had just turned 16 and Peter was 17, almost 18. Martin was much smaller than Peter and looked like he was about 13. They had both been held in juvenile detention for about a month and were wearing gray sweatsuits, which indicated that they were behaving well there.

The two brothers were allegedly involved in a carjacking. A driver reported that three youth approached his car. One of them asked for a quarter, which the driver gave him. That same youth then produced a gun and ordered the driver out of the car. The three boys then got in and sped away, with the first youth driving. The car was encountered by police a few minutes later. A chase ensued, followed by a crash, and all three boys tried to run away before being apprehended.

Peter and Martin were the two apparent accomplices who took no aggressive actions themselves. It was the other boy, age 16, who produced the gun, ordered the driver out of the car and drove it. The brothers had not known this boy for long, and there was no evidence presented at the cert trial that they knew he would pull a gun. Their principle crimes were that they got in the car with him then fled when the police came.

Neither of the brothers had any prior records. They clearly did not fall into the category of hardened criminals who had exhausted all juvenile services, because they had never had any. The sole reason they were being certified as adults was that a gun had been “involved” in their

alleged crime.

The defense argued (pathetically) that the boys were under the influence of marijuana at the time, but drug tests came out negative. They were otherwise healthy, normal kids, with no signs of mental illness.

The boys were certified, of course and sent downtown. In adult court, this is a relatively



minor crime, and they will probably get probation. On the whole, they will probably have it easier than if they had stayed in the juvenile system, but they will get no services. They will also have criminal records, and if they commit a crime again, they will automatically be treated as adults.

If we are going to have a juvenile system at all, then clearly these boys belonged in it. They made a one-time mistake, as every kid does. The juvenile system is designed to allow kids to recover from these mistakes without any permanent mark on the record.

Even the deputy D.A. handling the case seemed to agree that the boys didn't belong in the criminal system. Her position was that she didn't have any choice in the matter.

Family Court Chronicles talked with the deputy after the trial. She said that the "shall" in the statute was interpreted by her superiors to be mandatory not only for the judge but also for the D.A. Once a charge was filed involving a gun, then the D.A. felt obligated to file a cert petition regardless of the circumstances. Peter and Martin's case was unfortunate but unavoidable. The D.A. was only enforcing the law.

### Teuton Explains

In a June 26 TV interview (on *Face-to-Face with Jon Ralston*), the Assistant D.A. for the Juvenile Division, Bob Teuton, echoed the same philosophy. The discussion concerned a 14-year-old with diagnosed but untreated mental illness who had committed a string of armed robberies. Teuton was asked if he expected the youth to be certified.

"Initially, once we file a charging

document in juvenile court, if we don't file a petition to certify and the child were to come into court and admit the [charge], we would be prohibited from proceeding further. So to protect our rights and to give us time and to give those people investigating the crime, investigating the child, going through the testing and what-not, for that to occur, we have to certify, file the petition in every case. Quite often, our office in fact, once we are presented with the evidence, not speculation and not what mothers say in the press, when we have the actual evidence, we make the decision not to go forward."

Another guest, defense attorney Kristina Wildeveld, quickly replied: "Never! When? Anytime the district attorney's office has an opportunity to certify, they certify..."

Teuton: "Well, you know, I'm not going to debate whether we do or don't. It is my office. I know what our office procedure is. I ran the juvenile division myself for a period of about 10 years, and yes, we do. When we're not convinced ourselves that the judge has the evidence to go ahead and certify, we withdraw the motion, and we allow the juvenile to be treated in the juvenile system rather than them going forward. Our job is not to put children in the adult system if it is not warranted."

We understand from this that the D.A. is going to "file the petition in every case"—that is, whenever a presumptive cert is possible. He is going to file at an early stage, before all the facts are in, simply to preserve his right to do so. (Youth can only be certified before they plead.)

Later, the D.A. may withdraw the

petition, but only "when we're not convinced ourselves that the judge has the evidence to go ahead and certify."

In other words, as we understand Teuton, they are not going to withdraw a presumptive cert petition for moral reasons or the good of society or because they believe the kid belongs in the juvenile system. They will only withdraw a cert when it is likely to fail

before the judge anyway.

This logic, of course, is circular, since the burden of evidence is so slight. Presumptive certs, in the eyes of the D.A., justify themselves.

Like Wildeveld, we have never heard of the D.A. explicitly withdrawing a cert petition. It is certainly not "quite often," since we have never seen it in our year observing cert trials. Since Mr. Teuton brought it up, we would be curious to know when it occurred. Has it happened even once since the current law was enacted in 1995? If so, when?

Behind the circular logic, Teuton seems to be confirming that the D.A. exerts no meaningful discretion in the filing or pursuit of presumptive certs. As Wildeveld says, "Anytime the district attorney's office has an opportunity to certify, they certify."

### Origins of the Law

The certification law wasn't written by gods. We don't know much about the political environment in 1994-95, but NRS 62B.390 apparently came about because the Clark County juvenile judge at the time, Robert Gaston, refused to certify any youth. The law may have been a reaction to the D.A.'s sense of powerlessness. In the resulting Carson City smackdown, the D.A. won and the judiciary lost, and the pendulum swung absurdly the other way.

That's the way real law works. It isn't like the Ten Commandments sent down by God etched on stone. The law is an imperfect human endeavor, a product of seamy statehouse politics that is always going to be a reflection of the rivalries and obsessions of the time.

We understand the current text of NRS 62B.390 was an eleventh hour compromise brokered by the governor's office when the Nevada Assembly and Senate couldn't reconcile their two conflicting and heavily edited versions. It was probably one of those compromises worked out in a caffeine-fueled late-night work session with very little input from the parties most affected.

Given that the law was created by monkeys on typewriters who didn't have time to think about cases like Peter and Martin's, is it right for the D.A. to blindly worship it without the exercise of common sense?

### Who is the District Attorney?

The highest goal of the D.A. is not simply to "enforce the law." What he does is more subtle and complex. He "interprets" and "prioritizes" the law according to his own human judgment and the community standards of the people who elected him. Especially in a state with such messy and unrefined law, the D.A. provides an important buffer between the legislature and the real world. He cannot possibly enforce every law to its maximum limit, nor should he. He has to make value judgments and compromises based on the real needs of his community.

If the deputy D.A. believed that Peter and Martin should not have been certified—for their own good and the good of the community—then why wasn't the petition withdrawn?

The D.A. and his deputies may reply that they are just trying to fulfill legislative intent—that is, to adhere to some sort of perceived goal not expressly written in the law. Inferring legislative intent is always a dubious undertaking, like reading tea leaves. Maybe they didn't have any coherent intent other than what they wrote in law. Maybe they were monkeys on typewriters: sleep-deprived zombies without much knowledge of juvenile justice who were just trying to get through the session and appease the most powerful lobbyists. Twelve years later, the D.A. doesn't have to read the legislature's mind. He is only obligated to follow the law as written.

As written, juveniles "shall" be certified as adults in presumptive

cases—but only if the D.A. files a petition to begin with. If he declines to file one or he later withdraws it because he finds that it isn't in the best interests of society, he hasn't disobeyed the law, because nowhere does the law say he has to file. Instead, he has exercised good judgment on behalf of his community, based on the discretion that the law allows him.

### Juvenile Justice

To the best of our knowledge, the community at large still supports the existence of a juvenile justice system. Kids need the opportunity to make mistakes and be corrected without being scarred for life. If you are going to have a juvenile system at all, then you should avoid arbitrarily bypassing it.

The U.S. Supreme Court has said (as flashed on the screen during *Face-to-Face*): "It is implicit in the juvenile court scheme that non-criminal treatment be the rule--and the adult treatment, the exception which must be governed by the particular factors of individual cases." (*Harling v. United States*, 295 F.2d 161 (1961) )

NRS 62B.390 seems to be saying something different: that certain surface features of the crime, like the presence of a firearm, overrule "the particular factors of individual cases." Maybe, in some future epoch, this will be tested on appeal against the ruling above and presumptive certs will be struck down, but why should we have to wait?

For the sins of Judge Gaston, the legislature has taken almost all power away from both the judiciary and the defense in juvenile firearm cases. This creates a different environment than the deputy D.A.s are used to working in. Normally, they don't have to think about the defendant's needs, because the defense takes care of that. In this situation, however, the defense and judiciary have been disabled, and the D.A. now has the opportunity to walk into the courtroom and dictate what will happen.

The D.A. might say that the "burden" has shifted to the defense. We say, on the contrary, that the burden has shifted to the prosecution. Because the normal adversarial system has been disabled, the D.A. has a moral obligation

to play a more judicial and "holistic" role in deciding who to certify. The D.A. now has to consider all sides of the issue, like the judiciary. Because the defense can no longer realistically defend their client, maybe the D.A. should fill in for them, too.

All we'd like to see from the D.A., at least in presumptive certs, is a little more sensitivity and an acknowledgment of his own power. He shouldn't have to seek certification in every instance. He must be governed, whenever possible, by "the particular factors of individual cases."

Sensitivity may be a challenge for your typical deputy, but we know they can do it. Maybe the entire juvenile D.A. staff should go on a "retreat" for a few days—you know, like the public defenders do. They could go to a lake or the mountains and get in touch with themselves. They could gather 'round the campfire, hold hands, sing songs and let out their true inner feelings. It's okay to cry and tell your colleagues how much you love them! They could Channel, Rebirth, check their Auras and engage in Primal Hug Therapy. By whatever means it takes, we want all of our deputies to be happy, centered and self-actualized.

Only then we can get rid of those annoying public defenders.

—G.C

