

SENATE BILL NO. 493—COMMITTEE ON JUDICIARY
(ON BEHALF OF DISTRICT ATTORNEY’S ASSOCIATION)

MARCH 19, 1999

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to filing of information against defendant who is discharged by magistrate after preliminary examination. (BDR 14-613)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to criminal procedure; revising the provisions relating to the filing of an information against a defendant who is discharged by a magistrate after a preliminary examination; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 **Section 1.** NRS 171.198 is hereby amended to read as follows:
2 171.198 1. The magistrate shall employ a certified court reporter to
3 take down all the testimony and the proceedings on the hearing or
4 examination, and within such time as the court may designate have such
5 testimony and proceedings transcribed into typewritten transcript.
6 2. When the testimony of each witness is all taken and transcribed by
7 the reporter, the reporter shall certify to the transcript in the same manner
8 as for a transcript of testimony in the district court, which certificate
9 authenticates the transcript for all purposes of this Title.
10 3. Before ***the district court makes a determination concerning plain***
11 ***error pursuant to NRS 173.035 or, if such a determination is not made,***
12 ***before*** the date set for trial, either party may move the court before which
13 the case is pending to add to, delete from, or otherwise correct the
14 transcript to conform with the testimony as given and to settle the transcript
15 so altered.
16 4. The compensation for the services of a reporter employed as
17 provided in this section are the same as provided in NRS 3.370, to be paid

1 out of the county treasury as other claims against the county are allowed
2 and paid.

3 5. Testimony reduced to writing and authenticated according to the
4 provisions of this section must be filed by the examining magistrate with
5 the clerk of the district court of his county, and if the ~~{prisoner}~~ **defendant**
6 is subsequently examined upon a writ of habeas corpus, such testimony
7 must be considered as given before such judge or court. A copy of the
8 transcript must be furnished to the defendant and to the ~~{district}~~
9 **prosecuting** attorney.

10 6. The testimony so taken **may be used by the district court pursuant**
11 **to NRS 173.035. The testimony so taken** may **also** be used:

12 (a) By the defendant; or

13 (b) By the state if the defendant was represented by counsel or
14 affirmatively waived his right to counsel,
15 upon the trial of the cause, and in all proceedings therein, when the witness
16 is sick, out of the state, dead, or persistent in refusing to testify despite an
17 order of the judge to do so, or when his personal attendance cannot be had
18 in court.

19 **Sec. 2.** NRS 173.035 is hereby amended to read as follows:

20 173.035 1. An information may be filed against ~~{any person}~~ **a**
21 **defendant** for any offense ~~{when the person:~~

22 ~~—(a) Has} if:~~

23 (a) **The defendant has** had a preliminary examination as provided by
24 law before a justice of the peace ~~{,}~~ or other examining officer or magistrate
25 ~~{,}~~ and has been bound over to appear ~~{at the court having jurisdiction; or~~

26 ~~—(b) Has} before the district court;~~

27 (b) **The defendant has** waived his right to a preliminary examination ~~{:~~
28 ~~—2.— If, however, upon the} ; or~~

29 (c) **The district court has made a determination pursuant to this**
30 **section that the justice of the peace or other examining officer or**
31 **magistrate committed plain error by discharging the defendant on the**
32 **offense.**

33 2. **If a defendant is discharged on any offense after having had a**
34 preliminary examination , the ~~{accused has been discharged, or the affidavit~~
35 ~~or complaint upon which the examination has been held has not been~~
36 ~~delivered to the clerk of the proper court, the attorney general when acting~~
37 ~~pursuant to a specific statute or the district attorney may, upon affidavit of~~
38 ~~any person who has knowledge of the commission of an offense, and who is~~
39 ~~a competent witness to testify in the case, setting forth the offense and the~~
40 ~~name of the person or persons charged with the commission thereof, upon~~
41 ~~being furnished with the names of the witnesses for the prosecution, by~~
42 ~~leave of the court first had, file an information, and process must forthwith~~
43 ~~be issued thereon. The affidavit need not be filed in cases where the~~

1 ~~defendant has waived a preliminary examination, or upon a preliminary~~
2 ~~examination has been bound over to appear at the court having jurisdiction.~~

3 ~~—3.—The~~ prosecuting attorney may request the district court to
4 determine whether the justice of the peace or other examining officer or
5 magistrate committed plain error by discharging the defendant on the
6 offense. To make such a request, the prosecuting attorney must:

7 (a) File the request, in writing, with the district court not later than 15
8 days after the date on which the defendant was discharged on the
9 offense; and

10 (b) Include with the request a certified copy of the transcript of the
11 preliminary examination that is prepared pursuant to NRS 171.198.

12 3. The prosecuting attorney may include supporting legal points and
13 authorities with a written request filed pursuant to subsection 2. In
14 response to such a written request, the defendant may file opposing legal
15 points and authorities not later than 10 days after the date on which the
16 written request is filed by the prosecuting attorney. The prosecuting
17 attorney and the defendant may not present any additional testimony,
18 affidavits or other evidence to the district court.

19 4. If the prosecuting attorney files a written request pursuant to
20 subsection 2, the district court shall, for each offense for which the
21 defendant was discharged, determine whether the justice of the peace or
22 other examining officer or magistrate committed plain error by
23 discharging the defendant on the offense. The district court shall make
24 its determination based upon the evidence contained in the transcript of
25 the preliminary examination and any supporting or opposing legal points
26 and authorities that have been timely filed by the prosecuting attorney
27 and the defendant. In making its determination, the district court shall
28 not consider any additional testimony, affidavits or other evidence.

29 5. If the district court determines that the justice of the peace or
30 other examining officer or magistrate committed plain error by
31 discharging the defendant on the offense, the prosecuting attorney may
32 file an information against the defendant for that offense pursuant to
33 subsection 6.

34 6. An information must be filed ~~[within]~~ against a defendant not later
35 than 15 days after the ~~[holding or waiver of the]~~ date on which:

36 (a) The defendant waives his right to a preliminary examination;

37 (b) The defendant is bound over to appear before the district court
38 after having had a preliminary examination ~~[.]~~; or

39 (c) The district court makes a determination pursuant to subsection 5
40 that the justice of the peace or other examining officer or magistrate
41 committed plain error by discharging the defendant on the offense.

42 7. Each information must set forth the ~~[crime]~~ offense committed
43 according to the facts.

1 ~~[4.]~~ 8. If, with the consent of the prosecuting attorney, a defendant
2 waives his right to a preliminary examination in accordance with an
3 agreement by the defendant to plead guilty, guilty but mentally ill or nolo
4 contendere to a lesser charge or at least one but not all, of the initial
5 charges, the information filed against the defendant pursuant to this section
6 may contain only the offense or offenses to which the defendant has agreed
7 to enter a plea of guilty, guilty but mentally ill or nolo contendere. If, for
8 any reason, the agreement is rejected by the district court or withdrawn by
9 the defendant, the prosecuting attorney may file an amended information
10 charging all of the offenses which were in the criminal complaint upon
11 which the preliminary examination was waived. The defendant must then
12 be arraigned in accordance with the amended information.

13 **Sec. 3.** NRS 173.055 is hereby amended to read as follows:

14 173.055 1. The attorney general when acting pursuant to a specific
15 statute or the district attorney of the proper county shall inquire into all
16 cases of preliminary examinations as provided by law, concerning the
17 commission of any offense, whether the offenders are committed to jail,
18 recognized or held to bail.

19 2. If the district attorney or the attorney general determines in any such
20 case that an information ought not to be filed, he shall file with the clerk of
21 the court having jurisdiction of the supposed offense a written statement
22 containing his reasons, in fact and in law, for not filing any information in
23 the case. The statement must be filed ~~[within]~~ **not later than** 15 days after
24 the ~~[holding of the]~~ **date on which:**

25 **(a) The defendant waives his right to a preliminary examination;**

26 **(b) The defendant is bound over to appear before the district court**
27 **after having had a preliminary examination ~~[]~~ ; or**

28 **(c) The district court makes a determination pursuant to NRS 173.035**
29 **that the justice of the peace or other examining officer or magistrate**
30 **committed plain error by discharging the defendant on the offense.**

31 **Sec. 4.** NRS 173.095 is hereby amended to read as follows:

32 173.095 1. The court may permit an indictment or information to be
33 amended at any time before verdict or finding if no additional or different
34 offense is charged and if substantial rights of the defendant are not
35 prejudiced.

36 2. If an indictment is found charging a primary offense upon which a
37 charge of habitual criminality may be based, the prosecuting attorney may
38 file a notice of habitual criminality with the court. If an indictment is found
39 charging a primary offense upon which a charge of:

40 (a) Habitually fraudulent felon may be based, the prosecuting attorney
41 shall file a notice of habitually fraudulent felon with the court.

42 (b) Habitual felon may be based, the prosecuting attorney shall file a
43 notice of habitual felon with the court.

1 3. The court shall permit an information to be amended pursuant to
2 subsection ~~[4]~~ 8 of NRS 173.035.

3 **Sec. 5.** NRS 178.556 is hereby amended to read as follows:

4 178.556 1. ~~[If no]~~ *The district court may dismiss the complaint if:*

5 *(a) An indictment is not found or an information is not filed against a*
6 ~~person~~ *the defendant* within 15 days after he has been held to answer for a
7 public offense ~~[which]~~ *that* must be prosecuted by indictment or
8 information ~~[, the court may dismiss the complaint.] ; or~~

9 *(b) An information is not filed against the defendant within 15 days*
10 *after the district court has made a determination pursuant to NRS*
11 *173.035 that the justice of the peace or other examining officer or*
12 *magistrate committed plain error by discharging the defendant on the*
13 *offense.*

14 2. If a defendant whose trial has not been postponed upon his
15 application is not brought to trial within 60 days after the arraignment on
16 the indictment or information, the district court may dismiss the indictment
17 or information.

18 ~~[2.]~~ 3. If a defendant whose trial has not been postponed upon his
19 application is not brought to trial within 60 days after the arraignment on
20 the complaint for an offense triable in a justice's or municipal court, the
21 court may dismiss the complaint.

22 **Sec. 6.** NRS 178.562 is hereby amended to read as follows:

23 178.562 1. Except as otherwise provided in NRS 174.085, an order
24 for the dismissal of the action, as provided in NRS 178.554 and 178.556, is
25 a bar to another prosecution for the same offense.

26 2. The discharge of a ~~[person accused]~~ *defendant* upon preliminary
27 examination is a bar to another complaint against ~~[him]~~ *the defendant* for
28 the same offense, but does not bar the finding of an indictment or filing of
29 an information.

30 3. *The determination of a district court pursuant to NRS 173.035*
31 *that the justice of the peace or other examining officer or magistrate did*
32 *not commit plain error by discharging the defendant on an offense is a*
33 *bar to the filing of an information against the defendant for the same*
34 *offense, but does not bar the finding of an indictment.*

35 **Sec. 7.** The amendatory provisions of this act do not apply to a
36 criminal action in which an indictment has been found or a complaint or
37 information has been filed before the effective date of this act.

38 **Sec. 8.** This act becomes effective upon passage and approval.