

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Seventy-Fourth Session  
April 25, 2007**

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:08 a.m., on Wednesday, April 25, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 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/74th/committees/](http://www.leg.state.nv.us/74th/committees/). In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: [publications@lcb.state.nv.us](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblyman Bernie Anderson, Chairman  
Assemblyman William Horne, Vice Chairman  
Assemblywoman Francis Allen  
Assemblyman John C. Carpenter  
Assemblyman Ty Cobb  
Assemblyman Marcus Conklin  
Assemblywoman Susan Gerhardt  
Assemblyman Ed Goedhart  
Assemblyman Garn Mabey  
Assemblyman Mark Manendo  
Assemblyman Harry Mortenson  
Assemblyman John Ocegüera  
Assemblyman James Ohrenschall  
Assemblyman Tick Segerblom

**GUEST LEGISLATORS PRESENT:**

Senator Warren B. Hardy, Clark County Senatorial District No. 12

Minutes ID: 1072



**STAFF MEMBERS PRESENT:**

Jennifer M. Chisel, Committee Policy Analyst  
Risa Lang, Committee Counsel  
Doreen Avila, Committee Secretary  
Matt Mowbray, Committee Assistant

**OTHERS PRESENT:**

Carol Sala, Administrator, Aging Services Division, Department of Health and Human Services  
Barry Gold, Director, Government Relations, American Association of Retired People  
Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association  
Bruce Nelson, Deputy District Attorney, Vehicular Crimes Unit, Clark County District Attorney's Office  
Kristin Erickson, Chief Deputy District Attorney, Nevada District Attorneys Association, Washoe County  
Cheri Emm Smith, District Attorney, Mineral County  
Robin Keith, President, Nevada Rural Hospital Partners  
Laurel Stadler, President, Lyon County Mothers Against Drunk Driving  
Gerald Gardner, Assistant District Attorney, Carson City  
Jim Holmes, Chairman, Northern Nevada Driving Under the Influence Task Force  
William L. Gardner, Chief Criminal Deputy, Reno City Attorney's Office  
Brett Kandt, Representative, Office of the Attorney General and the Nevada Prosecution Advisory Council  
Lee Rowland, Staff Attorney, American Civil Liberties Union  
Dan Brubaker, United States Postal Inspector, United States Postal Inspection Service  
Ray Flynn, Assistant Sheriff, Las Vegas Metropolitan Police Department  
Scott Scherer, Representative, Dunn & Bradstreet  
Troy Dillard, Administrator, Compliance Enforcement Division, Department of Motor Vehicles  
Janine Hansen, President, Nevada Eagle Forum  
Tim Kuzanek, Representative, Washoe County Sheriff's Office and Nevada Sheriffs' and Chiefs' Association  
Jason Frierson, Public Defender, Clark County

**Chairman Anderson:**

[Meeting called to order and roll called.] We will open the hearing on Senate Bill 31 (1st Reprint).

**Senate Bill 31 (1st Reprint):** Makes various changes to provisions governing records of criminal history. (BDR 14-595)

**Carol Sala, Administrator, Aging Services Division, Department of Health and Human Services:**

[Read from prepared testimony ([Exhibit C](#)).]

**Assemblyman Conklin:**

Are these criminal records for Division employees?

**Carol Sala:**

The criminal records that the Division is asking to have access to are for suspects of elder abuse. Social workers go out alone on investigations and they may walk into situations where we find out later that they could have been in danger.

**Chairman Anderson:**

To clarify, this is allowing the Division to have the same kind of information that a police officer would have on the inhabitants when going into a house. With this, the Division would be able to utilize the Criminal History Repository.

**Assemblyman Manendo:**

The Division does not currently have access to these records?

**Carol Sala:**

That is correct.

**Assemblyman Manendo:**

In this bill it says "any reporter."

**Carol Sala:**

Correct. That actually came up in the Senate. There is quite an extensive list of who has access per statute, yet the Division was not listed. We have run into a problem where law enforcement is reluctant to give us that information. A reporter could get that information.

**Chairman Anderson:**

Could a newspaper reporter get that information?

**Carol Sala:**

The way the statute is written it says "any reporter for the electronic or printed media in his professional capacity for communication to the public."

**Assemblyman Manendo:**

That is on page 4, line 10.

**Barry Gold, Director, Government Relations, American Association of Retired People:**

[Read from prepared testimony ([Exhibit D](#)).]

**Chairman Anderson:**

We will close the hearing on S.B. 31 (R1).

Let me open the hearing on Senate Bill 35 (1st Reprint).

**Senate Bill 35 (1st Reprint): Revises certain provisions relating to the admissibility of certain affidavits and declarations in certain proceedings. (BDR 4-507)**

**Ben Graham, Representative, Nevada District Attorneys Association:**

[Submitted ([Exhibit E](#)).] You have in front of you S.B. 35 (R1). In 2004 the Nevada Supreme Court, with a three-judge panel, found that the statutory scheme that is in S.B. 35 (R1) was potentially flawed. As a result of that, the 2005 Legislature took that statute out with our cooperation. We had to try to figure out a way that we could utilize nurses and others who draw blood in driving under the influence (DUI) trials and DUI-related matters. After the Legislature adjourned, the full court took another look in 2005 and said that the statute was sound and could be utilized. By then, the matter had been taken out. What we are asking this Body to do is take another look and place that statute back in force. Additionally, there is a provision in this legislation for potential use of electronic communication and media with regard to cameras in Section 1, which I think is anticipatory. The turmoil that resulted with this decision in 2004 impacted all prosecutions, not necessarily the prosecution—but the preliminary prosecution of matters involving controlled substances and alcohol. It not only impacted the major metropolitan areas but, in many cases, nearly brought the prosecution to a halt in the rural areas because of the limited availability of people who draw blood. These people can be called as technical witness. If they appear in court, 99 percent of the time there is no cross examination. Frequently, counsel will simply stipulate to their testimony. There is a provision in here that if there is a serious challenge to the content or an issue with the draw, the witnesses will be brought in. I have Bruce Nelson with me, who has probably prosecuted more DUIs than anybody else in the State of Nevada. Kristin Erickson is with me as well. Her unit in Washoe County does DUI prosecutions. Also present are supporters of anti-drunk driving legislation from Mothers Against Drunk Drivers (MADD), prosecutors from Carson City, the City of Sparks, the City of Reno, the Douglas County District Attorney, and the

Carson City District Attorney's office. This is an extremely important piece of legislation, and we are asking this provision be put back in statute.

There are some concerns regarding confrontation clauses. I have been assured, and case law substantiates at the preliminary hearing stage and in the status present in this bill, there is no constitutional flaw in this legislation. I used to defend people. From a practical standpoint, it does not change that there is a series of witnesses who are mandated to show up at the preliminary hearing or trial. We are not in any way violating anybody's individual rights or constitutional protections. If there are any differences of opinion, it is primarily philosophical. I have not had a chance to discuss this with the American Civil Liberties Union (ACLU).

**Chairman Anderson:**

Mr. Nelson, are you taking us through the bill?

**Bruce Nelson, Representative, Clark County's District Attorney's Office:**

In 2006 we had approximately 7,100 DUIs in the Clark County justice court. That is up 30 percent from 2005. About 90 percent of those cases got set for trial. If we assume 50 percent of the people did a blood test and 50 percent took a breath test, we have to bring our nurses in for nine cases every day of the year and we have to bring our breath people in for 9 cases every day of the year. If they are doing that, they cannot act as nurses and breathalyzer analysts. A couple of years ago, we had to take the only nurse out of the trauma unit at University Medical Center (UMC) and have her testify in a misdemeanor DUI case. The nurse's testimony was, "Hello, I am a nurse. Yes, I filled out the affidavit. Yes it is true." That was the extent of her testimony. There is no practical cross-examination by the defense. I would also like to note that this bill does protect the defendant because they have the option of bringing the nurse in if they want to. If the defendant can show there is a substantial dispute, they can make us bring the nurse in. If we use the affidavit and there is something wrong with it, the defendant wins. We do not have the nurse there to clean it up. We are trying not to make nurses come to court for no reason. Nothing in their testimony contributes to the search for the truth. In other words, the nurse does not say, "I drew his blood, I looked at it, and he was drunk." The nurse says, "I drew his blood." It has already been declared constitutional by the Nevada Supreme Court.

**Assemblyman Horne:**

I am concerned about Section 2, paragraphs 6 and 7. Paragraph 6 states "if or at or before the time of trial the defendant establishes," and this is when you are speaking of the substantial dispute. Paragraph 7 says "during any trial in which a defendant has been accused, the defendant may object in writing."

These specifically narrow it to a trial setting, whereas throughout the rest of the bill it says "any criminal proceeding." What is the rationale for not allowing the defendant to make such a challenge at a preliminary hearing?

**Bruce Nelson:**

When we are dealing with a felony trial, we are searching for the truth. The jury is going to hear the case and decide the guilt or innocence of the defendant. At a preliminary hearing, we are not doing any of that; we are only determining if there is enough evidence to go forward. That is why we do not have confrontation at preliminary hearings, but we do have it at trial. There is a much greater justification for using the nurse's affidavit at a preliminary hearing and making the defense show that there is some legitimate need to have her there versus at trial where the defense can request that witness, and we have to bring them in. At the preliminary hearing, we have a lower standard. We are not doing the same things we are doing at trial, and I think that is the reason for the difference.

**Assemblyman Horne:**

If at a preliminary hearing for a felony DUI you have a law enforcement officer who made the arrest there, did you still have to meet your burden to have it bound up in district court? You may even have the blood. The defense attorney, at the preliminary hearing, wants to challenge that blood draw, and those are the only two pieces of evidence you may have. If this bill were to pass, all you would need at the preliminary hearing would be the affidavit. The fact that the nurse took the blood would be enough and any substantive argument that the defense would have about the blood draw would have to wait until the defendant is bound up in district court.

**Bruce Nelson:**

If your objection to the blood draw was that the police did not have grounds to draw the blood, you could raise that at preliminary hearing. The nurse is only going to say, "I am a nurse and I drew his blood." If you want to challenge that aspect of it, yes, you would have to wait for trial. For the thousands of DUIs I have prosecuted, I have never had a defense attorney question the nurse at trial. That does not happen. The nurse simply says, "I am a nurse. I drew blood." The officer then says, "The nurse handed me the blood. I impounded it into evidence." If you want to challenge the chain of custody, you would do that through the police officer at the preliminary hearing, not through the nurse.

**Assemblyman Horne:**

One of the things that the defense attorney might ask the nurse is whether she used an alcohol swab when she sterilized the entry point of the needle. If the nurse is not there, the defense cannot ask that question. That goes to the

credibility of the alcohol test you are submitting as evidence for the intoxication. If the nurse is on the stand and says she did use an alcohol swab, then the defense attorney can say the test is invalid because it is unknown whether or not this blood draw is good because she used an alcohol swab. Without the blood, you cannot meet your burden. Evidence needs to be shown in order to bind up.

**Bruce Nelson:**

The affidavits typically state whether she used alcohol to sterilize before taking the blood. Assuming the nurse did draw blood after using an alcohol swab—which has never happened—it would not affect the test because the nurse is not drawing the alcohol off of your skin: they are drawing your blood. If you want to challenge that, you would do it at trial.

**Chairman Anderson:**

Is the affidavit form being used in Clark County affirming that they did not use alcohol in preparing to take the blood the same affidavit form recognized throughout the rest of the State?

**Bruce Nelson:**

The Supreme Court, in *Walsh* [*City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P. 3d 203 (2005)], said that affidavit form was valid because that was related to the validity of drawing of blood. As far as I know, on every affidavit it says, "I am the nurse. I did not use any alcohol swabs before I withdrew his blood." They use a betadine solution which is safer.

**Kristin Erickson, Representative, Nevada District Attorneys Association, Washoe County:**

This bill reinstates the prior law. The current status of the law requires us to bring in the phlebotomist or the nurse who drew the blood of the person in order to prove a DUI case. This causes substantial difficulties, especially in the rural counties, and even in the larger counties such as Washoe and Clark. This bill puts the law back where it was before the Supreme Court ruled that we had to call the nurse to the stand. It allows us to use an affidavit in lieu of live testimony for the limited purpose that they drew the blood, and they handed it to the police officer. There are also safeguards built into this piece of legislation allowing, if there is a dispute, the defense to call the phlebotomist or nurse to testify. Additionally, the defense could subpoena the witness as well. It also puts back into effect the fact that we may use an affidavit for the blood alcohol content. If the defense wishes to have the expert present, all they have to do is put it in writing that they request the expert and we bring the expert in. We urge the passage of S.B. 35 (R1).

**Cheri Emm Smith, District Attorney, Mineral County:**

I have had to dismiss DUIs in the rural communities because we could not get experts to come in and testify. If the Highway Patrol or local sheriff's office prosecutes the DUI and there is a blood draw, it is sent to either Las Vegas or Reno. We have to get the expert to testify about the blood alcohol content (BAC), for the defense counsel to decide whether they want to use them in trial or not. We have had to fly an expert from Las Vegas into Reno, rent them a car, and pay for their travel to Hawthorne so defense counsel could talk to them for five minutes. If they want to have experts and there is a valid issue, it is not a problem getting the experts there. We have to coordinate getting defense counsel from Churchill County, Yerington, Reno, or Carson City. In addition to the experts, a trial can be fairly burdensome when coordinating everyone's schedule. In Churchill County and Reno, the courts typically meet on Monday, Tuesday, Wednesday, and Thursday. If we needed a trial on a Friday, could we find people to show up at that time? The affidavit saves a lot of time. If defense counsel is going to question the validity of a stop or the DUI, it involves the officer's testimony, the officer's stop, and the officer's perception on the field sobriety test. Very rarely does the expert come into question. I would support this bill.

**Robin Keith, President, Nevada Rural Hospital Partners:**

Nevada Rural Hospital Partners is a consortium of 15 of Nevada's small rural hospitals across the State. We are here in support of the bill. Staffing is a particular issue in rural hospitals. We often have maybe only two registered nurses (RN) in a small hospital during a shift and to pull one of them out leaves either the emergency room (ER) or the acute care part of the hospital virtually uncovered. We would appreciate your support of the bill.

**Chairman Anderson:**

Ms. Keith, are you a registered nurse? Do you do these blood draws?

**Robin Keith:**

I am a registered nurse. I do not do the blood draws.

**Laurel Stadler, President, Lyon County Mothers Against Drunk Driving:**

I am here in support of the bill for all of the reasons that the experts have mentioned.

**Gerald Gardner, Assistant District Attorney, Carson City:**

I would merely concur with the comments made by my colleagues and the District Attorneys Association ([Exhibit F](#)). For Carson City, it is a joint problem of the strain on the nursing staff and the fact that we need to bring experts from Las Vegas for approximately 25 percent of the cases we prosecute. We



handle about 500 DUIs per year. Cases involving blood draws are contracted out to Quest Diagnostics in Las Vegas. Last year, we spent an average of \$600 to \$1600 per witness per case who came here to testify. It is an enormous strain for a small office. We certainly believe that a defendant should be entitled to a face-to-face confrontation with a witness where there is a legitimate issue of fact. We believe this bill serves an important public policy.

**Assemblyman Horne:**

If this bill passes, does it only apply to DUIs?

**Gerald Gardner:**

It could arguably apply to misdemeanor or felony drug cases that go to trial. In a case where the defendant believes that the chemist or other witness would be critical to the case, that person would be called to trial.

**Assemblyman Horne:**

Section 2, subsection 1(a), deals with the testing for intoxication. In *Nevada Revised Statutes* 171.197, paragraph 4, says that if at or before the time of a preliminary hearing, the defendant establishes a substantial dispute and it is in the interest of justice, the magistrate may order the district attorney to produce the person to testify. That seems broad. If we pass this bill, will that still be in statute? There are other circumstances such as property crimes in which if somebody from out-of-state witnesses, they produce an affidavit to say that person was entitled to be on their property. Would this expand to those types of cases as well? I do not see how this bill limits witnesses to just nurses and blood testing.

**Gerald Gardner:**

The bill would apply to cases involving forensic analysis of blood and chemicals. The issue you are discussing is what was dealt with in the **Witzenburg** case [Sheriff v. Witzenburg, 122 Nev. Adv. Op. No. 91, 2006] which affirmed the constitutionality of affidavits in preliminary hearings for things like property crimes. I do not think that would be affected in any way one way or another by this bill. I think the bill is primarily to address the issue of forensic chemistry.

**Jim Holmes, Chairman, Northern Nevada Driving Under the Influence Task Force:**

We are here in support of this bill and we urge its passage. The function of the Northern Nevada DUI Task Force is primarily to conduct the Victim Impact Panel. In the 11 years that I have been associated with this organization, we have spoken to over 30,000 DUI offenders. It is helpful if legislators provide the tools for the prosecutors to do their jobs. You have to realize in the 11 years that I have been coming here, we have lost approximately

1,600 Nevadans. That is one every two days when you do the math. We have lost 15 people in this State in the last month due to DUIs.

**William L. Gardner, Chief Criminal Deputy, City Attorney's Office, Reno:**

In my 26 years as a lawyer in Nevada, I have spent 12 years with the City Attorney's Office as a prosecutor. As a defense attorney, I spent 13 years representing DUI and other criminal defendants. The key issues in these DUI cases rarely, if ever, stem from the potential problems and errors in the preparation of the alcohol testing solutions used in the misdemeanor cases. Often in DUI cases, the calibration of the intoxilizers or the blood draws commonly, at least in Washoe County, are done by phlebotomists. The current law imposes an added level of bureaucracy and cost without any meaningful benefit to defendants or to the protection of their rights. In felony DUI cases where there are substantial consequences if convicted, it would be more reasonable to have the person who drew blood testify. The proposed legislation is limited to the substantive rights at trial. The entry point with alcohol is a concept that we have talked about that is rarely a problem. If there is a critical issue, such as the qualification of a witness, the irregularity in a blood draw, the training of the witness, or the bias or motivation of a witness, how is that issue addressed at a preliminary hearing where you arguably have a chance of pleading not guilty? While this bill is limited to the trial, I would point out that a witness who draws blood, whether it is a nurse or phlebotomist, is usually easy to find, interview, and subpoena. Nothing under this legislation prohibits issuing a subpoena and requiring that person to be there.

If this were a critical issue that would merit the attention at a preliminary hearing, a subpoena could always be issued to that person. That does not put a burden on the defendant if you have a critical issue. There are certainly times at preliminary hearings when you would need to have individuals there. These kind of witnesses are usually available. I have read cases over the years and the legislative intent is clearly to get the drunk driver off the road and to prevent the carnage on the roads of Nevada. The existing legislation seems to thwart that intent by imposing that added level of bureaucracy, which really does not provide any meaningful protection to any substantial rights of the defendants. We support this bill. The other question you brought up, Assemblyman Horne, does apply to cases other than those involving DUI. It applies to any cases where there are analysts. It applies to the phlebotomist, the tech who maintains the machines, and the individual who prepares the wet bath solutions in the machines. The blood draw certainly can cross over to other non-DUI cases.

**Brett Kandt, Representative, Office of the Attorney General and the Nevada Prosecution Advisory Counsel:**

I have passed out a memo that details everything that has already been well stated and a copy of the *Walsh* case at issue ([Exhibit G](#)).

**Lee Rowland, Staff Attorney, American Civil Liberties Union:**

I resubmitted a copy of the original amendment that I submitted to the Senate Judiciary Committee when they were considering this bill ([Exhibit H](#)). I also deposited a copy with the LCB staff here. It may already be in the record on this bill.

Our proposed amendment would accomplish the same thing everyone who has testified in favor of the bill is hoping to accomplish. The amendment changes Section 6 of this bill, which now requires the defendant to prove that there is no material issue of fact in the affidavit to switch the burden to the prosecution. It would put the burden on the prosecution to show that in that affidavit there is no bonafide dispute as to the facts, and there will not be prejudice to the defendant. Since the defendant has a right to confront the witnesses against him, we believe it is inappropriate for the defendant to have to prove there is no material issue. Occasionally, those issues are not discovered until that testimony is given. In the situations outlined by the proponents of the bill, we believe the outcome would be the same. This way the defendant would not be the one having to guess whether or not there are material issues with that affidavit. Since the prosecution is the one who has the most access to the original affidavit, we believe that is the appropriate place to put the burden. All this would do is keep the bill intact. We like the bill, we certainly agree with the reasoning, and the nurse shortage is a serious issue.

**Chairman Anderson:**

We will close the hearing on S.B. 35 (R1).

Let me open the hearing on Senate Bill 155.

**Senate Bill 155: Makes various changes to provisions pertaining to the prosecution of identity theft. (BDR 14-1008)**

**Senator Warren Hardy, Clark County Senatorial District No. 12:**

Senate Bill 155 was brought to me by the United States Postal Inspection Service. This bill allows an inspector from the United States Postal Inspection Service to make arrests without a warrant in certain circumstances. At the same time, we saw an opportunity to tighten some laws relative to identity theft. Identity theft with the available technology is something on which the entire country is behind. Subsequent to the hearings in the Senate,

Scott Scherer, representing Dunn & Bradstreet, did bring to my attention an issue that, under the changes we are making relative to identity theft, might get the folks from Dunn & Bradstreet and other places thrown in jail. It was not our intent, so he brought an amendment forward that makes a great deal of sense.

**Dan Brubaker, United States Postal Inspector, United States Postal Service:**

[Read from prepared testimony ([Exhibit I](#)).]

**Chairman Anderson:**

Mr. Brubaker, what kind of training do you have as a peace officer? Do all postal inspectors meet that training requirement?

**Dan Brubaker:**

Our training is approximately four months in Potomac, Maryland. It is an accredited training academy. We are trained in firearms, constitutional law, officer safety, defensive tactics, and situational awareness.

**Chairman Anderson:**

The Attorney General's Office has had a cyber crime taskforce for some time, though I think it is commendable that Senator Hardy brought this piece of legislation. It has Secret Service, FBI, and other federal people on the task force. Have you thought about raising this issue with the Attorney General's Office relative to your status and opportunities or how it might help you with your identity theft issue?

**Dan Brubaker:**

We belong to several different task forces. We belong to the Southwest Identity Fraud Taskforce (SWIFT) in Las Vegas. It includes Las Vegas Metropolitan Police Department and Secret Service. We handle cases in the middle of the night where there might be a kid riding a bike down the street with a backpack full of mail. If Metro does not want to deal with it, we handle the situation. If it does not meet the United States Attorney's threshold, we can take the mail back, but we have to let that person go and possibly reoffend. That has created this problem in Nevada where there are no consequences to these people's actions.

**Chairman Anderson:**

This is broader than cyber crime.

**Dan Brubaker:**

Yes, sir, it is.

**Assemblyman Horne:**

Which other federal agencies do not enjoy state law enforcement status?

**Dan Brubaker:**

We are the Postal Inspection Service. We are loosely attached to the United States Postal Service (USPS), but the agencies that I shared with you earlier are the only federal agencies that do have state peace officer status here in Nevada.

**Assemblyman Horne:**

Were there any other federal agencies that do not have state peace officer status?

**Dan Brubaker:**

Yes, sir, there are many agencies. There is the Division of Alcohol, Tobacco, and Firearms (ATF) and Office of Inspector General. Each basic department in the government has an Office of Inspector General, and they have federal agents who do not have state peace officer status in Nevada. For example, the Department of Energy has federal agents who investigate fraud, waste, and abuse in the Department of Energy. They do not have state peace officer status.

**Chairman Anderson:**

Has everybody within your group been trained as a regular peace officer and certified in some way by the State or recognized as meeting those requirements?

**Dan Brubaker:**

Yes, Mr. Chairman, all of my personnel are certified agents. We have a general analyst in my office who does not have state arrest powers. All of the federal agents in my office have completed the training in Potomac, Maryland and are recertified in firearms, defense tactics, and officer safety twice every year.

**Assemblyman Carpenter:**

How would it work "when a person arrested has committed a felony or gross misdemeanor, although not in his presence," as it states in Section 1, at line 7?

**Dan Brubaker:**

Let us say Las Vegas Metro stops the guy on the bike with the backpack full of mail. He has committed a felony, but not in my presence. I would be able to take over that investigation, interview the suspect, and then arrest him based on the information we received from Las Vegas Metro stating probable cause.

**Chairman Anderson:**

Is this going to create a jurisdictional problem between you and the local law enforcement? Who do you think takes priority?

**Dan Brubaker:**

There is not a lot of competition for these types of cases. If Las Vegas Metro wants to take the case, we play very well with others. We have a great working relationship with Sheriff Gillespie and the whole department of Metro in Henderson and North Las Vegas. If there was a situation where they really wanted to take the case, the Postal Inspection Service would not have a problem with that. We are asking to be empowered in order to help local law enforcement deal with the problem.

**Ray Flynn, Assistant Sheriff, Las Vegas Metropolitan Police Department:**

Being a police officer for 27 years, I have had the privilege of working with the USPS on organized crime cases, gang cases, and being assigned to task forces. They are professional, responsive, and cooperative. As I understand their policy and procedures, they cannot make probable cause arrests on federal statutes. They prefer everything to go through the warrant phase. By having state peace officer status, they would be able to make probable cause arrests on the street for state charges. The case of the kid riding down the street on his bicycle going through everybody's mail would be a perfect case for them to handle. I do not see any competition with them. We need all the help we can get. Identity theft is a huge issue as you know, not only in Las Vegas but throughout the State. Obviously, there are not enough detectives working it. If we can enlist the USPS inspectors to help us, we would not argue about that at all.

**Assemblyman Horne:**

I would assume that the postal inspector in the example scenario—because they have a backpack full of mail—would already have jurisdiction to make the probable cause arrest. If he thought this was a person breaking into mailboxes and instead found a backpack full of methamphetamine, he would not be able to make a probable cause arrest because it is not in his jurisdiction, is that correct? This bill would grant him authority to make this arrest.

**Ray Flynn:**

If this bill is passed and becomes law, it would permit that postal inspector to make the probable cause arrest for methamphetamine under state charges.

**Assemblyman Horne:**

Senator Hardy, how did you pick the figure of \$3,000?

**Senator Hardy:**

I believe it was based on the Arizona statute that is similar to this, and Legislative Counsel Bureau (LCB) drafted it based on this. Is that correct, Mr. Brubaker?

**Dan Brubaker:**

Yes, sir, that is correct.

**Senator Hardy:**

The postal inspector does not currently have the authority to arrest the young man on the bicycle with the backpack. He could confiscate the mail, but would have to let the suspect go.

**Chairman Anderson:**

Could he hold him until the police arrived?

**Senator Hardy:**

I am not sure he could even hold him until the police arrived.

**Dan Brubaker:**

It is more likely that Metro would come in contact with the person on the bike and call the USPS. We would then respond to that scene, interview the suspect, and take the mail. We would then call the United States Attorney's Office, but if the incident does not meet a federal threshold, then we would take the mail but we would have to let that individual go. If Metro cannot arrest him for petty theft, he would be able to ride his bike home without consequences.

**Chairman Anderson:**

What would happen to the other materials found in the backpack? He would have been pulled over for probable cause. Would the local police be able to charge him for having drugs or other paraphernalia in his bag?

**Dan Brubaker:**

Yes, they would be able to charge him for possession of drugs.

**Chairman Anderson:**

The USPS would not be able to charge him for that because they do not have the power, is that correct?

**Dan Brubaker:**

Yes, that is correct.

**Senator Hardy:**

Mr. Scott Scherer has come up with a strong amendment that makes this bill better.

**Scott Scherer, Representative, Dunn & Bradstreet:**

We have three minor amendments to present to you today ([Exhibit J](#)). One is to change the existing language in the law. In Section 2, page 2, line 25, we wanted to insert the word "other" in front of "unlawful purpose". In the past, we have not been concerned about a lot of criminal statutes, but this session, we have become increasingly concerned. There have been incidents in other states where we do business, and the state collects information, including personal identifying information about businesses. If a business gets a negative report that may result in the business being denied credit or a transaction not being concluded, and that business would certainly say that they have been harmed by that. We wanted to make it clear by adding "other" in front of "unlawful purpose" if the "harm" in line 24 is harm that is committed unlawfully. We understand there is an exemption in NRS 205.4655, but the concern is that the exemption of the burden may somewhat shift to Dunn & Bradstreet, and they may have to prove the exemption. They would like to tighten up the elements of the crime itself and not have to rely on the exemption, which is somewhat ambiguous. On Section 2, page 3, line 6 is the enhancement. We are suggesting that the word "natural" be added in front of "persons," so that the enhancement would only apply if it were identify theft of five or more natural persons, rather than businesses.

Section 2, page 3, line 30 is trying to state that there is a rebuttable inference that occurs and applies only to the enhancement and not to the primary elements of the crime. Instead of adding the amendment we suggest onto line 27, add it to subsection 3, "proof of possession" and then to the existing language. Those are the three things we are trying to do: limit the enhancement to natural persons, limit the rebuttal inference to the enhancement itself, and make it clear that the harm done is done unlawfully.

**Chairman Anderson:**

The selling or sharing of identifying information between the businesses is often part of our problem in terms of identity theft. I serve on the Cyber Crime Task Force and have been dealing with this particular issue since Senator Raggio first proposed this legislation during the 1993 session.

**Scott Scherer:**

If it is personal identifying information of individuals that is being transferred among businesses, the enhancement would still apply to those individuals being harmed. From what I have seen, in the more serious cases, the individual has a



tougher time being able to clear their name and deal with the problems because they do not have the resources. If you were to steal the identifying information of a business and use it to unlawfully harm that business, you would still be subject to the penalties in Section 2, subsection 1. It would still be a crime, but there would not be an enhancement. When individuals who had fewer resources available to deal with identity theft issues were being harmed, that was a better case for the enhancement.

**Assemblyman Horne:**

Your third proposed amendment may apply to enhancements and subsection 3. Section 1, paragraphs 3, 4, and 5 state the terms of standard are reasonable cause. Why are we talking about reasonable cause? They cannot make an arrest here, but upon probable cause and arrest, but we just have it listed as reasonable cause.

**Senator Hardy:**

I think those terms are being used interchangeably.

**Dan Brubaker:**

You are absolutely correct. The reasonable cause and probable cause are used interchangeably. We actually visited this on the Senate side in the Judiciary. Reasonable suspicion is a lesser level of proof than probable cause.

**Assemblyman Horne:**

That is where my concern is. There is reasonable suspicion and probable cause, and now we have added reasonable cause. If you are using these terms interchangeably, I would have more comfort if it was changed to probable cause.

**Senator Hardy:**

I have no discomfort making this language match what is in NRS elsewhere for the type of cause we are talking about.

**Troy Dillard, Administrator, Compliance Enforcement Division, Department of Motor Vehicles:**

We are here in support of S.B. 155, particularly in relation to the increased penalties that target those individuals committing identity theft. As the primary issuing agency for identification within the State of Nevada, we see individuals attempting to bribe technicians to obtain a real Nevada driver's license on a regular basis. The going street price today is about \$500 to get an identification card fraudulently. With the forthcoming Real ID Act, the cost is projected to be \$1500 to \$5000 to obtain a Real ID card because the manufacturing process and security features are so difficult to duplicate. As a

result, we are anticipating the number of individuals who attempt to obtain these identifications will increase. The increased penalties will be a great deterrent for individuals who might think to conduct such an activity.

**Barry Gold, Director, Government Relations, American Association of Retired People:**

[Read from prepared testimony ([Exhibit K](#)).]

**Janine Hansen, President, Nevada Eagle Forum:**

We brought up some concerns in the Senate and some of them are the same ones that members of your Committee have brought up. We do support the intent of this legislation. We have been very supportive of legislation dealing with identity theft. On lines 3 and 4, we see that the postal inspector may arrest without a warrant. Although this may be practical, we are concerned about the legal precedent that it would set. Looking at lines 5 and 6, we certainly do not have a problem if this offense has been committed in the presence of the postal inspector. We have some concerns about lines 7 and 8 where the postal inspector can arrest someone for a felony or gross misdemeanor although he did not witness it. We are not sure exactly what that means.

In Section 3, lines 9 through 11, we have the same concerns as Assemblyman Horne with the term "reasonable cause" instead of "probable cause." We would feel more comfortable if it were "probable cause" as he mentioned. Even if they believe it has the same meaning, it takes away any possible confusion, and we would certainly support that change. I am assuming that on lines 12 through 14, where it says "on a charge," they have actually had a charge filed against the person. If there is a charge, I would think there would be an opportunity to obtain a warrant. We do not have a problem with Section 5 where a warrant has in fact been issued. We are concerned that this can extend to any felony. You mentioned that it could extend, so we may have postal inspectors being involved in arrests without the use of a warrant, arresting people for any felony. It appears to me that the bill allows postal inspectors to possibly arrest people without a warrant for any felony or gross misdemeanor in the State of Nevada. It is important that we walk a fine line in protecting our citizens from identity theft or other crimes, while also protecting their constitutional rights and their rights to due process. This particular bill may cross that line just a little bit. We do support the other provisions of this bill—the five or more persons and the limit of \$3,000—but we just wanted to express our concerns about these issues about not having a warrant.

**Chairman Anderson:**

There is a handout from Ms. Rowland and Mr. Turco that was submitted when the bill was heard in the Senate ([Exhibit L](#)). In Section 2, subsection 5, the bill reads "a rebuttable inference that the possessor intended to use such information in violation of this section." What is that inference?

**Senator Hardy:**

It is a rebuttable inference. This wording was taken from legislation in Arizona law. I would certainly allow your legal staff to determine whether that is a consistent term of art for Nevada's purposes or if there is a term of which is more consistent with what we use throughout NRS.

**Chairman Anderson:**

That question was not raised in the other House?

**Senator Hardy:**

Not that I recall.

**Chairman Anderson:**

I will close the hearing on S.B. 155.

Let me open the hearing on Senate Bill 93 (1st Reprint).

**Senate Bill 93 (1st Reprint): Revises the provisions governing the crime of grand larceny of a motor vehicle and an offense involving a stolen vehicle. (BDR 15-697)**

**Senator Warren B. Hardy, Clark County Senatorial District No. 12:**

We live in a nice, gated community in southern Nevada, and I had family over on Thanksgiving. My brother-in-law drove his car to our house and parked it in front of our gated community. We enjoyed our day together, and he went out to go home but his car was gone. Somebody had stolen his car from in front of our house in broad daylight, and it was a fairly crowded area. There were many cars out there and people coming in and out of other homes. I spoke to some of my friends at the Las Vegas Metropolitan Police Department (LVMPD) about what was going on. It was then that I learned that Clark County was number three in the nation in auto theft. We are now number one. That is not anything we should be proud of. Stan Olsen approached me during the interim about submitting this bill for LVMPD in an effort to try to assist them in the increasingly difficult situation in Southern Nevada.

**Ray Flynn, Assistant Sheriff, Las Vegas Metropolitan Police Department:**

This bill is part of our multi-phase strategy to combat auto theft. I am not proud to say that Clark County is number one in the nation now in auto theft. We are moving in the wrong direction. There is a new team of leadership in our auto theft unit. We now have the Repeat Auto Theft Suspects (RATS) program. We are also tracking 114 car thieves with the Vehicle Investigation Project for Enforcement and Recovery (VIPER), which is a multi-jurisdictional task force to go after chop shops. We are purchasing license plate readers that we can attach to our patrol vehicles, as well as detective vehicles, that automatically read license plates at intersections or while driving. We are having volunteers go into the community to etch vehicle identification numbers (VIN) into the windows. We are also making service announcements. Twenty percent of cars that are stolen had the keys in them. We have also deployed bait cars, which have been shown on the news programs in southern Nevada. We equip these cars with cameras, alarms, and tracking devices, as well as automatic features that lock the suspects in until we get there and can take them out.

We have a concern about how the courts are handling auto theft suspects. We are well aware of the pressures on the prison and court systems. Unfortunately, auto theft has become a sport in southern Nevada. Last year LVMPD alone arrested 1,154 adults for auto theft. One hundred and sixty of these individuals had prior arrests for auto theft. Twenty five had conviction for grand larceny auto. Twenty had convictions for other auto theft charges. None of them had done any prison time. It has become routine for them to get probation. The bill specifically goes after grand larceny auto and attempted grand larceny auto. For the average person that we arrest in auto theft case, we charge for possession of a stolen vehicle. Grand larceny auto has a high burden of proof. We think this will add to our strategy of going after the most prolific thieves. I am a firm believer that 5 percent of criminals commit 90 percent of the crimes. We want to go after our top suspects.

**Chairman Anderson:**

Oftentimes younger individuals are out joyriding in stolen cars. If someone is found in that situation, could he be arrested and charged for theft of the vehicle? If he is arrested a second or third time, would he then fit into the category, depending upon the price of the vehicle?

**Ray Flynn:**

This law only applies to adults after the second conviction, so that they do not receive probation. It only applies on the second conviction. The way the law is written, the first conviction would allow the jury to grant only probation. It only applies to grand larceny auto with a high burden of proof. Normally, that is where an office or a surveillance team of detectives actually see the suspect

steal the car. Normally we are under the direction of the district attorney's office. They prefer that if we catch somebody in a moving vehicle, we routinely charge them with possession of a stolen vehicle. This bill, as it is written, does not apply to minors joyriding.

**Chairman Anderson:**

Where does this state the age limit?

**Ray Flynn:**

It is stated that if those under age 18, unless certified as an adult, commit something like this, he would be charged as a juvenile delinquent. It would not be our intention to send a 16-year-old to prison for joyriding.

**Chairman Anderson:**

We have sent 15-year-olds to prison who were out joyriding, and there was a subsequent consequence associated with that. It brought them into the criminal justice system because of the serious nature of the first crime.

**Assemblyman Horne:**

I know you appreciate the prison overcrowding issue. You know we have been trying to alleviate those problems. The concerns I have are that we take the discretion away from the judges, the problem with the grand larceny, and the problem with intent. Intent can be walking between cars in a parking lot and finding burglary tools in your pocket, which in one case was a marble used to break the window. That concerns me. There are already statutes we use for repeat offenders. We have the small habitual and the large habitual standards. Do those statutes not cover defendants who continually steal cars?

**Ray Flynn:**

Last year we would have charged 25 people if this bill had been in effect, hoping for them to get jail time. That is 25 additional people who would be in the prison system. We are aware that auto theft is a major problem in southern Nevada.

**Tim Kuzanek, Representative, Washoe County Sheriff's Office, Nevada Sheriffs' and Chiefs' Association:**

We are in support of S.B. 93 (R1) and hopeful that our colleagues in the south will be able to straighten out the alarming rates at which vehicles are being stolen. The unfortunate thing is that typically in the Washoe County area, we generally follow after Clark County, so we can expect our stolen vehicle rates to increase in our area. That happens with a number of different crimes. We see this as a prohibitive or preventive measure that we can use as a deterrent in the

future to slow down the incidents of stolen vehicles that we have or expect to have in Washoe County.

**Chairman Anderson:**

Do you believe that increasing the penalty would be a deterrent to crime?

**Tim Kuzanek:**

We hope it will because there is currently no deterrent. It seems common with repeat offenders of this particular crime that they may steal several similar vehicles in a single day. With the repeat offender who has a prior conviction, we can deter them from continuing to commit that crime in the future.

**Chairman Anderson:**

How many vehicles were stolen in Washoe County last year?

**Tim Kuzanek:**

I did not receive that information from our detective bureau, but I can get it for you.

**Assemblyman Cobb:**

You believe that it is a small percentage of people that are committing these repeat offenses. Do you feel this would not crowd the prison system since it would only be that small amount of people and that jail would act as an effective deterrent to their future car theft offenses?

**Ray Flynn:**

Yes. The auto theft commander, whose beliefs are based on our numbers from last year, has stated that there would have been 25 people convicted and sent to prison on their second conviction of auto theft. That would have been a deterrent to others. While those prolific auto thieves are in prison, they are not stealing other cars.

**Assemblyman Horne:**

Does the number 25 not include attempts? I still question the number of 25 convictions of grand larceny in Clark County. When the number of attempts is added in as well, the number is likely way over 25.

**Ray Flynn:**

The offenses charged most often are possession of a stolen vehicle and attempted possession of a stolen vehicle. There are very few people who are convicted of grand larceny auto. When they are, it is usually pleaded down to attempted grand larceny auto. That is where we came up with the number of

25 people who had been arrested with prior convictions and received only probation.

**Assemblyman Segerblom:**

I thought with the new cars and electronics and security systems it would be more difficult to steal cars. Is it not?

**Ray Flynn:**

When the auto manufacturers come up with a new anti-theft device, it does not take long for the auto thieves to figure it out. We also know that 20 percent of thefts happen because people leave the keys in their car, either in front of their house, in their garage, or more commonly when running into a convenience store on a hot day. They do not want to be inconvenienced by shutting their vehicle off. I am not saying that people ask to be victimized. The suspect taking the car has no right to it. You can have all the best devices in the world, but if you do not take the necessary precautions to defeat it, it is going to continue.

**Jason Frierson, Public Defender, Clark County:**

It is difficult to oppose a bill that, on its face, makes sense, and we certainly understand that the goal is to target these repeat offenders. However, we have habitual criminal statutes in place to deal with these. During my time at the Public Defenders Office, I have rarely had a client who was a repeat grand larceny defendant who did not get jail time. In those rare instances where they do only get probation, there is a reason for them to get probation. Taking that ability away from the courts, the system, the prosecutor, and the defense attorney to negotiate those kinds of cases takes away the ability to look at each case and deal with it individually. There are oftentimes conflicts between the investigating agency and the prosecutor because what seems apparent on its face at an arrest is difficult to prove in court, and that is the way prosecutors handle cases. There are reasons behind negotiating a case in a way that gives the court discretion to deal with a certain set of circumstances and we are opposed to taking that away from the court. When we tie the courts hands without any regard for IQ, age, or specific facts and circumstances, such as if this person has a violent history or not. We complicate our prison population, and we end up putting people in prison that oftentimes are nonviolent. The ones who have a habitual history are going to be exposed, and those who have a violent history are certainly going to have a difficult time getting probation.

There are some measures in the works for community education, as well as the dummy vehicles that we have. This year there is already a 22 percent reduction in Clark County's auto thefts. We need to take some time to see if those efforts prove worthwhile. So far, they have been working.

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**Chairman Anderson:**

We will close the hearing on S.B. 93 (R1).

Meeting adjourned [at 10:27 a.m.].

RESPECTFULLY SUBMITTED:

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Doreen Avila  
Committee Secretary

APPROVED BY:

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Assemblyman Bernie Anderson, Chairman

DATE: \_\_\_\_\_



**EXHIBITS**

**Committee Name:** Committee on Judiciary

**Date:** April 25, 2007

**Time of Meeting:** 8:00 a.m.

<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
S.B. 31	C	Carol Sala	Prepared Testimony
S.B. 31	D	Barry Gold	Prepared Testimony
S.B. 35	E	Ben Graham and Kristin Erickson	DUI Prosecution Information
S.B. 35	F	Gerald Gardner	Prepared Testimony
S.B. 35	G	Brett Kandt	Memorandum
S.B. 35	H	Lee Rowland	Proposed Amendments
S.B. 155	I	Dan Brubaker	Prepared Testimony
S.B. 155	J	Scott Scherer	Proposed Amendments
S.B. 155	K	Barry Gold	Prepared Testimony
S.B. 155	L	Lee Rowland	Memorandum