MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON CORRECTIONS, PAROLE, AND PROBATION

Seventy-Fifth Session
March 10, 2009

The Committee on Corrections, Parole, and Probation was called to order by Chairman William C. Horne at 8:13 a.m. on Tuesday, March 10, 2009, 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/75th2009/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; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman Bernie Anderson
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Katherine Malzahn-Bass, Committee Manager
Julie Kellen, Committee Secretary
Kyle McAfee, Committee Secretary
Karyn Werner, Committee Secretary

OTHERS PRESENT:

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Karen Hughes, Lieutenant, Vice Section, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Bernard W. Curtis, Chief, Division of Parole and Probation, Department of Public Safety
P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety
Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada
Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada
Lucy Flores, External Affairs and Development Specialist, University of Nevada, Las Vegas, Las Vegas, Nevada
Katie Monroe, Executive Director, Rocky Mountain Innocence Center, Salt Lake City, Utah
Kate Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas, Las Vegas, Nevada
Sam Bateman, representing Nevada District Attorneys Association, Las Vegas, Nevada
Renee L. Romero, Director, Forensic Science Division, Washoe County Sheriff's Office, Reno, Nevada

Chairman Horne:
[Roll taken.] We are going to hear two bills today: Assembly Bill 238 and Assembly Bill 179. Both of them are my bills, so it is William Horne day. Vice Chair Segerblom will be conducting the hearings.

We will start with A.B. 238.

Assembly Bill 238: Provides that persons who are convicted of certain offenses involving pandering or prostitution of a child are subject to lifetime supervision. (BDR 14-177)

Vice Chair Segerblom:
We will open the hearing on A.B. 238.

Assemblyman William C. Horne, Clark County Assembly District No. 34:
I am presenting Assembly Bill 238. This bill deals with lifetime supervision for pandering a minor. I am not going to say that it is a simple bill, but the concept is very simple.

If a neighbor of yours were to go down the street in the neighborhood and solicit a 15-year-old to have sex and was discovered, he would be convicted of a sexual offense of a minor. He would have to report on the sex offender registry and be put on lifetime supervision until such time that he could petition to be removed from that registry. That time period is seven years. If that same person wants to have sex with a minor who happens to have been put out for prostitution, he would likely be cited and possibly arrested for solicitation of prostitution, but he would not have to register or be put on lifetime supervision.

I would like to think that those are equal crimes, because they are putting a minor at risk from something that we have put on our books that we are going to protect these minors from. Why should this person, who has decided to participate in this type of conduct, be protected because this child victim happened to have been a runaway, for whatever reason, or forced out on the streets to prostitute?

This bill is attempting to shine a light on these people. It is a risk that one is going to take if he solicits a prostitute. This prostitute may be underage. He may have to register as a sex offender for life if he chooses to conduct himself in this manner. Some people have told me that the age of consent in Nevada is 16 years of age. What about those kids who are 16 years old or older? The difference is that a 16- or 17-year-old who truly consents to having sex with an adult is different than a 16- or 17-year-old who is participating in an illegal activity. That is not consent, because a minor cannot consent to do an illegal activity. That is how I draw this distinction. This is a policy question for this Committee on whether or not we want to protect those minors who are not afforded the opportunity to live in the suburbs and be protected by our general statutes on sexual offenses against a minor.

Sitting next to me is Assemblyman Hambrick, who had a similar bill. Instead of having two separate bills, he has agreed to be a primary sponsor on my bill. He is asking this Committee to amend his name onto A.B. 238 as a primary sponsor.

Assemblyman John Hambrick, Clark County Assembly District No. 2:
We are all familiar with Judge William Voy's attempts to address some of these issues in his family court in the Eighth Judicial District. His courtroom has seen, and I prefer to use this word only once, prostitutes. In the federal sector, they are called victims. He has seen them as young as 11 years old.

The teen sex trade is a disgrace to any state that tolerates it. I am thankful to Chairman Horne for adding my name as a primary co-sponsor. This scourge has got to be addressed. Civilized society has no place for the teen sex trade. It must be stopped.

Most of you know my background, and I come to this in a beat cop mentality. Some say that we are never going to stop it, not on our beat, but we must.

Vice Chair Segerblom:
Right now, it is illegal for someone to have sex with someone under the age of 16 years. Is that correct?

Assemblyman Horne:
That is correct.

Vice Chair Segerblom:
Does this change the penalty for prostitution or voluntary sex?

Assemblyman Horne:
The charge for sexual assault on a minor under 16 years of age is not going anywhere. That will still be there and still be applicable. However, what is different is that sex with a prostitute who is 16 or 17 years old will no longer be a consensual act. It will be a felony crime requiring lifetime supervision.

Vice Chair Segerblom:
Is this a knowing crime? If they are under 18 years of age, but the person soliciting sex did not know that, does that make a difference?

Assemblyman Horne:
I do not believe that should make a difference. We currently have statutory crimes for sex with a minor. Age of consent is 16 years of age, and under that it becomes statutory rape. We have all heard the stories of the gentleman who

goes to the nightclub, and the girl looked like she was over 21 years old and had a fake ID. He came to find out, after sexual relations with her, that she was under the age of 21 or even under the age of 16. He can be convicted of statutory rape. That is the level that we place on protecting these kids. It does not matter if he knew, if she lied with a fake ID, or if she looked older. This is a group that we are going to protect.

If you move that level of protection to these kids who are on the street, I think that the protection should be the same. The vast majority of the kids on the street, no matter their age, are not there of their own volition. They have been forced or coerced to be there, and I believe that level of protection should exist. How do we attempt to dry up this solicitation of minors? I believe that once it is understood that if the person is soliciting sex from a minor, and he would have to report if caught, it would stop people from seeking out prostitutes in the first place.

This is not going to affect the legal brothels that we have. Those operations are legal, and the proprietors of those businesses thoroughly vet their workers, and that should not be a problem. If there was a minor who was working at a brothel, someone would stand a chance of being convicted of this crime.

Vice Chair Segerblom:
Does this also include the pimp who puts the girl out there? Will they be subject to lifetime supervision?

Assemblyman Horne:
Yes.

Vice Chair Segerblom:
Because we are going to amend the bill to add Assemblyman Hambrick's name, are you interested in having anyone else be a sponsor?

Assemblyman Horne:
Anyone else who would like to amend their name onto the bill, I would be happy to have them.

Vice Chair Segerblom:
Assemblyman Cobb, do you want your name on this great bill?

Assemblyman Cobb:
Actually, I would.

Assemblyman Horne:
It was pointed out to me that this will have to be done in drafting later, to get the true intent of this bill because it incorporates *Nevada Revised Statutes* (NRS) 201.300 through 201.340. At NRS 201.300, subsection 3, it says that "this section does not apply to the customer of a prostitute." Obviously, that is not the intent of this bill; it is supposed to apply to a customer of a prostitute. We may have to amend the definition of "minor prostitute" in this bill in order to incorporate the "customer."

Assemblyman Hambrick's bill was basically the same bill, but his bill adds a conviction for an attempt to crime. That would be the amendment proposed to be blended from his bill into A.B. 238. Assemblyman Hambrick's bill does not have a bill number yet, but it is Bill Draft Request (BDR) 15-977.

Assemblyman Anderson:
Will we be seeing this in a mock-up?

Assemblyman Horne:
Yes, this will be in a mock-up ready for the Committee's consideration at a work session yet to be determined.

Assemblyman Anderson:
Assemblyman Hambrick is going to drop his bill?

Assemblyman Hambrick:
It is my intent to let it die. I do not want competing bills out there. I would like to see my bill merged into Chairman Horne's bill.

Assemblyman Carpenter:
Assemblyman Horne, could you explain the amendment with NRS 201.300? How would you amend that?

Assemblyman Horne:
It was brought up to me this morning that this section does not apply to a customer of a prostitute. I am not exactly sure how the drafting would go, but it would outline what a minor prostitute is. For a prostitute under the age of 18, in the context of this bill, it calls for lifetime supervision for those customers of the minor prostitute and those persons who put her out to prostitute. Right now, the draft does not include the customer, but we want the customer to be included for these penalties, in this context for minors. We will have an opportunity to look at that when we have the mock-up.

Assemblyman Carpenter:
It is probably there now to protect the legal brothels in the rural areas. We need to be careful how we draft this.

We have these laws on the books. How successful are they at getting convictions now?

Assemblyman Horne:
There are not a large number of convictions. I received a notice of eight arrests in 2008 from the Las Vegas Metropolitan Police Department (Metro). From the District Attorney's (DA) Office, there were 11 people charged with this crime in these parameters. That was the request that I had made to them. I was asked how much this lifetime supervision proposal was going to cost. The numbers were small, and until this bill passes, it is not a felony crime. We are looking at small numbers now.

Assemblyman Carpenter:
I represent the area where there are legal brothels. Every time I go to Las Vegas, it makes me wonder why things go on there that we are able to control in the rural areas.

I understand what you are getting at, and I have no problem with it as long as it does not reach into the places where brothels are legal. That is the best way to handle it because the police make regular checks on the brothels, and the girls have to see a doctor regularly. I think it is a better situation, and I want to make sure that we do not disturb that.

Assemblyman Horne:
There is no intent of going into the legal brothels in the rural areas.

Assemblywoman Parnell:
Am I reading this correctly that there would be a level playing field for both the pimp and the customer? Is that what this bill does as far as level of punishment and lifetime supervision?

Assemblyman Horne:
Yes. I think they are equally responsible. The customer is the person who has the demand, and the pimp is supplying that demand. They are on either side of the victim. Without this demand—the customer—the pimp has nothing to provide for this child. I think that they are equally complicit in this crime.

Assemblyman Anderson:
This trade in underage prostitution, even in a legalized system, is unfortunately growing tremendously. I think that even though we have taken steps in the past to protect those who are being forced into houses of prostitution, whether they are legalized or not, the police cannot be there 24 hours a day supervising the activities of those places. We have to be concerned about that and make sure that the pandering or transportation of these people through the state does not take place. We want to make sure that these perpetrators are charged. Does this not happen with this piece of legislation?

Assemblyman Horne:
I know that I have already said this, but it is not our intent to reach into the legal brothels. I do not think that anyone would turn a blind eye if someone was forcing minors into these legal establishments, nor do I believe that the operators of these legal establishments want those minors there. They do everything that they can to get them out of there. How bad would it be for business if they had minors in the brothel, and there was a sting, and their customers were arrested? The operators do not want that situation, nor do we want it. If somebody tries to dodge this by hiding this activity in a legal brothel, we need to punish them.

Assemblyman Carpenter:
They are going to lose their license to operate. You need to be very careful.

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
We wholeheartedly support this bill. Lieutenant Karen Hughes, who is standing by in Las Vegas, can probably give a more technical side as to why we support the bill.

Karen Hughes, Lieutenant, Vice Section, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
The department supports this bill. We see the sexual exploitation of these kids every day. I do not want to get too technical, but I do want to go beyond some of the comments that have already been made in regard to the numbers. Last year in 2008, just our unit was able to identify 150 exploited kids who have been put into a life of prostitution. Many of those kids are from Nevada. Some are transported throughout the country to Nevada, and are exploited within our Strip Corridor in Las Vegas. They are not exploited into legalized houses of prostitution. This is specific to Clark County. It is alarming to us to see the number of kids who are coming into this lifestyle as young as 11 years old. Many are high-risk runaways between the ages of 11 and 15. They are being exploited by the pimps who consider them quite vulnerable. They are turned

out into a life of prostitution where they are soliciting customers and tourists within our corridor.

We support the bill wholeheartedly.

From a pimp's standpoint, these men are profiting off the backs of these young kids, and these kids are a special group of victims. They are damaged, and it is a difficult road to recovery for them if they do recover their innocence. In my unit, I have an entire squad that deals with nothing but child pandering cases, and we made 84 arrests last year of pimps and those who have exploited these kids in their life of prostitution. Some of them have been what we call the bottom girl in the stable; that is also a part of the recruitment and training of these young kids as they come into a life of prostitution.

We are making arrests. I cannot speak to the numbers of convictions, but I am sure that the Clark County DA's Office can attest that we were pretty successful, especially in child pandering cases. We charge for statutory sexual seduction. When these pimps recruit these girls into what they would like these young ladies to believe is a lavish lifestyle, the girls are sexually assaulted, beaten, and raped. That is typical behavior of these pimps. Lifetime supervision is appropriate for these types of offenders. They are pretty horrific.

I made a presentation last week to my department and the sheriff, and we spoke about quite a few of the cases that we are now putting together. The focus of my unit is on pandering and putting the violent offenders behind bars, and many of them prey on our kids. It is a feather in their cap when they have a child who is part of their stable. It is a strong statement when we can get a pimp in custody and sentenced, and if he is released, he has lifetime supervision. These pimps deal with each other and recruit from across the country, and lifetime supervision, in my opinion, is very appropriate.

Bernard W. Curtis, Chief, Division of Parole and Probation, Department of Public Safety:

We are in support of this bill. It is the right thing to do, and yes, there will be some impacts upon the Division of Parole and Probation, but it is well worth it.

P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety:

Within the division is a sex offender registry. I wish to express our concurrence with Chief Curtis, as the bill will have an impact, but we will absorb that. We think that it is the appropriate bill for us.

Vice Chair Segerblom:
While we say lifetime supervision, the same provisions that apply to other lifetime supervision will apply here, correct? There is an appeal process, and after a certain number of years one has the right to appeal for removal of his name.

P.K. O'Neill:
Lifetime supervision is handled by Parole and Probation. Yes, they would also have an appeal process within our tiering system of the sex offender registry.

Vice Chair Segerblom:
Do you know what tier this would be, or would it depend on the case?

P.K. O'Neill:
Under the current guidelines that we work under, I cannot say for sure because it depends on the criminal history of the individual. Most likely, because of the age of the victim, they would probably fall into tier 2 or tier 3.

Vice Chair Segerblom:
Are there any other individuals who would like to speak in favor of this bill? How about those in opposition?

Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada:
In this instance, we do not take issue with the effort in requiring that people who victimize those under the age of 18 have to register. Our concern is that we do not believe this bill does that. This bill relies on a statute, and that statute is the pandering statute in which subsection 1, paragraph (a) in NRS 201.300 provides that someone "who induces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution" is guilty of pandering. That is essentially a conversation in a bar.

While we have not, at the Public Defender's Office, represented a significant number of cases where the prostitute turned out to be under the age of 18, there is a reason for that. It is because we are often involved in representing those juveniles in a family court capacity, protecting them. However, we have, in the last couple of years, represented nearly 100 defendants charged with pandering where they were essentially having a conversation at a bar.

Paragraph (a) does not require that there be an agreement to exchange money, and it does not require that there be anything other than encouragement for someone to engage in what is otherwise a legal activity. In the counties where

it is legal, if you are encouraging someone to engage in prostitution, this will subject you to felony treatment in the statute.

My issue with the instant bill is that it is relying on that statute and possibly opening the door to require people to register as lifetime sex offenders who are not necessarily predators. We have no issue with isolating, identifying, and registering for life people who victimize children.

Our concern is that this bill opens the door, and we have had many examples where the judge has thrown out a case because the judge concluded that it was just a casual conversation at a bar. For every one of those cases, there are other cases that do not get thrown out or get negotiated because of fear of lifetime felony implications. We believe that paragraph (a) is the primary problem with this bill and its reliance on that statute. We are going after those who threaten or force someone to engage in prostitution with the pandering statute. Paragraph (f) deals with the exchange of money, and if someone enters into an agreement to convince someone to become a prostitute and discuss an exchange of money, that is illegal conduct.

To simply say, "There is an opening at the Bunny Ranch; I think you should go apply," and to make this a felony and to rely on this statute for lifetime supervision, the implication is problematic. I have spoken with law enforcement about the effort on putting "attempt" into the pandering legislation, which broadens it even more. If you encourage or "attempt" to encourage someone to engage in prostitution, that broadens it. We would be far less concerned if paragraph (a), which requires no exchange of money, was removed from the pandering statute. To some extent, that would eliminate the need for concern, litigation, and continued appeals on cases where it is a conversation at a bar. While that might seem like the exception to the rule, oftentimes that is what we, at the Public Defender's Office, deal with, the exception. Those cases are oftentimes negotiated down or dismissed, but it is a tremendous amount of litigation, and for those individuals, a tremendous amount of exposure over a broad statute that makes it a felony to have a conversation.

Assemblyman Anderson:
When I read NRS 201.300, I read paragraph (a) as a preliminary sentence which includes "encourages," and it gets progressively harsher with threats and exchange of money. It seems to me that one needs paragraph (a) and any of the other paragraphs in order to fit into the pandering definition.

Jason Frierson:
I would like it to be read that way, but, unfortunately, in practice, pandering is charged under any of those sections. I believe from paragraph (e) to

paragraph (f) it says "or." That means any of those criteria would meet the statutory requirements for pandering. The threats of force and other criteria are there but do not have to be relied on. If someone encourages someone to engage in prostitution, that meets the definition of pandering. It has been charged that way, at least in Clark County.

Vice Chair Segerblom:
Realistically, was this a conversation with an undercover officer?

Jason Frierson:
Yes, they are typically sting operations. This is where an undercover officer is at a bar, typically in a casino, and she is targeting people who she identifies as potential panderers. I have a transcript from a recent preliminary hearing where the undercover officer listed the factors that they look for, and it was the way the person dresses, looks, and their race. That was that particular officer's criteria for the type of person they would approach at a bar to engage in a conversation and to feel out whether or not that person was trying to pander them. This undercover officer would rely on language that, through their training, they believe is typical in pimp language.

In the course of representing individuals who are charged with this crime, we have obtained some of the materials that the officers rely upon. In particular, there is an article from 1979 that officers today rely on about pandering language, the lingo, to determine whether or not this person at the bar is saying things that would make him a panderer.

Vice Chair Segerblom:
When you said that they look for a certain race, what race would that be?

Jason Frierson:
That would be African American. An attorney in our office collected some statistics over the last couple of years of the pandering cases that we have had. While the typical pandering cases resulted in 25 arrests, it appears 36 percent of those were black males. The sting operations resulted in 66 arrests, and 97 percent of those targeted were black males. The officer testified that is what she looked for.

Vice Chair Segerblom:
If we eliminated paragraph (a), you would have no problem with the rest of the bill?

Jason Frierson:
Whether or not someone is labeled as a sex offender for life, I think, is within the purview of this body, and we would respect what the Legislature decides are appropriate levels of supervision. We would have no opinion on this bill if paragraph (a) was removed from the statute. We think that would make the statute much less problematic, and therefore, relying on it to register someone as a sex offender much less problematic.

Assemblyman Carpenter:
I think I am getting the sense of what you are saying. You are able to get many of these people off? Is that correct?

Jason Frierson:
A good percentage of all our cases negotiate down. There is no exception in this case. The difference in this case is that people are subjected to sex-related crimes, and for it to be that level of penalty, with lifetime consequences for something that could turn out to be casual conversation, there is much more at stake.

Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada:
I echo what Mr. Frierson said.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
We would like to echo the sentiments expressed by Mr. Frierson. Obviously, the idea that racial profiling is being used in order to address pandering is highly problematic. We hope that you take that into consideration. Beyond that, this statute and all the statutes that relate to pandering are extremely broad. It is likely that the legislative intent, when these statutes were created, was meant to be broad. When the Legislature changes the application of criminal penalties, it highlights how overly broad the pandering statutes are.

Currently, the crime of pandering is not limited to illegal prostitution. There is one exception, and that is in NRS 201.354, which makes an exception for licensed houses of prostitution. The definition of pandering, as it relates to prostitution, is not limited to illegal prostitution. Before you make any decisions on this bill, I encourage you to review all of the statutes that this bill is proposing to cover because, for example, NRS 201.300, subsection 1, paragraph (e) covers an individual who "takes or detains a person with the intent to compel the person by force, threats, menace or duress to marry him or any other person." What this would do is cover the young girl who is

17 years old and her boyfriend who is 18 years old and is encouraging her to runaway with him. As you see, the language provided there is broad.

Nobody knows better than this Committee the seriousness with which the label of "sex offender" affects a person's life. Because of that, we have challenged the application of the law as this body applied it in the 2007 Session. Currently, we are involved in litigation in the Ninth Circuit. There is a possibility that the question of the laws as currently written, and not yet in effect in the State of Nevada, could go all the way up to the Supreme Court. Congress, at a federal level, is reviewing the Adam Walsh Act, and that is with good reason. It is being applied in problematic ways across the nation. Being classified a sex offender can prohibit a person from living in a certain place, cause lifetime supervision, be extremely expensive, and in the cases in which a person who, under paragraph (a), for example, induces or persuades a person to engage in prostitution, which could be legal if in a rural county, they would be covered. For example, two young girls who are best friends are talking about what their future is going to be. If the two of them are inducing each other to become prostitutes when they turn 18, that would be covered by the way this statute is written.

Most importantly, the way that the pandering statutes are written, it shows that pandering is not actually a sexual act. What this does is, if this body decided to apply the definition of "sex offender" to the acts as delineated in the pandering statutes—although this panderer is not committing a sexual act but is inducing people or trying to get somebody to become involved in prostitution—is label that person as a sex offender even though they are not committing any sexual acts. This dilutes the pool of sex offenders and, as someone noted earlier, is meant to address those individuals who are the worst of the worst.

I am not here to say that some of the possibilities that might fall under the pandering statute are awful. I am saying that the pandering statutes are overly broad and are vague. When applying the sex offender definition to these statutes, I think that it opens up a Pandora's Box that this state should not open up.

Assemblyman Anderson:
Is it the American Civil Liberties Union's (ACLU) position that anything dealing with sex crimes should not be dealt with because of Megan's Law and pandering, and we should just ignore the questions dealing with the peculiarity of Nevada's rural counties that have legal prostitution? I do not think that any other state has legalized houses of prostitution, so we should stay away from the question entirely? Is that what your contention is?

Rebecca Gasca:
That is quite a complicated question. You are right, and as far as I am aware, Nevada is the only state where the majority of its counties allow prostitution. The application of different prostitution laws is very different in our state. Therefore, because we find ourselves in a unique situation—not only with prostitution but also with the sex offender laws that are currently in litigation—Nevada as a state should not move forward with an additional overbroad application of sex offender laws.

I am by no means an expert in this area, and for those of you who have detailed questions, I would be happy to put you in touch with Maggie McLetchie, who is the attorney currently litigating the Adam Walsh Act at the Ninth Circuit.

Assemblyman Anderson:
Maybe they are overly broad because Nevada has those 15 counties that have legal prostitution. We have always been careful in making accommodations for that. Nevada may not feel it is necessary to wait around for the determination of a particular piece of federal legislation. We can wait for the court system to operate forever, and we would never get anything done.

Rebecca Gasca:
What you said does ring true in that the body of law that covers issues of public policy is ever-evolving. This Legislature needs to make decisions at some point and has to make it in the best interest of their constituents. I am not here to determine how the history of Nevada law relates to the legalized forms of prostitution. I am sure that could be a doctoral dissertation. I am here to ask you to consider the implications of the way that the pandering statutes are worded and how that applies to the sex offender laws. It is a large question, but I am here with good intent to offer the information that we have.

Assemblyman Hambrick:
There was an analogy mentioned a few minutes ago about this bill affecting the casual conversation in a bar. Do you believe that an 11-year-old could have a casual conversation with a pimp about prostitution?

Rebecca Gasca:
I am not an attorney, and I am not involved in situations like that. I do not think that me saying yes or no would make a difference. It would be a pure supposition.

Assemblyman Hambrick:
That is what I am asking.

Rebecca Gasca:
Is it possible? Probably, and I understand that there is an intent of this bill to address highly problematic situations that have been identified in the public sphere. I go back to the way that these laws are written, and how overly broad they are. The targeting is not clear.

Assemblywoman Dondero Loop:
With all due respect, I think you missed the operative word "bar." I have three daughters, and I do not think any of them at 11 years old looked old enough to be in a bar. Rephrasing that question, do you think that an 11-year-old could sit in a bar and be induced into that situation?

Furthermore, the way I am reading this—and someone in the legal community will have to correct me if I am wrong because I am an educator—what if two 18-year-old girls are sitting in a bar who have fake IDs, and they are talking to each other about becoming a prostitute. Using the language of NRS 201.300, a panderer "induces, persuades, or encourages." In this case, "persuades" means, "I have decided to do it." "Encourages" means, "I have decided to do it." So does "compels." It does not mean that the person has just thought about it and did not do it. Someplace along there, the action takes place, and that is the part that is escaping me when I am hearing the opposition.

Rebecca Gasca:
The example of the bar was presented by Mr. Frierson. I could be wrong, but when I presented the example of two girls talking, I did not describe it in the setting of a bar because that could happen in the setting of a school. Teachers or principals could hear it, and after extracting it out of them, they both get in trouble, and one parent is extremely upset and wants their daughter's friend to be prosecuted because they believe that she is the one who is influencing this.

When it comes to finding 11-year-olds in a bar, it could very well be possible. An 11-year-old girl can get a fake ID and get into a bar. Young women these days are very mature looking sometimes, and as has been identified, problems such as that have been presented. I am not here to deny that there is an issue that is meant to be addressed by this bill. I am here to help put forward the recognition that these pandering laws, as currently written, are overbroad in their application to sex offenders.

I apologize to the Committee. I am not an attorney, so I cannot follow up on that last interpretation of paragraph (a).

Assemblyman Horne:
We know that this is not a court of law, and this will not be a rebuttal. I knew about the Adam Walsh dilemma that currently exists, and I asked Legal to keep that in mind in drafting this. I was aware of that when working on the bill.

Many of these Committee members have served with me on this Committee before and know that I am one of the first to step up when particular bills or statutes are not supposed to capture certain people or are too broad. In introducing it, I understand, as with all pieces of legislation, there may be some issues. With that said, I brought this bill with the best intent, which was primarily to protect our children who are out there being victimized in the realm of prostitution.

Vice Chair Segerblom:
I will close the hearing on A.B. 238.

[Recessed and reconvened.]

Vice Chair Segerblom:
I will open the hearing on Assembly Bill 179.

Assembly Bill 179: Revises provisions governing post-conviction genetic marker analysis. (BDR 14-869)

Assemblyman William C. Horne, Clark County Assembly District No. 34:
Today, I am presenting Assembly Bill 179. Assembly Bill 179 creates a post-conviction deoxyribonucleic acid (DNA) testing statute. Currently, Nevada provides for post-conviction DNA testing only for death row inmates. The Ninth Circuit Court of Appeals recently ruled that prisoners have a right to this testing if the evidence is in the state's possession and the evidence has the potential to prove innocence.

If this Committee remembers testimony from the Department of Corrections earlier this session, the cost per year, per inmate, for incarceration is more than $20,000. A recent study establishes an error rate of 36 percent in the criminal justice system. Besides being the right thing to do, it would be fiscally prudent to identify those innocent persons who are currently being incarcerated in our state.

With me today are Katie Monroe, the Executive Director of the Rocky Mountain Innocence Center, and Professor Kate Kruse of the William S. Boyd School of Law Innocence Clinic. They will go through this bill in more detail and describe

how post-conviction DNA testing is supposed to be implemented and the successes that they have witnessed.

There are some friendly amendments to this bill being presented today. In fact, this is a consensus amendment made by Katie Monroe, Kate Kruse, and Sam Bateman of the Nevada District Attorneys Association. One of them will outline, in more detail, the amendments which have already been passed out to you (Exhibit C).

I was first introduced to the Rocky Mountain Innocence Project last year when I was working at Snell & Wilmer. A couple of people there had benefited by this effort to find those individuals who have been wrongfully convicted. The DNA evidence at the time of their conviction either was not available or, due to less advanced technology, gave insufficient results. Those individuals were later exonerated for the crimes that they were incarcerated for and have since been released.

I will be relinquishing my seat to Lucy Flores at the witness table.

Assemblyman Cobb:
Do you want to take questions on the particulars of the bill now? I did not know if the witnesses were going to speak directly to the aspects of the bill or just provide a background on the Innocence Project.

Assemblyman Horne:
They are going to do both.

Assemblyman Cobb:
I will wait until they have the chance to testify.

Lucy Flores, External Affairs and Development Specialist, University of Nevada, Las Vegas, Las Vegas, Nevada:
As Chairman Horne mentioned, when we did this presentation regarding wrongful convictions, we did bring some exonerees who gave their story. That is what we are going to start with today. Unfortunately, we could not bring anyone in person, but we are going to introduce a short video regarding that.

In addition, we are going to talk about wrongful convictions and give a background on that, but we are also going to go through A.B. 179, which would extend Nevada's post-conviction DNA testing statute to noncapital crimes.

[Showed video (Exhibit D).]

I will hand it over to Katie Monroe to give an introduction on the wrongful conviction area.

Katie Monroe, Executive Director, Rocky Mountain Innocence Center, Salt Lake City, Utah:
[Provided PowerPoint presentation (Exhibit E).]

We investigate provable and credible claims of actual innocence in three states: Nevada, Utah, and Wyoming. We work in conjunction with the Innocence Clinic formed at the beginning of this school year that is based at William S. Boyd School of Law in Las Vegas, Nevada. It is directed by my colleague, Professor Kate Kruse. Together, we work on cases and investigate claims of innocence in Nevada.

That video introduced you to three exonerees from Texas. We have actually had, in our country, 232 DNA exonerations. The most recent happened a few weeks ago. What this means is that these individuals had claims of innocence and were able to get access to physical evidence that had been left by the actual perpetrator at the scene of the crime 5, 10, 15 years ago and had been collected at the time. The evidence either was never subjected to DNA testing because it was not available as a science or for any number of reasons was not subjected to DNA testing. DNA testing has the capacity to take the biological evidence left by the actual perpetrator and identify both the person who did not commit the crime and, in 50 percent of those exonerations, the actual perpetrator of the crime. These 232 individuals came from 31 different states and, on average, spent 12 years individually in prison; collectively they wrongly spent 2,789 years in our prisons.

DNA testing has established that our criminal justice system makes mistakes. It has also established a number of causes for those mistakes. You heard a few of them in the video. Eyewitnesses often get it wrong, and police often rush to judgment and latch onto the wrong person. Sometimes prosecutors cut corners to win a conviction, and defense attorneys often do not do justice for their client. Most importantly, DNA has established that a number of forensic sciences that we used to rely on in the past, like blood, hair, or fiber comparison, are not actually reliable.

DNA evidence has the scientific certainty to establish who did or did not commit a crime. As a result, it serves a variety of purposes. It does not just benefit the innocent prisoner, but it is also a service to the crime victim, law enforcement officials, and the public, because at the end of the day, no one wins when the wrong person goes to prison. When the wrong person is in prison, the right person is still free on the streets to commit additional crimes. The crime victim

has not had closure or justice because the person who actually committed the crime against them or their loved one has not been brought to justice and imprisoned. The public's faith in law enforcement is weakened drastically, and precious public funds are wasted on investigating, trying, prosecuting, and imprisoning the wrong person.

I wish I had a particular person at the table to speak to today, but I do not. Her name is Jennifer Thompson Cannino, and she is a rape victim from North Carolina who illustrates the importance of DNA testing to the crime victims better than anyone else. Jennifer was a college student in North Carolina, and she awoke one night to someone in her bedroom and was subjected to four hours of violent and almost fatal rape.

During the course of her rape, Jennifer decided that she was going to survive, and she was going to memorize the face of her attacker so she could put the person who was harming her in prison.

When Jennifer was finally able to escape her rape and get to the police that same evening, they asked her, "Can you identify your rapist." She said, "Absolutely." She had actually gotten her rapist into the kitchen and turned on a light. She had gotten him to relax a little bit in her house so she could get a good look at him. Unfortunately, as a result of the way eyewitness identification works, she started with a drawing, then moved on to photo identification, and then to a live identification. Jennifer actually picked the wrong young man, Ronald Cotton. This innocent young man went to prison for Jennifer's rape while the actual rapist, Bobby Poole, went on to rape eight other women in Jennifer's apartment complex before being caught and put in prison.

Ronald was able to get access to DNA testing 12 years into his prison sentence, and the evidence proved not only that Ronald Cotton was not her rapist, but that Bobby Poole was.

The reason Jennifer is not here is because she and Ron, after this horrible ordeal, became friends and now tell their story together. Last week they published a book called *Picking Cotton* that they wrote together and which tells the story, so they were not available to come here today.

I cannot overemphasize what DNA testing has the capacity to do for all of us in the room, and particularly for crime victims. When the wrong person goes to prison, they suffer a double tragedy. It is easy for us to say this as an Innocence Project, but our goal is not to assist a guilty person in prison. Our goal is to identify people in prison who may be innocent and give them a remedy to be rightly released. If that DNA evidence can exonerate an innocent

person, it can be put into a program, and ideally, the DNA can identify who actually committed the crime. We see this as a win-win situation for law enforcement officials. The DNA evidence has the capacity to prove who actually committed the crime with scientific certainty. If someone were to bring a false claim of innocence and get access to DNA testing, the DNA testing would have the capacity to shut down that case forever and bring true finality. Either way, law enforcement wins and the crime victim wins, because the innocent person is released, the guilty person is identified, or a false claim of innocence is put away forever.

I want to make one last policy point. Currently, there are 44 states that have DNA testing statutes. Often, when DNA testing is being considered as a statutory remedy for a prisoner with a claim of innocence, the concern is how many requests there will be. Will there be a flood of litigation? From our research, the answer to that is no. I have personal experience on this. I have worked on DNA cases in Virginia, Maryland, and Washington, D.C. I now work on them in Nevada, Utah, and Wyoming. The states that have tracked the number of requests for DNA testing have found that there have been very few requests. There are a couple of reasons for that. The vast majority of criminal cases do not have biological evidence that can be tested for DNA. This is because it was not the kind of crime where the perpetrator left biological evidence at the scene, or because it was not collected or preserved. In order to get access to DNA testing, the prisoner must meet standards. He must be able to say that he is making a credible claim of innocence and that evidence exists to prove that innocence. Most statutes build in a punitive measure for those who might be bringing a frivolous or false claim. The innocence projects that handle these cases have strict vetting processes because our goal is not to assist a guilty person. Long before we would ever seek DNA testing in a case, a years-long investigation has gone on to make sure that this prisoner has a credible and provable claim on innocence.

I would like to turn it over to my colleague, Professor Kate Kruse, who is going to walk us through the components of this bill.

Vice Chair Segerblom:
Ms. Kruse, do you have the proposed amendments?

Kate Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas, Las Vegas, Nevada:
Yes, I have the proposed amendments.

I am going to talk about the post-conviction DNA testing statute in Nevada, the changes that we want to make to it and how those changes fit into the larger

picture of the remedies that are available for people who are claiming innocence in Nevada.

Like 43 other states in the nation, Nevada does have a statute that allows prisoners to petition for post-conviction DNA testing. However, unlike 42 of those states, Nevada does not have a remedy for prisoners not on death row, including all of the people you saw in the video, Ronald Cotton, and anyone who is not serving a death sentence. Nevada's statute applies only to capital cases. There are six states that have no statute, while Nevada and Kentucky have a statute that applies only to capital cases.

It is important to understand that once someone is convicted, innocence is no longer a question. For people who are not serving death sentences, the whole appellate process is focused on whether they got a fair trial and not on whether the jury reached the correct result, and one cannot admit new evidence into the process. The appellate courts are looking solely at whether or not the defendant received a fair trial based on the evidence that was presented at that trial. There is a habeas corpus remedy where someone can file a post-conviction habeas corpus claim, but that does not provide a remedy for someone who is claiming innocence. It provides a remedy for someone who claims that there was a constitutional violation in the way his case was handled.

The way that someone claiming innocence could get a new trial based on newly discovered evidence would be through NRS 176.515. This is a statute that allows one to petition a new trial based on newly discovered evidence. This is typically what new DNA evidence is; however, motions for a new trial under that statute are limited to two years. In 1989, the Nevada Supreme Court decided, for important policy reasons, that the court could not provide exceptions for that two-year limit.

The case *Snow v. State*, 105 Nev. 521 (1989), is interesting because it is based on an assumption, which was probably true at the time, that the longer the case is around, the staler the evidence becomes. It is not fair to the state to allow a petitioner to reopen a case after a certain amount of time because the evidence that could be used to reconvict them at a new trial has gotten older and less useful.

The first DNA exoneration was in 1989, the very year that the *Snow* case was decided. That first exoneration changed the way that people looked at older cases. Unlike other evidence, DNA testing gets more powerful as time goes by because DNA technology improves. Blood or body fluid samples can now be tested that could not be tested in 1989. In 1989, a significant amount of a sample was needed in order to subject it to testing. The technology has

improved so that only small amounts of biological material left at the crime scene are needed. We used to think that we did not have a test available for hair samples without the follicle, but now the technology is advancing to the point where hair can be tested even if it does not contain the cells in the hair follicle. We are at the frontier of developing technology to lift DNA off of fingerprints. There is an ever-widening pool of old evidence that could bring us answers that we did not have before, because the evidence is actually getting better rather than worse.

In 2003, Nevada passed the DNA testing statute that we currently have. It recognized that DNA was different from other kinds of evidence, and it created a procedure to petition for DNA testing if there is a reasonable possibility that new tests available now would change the outcome of an old case. If the DNA tests came back favorable to the petitioner, our DNA testing statute allows an exception to that two-year limit. There is a special exception for DNA because of the different type of evidence that DNA is. However, as we have mentioned, it applies only in capital cases.

I am going to talk about the five main changes that we are proposing to A.B. 179. We have had some time to talk to Mr. Bateman, who is representing the district attorneys (DA), and to work on some additional language which has been distributed to you (Exhibit C). We all find this language agreeable. We are all concerned about the balance between allowing a remedy for truly innocent inmates when new technology can shed light on their old evidence, and preventing a flood of people who could get in under the current language in the Nevada statute.

The first major change is in section 1; this would extend Nevada's post-conviction DNA testing statute to all category A and B felonies. If you go lower than that, you are talking about crimes that carry a maximum sentence of five years. This adds a subsection 3 to section 1. Subsection 3 creates a clear definition of what needs to be alleged in the petition for DNA testing. It basically says that, if a prisoner wants to ask for testing, in his petition he must state what evidence he thinks the state has, and explain why testing that evidence now would help support a claim of innocence.

The reason the petition needs to specify these things is because we want courts to be able to sort through these petitions. In the event that there are petitions that are filed that do not have a basis in the case, the court can look at the face of the petition and dismiss it. These are amendments in what is now subsection 4. It creates a sorting mechanism for the court. The court can dismiss petitions that are inadequate on their face, and can also appoint counsel in cases where a good claim appears to be alleged. I think that is especially

important so that someone can go through and negotiate with the DAs about what should be tested and the extent of testing. When the tests come back for many of these cases, there can be stipulations for a new trial or to dismiss the charges if the testing warrants it.

Assemblyman Carpenter:
Will you go back to the situation where you want to change it to an A or B felony and give your reasons?

Kate Kruse:
When you get down to category C felonies, the sentences are one to five years. I think the types of cases that are most important are older convictions where the technology has changed since the time of trial, and the person is still serving his sentence for that crime. It is not for defendants who could have gotten a test prior to trial—but decided not to—but for those where the technology has changed and a new test could be done. I think limiting testing to category A and B felonies would be responsive to the concern of the overburdened crime labs that they would be flooded with requests for testing; yet, it would leave a remedy available in those situations where post-conviction remedies are needed.

Assemblyman Carpenter:
As I understand it, in your handouts (Exhibit F), there are very few people who ask for this, especially when your organization, or an organization similar to yours, does a lot of pretesting.

Kate Kruse:
I share your concern to make the remedy as widely available as possible. However, it takes several years to develop the type of investigations that we are talking about. We do not see those types of investigations occurring in cases where the perpetrator is serving less than five years in prison. The one exception might be for inmates serving sentences for lower category felonies where habitual offender enhancements have created longer than normal sentences.

Assemblyman Carpenter:
It is okay if I disagree with you, right?

Assemblyman Anderson:
Justice Hardesty's Advisory Commission on Sentencing has a piece of legislation that they have been pursuing in this general area. One of the issues that they have been looking at is that the people who are incarcerated may want to pay for the testing themselves. Thus, the lower end crimes would fall into this category.

Oftentimes, individuals do not behave well inside the prison system, and as a result, they end up being there longer than two or three years. Part of our prison population may be serving longer than you were anticipating, and you would not want to cut off their opportunity. Are you trying to broaden this so anyone who feels they have been wrongfully convicted would now have the opportunity to have DNA testing done?

Kate Kruse:
Your questions may be better addressed when Renee Romero from the crime lab comes up. I believe that our willingness to limit this to A and B felonies comes from our desire to present you with some compromise legislation where everyone who is involved in these questions can agree to the terms. We would not oppose broadening the crime categories or broadening them with the provision that people in other crime categories would have to pay for the testing themselves.

The proposed amendments to the bill also create two disincentives for those who know they are guilty and who are filing petitions. First is their knowledge that the test results will be forwarded to the Parole Board if those results are not favorable to the petitioner, and this appears in subsection 8, paragraph (f).

The second disincentive appears in subsection 12. The cost of the genetic marker analysis will be born by the Department of Corrections only if the petitioner is incarcerated, is indigent, and the genetic marker analysis is found to support the petition. Slightly before this hearing, we and Mr. Bateman agreed to "support the petition or if the results of the testing are inconclusive." This means that it is only if the tests come back in a way that is not favorable or is culpatory to the petitioner that they would be asked to bear the cost. I think that the prospect of having the costs of the tests laid on them, and also having the Parole Board notified of unfavorable results, provides a disincentive to people. It is our experience that it is an important part of the process of counseling our clients as to whether they want to push for genetic marker analysis—DNA analysis—and that they understand there is a downside for them if it comes back unfavorable.

Vice Chair Segerblom:
This may be a rhetorical question, but if one is an incarcerated indigent, how does that person pay for it?

Kate Kruse:
I take your question to being whether it will really deter people if they know that they are judgment proof.

Vice Chair Segerblom:
I said that it may be a rhetorical question.

Assemblyman Anderson:
Can the lab reject a sample if it knows it is not of a quantity or quality to be tested? What happens if testing has already been requested and completed? They cannot request a second or third test, thus increasing the cost to the Department of Corrections, correct? Even when new technology comes around, do they have only one request?

Kate Kruse:
The process is that the court holds a hearing on the petition after it is filed. Part of that hearing process is to request an inventory from the agency that holds the evidence. At that hearing, the court and both sides consider what evidence actually exists and what condition it is in. The court will then make an order for the evidence to be tested. For the court to request an order, there must be a reasonable possibility that the petitioner would not have been prosecuted or convicted had the results been obtained earlier, that evidence exists, and the evidence had not previously been subjected to genetic marker analysis, unless it was subjected to another type of analysis or an analysis that was inconclusive.

The last major change that our bill—not the amendments—makes is to provide notice to the victims, pursuant to the statutes that already apply to victims' rights, that the hearing has been ordered.

The flip side of one of these stories of a wrongfully convicted person is the story of Christopher Ochoa, and the parallel story to that crime about Jeannette Popp, who is the mother of the young woman who was raped and murdered in that case. Under interrogation by the police, Christopher broke down and confessed to a crime that he did not commit. Usually, when that happens, the law enforcement officer is pushing and saying that they, the police, have the evidence, and they have a scenario of how they think the crime occurred.

Based on the physical evidence that they had at the time, the police believed the crime was committed by more than one person, and they believed it was a multiple sexual assault that involved both rape and sodomy. The confession that Christopher Ochoa gave was consistent with the police's interpretation of the physical evidence at the time. He included the detail that the victim was shot as she was down on her knees begging for her life. For 12 years, her mother had to live with that image in her mind. When the true perpetrator finally confessed, it was a single person and a single rape. There was no

begging for her life on her knees before she was shot. It was a much less painful thing for the victim to live with. The true perpetrator confessed because he went through a religious conversion while in prison for other rapes.

The DA behaved honorably in this case. When the true perpetrator contacted them, they contacted Christopher Ochoa and told him that someone else confessed to his crime. They asked him if he wanted the DNA to be tested. He was afraid of how it would affect his parole and declined the offer to test the DNA while still claiming his guilt. Eventually, he contacted the Innocence Project of New York and asked for help. He finally consented to have the DNA testing completed. As soon as that request was made, the DA tested it because they wanted to know and to preserve the evidence. When the DNA was tested, it turned out that the man who confessed after the fact was, indeed, the true perpetrator. Both Christopher Ochoa and his co-defendant, who was also wrongfully convicted, were excluded by those tests.

I have had the pleasure of hearing Jeannette Popp speak, and it is a moving story. Some say that Christopher Ochoa should have to live with the consequences of falsely confessing. He chose to confess and plead guilty; however, the victim in that case did not choose to live with the version of events that was not true. DNA has the power to change everyone's view of the case and to bring the truth to light. We would encourage you to extend that remedy beyond capital cases.

Lucy Flores:
I wanted to bring your attention to a publication that you all have that is called *200 Exonerated* (Exhibit G). It is little snippets of stories of the first 200 exonerees that were exonerated based on DNA evidence. We are not dealing with one victim, but many victims. It is in all of our interests to have the true perpetrator incarcerated rather than an innocent person. I hope that the Committee will take a moment to look at this.

Vice Chair Segerblom:
What is the average cost of the DNA tests?

Katie Monroe:
There are a variety of DNA tests. The most basic form is testing just to identify the DNA sample. This is called Short Tandem Repeat (STR) testing, and that testing costs anywhere between $800 and $1,500. There is a secondary type of testing that isolates a biological sample from a male or female and is often run in a rape case. This testing is called Y-chromosome Short Tandem Repeat (YSTR) testing and costs anywhere between $2,000 and $2,500. The most expensive DNA testing is a new form called mitochondrial testing. This can be

done on hairs, bones, and teeth. This is not a common form of DNA testing, and we have never requested it in a case. Most of the 232 exonerations were based on biological evidence that can be tested by an STR or Y-STR DNA test. A mitochondrial test can run in the range of $10,000 or more.

I would like to give a couple of extra numbers. In Utah, where we unanimously passed a post-conviction DNA testing statute applying to all felonies, we have had seven requests for DNA testing since 2002. Arizona, which passed its statute in 2000, has had no more than 20 requests. In Wyoming, we passed this same statute last year, and they have had no requests, and we do not have any in the near future. Nevada should not expect any kind of flood. There will be some fiscal impact, but it will not be huge amounts. We made these numbers available in the handouts you received earlier (Exhibit F).

Assemblyman Cobb:
Is this bill intended to have a retroactive effect on those who have already been convicted?

Katie Monroe:
In spirit, yes. One of the things that we have discovered is that these exonerations are based on cases from 10 to 15 years ago when DNA testing was not available, or the testing that was available is not as scientifically accurate as it is now. Ideally, going forward, testing will happen in a pretrial setting, and the questions about who the actual perpetrator may be will happen before anyone goes to trial or is wrongly convicted. That said, this bill is not meant to be retroactive. The idea is that if someone ends up being wrongfully convicted and finds himself in prison and testing was not available at the time, or as testing gets more advanced, or for any number of reasons, it is important to test that evidence. Ideally, we will see fewer numbers going forward.

Assemblyman Cobb:
There is an issue of spoliation of evidence because we do not hold onto this evidence indefinitely. However, this bill requires that you cannot apply that retroactively because, in many cases, the evidence has been removed, so there is nothing to compare it to anymore. I have not examined the entire bill and amendments to see if there would be a legal issue there, because I do not think there is any type of allowance for spoliation of evidence on behalf of the DA's office or the courts.

The other issue is bringing these matters before the trial occurs. We do not want to have the cost of the trial when we can clear an individual with DNA testing ahead of time. I have been told by the DA that they already do this if there is a question of identity.

Katie Monroe:
All of the cases that I have worked on personally, and the cases that we are currently working on, are from some years in the past. There are some cases that raise the legitimate question that DNA testing was not available at the time. This bill does not require evidence preservation. I commend Nevada because we often find in this state that the evidence does exist. We have a case right now that is 26 years old, and all of the physical evidence from the crime scene was preserved by the trial court. We can put this kind of matter to rest. In other states where I have worked, in 75 percent of the cases, we do not find the evidence because it is no longer available. That is a tragedy for all involved. This bill does not mandate evidence preservation, but it does require that once a petition is filed and a hearing is scheduled, the state must inventory the evidence it has and preserve it for the purposes of the testing going forward. We did not attempt to address the former complex issue of statewide evidence preservation in this bill.

Kate Kruse:
There may be other legislation coming on evidence preservation, but this remedy applies only to evidence that exists at the time the petition is filed. It requires that the evidence be held onto while the petition is pending, and that an agency would not respond to a petition by losing or destroying evidence. It is a separate question, and we would hope that it would not be necessary to test evidence into the future, but in the event that there is evidence to be tested and technology has advanced to the point where we can get answers to stuff that we did not know before, it allows us to seek those answers. At this point, people who are convicted of noncapital cases in the State of Nevada can be sitting in prison with the evidence sitting in the crime lab or evidence vault, and there is no way to test it. There is no way for the person sitting in prison to ask for it to be tested.

Assemblyman Cobb:
There is nothing in existing law or in this bill, and is certainly not the intent of this bill, to provide some type of remedy to a convicted felon because evidence has disappeared over time, intentionally or not? We are not going to see court cases down the line where a convicted felon is making the argument of the state not living up to the requirements under this statute; therefore, since there was spoliation of evidence, he should be released?

Kate Kruse:
This does not provide a remedy based on the destruction of evidence. It provides a remedy for the testing of evidence that still exists.

Assemblyman Cobb:
It is a due process argument, regardless of whether it is explicitly written in statute, if the state does not live up to their obligations under evidentiary rules and such.

Kate Kruse:
There may be a due process argument that could be made, but this statute would not be the way to make it. The way to make that argument would be through already existing state habeas corpus proceedings. This would not change that in any way.

Katie Monroe:
We had a case in Virginia where the courthouse wrongfully disposed of all of the physical evidence in a capital case. It was understood by all of the authorities that the evidence was supposed to be preserved. The state actually said that it was on the verge of criminal. The defendant, Robin Lovitt, was represented by Ken Starr. He was facing the death penalty, and he had no remedy because the evidence no longer existed. He had no argument to make other than saying, "If the evidence were still around, it would prove my innocence." That evidence was not, so there was nothing further to do in the case. Fortunately, the governor at the time, Mark Warner, commuted Lovitt's death sentence to life, with the understanding that there was a potential claim of innocence, but he had no remedy.

Assemblyman Horne:
I came up to the table for clarification about the last line of questioning on the spoliation of evidence, but I believe that Ms. Monroe addressed that adequately.

Sam Bateman, representing the Nevada District Attorneys Association, Las Vegas, Nevada:
I wanted to note, on behalf of the Nevada District Attorneys Association, that we are not opposed to post-conviction DNA testing. We believe, in the vast majority of cases, that it is going to vindicate individual prosecutor's decisions and vindicate law enforcement's investigations. In the past, we have worked with the Rocky Mountain Innocence Project doing DNA testing. Currently, there is one in the Clark County District Attorney's Office from the early 1980s. I want to make sure that the Committee is aware of the Nevada District Attorneys Association's position in that regard.

Initially, when we reviewed A.B. 179, we were concerned. The concern was that this statute in existence applied only to those convicted of the death penalty. It did not have some of the safeguards that other statutes have across the west that encompass more felony convictions than just those of individuals

sentenced to death. As a result, I spoke with the sponsor, Assemblyman Horne, and I reviewed some of the statutes in the west to see what kinds of safeguards are included in those statutes. I wanted to know what other states were doing in this regard, given the fact that we are opening it up to a substantial amount of felony convictions.

I came up with an initial set of amendments that were taken largely from those other statutes. I sat down yesterday with interested parties, and we worked out the amendments that you have before you (Exhibit C). Those amendments are something that our association and interested parties can live with. I cannot speak for the Las Vegas Metropolitan Police Department (Metro) or any other law enforcement agency, but I believe that they feel comfortable with the amendments that are included. I think the amendments strike a balance between the interest in exoneration, if that can be done, and the interest of the people in the State of Nevada, in the finality of judgments. The amendments create some clear standards: they give courts flexibility to address cases, and they address who is going to pay the costs.

I am not as concerned about groups like the Innocence Project coming forward and asking for this testing. I am more concerned about the potential of a flood of requests, and I understand that there are numbers from other states that would suggest that this is not going to happen. Unfortunately, I think things happen differently in Nevada. I am concerned about an influx of, for instance, *pro se* or *pro per* petitions. We already deal with those now in the context of petitions for writs of habeas corpus, and they can be very time consuming and difficult to deal with. I think that the structure that we have included in these amendments and to the existing statute would address the potential for that type of litigation.

I would note one additional point. I spoke with our lab director, Linda Krueger, recently about this situation, and the status of their DNA testing in the Clark County laboratory. Currently, they are four months behind in DNA testing. We ask for quite a bit of DNA testing because it is more available for ongoing criminal cases prior to conviction. I think going forward, we will be doing more and more of that, but right now, we are four months behind on cases that are in the system where we are either trying to solve crimes or are in the actual criminal justice process prior to conviction, when defendants have the most rights.

The concern from the Clark County laboratory's standpoint is that a flood may occur and extend that four-month period. We are delaying investigations and hampering public safety to some extent. That is why the amendments are proposed the way they are. They strike that balance that will not have a

significant negative impact on the system. With the amendments, the Nevada District Attorneys Association can support A.B. 179.

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
We support A.B. 179 with the proposed amendments from the DA's office.

Assemblyman Anderson:
Currently, who covers the cost of the DNA testing that is done through the Clark County office for both the prosecution and defense? Is there a screening process with DNA testing? How is that information shared with the defense?

Sam Bateman:
I assume you are referring to prior-to-conviction testing. I do not know all of the funding mechanisms for how the Metro pays for testing, but I assume it comes out of their budget. The State of Nevada pays for it prior to conviction.

Assemblyman Anderson:
The State of Nevada or the county pays for it?

Sam Bateman:
That might be a better question for the representative from Metro to answer. I do not know how the funding operates for preconviction DNA testing.

Assemblyman Anderson:
What about the sharing of that information to all of the potential people whose DNA is tested?

Sam Bateman:
The first part of your question was how we screen. It is like any other investigation. We decide whether or not DNA testing would be relevant to the case. That is often done by law enforcement before it gets to our office. We may do it after it gets to our office upon further review of the case. We are obligated to provide to the defense attorney discovery regarding any reports in the case and any testing. Sometimes the defense will ask us to do specific testing, and if we think it is relevant, we might comply with that request. In anticipation, we either negotiate the case or go to an actual trial. We provide all information that we intend to use at trial to the defense. If the DNA ultimately is exculpatory, we have some obligation to provide that information as well.

Assemblyman Manendo:
Back in 2001, Assemblyman Price had a similar piece of legislation, so I appreciate this piece coming forward.

Along the same lines as Assemblymen Anderson and Cobb, when one is put into the position of trying to be convinced to confess to a crime, and when a test can be done to find out for sure if that is the right person, why is that not done in the first place? I have an issue with anyone spending time in jail or prison for a crime that they did not commit. I think that it is an absolute waste of time and energy for everybody in our system. The judicial system, the prison system, and jails are bloated, and nobody wins. Maybe you can explain that to me and why you believe that is not the right way to go.

Chuck Callaway:
I wholeheartedly agree with you. I think that the right thing to do, if we have that evidence beforehand, is to test it. In the majority of cases, we are either lacking the evidence, or the crime is not of a magnitude to justify the expense of the DNA testing beforehand. We might have other evidence which we feel is sufficient enough to prosecute. Submitting for a DNA test, which is expensive, is something that the officer or the department may choose not to do.

I do agree that if it is a case of such magnitude where someone could spend a degree of time in prison, it would be in the best interest of the public and the department to do that testing prior if we are able to.

Assemblyman Manendo:
In a case of rape or murder, if you have a piece of DNA, do you test in every single situation? And if not, why not?

Chuck Callaway:
I would like to say that, yes, we do. If we do not, it would be decided on an individual, case-by-case basis as to why that testing was not done.

Assemblyman Manendo:
Is it because you think you have the right person?

Chuck Callaway:
I would say in a case of major magnitude where someone is charged with murder or rape, and they will probably go to prison for a long time, that DNA would be tested prior to the trial date.

Vice Chair Segerblom:
I think, Assemblyman Manendo, we are dealing with prior cases as opposed to current cases. I think that they do test everything now.

Chuck Callaway:
We support this bill with the proposed amendments.

Renee L. Romero, Director, Forensic Science Division, Washoe County Sheriff's Office, Reno, Nevada:
I support the bill with the amendments. Initially, I did not support this bill, but now that I have gotten the chance to see the amendments, I do support it. I was concerned about all felonies and the floodgates, much of which has been discussed today.

Today, we test DNA for touched samples. We can process touch DNA, and I worry about the floodgates opening from the lower crimes in analyzing touch DNA. For example, a controlled substance case where a baggie of drugs was taken off of the individual, and now we want the bag tested for who touched the bag. Hopefully, there would be enough vetting out that something as irrelevant would not come forward, but that is where I had concerns. I do support the amendments that were provided today.

Assemblyman Cobb:
In reference to the sixth amendment listed on page 2, is that meant to be aimed toward achieving that goal of having these issues handled pretrial? It makes reference to tactical or strategic decisions, and I would like to hear more about that. Are you trying to require a defendant to request this evidence up front and avoid the cost of the trial? What type of penalty would there be if one does not request this pretrial and waits until after the trial?

Sam Bateman:
A number of statutes around the West have that type of limitation, which is to say that if DNA testing is readily available prior to trial and one chooses not to take advantage of that, or perhaps one chooses a theory of defense that would render DNA testing irrelevant, there could be a penalty. The example I can think of is sexual assault where someone claims that it was a consensual encounter as opposed to, "I was not there, and I did not do it." DNA would prove that. I think there is an interest in providing some incentive to do that up front and make those requests early on, if they are available, and to identify whether that can be helpful as opposed to going through the process with one particular type of defense and later, even five years later, someone makes the request. We would not be the only state to include something of that nature. I think it would vet these cases by having that particular requirement in there.

Assemblyman Cobb:
That answers my question, that you are just encouraging the defendants to request this up front in pretrial at their cost.

Sam Bateman:
Yes, and that happens now mostly in cases where DNA is an issue. Defense attorneys will file motions with the court to have their own independent testing done to either try to corroborate or to vet the testing done in our crime labs. They absolutely have that ability to make the motion prior to trial. Very rarely does the state oppose that type of motion so long as strict controls are placed upon the testing. The crime lab in Clark County has controls about how they send biological evidence out to private labs on request of defense counsels. Those are all intermediate steps the defense counsel can take if DNA is an issue in the case, and if it would make DNA an issue in the case.

I will make one more point. There is nothing in this bill that would eliminate the ability of a petitioner and a prosecuting agency from entering into a stipulation to test DNA evidence. There is one particular statute in another state that has that exact provision. While this creates a scheme for people to file these motions, there is nothing to prevent, for instance, the Innocence Project from coming to the Clark County DA's office and saying, "Hey, this is our case, and this is what we have been investigating. We think testing on this particular piece of evidence would be beneficial and helpful. Would you agree with us to do that?" For any of the other concerns that are out there for lower level felonies and such, this statute would not necessarily preclude testing where the parties agree to testing on their own terms.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
I am in support of A.B. 179. I would like to comment that the American Civil Liberties Union (ACLU) would like to see the language re-expanded out to include other felonies. As Assemblyman Manendo noted, we have bloating in our system, and in the cases in which we could spend $2,000 to exonerate an individual, rather than keep him incarcerated for five years, there would be a huge cost savings.

On the amendment that has been proposed, in section 1, page 3 of the document that you have (Exhibit C) it says, "A person convicted of a crime [crime and under sentence of death] category A or B felony..." What is also added is "who is currently under sentence of imprisonment." We would object to the addition of that language because we believe that the due process rights still cover their requests after they have served their time. This Committee knows that when a person is convicted of a serious felony, particularly A or B, it is difficult to live a productive life after their sentence ends. It is hard to do things, for example get a job, if there is a felony on one's record. If a person maintains his innocence and wants to try to get that conviction overturned after

he has already served many years, we are certainly of the ilk that he deserves to have his day in court and have that addressed.

Finally, there was a statement made earlier by one of the women from the Rocky Mountain Innocence Center who was testifying as to the intent of this bill and whether it is retroactive or not. Clearly, there have been 232 people mentioned today whose convictions have been overturned based on evidence that was kept from crimes that may have been committed as long as 25 years ago. We hope this bill will be entered in, as record of the intent of this legislative body, to allow those people whose crimes were tried years ago to have the opportunity to enjoy the full establishment of rights.

Vice Chair Segerblom:
It looks to me, due to the last sentence of the bill, it is definitely retroactive and applies to anyone who was convicted before October 1 or after October 1.

I want to thank you for bringing this. I think this a fantastic piece of legislation.

Assemblyman Ohrenschall:
I wanted to thank you as well, Assemblyman Horne. I actually got to meet Mr. Cotton at the William S. Boyd School of Law. As someone who served a decade of his life for a crime he did not commit, and going around lecturing and campaigning for this type of legislation, he makes a very powerful statement. It tears me apart to think that there might be people who are sitting in prison right now and who cannot access this DNA evidence because we do not have this provision in law.

Assemblyman Anderson:
Justice Hardesty's advisory committee has similar concerns, and Bill Draft Request (BDR) 14-518 will be dropped today which addresses some of the other concerns that were raised. The Innocence Project may want to take an examination of it.

Assemblywoman Parnell:
I do not know if you are all aware, but *60 Minutes* ran Mr. Cotton's story on Sunday night. It is probably still easy to access.

Vice Chair Segerblom:
We will close the hearing on A.B. 179.

[Assemblyman Horne resumed chair.]

Chairman Horne:
There is a work session on Thursday. I believe Chairman Anderson has a number of bills for the Assembly Committee on Judiciary's work session on Thursday.

[The meeting adjourned at 10:58 a.m.]

RESPECTFULLY SUBMITTED:

_____
Julie Kellen
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Corrections, Parole, and Probation

Date: March 10, 2009 Time of Meeting: 8:13 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 179	C	Katie Monroe, Kate Kruse, and Sam Bateman	Proposed amendments to Assembly Bill 179.
A.B. 179	D	Lucy Flores	Video of exonerees due to DNA testing.
A.B. 179	E	Katie Monroe	PowerPoint presentation.
A.B. 179	F	Katie Monroe, Kate Kruse, and Lucy Flores	Handouts explaining Nevada's post-conviction statute.
A.B. 179	G	Katie Monroe, Kate Kruse, and Lucy Flores	*200 Exonerated* booklet.