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

Seventy-Fifth Session
March 31, 2009

The Committee on Corrections, Parole, and Probation was called to order by Chairman William C. Horne at 8:24 a.m. on Tuesday, March 31, 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:

Assemblyman Lynn Stewart, Clark County Assembly District No. 22

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Nicolas C. Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Karyn Werner, Committee Secretary
Steven Sisneros, Committee Assistant

OTHERS PRESENT:

Donna Coleman, Child Advocate, Las Vegas, Nevada
Barbara Caldwell, Private Citizen, North Las Vegas, Nevada
Desiree Caldwell, Private Citizen, North Las Vegas, Nevada
Mark Woods, Deputy Chief, Division of Parole and Probation, Department of Public Safety
Tom Roberts, Lieutenant, Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department; and representing the Nevada Sheriffs' and Chiefs' Association, Las Vegas, Nevada
Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada
Maggie McLetchie, Staff Attorney, American Civil Liberties Union of Nevada, Reno, Nevada
Keith G. Munro, Assistant Attorney General, Office of the Attorney General
Howard Skolnik, Director, Department of Corrections
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General; and Executive Director, Advisory Council for Prosecuting Attorneys
Samuel G. Bateman, representing the Nevada District Attorneys Association, Las Vegas, Nevada
Lucy Flores, Rocky Mountain Innocence Center, Las Vegas, Nevada
Kate Kruse, Director, Innocence Clinic, Las Vegas, Nevada

Chairman Horne:
[Roll called. The Chairman reminded Committee members, witnesses, and members of the audience of Committee rules and protocol.]

We will start with Mr. Stewart's bill, Assembly Bill 325.

Assembly Bill 325: Revises provisions relating to sex offenders. (BDR 14-1028)

Assemblyman Lynn Stewart, Clark County Assembly District No. 22:
I am here today to present A.B. 325, which deals with sex offenders and distance. This issue was first brought to my attention by an advocate for the victims of sex offenders, Ms. Donna Coleman. The main purpose of the bill is to provide additional protection to victims of sex offenders. However, as I learn more about this and I talk to law enforcement, I have two additional objectives: one is to provide flexibility to the law enforcement officers in enforcing sex offender restrictions; and second is not to make it so restrictive that sex offenders are driven underground, or fail to report their residency and we have unintended consequences. We will hear the testimony of an individual who, as a juvenile, had a sex act performed against her, and then the offender moved in next door to the victim.

Restriction laws concerning sex offenders were first enacted in Alabama in 1996. Since then, laws have been passed in at least 21 states and approximately 400 communities. Current *Nevada Revised Statutes* (NRS) require convicted sex offenders to adhere to various conditions, including searches and visits by parole officers, drug testing, counseling, and residency restrictions, including distance from playgrounds and schools. This bill addresses some of the previously passed restrictions and concerns about these restrictions being retroactive. One thing that our bill does is to handle the situation of the retroactiveness.

I will quickly go over the bill; it is rather straight forward. On page 4 of the bill, it prohibits a sex offender from residing closer than 1,000 feet to his victim. Again, we will have testimony concerning that. This provision would be in effect on October 1, 2009. The other restrictions that were passed previously concerning sex offenders not living within distances of playgrounds and other places where children congregate was effective October 1, 2007. Putting both of these dates in removes the situation of being retroactive and, therefore, removes the ex post facto objection which we have had on many occasions.

Chairman Horne:
If I can stop you, Mr. Stewart. Briefly, the section that sets the date at 2007, are you saying that you received an opinion that it is not retroactive?

Assemblyman Stewart:
No. What I am saying is that there were some objections in the past to the previous restrictions concerning distance to playgrounds and schools before that date was put in. Individuals already living next to or near playgrounds and schools claimed that it was retroactive against them. They were already there

before the law was passed. So we put that in to make those previous restrictions not retroactive. Is that clear?

Chairman Horne:
Section 1, subsection 2, paragraph (a), states in that area, "without limitation, a public or private school, a school bus stop...daycare services, a video arcade...," et cetera. The provisions of this paragraph apply to the defendant who establishes a residence on or after October 1, 2007. So, someone who lives there today, who moved in late last year, would have to move if this goes into effect.

Assemblyman Stewart:
Correct. Those restrictions were already in previous law. If someone had been there in 2006 before that section of the law passed, they would not be affected. But if they moved in after the law was passed and went into effect ...

Chairman Horne:
I see what you are saying. This law came into effect in 2007. Let me get clarification from Legal. Mr. Anthony.

Nicolas C. Anthony, Committee Counsel:
Yes. That is correct. I believe the problem that they are hoping to fix stems from Senate Bill No. 471 of the 74th Session, which would have taken effect October 1, 2007, so this merely clarifies the intent of the effective date of that prior legislation.

Assemblyman Stewart:
That was our intent. Thank you.

Basically, that is it. We want to give an individual who is on parole or probation for committing a sex offense an additional restriction that he cannot move within 1,000 feet of his victim. Effective October 1, 2009, the other restrictions concerning playgrounds, schools, and so forth, are clarified to be effective October 1, 2007.

I have met with the Department of Public Safety (DPS) and they have an amendment that will make things more flexible. We sometimes have situations that are unintended. For example, we had a situation where a sex offender moved out into the country to comply with all of the restrictions and then housing developments came in around him. We had another situation where an 18-year-old was having consensual sex with a 14-year-old, but the parents objected. He was convicted, but later they got married and had children and grandchildren, so we do not want to break up the family. The DPS will present

an amendment that will give them more flexibility in making exceptions to the rule if there are extenuating circumstances.

That is basically the bill. We tried to make it flexible. We have tried to protect the victims of sex offenders without putting too many restrictions that would make enforcement more difficult, and also give some latitude to the sex offenders so they are not put into a situation that makes it difficult for them to obey the law.

Chairman Horne:
To address your attempts at flexibility, you mentioned the individual who moved out to the country and the restrictions came to him. I guess Parole and Probation (P&P) will address that when it comes up. I was thinking of a situation where an offender is living in a large apartment complex and then the victim unknowingly moves into that same apartment complex and later finds out the offender lives there. What if a victim moves in within that parameter to the offender as opposed to the offender moving near the victim?

Assemblyman Stewart:
That is why we would leave it up to the Department of Public Safety to assess the situation and determine the difficulty and danger of it. It would be up to them to make a determination; this amendment gives them that flexibility.

Assemblyman Mortenson:
Looking through the bill, I do not see where it says there is some discretion given to the Parole Board.

Chairman Horne:
That is going to be in an amendment.

Assemblyman Mortenson:
You said there was a situation where an 18-year-old and a 14-year-old had consensual sex and later they were married, after he had been convicted. What was the nature of his punishment? Was he put in prison, or jail, or do you know?

Assemblyman Stewart:
I do not know the exact punishment that was given to him, but they were put in a very difficult situation because they were in love and wanted to be together. The law would not allow that to happen, so we wanted to give the flexibility to law enforcement in dealing with individual cases that might have extenuating circumstances.

Assemblyman Mortenson:
That is good because the law should not be in the bedroom like that.

Assemblyman Segerblom:
This is to Mr. Anthony. As we talked earlier, the current tier system applies to the old law under which tier 3 relates just to people who have a high probability of recidivism. My question is, if the law that is on appeal to the Ninth Circuit were reversed and our Adam Walsh Act were upheld, would this tier 3 become that tier 3? Which tier 3 would apply?

Nicolas Anthony:
Yes, I would agree with your analysis. As you are aware, under the pending litigation, there is some question over the tier system and how that is determined under the Adam Walsh Act. The opinion of our office is that we are currently operating under the law that was in existence prior to the passage of Assembly Bill No. 579 of the 74th Session, our law that was in existence as of 2007. If this bill were to pass, it would be based on the tier system from 2007, which was based on the rate of recidivism.

Assemblyman Segerblom:
You talked about the situation of the statutory rape, which probably would not be a situation where that person would be in tier 3, so hopefully the bill would address some of the discretionary things that you are talking about.

Chairman Horne:
I see no other questions for Mr. Stewart. Is there someone else you would like to bring up to the table now? You said you had someone to testify. Is that someone in Las Vegas?

Assemblyman Stewart:
I believe Ms. Coleman is in Las Vegas, and she has a person with a personal experience.

Donna Coleman, Child Advocate, Las Vegas, Nevada:
I am here to ask you to vote for A.B. 325. When I learned that there was no law preventing a convicted sex offender from moving in next door to his victim, it was hard for me to believe. I do not know how many cases this affects in this state, but there is a newscast by Colleen McCarthy that is supposed to be played.

I would also like to tell you that I am fully supportive of the proposed amendment by the Department of Public Safety. I would also like to introduce the grandmother from the story that you will see, Barbara Caldwell.

Barbara Caldwell, Private Citizen, North Las Vegas, Nevada:
I would like the Legislators to know that I hope a bill will be passed to keep a sex offender from moving in next door to me. My granddaughter, at the age of four years old, was raped by a man who has now moved in right next door. After 39 years at my residence, I am now uncomfortable living there. I have grandchildren and great grandchildren and I am afraid to let them go out into the yard to play. I would like to see this bill passed to keep him from moving in next door to the victim. Thank you.

Chairman Horne:
This person who moved in next door to you, was this after a term of confinement?

Barbara Caldwell:
Yes, it was.

Chairman Horne:
Were you notified upon his release from prison?

Barbara Caldwell:
No, we were not notified at all.

Chairman Horne:
Is this person a family member or a family acquaintance? I am trying to get a picture.

Barbara Caldwell:
My daughter knew him at the time this happened. He was babysitting.

Desiree Caldwell, Private Citizen, North Las Vegas, Nevada:
I am the victim in this case. I want to state that I live this whole thing all over again when I go to my grandmother's house. I have a daughter who is almost 13 years old. At first, my daughter was there every weekend and went places with my grandma, but I no longer allow my daughter to go over there. Every time I go over there, I have to face him looking at me and laughing at me. It is scary to see him. I would also like to see this bill passed.

Chairman Horne:
I appreciate this. I know it is tough for you to testify before a committee, particularly under these circumstances. Are there any questions for Ms. Caldwell?

I have a question for you, Mr. Stewart. The bill says 1,000 feet from the property line of the victim. From this testimony, it appears that Mrs. Caldwell is the grandmother of the victim, but the victim does not live there. Do you think this bill would encompass family members?

Assemblyman Stewart:
As written, the bill would just apply to the victims themselves. It is my understanding that at one time the victim did live with the grandmother, so that would affect it if that was the residence.

Chairman Horne:
I just wanted some clarification on the scope of it.

Assemblyman Stewart:
We are not trying to make it too broad.

Chairman Horne:
I think that would make it too broad. If an offender moved next to your uncle who you visit all of the time, we would not want it to apply to that situation.

Assemblyman Stewart:
That is not our intent.

Mark Woods, Deputy Chief, Division of Parole and Probation, Department of Public Safety:
We have been working with Mr. Stewart, and we are requesting an amendment to this bill (Exhibit C). In short, the amendment we are requesting basically gives the Chief of the Division a little bit of latitude on issuing a variance on a case-by-case basis for the 1,000-foot rule. The reason for this is that our biggest concern is for the safety of the community. However, with the 1,000-foot rule, we have run into circumstances where a victim could live on one side of I-10 and the offender on the other side of I-10. They are within 1,000 feet, yet the person would have to go across an eight-lane freeway to get there.

A second scenario would be out in the rural areas. If an offender who is working in a mine is given a trailer to live in, and that trailer is within 1,000 feet of the property line of a ranch, but the house on the ranch is literally dozens, if not hundreds, of miles away, he technically would be in violation without this variance. The Division is requesting that, on a case-by-case basis, an offender can go to the office of the Chief and request a variance, with no guarantee that it would be given.

Chairman Horne:
My first thought, Mr. Woods, is if the Committee were inclined to adopt this amendment and give the Chief some discretion, are we going to hear a news program where Parole and Probation is saying, "The Legislature made the law like that and we had to use discretion"?

Mark Woods:
To be honest, some of these cases would be given a variance for very legitimate reasons; for instance, the freeway. It will also be very black and white on other cases where our offender wants to move into an apartment complex and we simply say no.

Chairman Horne:
You heard my question earlier about the restriction coming to the offender. If the offender is already living in an apartment complex and the victim moves into the complex knowing that the offender lives there, are you going to make the offender move?

Mark Woods:
Again, we would have to look at the case individually. There are apartment complexes all around, so if it would be more appropriate to have the offender move, we could. If we feel that it is still not clear-cut whether the offender needs to move, we have no problem going back to the Board or the court, explaining the entire situation to that body, and have them make the decision on that offender.

Chairman Horne:
I am not sure, and maybe you can explain to us, how either the offender or the victim knows where the other moves. I know it is different when you have an offender, and he tells you the address where he wants to live. You can probably say this is where the victim lives and this is the same address. You can also tell him he cannot live there because it is too close to the victim's address, as opposed to your telling him he can live there, then three months later the victim tells you she just moved in the same complex and learned that her attacker lives there. Are you going to move the offender somewhere else, even though he acted in good faith by checking with you first, but the restriction came to the offender through no fault of his? Are we now putting other conditions on the offender because he now has to come up with first and last month's rent, new notifications of the next place he goes, et cetera? I am not saying this is an easy job.

Mark Woods:
I agree with your last statement; it is not an easy job. We are hoping that, if a victim is going to move, she would go on-line and find out where the offender is living. That is knowledge that she can get. Then she could contact us before the move is made. Chances are that we will find out about it after the fact and then we are going to have to look at that case. This could be an offender who is moving on a regular basis, so to make that person move again is not a hardship. It is the occasion where a person has a long established residence and is doing very well that is going to be the tough call that we will have to make. Again, we will see how the bill passes and establish some kind of guidelines.

Assemblyman Cobb:
I would oppose this amendment and would ask the bill sponsor a question regarding the intent of this legislation. Let us keep in mind that this is very specific legislation. This does not refer to 1,000 feet from any kids or schools or anything like that. This refers to the actual victim of that perpetrator. In those very specific circumstances, I could care less about inconveniencing a sex offender. I would be much more likely to side with the victim, the person who is living with this trauma every single day. I think the intent, if I understand the bill sponsor, is to get these people away, outside of the lives, neighborhoods, and communities of the people who were traumatized and victimized by these people, not to play around with semantics so they can live on the other side of a freeway within viewing distance of the victim. I ask the bill sponsor if I am correct in that, if he agrees with me, we need to get these people out of the victims' lives.

Assemblyman Stewart:
The main intent of the bill is to protect the victim; that is correct. But in talking with law enforcement people, the Department of Public Safety, we realize that occasionally there are circumstances where they need to exercise discretion. Mr. Woods mentioned the ranch where they might be 100 miles away, but technically they would be violating the law. We would give them some discretion in dealing with individuals who are trying to obey the law and trying to live by the terms of their parole or probation. It gives DPS the leeway to make this reasonable. Our intent is definitely to protect the victim.

Mark Woods:
For the record, our amendment also deals with section 1, subsection 2, paragraph (a), which does not talk about the victim. That is about anywhere children may be. Using that 1,000 foot rule, there will literally be towns in the state in which these people cannot live in. Our concern is that this might drive

them underground. The amendment not only refers to the victim, but also any place that a child could be, even a bus stop.

Assemblyman Cobb:
I understand that and it is understandable that we will need to have some leeway there because it could be impossible for people to live just anywhere. When we talk about the actual victim, I do not think we need to be bending over backwards for these offenders to help them live wherever they want to live.

Assemblyman Carpenter:
The way this bill is written, it would not apply to the Caldwells because the victim does not actually live at that residence.

Chairman Horne:
I am uncertain on when the offender moved in next door to Mrs. Caldwell. If he moved in after October 1, 2007, I think it would apply to this individual. Mrs. Caldwell, do you recall when this person moved in?

Barbara Caldwell:
He moved in during May 2008. I would also like to say that my granddaughter was born at this residence and was raised there. She went to school from there. Prior to his moving in, we notified the defendant's family that he was the one who raped my granddaughter.

Chairman Horne:
It does appear that this bill, as it is written, would apply since he moved in during May 2008.

Assemblyman Stewart:
The intent is to go forward. We realize that we cannot go backwards and protect anyone from things that have already happened. Our intent is to go forward and try to prevent these things from happening in the future.

Assemblyman Mortenson:
I really like the amendment. It seems to me that we pass laws that are meant for one situation, and it turns out there are an infinite variety of new situations that come up. Whenever we can give discretion, I think it is a very positive thing. We just cannot craft a law that covers every situation.

Chairman Horne:
I agree that limited discretion is sometimes appropriate. I appreciate the bill sponsor working with P&P and coming up with this amendment and recognizing those circumstances that you highlighted do sometimes exist in our state.

Our video is ready if there are no more questions for Mr. Woods.
[Video was viewed, but no copy was provided.]

Chairman Horne:
Are there any questions?

In the story, it said that the offender is not obligated to report except for lifetime supervision. He had a couple of arrests for failing to state his address. Other than that, he is not on parole or probation. Mr. Woods, are you familiar with this case?

Mark Woods:
I am not familiar with this particular case, but unlike what the reporter said about the offender coming out without supervision, we do have lifetime supervision. They are responsible for reporting to us and we do oversee them. However, I would glean from this video that this is one of those individuals who was not on lifetime supervision, but is under the requirements to register as are all sex offenders.

Chairman Horne:
At the risk of the Committee micromanaging your department, could you look into that particular case and see what the status is of that person? I am sure someone has already asked if he is under your jurisdiction and if he can politely be asked to move.

Tom Roberts, Lieutenant, Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department; and representing the Nevada Sheriffs' and Chiefs' Association, Las Vegas, Nevada:
We support this bill as amended. It is a good piece of legislation to keep folks from being revictimized. Although this may not deal with this one specific case, I think it would be a travesty if this were allowed to happen somewhere else and there was not a tool to save those folks from having to deal with this day in and day out.

Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada:
I think the concerns I have with these types of cases have been addressed by the Committee; in particular, the situation where the victim moves to where the

offender resides. I think the amendment addresses that to some extent and provides some discretion. That would be our concern. I have discussed the American Civil Liberties Union's (ACLU) concerns with them and I will let the folks who get involved with that address those concerns. Otherwise, we support the concerns that have been expressed about the bill.

Chairman Horne:
Have you seen the amendment? Does this make it better for you?

Jason Frierson:
I believe they need to have some discretion to address situations like the Chair brought up regarding victims not realizing it and moving in where the offender already lives. Some discretion is needed, not necessarily to make the offender's life easier, but to deal with situations in a way that does not overburden the Department and force people to move if there are circumstances that can be avoided.

Maggie McLetchie, Staff Attorney, American Civil Liberties Union of Nevada, Reno, Nevada:
I am a staff attorney for the ACLU of Nevada, and I am the attorney who litigated the case that resulted in the injunction against both A.B. No. 579 and S.B. No. 471, the bill which put into place the movement and residency restrictions that are part of the bill that you see in front of you. However, the state is currently enjoined from enforcing those.

For the record, the ACLU is not opposed to strict sex offender laws like this victim residency restriction. It is not the kind of thing that the ACLU opposes; however, the ACLU does oppose them when they apply retroactively because they violate the ex post facto clause of the Constitution. I appreciate Assemblyman Stewart's desire to try to fix the ex post facto violation with respect to the new victim residency restriction, in addition to the prior movement and residency restrictions. I also appreciate and support the amendment because we do support added flexibility. However, unfortunately, even with the changed language this would still be a violation of the Constitution. What the ex post facto clause prohibits is not making someone not move after he has established a residence, but instead imposing punishment retroactively. If this bill were enforced against people whose crimes were committed, or they were released on parole or put on lifetime supervision before October 1, 2007, or October 1, 2009, it would still violate the Constitution.

I spoke to Assemblyman Stewart briefly this morning and would be happy to work with him to try to further cure some of the constitutional problems, but we have to oppose this bill as it stands right now because it still violates the

Constitution. In addition, we have some concerns that it may have unintended consequences for victims. I am concerned that victims may have to disclose where they live, and then the perpetrator would have knowledge regarding the victim. The ACLU is concerned about the privacy of victims as well.

Chairman Horne:
I am uncertain how you still see this as a violation of the Constitution and ex post facto when this provision prevents the offender from living within 1,000 feet of a victim as of October 1, 2009, which has not occurred yet. So, I do not know what new punishment is being put on this. Also, I am sure that punishments were their terms of imprisonment, et cetera, but conditions of release have never been viewed as punishments but as conditions for release. And, as you pointed out with the federal suit that you have going, we have an opinion from our Legal Division that Nevada goes back to the laws that were in existence before the passage of those two bills. If those laws are currently in affect, we are not violating the injunction or anyone's constitutional rights.

Maggie McLetchie:
I think that it would still continue to violate the Constitution. The problem is not necessarily the language of these bills, but the enforcement of them. [See (Exhibit D).] The bills were enforced against people who were released and whose crimes were committed as far back as 1956. The ex post facto clause does prohibit adding new terms to people's lifetime supervision, to their parole, or to people out in the community after they are released. That is the reason why there is an injunction in place and, while I understand what you are saying, the tier 3 definition could be enforced against the people who are under the individual assessment system that Nevada currently has in place. The problem is, however, it was not just A.B. No. 579 that was enjoined by the court, it was also S.B. No. 471 and the provisions that you see in front of you about movement and residency restrictions. Together they do constitute retroactive punishment because they can make it impossible for someone to go to work or live in a community, and as the Department of Public Safety mentioned, they can drive offenders underground, which does not help promote public safety.

Chairman Horne:
If someone is convicted in 1980 and gets out, and he establishes a residence today, it does not apply. But if he is on notice about this law, and he establishes residency afterwards, he has been given ample notice that this is a place where he cannot live if it is near his victim.

We will close the hearing on A.B. 325 and bring it back to the Committee.

We will now move to Assembly Bill 85.

Assembly Bill 85: Revises provisions relating to sex offenders. (BDR 14-259)

Keith G. Munro, Assistant Attorney General, Office of the Attorney General:
One of our office-submitted bills was A.B. 85, which was assigned to this Committee. Earlier this session, I provided an overview of where Nevada was regarding the Adam Walsh Act, which was passed last session. As you may remember, a permanent injunction was entered against Assembly Bill No. 579 of the 74th Session and Senate Bill No. 471 of the 74th Session. The state is currently appealing that ruling to the United States Court of Appeals. While that appeal is pending, the old sex offender registration and notification laws remain in affect. I received the opinion from the Legislative Counsel Bureau (LCB) today and the Office of the Attorney General concurs.

Assembly Bill 85 was submitted in hopes of correcting the alleged legal difficulties with the Adam Walsh Act. During the interim, our office also worked with others to review the juvenile portion of the Adam Walsh Act to determine if it should be amended. Assembly Bill 85 is a pre-filed bill. Pre-filed bills, for the most part, have been a good thing. Assembly Bill 85 in its current form is really just a shell. It was intended to be a place holder that could be filled with a solution to the alleged legal problems with the Adam Walsh Act. As we got deeper into analyzing that issue, correcting those problems turned out to be more difficult than originally anticipated. It is not very often that an entire bill gets enjoined. Mostly, when a federal court reaches down and stops a state from carrying out one of its laws, it does so with particularity and explains itself so the citizens of the state have an explanation why the federal government is exercising its authority over the state legislature. Usually, the court explains why the state legislature violated the federal Constitution governing our country. I think everyone has a copy of the federal injunction that was entered (Exhibit E). I want to go through the injunction entered by the federal district court. It is an extremely short order, just five pages, which is why it is so problematic.

Page 1 is the coversheet. As you can see, at the top, it was drafted by the American Civil Liberties Union (ACLU). The caption sets forth that the ACLU and John Does have sued. The heading references where the order came from, the United States District Court, District of Nevada. The right-hand side references what it is, an order granting permanent injunction.

Page 2 references a hearing conducted in federal court on September 10, 2008. In the second full paragraph, it references what the ACLU wished to do: prohibit the enforcement of changes—and I emphasize "changes"—to the *Nevada Revised Statutes* (NRS) that were made by A.B. No. 579 and S.B. No. 471. On the bottom of the page, it starts listing the defendants, the

officials whom the ACLU wished to stop from carrying out A.B. No. 579 and S.B. No. 471.

Page 3 continues to list the defendants, sets forth some procedural history of the case, and provides a version of the effect of A.B. No. 579 and S.B. No. 471.

If you turn to page 4, the first full sentence sets forth an important applicability of both of those pieces of legislation. "The statutes mandated that sex offenders would henceforth be automatically classified based on one factor, the crime committed." That is correct. The Adam Walsh Act sets forth a system that was based on what you are criminally convicted of. You were criminally convicted of a certain crime. You have a particular set of registration and notification requirements. It takes the discretion out of the process.

Turning to page 5, you will see the federal judge's signature. You will also see lines 1 through 4. That is who this ruling applies to. It applies to all sex offenders, not just the named plaintiffs. The federal court has prevented Nevada from applying these laws to all sex offenders. The named plaintiffs could not settle this litigation now even if they wanted to, because it is not just their interests at stake.

I want to take a second and explain how laws can be effective. Laws mostly apply prospectively, moving forward from a particular date. Laws also can apply retroactively, moving backwards from a particular date. The Adam Walsh Act applies retroactively and prospectively. If you turn back to page 4, and you look at lines 11 through 13—literally just one sentence—it explains why A.B. No. 579 and S.B. No. 471 are unconstitutional prospectively, moving forward. It says that it is a procedural due process violation. Lines 15 through 20, just two sentences, explain why A.B. No. 579 and S.B. No. 471 are unconstitutional retroactively. If you look at the language, it says, "Retroactively applied in violation of the ex post facto and double jeopardy contract clause." I understand the arguments that A.B. No. 579 and S.B. No. 471 are unconstitutional as applied retroactively. I do not agree, but I understand the ex post facto clause, the double jeopardy clause, and the contract clause. I would have liked to have had some analysis of how the existing interpretations of those provisions rendered these two acts of the Nevada Legislature unconstitutional. The order should have done so.

I have considerable concern, however, with the explanation given by the ACLU as to why A.B. No. 579 and S.B. No. 471 are unconstitutional prospectively, moving forward. The order states A.B. No. 579 and S.B. No. 471 do not provide any procedural due process protections. Just a minute ago, I read to

you in the order where the court determined that the Adam Walsh Act process was conviction based. This finding that there are no procedural due process protections prior to a conviction in Nevada is alarming. The last time I checked, Nevada has lots of procedural due process protections prior to conviction. A person has a right to a probable-cause arrest; Miranda rights; to be free from searches and seizure; to receive the charges against him; that those charges be clear; to effective assistance to counsel; a speedy, fair and public trial; a right to confront his accusers; to present evidence and witnesses on his behalf; to expect those charges be proved beyond a reasonable doubt; to be free from cruel and unusual punishment; a direct appeal; and to petition for a writ of habeas corpus. This finding that there are no procedural due processes prior to conviction in Nevada is flat out untrue.

Now I think you will understand the difficulty we are having correcting the alleged legal difficulties regarding the prospective application of A.B. No. 579 and S.B. No. 471. This order prepared for this federal judge simply goes too far. Nevada has procedural due process protection prior to conviction. We all have. We have all the procedural due process protections required by the *United States Constitution*; we have had them for many, many years. If Nevada did not, we would have known that long before the passage of A.B. No. 579 and S.B. No. 471. I do not recommend processing the provisions of A.B. No. 579. They do not provide any new procedural due process protections for anyone convicted of a sex offense and, therefore, would not cure the procedural due process violation entered by the federal court. I cannot recommend to this Committee or to the Legislature that it pass a piece of legislation that does not cure the constitutional violation identified. I do not think it is a true constitutional violation, but it has been identified by the federal court.

The ACLU is here and I hope they come up and testify with respect to this bill. Managing sex offenders is serious business. Sex offenders are a group of criminals who are most likely to reoffend. The law enforcement community in our state supported both A.B. No. 579 and S.B. No. 471. They were ready, willing, and able to undertake the cost of doing so. I presume they wanted to do so to give their best effort to make sure we did not have more victims. My guess is that the ACLU will talk about delaying the implementation of A.B. No. 579 so that the matter can be studied. I do not have a problem with studying anything, but it has to be reasonable. However, we are in the middle of litigation protecting legislation that the Nevada Legislature passed unanimously.

My guess is the ACLU would like to delay the effectiveness of A.B. No. 579 in order to moot the pending litigation. I do not think that would be good for three

reasons. First, they have a financial stake in that litigation. By delaying the effective date of A.B. No. 579, mooting the legislation will allow them to collect their attorney's fees, the hollow victory they won with this order. I think they know they are going to lose regarding the prospective application of A.B. No. 579 and S.B. No. 471. Second, if they choose to render the litigation moot, the ACLU will simply reinstitute the litigation once the law again becomes effective. We will have to restart the litigation and go through this process again. Third, I do not see any real benefit. The ACLU knows this litigation will likely last for several more years. The effectiveness of Adam Walsh is already going to be delayed because of the federal injunction. While I cannot promise it, the Nevada Legislature should have the 2011 session to again review this matter before the legislation is completed. Moreover, delaying the effectiveness of A.B. No. 579 sends the wrong message to our citizens.

Chairman Horne:
Let us talk about the current bill before us, A.B. 85. Mr. Munro, is it your position today that we can or cannot move forward with A.B. 85?

Keith G. Munro:
I do not see how to cure the finding of a procedural due process violation. We had to put forth a bill. I do not see anything in there that cures a procedural due process violation by the State of Nevada with a conviction based system.

Chairman Horne:
That was a lawyerly way to say no.

Keith G. Munro:
No.

Chairman Horne:
Is there anyone in opposition of the bill?

Ms. McLetchie, before you get started, the proponent of the bill, the Attorney General's Office, said that we should not process the bill. There is your hint.

Maggie McLetchie, Staff Attorney, American Civil Liberties Union of Nevada, Reno, Nevada:
We do think you should go forward with the bill. First of all, I will start by saying that we oppose A.B. 85, but support it, obviously, with the amendments that we proposed (Exhibit F).

I am going to start by addressing some of the things that Mr. Munro raised. I know Mr. Munro very well and I respect him, but I have to respectfully disagree with a number of things that he said today. First of all, the ACLU is not pursuing a legislative solution to the litigation at hand because we think we are going to lose. I am confident in the arguments that I made in district court. A federal judge has already agreed with me. I am confident about my chances with the Ninth Circuit. Instead, I am here because, as the ACLU often says and it is absolutely true, litigation is a matter of last resort. That includes when litigation is ongoing.

Mr. Munro mentioned that we have a financial stake in the litigation at hand and suspected that it was part of our motivation today.

Chairman Horne:
I am going to stop you very quickly to make sure everyone has the amendment proposed by the ACLU with them. It should be in your packet.

Maggie McLetchie:
If anything, we have a financial stake in the litigation continuing. We have already won an order of attorney fees from the district court in the amount of $145,000. The Attorney General's Office has not appealed that award. If the case continues and we are successful, obviously we will be entitled to more attorney fees under the law. If anything, we have a financial stake in not pursuing a legislative solution. As I mentioned earlier, we always try to work with the Legislature to determine if we can work together to cure constitutional deficiencies.

I also disagree with Mr. Munro's analysis that the named plaintiffs could not settle the lawsuit. That is a complicated legal issue and I am happy to talk further with Mr. Munro about that, but while I do not have the authority to settle this, my clients do have the ability to settle that case. In addition, I think that there is some confusion about the due process issue and why A.B. No. 579 and S.B. No. 471 were enjoined in their entirety. They were enjoined in their entirety because of something called the "separability doctrine." When a law has a number of constitutional problems, and so much of the law has to be taken out that what is left behind is unenforceable and meaningless, then the laws—the changes themselves—all have to be taken out. We had more than one definition of sex offender, and the state could not have two different definitions of sex offender working at the same time. If we had just taken out the unconstitutional provisions and said you can apply this prospectively, but not retroactively, it would not have worked. There was already enough confusion with both A.B. No. 579 and S.B. No. 471. For example, Parole and Probation (P&P) may have a different interpretation of the law even from the

Attorney General's Office. I myself spent about a month trying to understand the complexities of the two bills passed in the 2007 session and how they worked together.

I also want to talk about the history of the Adam Walsh Act and the Nevada sex offender laws. As we all know, they were passed in 2007. They were passed in order to comply with the federal Adam Walsh Act. They made fairly sweeping changes. They took what was the previous system in Nevada and replaced it with a new system. Before 2007, Nevada had strong sex offender laws, and still has because of our injunction. Now there is an individualized assessment process that really helps P&P target the most dangerous offenders, instead of only being tied to the fact of conviction and going back as far as 1956. What the changes to the law did was put those people whose crimes were committed as far back as 1960 in the category of "truly dangerous offenders." One such crime was statutory rape committed by a man who was 18 at the time, and was 67 years old when the laws were going to be put in place last July. In Clark County alone, it would have taken the number of tier 3 offenders that P&P is supposed to pay the most attention to—this is an already overworked Parole and Probation—from 100 to 2,400. In our view, the changes to the law would have diluted attention away from the most dangerous offenders.

There were people who were assessed as dangerous on an individualized basis, but perhaps because their crimes were not the most serious—because they plead them down, were in counseling, or under the supervision of P&P—they were going to come out of the system entirely and would not have been classified as truly dangerous any more.

As Mr. Munro detailed, we did win an injunction. The laws are currently enjoined. Meanwhile, the studies in states nationwide are finding more and more problems with the federal Adam Walsh Act. The costs are astronomical. In Virginia, the costs were estimated at $12.5 million. The State of Nevada has not done the kind of study that other states have done to estimate, so we do not know exactly what it is. There was an estimate last session by the LCB of about $700,000. On the other side of the equation, I believe part of the motivation and the strongest impetus last session for the Attorney General's Office, who was the proponent of the bill, was to ensure federal funding was not reduced. But the most federal funding that we could lose was only $300,000, which was a drop in the bucket.

Chairman Horne:
I am going to stop you there. In part it is our timing, and number two you are making public policy arguments, and I am used to ACLU making constitutional

arguments. Number three, this is my fourth session and I have never seen us process a bill that the sponsor said not to process, but the opponents came with amendments and said to process. I am pretty comfortable saying that it is probably not going to get processed. In the interest of time, will you please cut to the chase on your constitutional concerns and the amendment. I want to give you your time on that, and then we will close the hearing on it.

Maggie McLetchie:
I will be very brief. My written testimony (Exhibit F) is very long and you can look at that if you need further information. The constitutional arguments are the same that we have made and won in federal court. The laws cannot be enjoined right now. The State of Nevada is barred from doing so. All we are asking the State of Nevada to do is to look at these laws more closely. I would hate to see Nevada in the same position in 2010 should the unlikely event occur that the injunction is overturned. In the last few months of 2010, Nevada could be in the position of trying to enforce a 2006 version of the Adam Walsh Act.

One thing that I want to share with the Committee—and this will be the last thing that I raise today—is that the federal government may very well change what they are doing on the Adam Walsh front. They are giving states extensions. We have worked with the Attorney General's Office; they have already gotten a one-year extension. It is very possible to get an extension until 2011. Mr. Munro agrees with me about that. Meanwhile, the United States Congress is having hearings on Adam Walsh, and they are relooking at aspects of the law and problems that have led other states to delay enforcement.

Chairman Horne:
We will close the hearing on A.B. 85 and bring it back to Committee.

[Five minute recess was taken.]

Chairman Horne:
Bring the Committee on Corrections, Parole, and Probation back to order.

We will open the hearing on Assembly Bill 474.

Assembly Bill 474: Revises parole eligibility for certain offenders. (BDR 16-1127)

This is a Committee bill that addresses those offenders who were convicted to life with the possibility of parole when they were less than the age of 16. I will

give the background and the reason the Committee chose to hear this bill since there is no presenter.

In the bill, if you look at section 1, it says "a prisoner who was sentenced to life imprisonment with the possibility of parole and who was less than 16 years of age at the time that he committed the offense for which he was imprisoned must be released on parole if..." they achieve these four conditions, and those four conditions are: 1. Serve the minimum term of imprisonment; 2. Complete an industrial or vocational training program; 3. Complete their general education; and 4. Has not committed, within the immediately preceding 12 months, a serious infraction of the regulations of the Department of Corrections (DOC).

The reasoning behind this bill is there are a handful of offenders currently serving time in the Department of Corrections who were of a young age at the time of the offense and these individuals were not captured with Assembly Bill No. 510 of the 74th Session. Since impositions of sentences and these individuals being sentenced to the Department of Corrections as adults, this Committee and the Judiciary Committee have received multiple testimonies and evidence pertaining to the youthful offender, the brain of the youthful offender, the recidivism rate, et cetera. It was thought that this handful of offenders may be appropriate for consideration for release.

Director Skolnik, if you would come forward please, you may be able to help me. Are you familiar with the bill?

Howard Skolnik, Director, Department of Corrections:
Not particularly.

Chairman Horne:
My question to you is what is the approximate number of offenders that you have had who were convicted to a life sentence that committed their offense under the age of 16?

Howard Skolnik:
I would say very, very few. At this point in time, I know we have no inmates under the age of 16 in our system. I do not think there are very many. I have been with the Department since 1987 and, frankly, I can only remember three or four inmates 15 or younger who have been committed to us during that period.

Chairman Horne:
That was my initial thought. I remember a prison tour where we had met an individual who had been 15 when he was brought in, and he was about

26 when we spoke to him, or not much older than that. This bill is to address that very small group of inmates. This is a public policy question to the Committee on whether this small group can be considered for release under these conditions. When requesting this bill, it was not the intention of this Chairman, nor is it anywhere in the bill, that these persons would not be subject to the conditions imposed upon them by the Parole Board. If an individual came before the Parole Board who meets these conditions and the Parole Board agrees all four conditions have been met and they are going to parole him, they can still set the conditions of his parole. That would still exist.

Assemblyman Carpenter:
The way the bill is written, could the Parole Board put other conditions on their release if they had completed the four criteria? Could they put other restrictions on it without an amendment to this bill?

Chairman Horne:
Do you mean having them meet other criteria before releasing them?

Assemblyman Carpenter:
Yes.

Chairman Horne:
To this, no. Do you propose that a certain criteria be proposed?

Assemblyman Carpenter:
I am not thinking of particular criteria. I was just wondering if the Parole Board could put some kind of condition on them, like they would be on parole for a certain length of time and that they had to be supervised.

Chairman Horne:
Yes, the Parole Board would still be able to do that. They would be able to say, "Mr. Smith you are being paroled, but the length of your parole will be an additional 10 or 15 years," or whatever.

Assemblyman Carpenter:
They could do that the way this bill is written?

Chairman Horne:
Sure. This does not preclude them from doing that.

Assemblyman Carpenter:
That was what I was looking at.

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General; and Executive Director, Advisory Council for Prosecuting Attorneys:
We would request, along with some of the comments made by Assemblyman Carpenter, clarification on the actual impact of the legislation and its relation to existing statutory processes for mandatory parole for certain prisoners. *Nevada Revised Statutes* (NRS) 213.1215 already has a statutory scheme for mandatory parole for another certain class of prisoners. Within that statutory scheme, we are asking to have clarified whether those same statutory processes would apply to the class of prisoners that are affected by A.B. 474.

Before I go further, for a frame of reference, the class of prisoners we are talking about—individuals who received life sentences for a crime they committed when they were younger than 16—either murdered or raped someone, and that is why they received a life sentence. It is going to be one of those two crimes. Looking at the existing statutory processes for evaluating individuals who are eligible for parole to determine whether they will be a danger to public safety while they are on parole, we believe those processes should apply to this class of prisoners. Once again, we are talking about prisoners who either raped or murdered someone.

That is my first question: do the provisions in NRS 213.1215 apply to the class of prisoners addressed in this bill? Also, what is the applicability of an assessment having to be done by a psychological review panel? As you know, in NRS 213.1214, if the prisoner had committed a sex offense, he would have to undergo a review by a psychological review panel before he is released on parole. It must be determined whether he represents a high risk to reoffend and, therefore, would represent a significant danger to the public. We believe it would be entirely appropriate for those individuals to be assessed by a psychological review panel. I am posing this as a question because it is unclear whether those existing statutory provisions to assess the risk to the public, if someone is put on parole, would apply to this class of prisoners under A.B. 474. They are there for a very good reason.

Chairman Horne:
Those offenders who committed a murder should have a psychological evaluation. I do not have a problem with that.

Assemblyman Carpenter:
When the judge sentences a person to life imprisonment with the possibility of parole, is there any set period of time that he must serve before he is eligible for parole? Is there anything in statute?

Nicolas Anthony, Committee Counsel:
In the bill is one of the conditions before they are released. It states, "The prisoner must serve the minimum term." So, for instance, if someone was given a 20-year-to-life sentence or life with the possibility of parole after 20 years, he must serve that 20 years before he would be eligible to be released.

Assemblyman Carpenter:
Is that the normal sentence, 20 years? Or could they be given less than that?

Nicolas Anthony:
I will do a quick search to see if this is the normal range for the serious felonies, unless Mr. Kandt happens to know.

Brett Kandt:
I would have to call on one of the district attorney representatives to answer that.

Chairman Horne:
I know it is in statute in Chapter 193 of the NRS, but I think Mr. Bateman may know.

Samuel G. Bateman, representing the Nevada District Attorney's Association, Las Vegas, Nevada:
We have the same concerns that Mr. Kandt has just addressed. I spoke with the Chairman about our concerns. Obviously, it is dangerous because the only 14- or 15-year-old individuals who are going to get a life sentence committed either a murder or a sexual assault.

To Mr. Carpenter's question, in terms of a murder where you would have a life sentence, it would be either a second-degree murder or a first-degree murder. A second-degree murder would have a minimum term of 10 years. A first-degree murder, if they did not get life without, would have a minimum of 20 years. That is setting aside if there were any enhancements. If a weapon was used, that is going to enhance the penalty.

I empathize with where we are trying to go. I wonder if there is a way to do this within the existing statutory scheme, or with the regulations that the Parole Board uses, because I perceive this as being problematic in a practical sense. If you are a 15-year-old and you commit a premeditated, first-degree murder and you do not get life without, but we negotiate your case and you get a life sentence with, you would be eligible for parole at 20 years if you did not use a weapon. There is actually a third option in both the second-degree and

first-degree murder statutes. You could get a sentence of 50 years with parole eligibility beginning after 20 if it is a first-degree murder. The bill does not account for the situation where if you got 50, you would not get automatic parole at 20. Obviously, you could redraft it and try to cover those things, but then there is a second problem.

Often times you have other charges that go along with the murder. For instance, if you committed a first-degree murder through the commission of a robbery with the use of a deadly weapon, that is called felony murder. We might negotiate a situation where we are going to reduce your charge down from a first-degree murder to a second-degree murder so you get the benefit of that lower parole eligibility of 10 years. But then, we might in exchange say that you need to plead to the armed robbery that you committed, the robbery with the use of a deadly weapon. That charge could be run concurrent or consecutive. This bill would not take into account that second charge. You might get the automatic parole on the murder, but you might be doing an 8-to-30 on the robbery with use of a deadly weapon, whether it is run concurrent or consecutively. I think it is very difficult to create a scheme to get where you want when deciding whether to parole them quicker than they might otherwise be with all of those scenarios. We could look at some options to take into account the age and the mind-set of the juvenile at the time he committed the crime.

Chairman Horne:
I understand those scenarios, and I do not believe that the Committee was wishing to completely wipe out consecutive sentences, which would be in the enhancements. It would enable this offender to move on to his next sentence, which could be an additional 10 years.

I appreciate your willingness to sit down and discuss what other statutory schemes we have where we could achieve this result.

Assemblyman Cobb:
I would agree with and echo some of the comments that the district attorneys' offices and the Attorney General's Office have brought forward. The enhancement issue would obviously need to be worked out, along with the issue that was brought forward about being able to examine individuals and determine whether they are a continuing danger to society. It seems that this would be a bit extreme and would eliminate any type of review process. I think that is an important point that we will have to be sure to address if we move forward with this bill.

Chairman Horne:
Mr. Frierson, Mr. Bateman alluded to possibly being able to find other means to do something under our current statutory scheme. Do you have any ideas, or could you find your way to sit down with Mr. Bateman and work on the bill to see if there is anything?

Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada:
We have discussed it briefly leading up to today. I would be willing to do that to try to work something out.

Chairman Horne:
I am going to close the hearing on A.B. 474 and bring it back to Committee.

That concludes the bills that we are going to hear today. We are going to begin our work session that includes two bills.

We will have Ms. Combs begin with Assembly Bill 179.

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

Allison Combs, Committee Policy Analyst:
The work session document has two bills in it which have topics that somewhat interrelate. The first bill is A.B. 179 (Exhibit G) and it involves the issue of post-conviction genetic marker analysis. It allows certain individuals to apply for this type of analysis under certain conditions. Page 3 of the work session document starts with a letter received during the hearing from the Nevada District Attorney's Association presenting the consensus amendment, which had a number of changes to the bill.

Page 4 summarizes all of the amendments that were included in this amendment. The first amendment deals with the type of felonies that would be applicable under the bill. The second one specifies the information that would have to be provided in the petition. The next page and the following pages are the mock-up that was submitted and discussed during the hearing. The third one gives the court discretion to dismiss frivolous petitions and, if there appears to be merit, appoint counsel to review and supplement the petition. The fourth one limits the inventorying of evidence to relevant evidence. The fifth is to define the nature of the evidence that may be allowed at any hearing scheduled on the petition and requires the judge who presided over the case, up to and including conviction, to hear the post-conviction petition. Number six limits those who may take advantage of post-conviction genetic marker analysis

based on pre-conviction tactical or strategic decisions. The seventh limits the district attorney's responsibility to notify victims, depending on whether the court set a hearing, and whether the victim requested notification. And finally, places the cost on the petitioner unless the petitioner is incarcerated at the time of the petition, is indigent, and the results were favorable to the petitioner.

I would also note that during the hearing on the next bill to be considered, the Chairman stated that the bills would be considered together in a work session. The testimony urged the Committee to apply felony charges the same in both bills according to the amendments on the two bills. In the second bill, one of the components of that bill is evidence preservation, which would then subsequently be involved in the post-conviction genetic marker analysis.

Chairman Horne:
If you look on page 2, we have the mock-up with the change "category A or B felony who is currently under sentence of imprisonment ...," as opposed to where Professor Kate Kruse suggested the same thing, but with "a sentence greater than 10 years." Then there is the situation where you have individuals who are no longer under terms of imprisonment, but are looking at lifetime supervision. They may still have a desire to overturn their conviction. They would not be captured in this. I see Deputy District Attorney Bateman disagrees with me. I am not sure if I would like them to be precluded from being able to petition for this preservation.

In number 5 on page 4, "require the judge who presided over the case ..." would have to be language more like "the jurisdiction in which the case was heard." We elect our judges, but that judge may not still be there. It would be more preferable to have that judge hear it, but that is not always possible. I think another district judge might be just as competent to hear the petition.

Assemblyman Cobb:
To the first point that you made, I assume you are talking about after they have served their terms and they still want to clear their names or have their rights restored. Is there some way that we can get a description of how that works now? I assume that an individual can simply pay for the genetic testing himself and have it done, but if that is not allowed by the courts or the law enforcement system, I would like to hear how that process works. Would it be necessary for us to include them in this bill, or do they already have the ability to do so on their own?

Samuel Bateman, representing the Nevada District Attorney's Association, Las Vegas, Nevada:
When I was looking at some of the other statutes that have similar schemes to what we are trying to do here, I requested "who is currently under sentence of imprisonment" be included. Some of them had schemes that said, "... if you are currently in prison or you are currently serving your incarceration time." I had a feeling that some of the proponents of the bill would not like that. So what I included in that particular section, the phrase "who is currently under sentence of imprisonment," is a phrase that is defined in terms of aggravators in capital murder cases, including probation and parole. If you are on probation, parole, or you are serving your actual term in confinement, you would be covered under this statute. I probably shook my head too early because I am not entirely sure whether that term would cover someone who is under some type of lifetime supervision as a result of a sex offense. I can certainly look into that, but I do not know the answer to that specifically.

As to your second question regarding section 5, this is the section where I thought it might be good to have the judge who heard the case hear the petition. I saw this in a couple of other schemes from other states. One thing that I included in there as the last few words is, "unless the judge is unavailable." That might be the opt-out where you do not have the district court judge who heard the trial there any longer, or who cannot hear the petition for the obvious reasons that you identified, then the petition would be able to go to a different district court to be heard. I thought that provision was interesting in that it might make the process more efficient to have the judge who knows about the case making the decision with regard to the petition rather than a judge who would have to look at the cold record or petition that he does not know much about. I would defer to the Committee on that issue.

Regarding Mr. Cobb's question, if the issue is that they are trying to seal their conviction later, obviously there are sealing provisions. If the issue is that they are trying to exonerate themselves after they have served either a probation, parole, or prison term, as I said in the original testimony, they certainly have the ability to seek to have testing done at their own expense. I do not know if there is anything in the law or the provisions of the statute that would necessarily give the district attorney's office a strong basis to oppose it.

Lucy Flores, Rocky Mountain Innocence Center, Las Vegas, Nevada:
Mr. Bateman was correct in adding, "Under sentence of imprisonment," since it is defined that way in federal statutes. It is defined as any kind of post-conviction monitoring, whether it is parole, probation, or serving your term. It is my understanding that it includes anything whether it came from a sexual offense or any other type of offense.

Assemblywoman Parnell:
I have a question that you referenced on the bottom of page 2, where it has "a person currently serving a sentence for a Category A or B felony with a sentence greater than 10 years." I am curious why we need to have "with a sentence greater than 10 years." I would personally prefer to see it "serving a sentence for a Category A or B felony." I cannot remember if it was because we could not process all of that, so I would appreciate a response.

Lucy Flores:
I just saw Professor Kate Kruse arrive and she can answer that much better than I, so if it is possible, she can address Ms. Parnell's question.

Kate Kruse, Director, Innocence Clinic, Las Vegas, Nevada:
I heard the question and the answer is that the language was the language that was voted on by the Advisory Commission on the Administration of Justice (ACAJ). I would not oppose "all A and B felonies." That would be better language as far as I am concerned. It was just a matter of tracking what had been voted on in that Commission.

Chairman Horne:
So, the Commission wanted "greater than 10 years," but you propose to just say "A or B felony."

Kate Kruse:
I think we would really be pleased to see any kind of preservation bill. Our position is that we would support any of the crime categories that are before the Committee. I think the "A or B felonies with a sentence greater than 10 years" was the language that the Advisory Commission voted on at their December 18, 2008, meeting. I think that was a compromise between our original proposal of "any felony" and the District Attorneys Association's proposal of "homicide and sexual assault." For public policy reasons, I think it is important for the reasons that I mentioned before.

There is a new Request for Proposal (RFP) that was issued last Friday on grant funding that requires states to show that they have preservation and DNA testing provisions available to people that are serving prison sentences in their state. That covers the crime categories of murder, non-negligent manslaughter, and rape.

Chairman Horne:
Thank you. This is getting into testimony again. We only wanted clarification.

The Chair will entertain a motion.

Assemblyman Segerblom:
I move that we amend by accepting "category A or B" and "who is currently under sentence of imprisonment."

Chairman Horne:
The amendment is the whole section on page 2 that deals with A.B. 179. Then on page 4, the eight outlined amendments proposed by the Nevada District Attorneys Association are not included.

Assemblyman Gustavson:
I am concerned about the affect these changes will have on the fiscal note on the bill. We have a $468,000 fiscal note on the bill and I am curious if that will be increased or decreased.

Allison Combs:
I cannot give you a definite answer, but the fiscal note is based on the bill as written. That was for any felony, and this will limit that application. I assume the fiscal note would go down, but I cannot give you a number.

Chairman Horne:
The bill as written was broader because it said "any felony," and we have limited it to categories A and B. I see some concerns about not including the district attorneys' amendments.

Assemblyman Segerblom:
If that is a concern, I will be happy to make my motion again to include the district attorneys' amendments.

Assemblywoman Parnell:
I would like to add the suggestion in number 5 from the district attorneys, that is, "unless the judge is unavailable."

Chairman Horne:
Yes, Ms. Parnell. If you look on page 6 of the mock-up, he does have that in here, and we will make sure it stays in there. It is subsection 5, and it says, "Any hearing or consideration of a petition shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the judge is unavailable."

Mr. Segerblom has amended his motion to include the district attorneys' proposed amendments, so we need a second for the new motion.

Assemblyman Carpenter:
I would like to see it expanded to any felony, but I guess we have to take what we can get.

Assemblyman Ohrenschall:
By including "under sentence of imprisonment," would someone who has served his time and wants to try to clear his name have his evidence preserved?

Samuel Bateman, representing the Nevada District Attorney's Association, Las Vegas, Nevada:
I believe that the Assemblyman is referring to A.B. 279. I do not think the two are contingent on each other.

Chairman Horne:
The motion is to amend and do pass with the amendments stated on page 2 of A.B. 179, with the paragraph "category A or B felony who is under sentence of imprisonment," and the Nevada District Attorneys Association's amendments that are on page 4.

ASSEMBLYMAN SEGERBLOM MOVED TO AMEND AND DO PASS ASSEMBLY BILL 179.

ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Next is Assembly Bill 279.

Assembly Bill 279: Makes various changes relating to certain convicted persons. (BDR 14-518)

Allison Combs, Committee Policy Analyst:
The next tab is A.B. 279 (Exhibit H). As discussed earlier, this bill has provisions in it requiring criminal justice agencies to preserve certain evidence in cases involving a conviction for murder or a sexual offense. That relates to the discussion on the earlier bill on which felonies were to be included. On page 9 under the Proposed Conceptual Amendments, the first amendment would be to remove section 3 of the bill, which is the issue involving post-conviction genetic marker analysis already handled in A.B. 179. The second area of Proposed Conceptual Amendments is the issue of which felonies would be included under section 2 of that bill, whether it would be category A and B felonies as proposed by Professor Kruse, or as she referenced earlier, the other option to change "murder" to "homicide" to capture the broader category there.

Her testimony is included as an exhibit to this document if it is needed for reference.

In the second part within this area, 2 (b), there is a letter submitted by the Attorney General requesting that "the approval of the defendant to consume biological evidence" be changed to "notice to the defendant." That letter is also included in this document on page 15. That proposed amendment is on page 16 in the last full paragraph.

The final proposed amendments on the bill are on page 10 of the document. At the hearing, the Department of Corrections (DOC) indicated they wanted to work on section 4 and the related sections on that bill that reinstated language that was repealed in the 1990s allowing a defendant who had not yet been sentenced to be sent to the Department of Corrections for an evaluation period. They wanted to work on that language with a group of individuals, including Parole and Probation (P&P) and the Department of Health and Human Services, and that group met and the amendment on page 10 is what was submitted for the Committee's consideration. It would provide more options. The underlined or green language that you see on page 10 would allow the Department in these cases to have more alternatives to incarceration. One would be to commit the defendant to the custody of the Department for an evaluation period not to exceed 30 days, or provide a short-term incarceration in the local detention center or in the custody of the Department of Corrections, or seek committing the defendant to the Department of Corrections not to exceed 180 days as an intermediate sanction, with intensive treatment under the supervision of the Department of Health and Human Services. The evaluation or the recommendations would be reported back to the court. The other underlined or green language in subsection 3 would be items that might be reported back to the court. The original language presented by the Department is included and is the last page of this document.

Chairman Horne:
We will look at these one at a time. Under the Proposed Conceptual Amendments, it is proposed to delete number 1 because it is handled in A.B. 179, which we just passed. Number 2, Evidence Preservation, Professor Kruse wants "expand the list of crimes to category A or B felonies," and change "murder" to "homicide." I believe expanding the list of crimes in category A and B addresses those concerns, and preserves the federal grant monies that we are eligible for.

Assemblyman Cobb:
I am interested in what specific evidence is going to be required to be preserved under this. Is it evidence in the evidence vault, forensics lab, or court clerks' possession? What is the scope of the evidence?

Chairman Horne:
I believe it is going to be relevant evidence. I do not know if Professor Kruse wants to address that.

Kate Kruse, Director, Innocence Clinic, Las Vegas, Nevada:
The definition of evidence is included in the proposed language of the bill, which is "biological evidence." It is limited to samples with biological evidence. For example, if there were a blood stain on a couch, the swatch of the couch that contained the blood stain could be cut out and preserved and that would fulfill the language of the bill. That is my understanding.

Chairman Horne:
I am looking at section 2, paragraph 1 of the bill and it references the custody of any biological evidence. There is a definition in paragraph 5(b), "Biological evidence means any semen, blood, saliva, hair, skin tissue, or other identified biological material removed from physical evidence."

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General, and Executive Director, Advisory Council for Prosecuting Attorneys:
I do not have anything to add. I think it is important to note that it is any evidence secured in connection with the investigation and prosecution. That would not only include evidence in the crime lab, evidence in the possession of law enforcement agencies, but also evidence retained by the district court that tried the case. It is broad in terms of the agencies that would have the evidence preservation requirement imposed upon them, but it would be consistent with the definition that you just recited and be limited to identified biological material.

Samuel G. Bateman, representing the Nevada District Attorney's Association, Las Vegas, Nevada:
I do not have anything in particular to add. I think the concern ultimately from the law enforcement agencies is that sometimes there are items in the evidence vault that have biological evidence on them that are not relevant to the case. I think the real concern is that we have a bunch of cases where there is biological evidence at this time. It has been sitting in the evidence vault and no one has tested it; is it that type of evidence that we are trying to address? We are trying to address the evidence that has been identified as relevant, it has been

tested and may be introduced at trial, or has been identified by both parties as relevant.

Allison Combs:
I want to clarify the language on page 9, at 2(a), subsection 1. The proposed language in the document submitted is what you were just looking at, on page 2, of the document in relation to A.B. 179. On page 2, as the testimony indicated, preference is that the felonies considered be the same under both bills for the Committee's consideration.

Chairman Horne:
We are keeping it as we passed it on A.B. 179, just "category A or B who is currently under sentence for imprisonment."

Then in 2(b), "Notice to or Approval of the Defendant to Consume Biological Evidence," the Attorney General's Office wanted to change "the approval of" to "notice to" the defendant. I have some worries about that. I understand how the process typically works, and I do not have any great concerns that evidence is going to be destroyed without participation of the defendant and his counsel.

That takes us to number 3, "Commitment of a Defendant to the Department of Corrections Prior to Sentencing." I am going to ask Director Skolnik to come forth and give us some clarification on this. He referenced this to the Committee a week or so ago, but there was no formal testimony on it. He wants to amend this bill to add this, so we are going to give him an opportunity to explain this amendment.

Howard Skolnik, Director, Department of Corrections:
The original language reinstated what was called the "safekeepers" program, which the Department ran until 1997 or 1999. It was a fairly expensive program for the Department because we had folks in our system who had not been convicted of anything at that time. They went through our standard intake process and then we were required, because of their status, to essentially hold them alone in a cell for the balance of the 180 days of assessment time before we returned them to the courts with an evaluation. We felt that the reinstatement of that, as it stood, was not in the best interest of either the offender or the Department.

What we did was get together with a number of the players to talk about a combination of things that had been floating around. One is the assessment bill, which we feel would not need more than a 30-day period where we could assess the inmate and then get back to the court with our evaluation if the court so chose.

The second thing that we included was a reference to a short period of incarceration, 48 hours either at the local detention center or at the Department of Corrections. This mimics a program that has been started in Hawaii called "The HOPE Program," which has been an extremely successful program in terms of interdicting commitment to the Department. Dr. James F. Austin (Council of State Governments; President of the James F. Austin [JFA] Institute) has indicated that there are approximately 1,500 individuals per year who are committed to the Department of Corrections as probation violators, some technical and some not so technical. The average stay of those individuals is between 18 and 24 months. We feel that if we can come up with a good interdiction program and get even 300 to 400 of those people, we could free up 600 beds in the Department in a two-year cycle, which is obviously in everyone's best interest.

The third proposal is one that Senator Horsford has talked to us about in terms of an alternative, intermediate sanction, particularly for substance abusers. It would be an in-depth, six-month therapeutic program operated inside an institution. The program would be operated by the Department of Health and Human Services, and the general containment of the individual would be monitored by the Department of Corrections. That is the 180 days. This would open up the ability for all three of those programs to be implemented, should the Legislature so desire.

Chairman Horne:
Here is my first inclination, Director Skolnik. I sat in on some of those meetings with Senator Horsford as well, and I would be more comfortable if these provisions had a full hearing on them. We could process this bill and send it over to the Senate where it can be amended. We would then know that it had a full hearing on an amendment, and this Committee would have some background on it. When it goes to conference, we would be able to further discuss Mr. Anderson's bill. This is more in-depth than how we process an amendment that did not have a hearing. If the Committee is comfortable with sending this bill with the amendment to the Senate, so am I.

Mr. Anderson, how do you feel about this amendment?

Assemblyman Anderson:
This bill came from the Sentencing Commission. While I would love to take full credit for it, I do not. I have no objection to following the suggestion by the Department of Corrections. I know they were concerned about the difficulty of holding people who have never gone through an administrative hearing. I think your point is absolutely essential that there should be an administrative process

that they have gone through. I would be comfortable in moving this if you are, Mr. Chair.

Assemblyman Carpenter:
Have you conferred with the Department of Health and Human Services regarding being able to put one of these programs together? Do you have the facilities where you could take care of these people?

Howard Skolnik:
We have identified physical locations both in the northern part of the state and in Clark County. They could accommodate such a program if it is the desire of the Legislature to proceed. We have met with the Department of Health and Human Services, Parole and Probation, the Parole Board, and representatives of the community at various times about this program. Candidly, I think this is one of those things that if we do it right, we will have a significant long-term impact on the prison population in the State of Nevada. It will be a positive one in terms of reducing the number of people that we incarcerate.

Assemblyman Carpenter:
I agree with that. If we can do this, it would be good.

Assemblywoman Parnell:
I would agree with all that has been said so far. Coming back to the proposed amendment 2, I do not think we made a decision on that, and I would say that it would be my preference to go with 2(a)(i), "A and B felonies" rather than "murder" to "homicide."

Chairman Horne:
I will accept a motion. The motion is to amend and do pass with the amendments as proposed in amendment 1, 2(a)(i), and 2(b), and the adoption of number 3.

Assemblyman Ohrenschall:
I thought there was a significant reason for us to change "murder" to "homicide" in 2(a)(ii).

Chairman Horne:
That was addressed to cover other types of death-related crimes, but "A and B" will cover that.

ASSEMBLYMAN ANDERSON MOVED TO AMEND AND DO PASS ASSEMBLY BILL 279.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

There is no other business to come before the Committee.

We are adjourned [at 10:59].

RESPECTFULLY SUBMITTED:

Karyn Werner
Committee Secretary

APPROVED BY:

Assemblyman William C. Horne, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Corrections, Parole, and Probation

Date: March 31, 2009 Time of Meeting: 8:24 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 325	C	Mark Woods	Proposed amendment
A.B. 325	D	Maggie McLetchie	Written testimony and proposed amendment
A.B. 85	E	Keith Munro	Copy of the federal Order Granting Permanent Injunction from the United States District Court, District of Nevada, filed October 7, 2008
A.B. 85	F	Maggie McLetchie	Written testimony and proposed amendment
A.B. 179	G	Allison Combs	Work session document
A.B. 279	H	Allison Combs	Work session document