MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
April 22, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:14 a.m. on Wednesday, April 22, 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 Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chairman
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

Assemblyman James Ohrenschall (excused)

GUEST LEGISLATORS PRESENT:

Senator Bernice Mathews, Washoe County Senatorial District No. 1

Senator David R. Parks, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Kyle McAfee, Committee Secretary

OTHERS PRESENT:

Lora E. Myles, representing Carson and Rural Elder Law Program, Carson City, Nevada
Ernest K. Nielsen, Attorney, Senior Law Project, Washoe County, Reno, Nevada
Wes Henderson, Government Affairs Coordinator, Nevada Association of Counties, Carson City, Nevada
Michael Foley, Clark County District Attorney's Office, representing the Clark County Public Administrator's Office, Las Vegas, Nevada
Kathleen Buchanan, Clark County Public Guardian, Las Vegas, Nevada
Sally Crawford Ramm, Elder Rights Attorney, Division for Aging Services, Department of Health and Human Services
Peter Maheu, President, Nevada Society of Professional Investigators, Las Vegas, Nevada
Mike Kirkman, Vice President, Nevada Society of Professional Investigators, Las Vegas, Nevada
Alan Glover, Carson City Clerk/Recorder, Carson City, Nevada
Jo Lee Wickes, Deputy District Attorney, Juvenile Division, Washoe County District Attorney's Office, Reno, Nevada
Kristin Erickson, representing Nevada District Attorneys Association, Reno, Nevada
Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General
Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada
Keith Munroe, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General
Lee Rowland, Northern Coordinator, American Civil Liberties Union of Nevada, Reno, Nevada
Orrin Johnson, Washoe County Public Defender's Office, Reno, Nevada
Karl S. Hall, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney's Office, Reno, Nevada

Chairman Anderson:
We are going to begin with Senate Bill 194 (1st Reprint).

Senate Bill 194 (1st Reprint): Revises provisions governing the appointment and duties of public administrators and guardians. (BDR 20-181)

Lora E. Myles, representing Carson and Rural Elder Law Program, Carson City, Nevada:
A couple of years ago we amended Chapter 253 of *Nevada Revised Statutes* (NRS) in regard to public guardians. This time we are looking at NRS Chapter 253 in regard to public administrators. We have an amendment that I brought in this morning (Exhibit C). The amendment has been approved by the parties involved with this bill.

The primary purpose of S.B. 194(R1) is to remove the distinction between the larger counties and the smaller counties as it relates to public administrators. There has always been a distinction between counties with populations under 100,000 and those over 100,000. The consensus throughout the state is that there should be no distinction. A public administrator is a public administrator regardless of what county he operates in, so we are removing those distinctions.

In section 2 of the bill, we are addressing the fact that there are currently three counties that do not have public administrators becaise nobody ran for the office. We have created a process whereby the county commissioners of each county can appoint someone to fill out the term of public administrator if nobody runs for the office. Under current statute they would have to appoint somebody case by case. This allows them to simply appoint someone to fill out the entire term of the office if nobody runs for that office. We are also requesting that the District Attorney of Humboldt County be appointed as the permanent Public Administrator in Humboldt County.

In section 6 of the bill, we have another issue with the public administrators. Under the private investigator statutes, someone who is investigating an estate or looking for heirs must be a private investigator. Unfortunately, that is part of what the public administrator does, so it seems ridiculous to require a public administrator to be a private investigator or to hire a private investigator to do his job. We are stating that the public administrator can investigate any matter regarding an estate without having to hire or be a private investigator, creating an exception to Chapter 648 of the NRS.

Another issue that has arisen is the situation where public administrators have administered estates where there is a trust, there are named beneficiaries, or

the estate is held in joint tenancy with an individual. In those cases probate is not required; however, public administrators in some counties have been forcing probates on those estates. In section 5 we are stating that the public administrator cannot administer estates where there is joint tenancy, where there are beneficiaries listed on the assets, or where there is a deed upon death which lists beneficiaries of the assets.

Another portion of the bill raises the gross value of estates that the public administrator can administer under set-aside or summary provisions, in line with the provisions under the estates statutes.

Regarding public guardians, we are setting a retention schedule for public guardian records, particularly financial records, so that all public guardians in the state will retain the financial records on their wards for the same period of time. It coincides with Internal Revenue Service (IRS) requirements, and our judges are very much in favor of that. That information is available if there is any question in the future from family or other interested parties about the finances of the public guardian cases.

The amendment I mentioned earlier applies to section 11 of the bill. The public guardians have been facing a major problem that is becoming more and more frequent: how to get funding to pay for a ward's care? Nevada has an increased number of residents who cannot prove citizenship. Under the federal Deficit Reduction Act of 2005 and the Homeland Security Act of 2002, if you cannot prove citizenship by a valid birth certificate, a valid passport, or a Social Security Numident then you are ineligible for all government benefits, including Social Security, Medicare, and Medicaid. Under Nevada statutes if you are ineligible for Medicaid you are also ineligible for any county assistance programs. We currently have one county, a rural county, where the public guardian is the guardian of an individual who had a stroke. He is an illegal alien, he has no valid Social Security number, and he is currently in a nursing home in the rural county. That nursing home is eating approximately $87,000 in costs for his care per year because there is no means of paying for his care and support. The Immigration and Naturalization Service (INS) has been contacted several times, and they will not deport this individual back to his home country. The county is struggling with how to pay for and provide care for this individual. The county does not have the funds to pay $87,000 per year for one individual's care. In our amendment to section 11 of the bill, we are requesting that the public guardian be allowed to be released from guardianship if she cannot provide any means of paying for the ward's care after she has gone through every process trying to find some source of payment.

Another issue arising from public guardians is the support of people coming in from other states. We are addressing that in Senate Bill 313 in more detail. Someone comes in from another state, and all of his assets and income are held by family members in that state who refuse to release those assets or income to pay for the ward's care. If the county, in the form of the public guardian, cannot pay for the ward's care, it should not assume that liability. We had some arguments from people who have opposed this bill, though the opposition did not arise until after it was heard in the Senate committee. Their issue was, if we pass this amendment to section 11 of the bill, that it is going to leave a lot of individuals without a guardian. That is not the issue in this case. The issue is releasing the public guardian and the county from liability in certain situations. The public guardian can still be the guardian of the person, ensuring that the ward gets medical care or is placed in a facility, but does not have to be the guardian of the estate, ensuring that there is a source of payment for the ward. We have had judges who have ordered that the guardian not be guardian of the estate because there is no means to pay for the ward's care. The amendment we presented is the consensus of several different parties, including the major parties that were opposing having any restrictions on the public guardian taking these cases.

The remainder of the bill focuses on clean-up language, repealing sections of the statute that pertain to the division between counties of less than or greater than 100,000 people and changing some other chapters to conform to the new provisions within this bill.

Chairman Anderson:
I have a question about the proposed amendment to section 11. Why was that issue not addressed by the Senate? This huge financial obligation was obviously something that affected counties knew about. Eighty-four thousand dollars is not something that a smaller county would fail to notice in their budget.

Lora Myles:
The original language in section 11 addressed that issue; however, after the Senate hearing we heard from judges in Washoe County in opposition to that language. You would have to ask Ernest Nielsen, or other people who came forward after the hearing in the Senate, why they did not appear to oppose the language that is currently in section 11.

Chairman Anderson:
Are you aware of an executive-agency, unsolicited fiscal note of a potential $2,811,622? This is not a money committee, but I want to make sure that this amendment can take care of that. Is that what this is designed to solve?

Lora Myles:
We are unaware that there is a fiscal note to this bill. It should not affect any of the state agencies. It affects the counties. This concerns county employees and county business. We are unaware that there is a fiscal note for the state.

Senator Bernice Mathews, Washoe County Senatorial District No. 1:
This is the first we have heard of a fiscal note. It would have been rereferred if we had known that.

Ernest K. Nielsen, Attorney, Senior Law Project, Washoe County, Reno, Nevada:
I missed the hearing.

Chairman Anderson:
I have an executive-agency fiscal note that was printed on S.B. 194(R1) from B. Berry. The counties are responsible for providing public guardianship services. The state does not have the authority or the responsibility to provide that service on a regular basis.

Lora Myles:
I know that there has been some discussion about whether this passage of section 11 would cause guardianships to be transferred to the Division for Aging Services; however, the majority of individuals who would not qualify for a public guardian under these provisions are not seniors. They are younger individuals who, for one reason or another, have incapacities. We are able, in one way or another, to get some sort of funding for the few seniors we do see, but I think that might require the state Division for Aging Services to take over guardianship cases.

Ernest Neilsen:
I am aware of the fiscal note, and I believe that Sally Ramm is ready to lift that fiscal note with respect to this amendment.

Chairman Anderson:
I was hoping that was one of the outcomes.

In section 4 of the bill you are changing NRS 253.0407. I am curious about page 4, lines 16 through 18: "The property, if that of the ward, is not necessary for the care or comfort of the ward." One of the discussions in the past dealt with the fact that there may be some small trinket, a thing of little or no economic value, such as a stuffed animal or a prized possession that means something only to that individual. What will happen with that?

Lora Myles:
That section no longer applies to public guardians and wards. This section applies only to public administrators. The remainder of NRS Chapter 253 has different sections for public guardians and assets of the ward. This was missed last session when we were trying to remove all of the language regarding a public administrator also being a public guardian. This is leftover language from that time. This section will apply only to public administrators. The issue of the ward's assets would be under the remaining provisions of NRS Chapters 253 and 159.

Chairman Anderson:
If the public administrator is taking over does he have to take that into consideration?

Lora Myles:
The public administrator will no longer be handling a public guardian case, so he will only be handling assets of a decedent, not assets of a ward.

Chairman Anderson:
Regarding the assets of the decedent, family members might still be concerned about those particular pieces of memorabilia. Will they still have a special status even though they have no economic value, recognizing the smaller nature of the total assets of the deceased?

Lora Myles:
Absolutely. That is contained under NRS Chapter 161, further on, pertaining to estates and distribution of property to relatives and distribution under the estate statutes.

Chairman Anderson:
Is 15 days the length of time?

Lora Myles:
That is for assets that are not otherwise distributed. Usually this arises in an estate where you have, for example, an individual who was living in his vehicle, and the only assets he had were in his vehicle. Most of the assets, as far as we could determine, had no value. Photographs and things like that were held by the public administrator. Letters were sent out after they found the heirs. The 15 days begins after the next of kin has been notified that those assets exist and he has the right to come forward. It may take six months to find the next of kin, and the public administrator will have to hold those assets until that time.

Chairman Anderson:
Does that take the resources of the county or the state?

Lora Myles:
The county. These are all county employees, not state employees.

Assemblyman Carpenter:
I wonder why you are taking the language out on page 5, lines 16 through 19, where the county commissioner can designate the public administrator as a public guardian. Are they trying to separate everything?

Lora Myles:
Yes. We separated that out. In the 74th Legislative Session we created a provision under the public guardian part of the statute whereby the county commissioners could appoint the public guardian. The public guardian could either be another county employee, including the public administrator, or a new office, and it was up to commissioners of each county to determine how to appoint a public guardian. At this point in only one county, Douglas County, the public administrator and the public guardian are the same individual. Every other county has elected to have a different party as the public guardian, separate from the public administrator's office.

Assemblyman Carpenter:
What happens in Douglas County where the public administrator is also the public guardian?

Lora Myles:
She operates under two different sections of the statute. As the public administrator she operates under the first half of NRS Chapter 253, and as the public guardian she operates under the second half of NRS Chapter 253.

Assemblyman Carpenter:
There is no problem with having the same person act in both capacities?

Lora Myles:
No. It is the county's choice. All of the other counties have chosen to make them two separate individuals. Some of the counties had a separate office of public guardian for several years, but all of the counties have now gone to this, except for Douglas County where the office is separate from the public administrator.

Assemblyman Carpenter:
With regard to your amendment, it looks to me as if you are trying to get the county off the hook for paying for a person like you were talking about before. If the county is not responsible, somebody has to be responsible. Who has the ultimate responsibility?

Lora Myles:
That is an issue. Unfortunately, the federal government has chosen, under the Homeland Security Act of 2002, to create this lack of support for individuals. Unless the state comes up with an alternative means of paying for the care of these individuals, there is no means of support for these individuals. We do not see a lot of them, but I know of one case right now where a rural county has no means of paying for his care. As I stated, we can find a means to pay for the care for most seniors. Unfortunately, these individuals are exempted under federal law from any kind of government support.

Assemblyman Carpenter:
I understand that, but something has to happen if these small, rural counties do not have the funds. I do not know what happens. The nursing home cannot stand it.

Lora Myles:
The nursing home in that particular case is writing off the cost of his care.

Senator Mathews:
It all started with a situation we had in Washoe County, some years back, where people began to look at separating the duties of those two positions.

Chairman Anderson:
Does the amendment represent the compromise between you and Mr. Nielsen?

Lora Myles:
Yes, and several public guardians participated as well. We have a consensus on this.

Ernest Nielsen:
We are in consensus with respect to the amendment that is before you. The original language was a bit too broad. We believe this amendment language protects the ward. One of the conditions for a public guardian to terminate the guardianship would be that the continuation of the guardianship would confer no benefit to the ward. We are confident that the safety net will remain, and the amendment ensures that.

Assemblyman Carpenter:
You said that the safety net would remain. What do you mean by that?

Ernest Nielsen:
The public guardian is the guardian of last resort. For some of our citizens who may not have resources, often there is still a benefit conferred by having somebody be a surrogate decision maker for health care decisions and so on. If the public guardian determines that there are not sufficient funds within the ward's estate to pay for necessary services, this amendment allows him to petition the court to terminate the guardianship. The one remaining issue is that the court has to find that continuing the guardianship confers no benefit to the ward. For example, some healthcare issues need to be addressed, and if the ward is not viewed as having the capacity to intelligently involve herself in those medical decisions, the public guardian would definitely be available to make decisions for that ward.

Assemblyman Carpenter:
It looks to me like this amendment is designed to take away the responsibility of the county. If you cannot get anybody else to pay for it, then there is no safety net as far as taking care of the ward.

Ernest Nielsen:
That is true. There is no safety net in terms of the money to pay for the nursing-home care that Ms. Myles discussed; however, the safety net would still continue with the public guardian having some ability to make decisions for that ward. This does not create new money; it simply enables the public guardian to continue to be helpful to a ward who has needs and is not able to make decisions.

Wes Henderson, Government Affairs Coordinator, Nevada Association of Counties, Carson City, Nevada:
We would like to go on record in support of S.B. 194(R1). As Ms. Myles said, I believe this is a good bill. Also, the Nevada Association of Counties (NACO) believes that, in instances where it makes sense, all counties should play by the same rules.

Chairman Anderson:
It is particularly of concern for the smaller counties where there is difficulty in finding separation between offices.

Assemblyman Carpenter:
I understand that the counties can have different persons as the administrator and as the guardian, but one person can also have dual roles. Is that what you are talking about?

Wes Henderson:
Yes. It is up to the counties to choose. As Ms. Myles said, every county except Douglas County has chosen to have separate individuals fill these roles. Douglas County may or may not do that in the future, but they have that option.

Michael Foley, Clark County District Attorney's Office, representing the Clark County Public Administrator's Office, Las Vegas, Nevada:
On sections 1 though 9 of the bill dealing with the public administrator's office, the Clark County Public Administrator is fine with the language that came out of the Senate. I do not think there are any new proposals on those sections. We are fine with the proposed amendment to section 11 that Lora Myles talked about. The main purpose for these changes was to not have taxpayers paying for the guardian in cases when there is nothing he can do. We have seen that in a couple of cases where wards are in the physical custody of the state or someone else, and there is nothing we can do as far as getting housing assigned and so forth.

Kathleen Buchanan, Clark County Public Guardian, Las Vegas, Nevada:
I would like to answer Mr. Carpenter's concern about the safety net. It is important for all of the Committee members to recognize that a public guardian is not a social services agency. I say that because monies do not come to us. When we serve as a guardian for an individual, we manage the assets that come with that individual, whether that be $30 or $1 million. When you are talking about somebody falling through the cracks, I do not see that happening. This person who Lora Myles mentioned is being cared for at the hospital. There is nothing that a public guardian could do other than perhaps make medical decisions for that individual so that he is not being denied on that level. I wanted to get that on the record and make that clear.

Sally Crawford Ramm, Elder Rights Attorney, Division for Aging Services, Department of Health and Human Services:
I raised some of my concerns with the Senate. We were very concerned about the broad language of the bill as it was originally written. As Assemblyman Carpenter said, somebody has to pay. The way the bill was written we felt there was a chance that the Division for Aging Services would have to step in, because a part of the law says that the specialists for the rights of elderly persons must step in as a temporary guardian for people who had no

other guardians. We do not do that very often. When we do it, it is extraordinarily time-consuming. Given that there is no money built into the bill to pay for the services, we felt that, if the state became responsible for any one of these people, we would be responsible for not only the guardianship duties but also paying for the care of our ward. That is the reason for the fiscal note. The money issues do not go away with the amendments, but they leave the purview of the Division for Aging Services. We will be able to take away the fiscal note on the bill if it is passed with this amendment.

Assemblyman Carpenter:
How do you figure you are off the hook with this amendment?

Sally Crawford:
The court will be involved, and the guardian will be the guardian of the person. That is primarily what we would be concerned about: that the person would have someone who could make his decisions for him on a personal basis. That is why we do not think they will need us as a guardian; they will already have a guardian. The little known part of the statute that would involve us would probably not be invoked.

Lora Myles:
I would like to further address the question Mr. Carpenter asked Ms. Ramm. The amendment allows the public guardian to remain the guardian of the person, even though he is no longer the guardian of the estate. He can continue to maintain care of the individual, even though he is no longer responsible for obtaining funding to pay for the individual's care, so there is still someone who can respond in an emergency or a medical situation for the individual.

Assemblyman Carpenter:
Everyone is trying to wash their hands of this individual, and I do not think that is right.

Lora Myles:
The individual still has the public guardian in charge of his person. The issue is paying for his care. Unfortunately the county is not one of the wealthiest in the state, and there are no funds to pay for this individual's care.

Vice Chairman Segerblom:
Is he living on the street?

Lora Myles:
No. He is in a nursing home, and the nursing home is writing off the cost of his care.

Vice Chairman Segerblom:
Does the nursing home have the right to discharge that person, or does it have to keep him there?

Lora Myles:
If they tried to evict the individual it would be an unsafe discharge under Medicare and Medicaid law because there is no place for him to go. He was a migrant worker, and he has no home or family here in Nevada or in other states.

Assemblyman Hambrick:
You made an observation several minutes ago that INS would not deport the individual. Have you sought other intervention from one of our two senators or one of our congressional delegates?

Lora Myles:
I do not know whether the public guardian or the district attorney has sought intervention from any congressional members. We know that we have tried everything possible to get him eligible for Medicaid, but unfortunately he has been using a false social security number and is not a citizen, and they refuse to consider paying for his care.

Assemblyman Hambrick:
You know the country of origin?

Lora Myles:
He is from Mexico.

Peter Maheu, President, Nevada Society of Professional Investigators, Las Vegas, Nevada:
We are not opposed to the bill in its entirety. We are opposed to section 6, subsection 3, which limits or removes the requirement that a licensed private investigator do any investigations on the person receiving the public administrator's help. Our concern is that a private investigator in the State of Nevada requires 10,000 hours of training under a licensed private investigator. That person must submit to a written exam, an oral exam, and a thorough background investigation.

My concern with this particular section is something that is referred to as the Fair Credit Reporting Act as well as what is referred to as Safe Harbor.

Safe Harbor allows the transmission of information from European Union countries into the United States legally. Your country has to be a member of Safe Harbor to receive that information from any of the European Union countries. The United States-European Union Safe Harbor Framework was agreed to in 2000.

We are all familiar with the federal Fair Credit Reporting Act because of the amount of identity theft that has occurred as well as the violations that have been noted and the fines that have been levied by the Commerce Department for violations of the Act. It requires extensive training to comply with all of the definitions and standards of the Fair Credit Reporting Act. We feel that a private investigator has the training to do that. Not using a licensed private investigator could cause the state, the counties, and the public administrators an extreme amount of misery because of receiving federal fines and judgments for failure to comply with the Act. One hotel received a $300,000 fine for violating the Fair Credit Reporting Act. The fines are hefty, and it is a great concern of ours that this bill would eliminate people specifically trained in that area for what seems to not be an advantageous purpose. We have the ability to conduct investigations in over 100 countries and have done so and received information from those countries. The use of licensed private investigators in the State of Nevada to investigate the assets or history of a decedent should not be eliminated by this bill.

Vice Chairman Segerblom:
Are you currently being used for this purpose?

Peter Maheu:
We have never been used for that. We operate in every county in the State of Nevada as well as in more than 100 other countries. This is not expensive work for a private investigator who has the tools at hand to do it.

Vice Chairman Segerblom:
Who is currently doing this for the counties?

Peter Maheu:
I do not have a clue.

Mike Kirkman, Vice President, Nevada Society of Professional Investigators, Las Vegas, Nevada:
I can assure you that this is not simple work. It requires a lot of expertise. It would be shameful if someone passed away who had heirs and those heirs were not found. Because of that I think it is a tremendous mistake to eliminate the need to have a qualified investigator perform this service. I recommend and

urge you to consider changing subsection 3 of section 6 of the bill so that you do not eliminate qualified investigators in all of the counties from working for people who need that help.

Assemblyman Segerblom:
Have you done this work for the Clark County Public Administrator or Public Guardian?

Mike Kirkman:
I have not. A lot of work has been done for trust departments in banks that have a similar need.

Alan Glover, Carson City Clerk/Recorder, Carson City, Nevada:
Subsection 3 of section 6 of this bill does not prohibit private investigators from doing this work. We use private investigators to help locate heirs. The problem came up a number of years ago when we had heir finders who had found heirs without being licensed. We extensively use genealogy researchers to find people. My personal experience has been that private investigators are really good at finding the living but not as good when it comes to finding other relatives. We use private investigators, heir finders, and genealogy people. When this first came out I must admit it put quite a stir through the Mormon Church, members of which do research finding family members for people. We think the language is good because it still allows us to use private investigators, who are very important in this process, but it also allows us to use genealogy researchers, who are also very professional.

Assemblyman Segerblom:
At the current time you use both, and this law would not prevent you from doing that?

Alan Glover:
Absolutely not. We would continue to do that because private investigators are very good in this area.

Lora Myles:
This does not eliminate the use of private investigators, but in many cases the public administrator is dealing with a very small estate where there are no fees or funds to be able to pay a private investigator. The current private investigator statute does not just pertain to looking for heirs; it also prohibits the public administrator from searching for assets that the public administrator, by statute, is supposed to be administering under an estate. To require the public administrator in every single county to hire a private investigator to locate assets, when the public administrator's job is to find those

assets and administer that estate, is prohibitive in most of the counties and for most estates. When you have an estate that is worth less than $100,000, there is no extra money to pay a private investigator to look for all of the different assets, not just the heirs, but all of the other issues that the public administrator is required to address. This is why we are asking that the exemption be made, so the public administrator can actually do his job without having to be a private investigator or hire a private investigator.

Peter Maheu:
I cannot tell you how much pro bono work we do for the State of Nevada and the different counties in Nevada, such as finding missing children. All a public administrator would have to do is ask our society to find somebody or locate heirs. I have no problem with public administrators using genealogy to locate family relatives. Our big concern is locating assets without violating the Fair Credit Reporting Act. I can assure you that that is going to occur. It is a federal law, and it is almost impossible to properly meet the requirements. We do State of Nevada background investigations. We have no problem with doing pro bono work for public administrators. If they would like to include in the bill that they can search family trees and ancestries, that would not concern us. What concerns us is eliminating the private investigator or appearing to eliminate the private investigator.

Mike Kirkman:
It is not that private investigators could not be used, it is that this paragraph says they do not have to be. In other words, say the public administrator says he is competent to do the work when we do not believe that he is. It is a huge mistake to give somebody the authority to do the work who is not competent to do it and does not get assistance from someone who has the skills.

Assemblyman Hambrick:
I take it that most public administrators have the ability to call upon assistance from other county or city employees? The county auditor may have experience doing things. For instance, you see the term "forensic accounting," being able to use certain databases that might assist you?

Lora Myles:
The public administrator, as a county official, has the ability to use all of the resources of the county. They may not be experts like a private investigator is, but it is their job, and they need to do that work. To require them to hire a private investigator to do their job is unreasonable.

Chairman Anderson:
I close the hearing on Assembly Bill 194(R1) and bring it back to the Committee.

Let us turn our attention to Senate Bill 235.

Senate Bill 235: Revises the provisions relating to the jurisdiction of the juvenile court over certain offenses. (BDR 5-553)

Senator David R. Parks, Clark County Senatorial District No. 7:
Senate Bill 235 arose from the actions of the 74th Legislative Session when we reestablished the sentencing commission under Assembly Bill No. 508 of the 74th Session. That committee was subsequently renamed the Advisory Commission on the Administration of Justice. Under the leadership of Chief Justice James Hardesty, we met monthly since July 2007 and brought forward many suggestions after numerous hearings by the Commission and its subcommittees, one of which is the Juvenile Justice Subcommittee. Senate Bill 235 was one of the bills recommended for the 2009 Legislature to consider.

Jo Lee Wickes, Deputy District Attorney, Juvenile Division, Washoe County District Attorney's Office, Reno, Nevada:
Currently under Nevada law there is a gap in the statutes: if a juvenile under the age of 18 commits a very serious felony—this bill is designed to address class A and B felonies, things such as sexual assault, battery with a deadly weapon, and robbery with a deadly weapon—and they are not apprehended or identified as the alleged perpetrator until after they are 21 years of age, there is currently no jurisdiction by any court in the State of Nevada to pursue any delinquent or criminal sanctions against that person. This is a gap in the legislation of our state. Senate Bill 235 is designed to fill that gap.

There is one other issue where we have a crime that is committed against a citizen of our state by someone who is under the age of 18, he is identified and charges are filed, but he cannot be located. In those instances normally a warrant is issued for that person's arrest, but if the warrant cannot be executed or served prior to that person turning 21 years of age, even though that case would start within the jurisdiction or power of juvenile court, the juvenile court loses its jurisdiction over that person on his 21st birthday. If he is not apprehended on those charges until after he is 21, there is no court that has jurisdiction to hear and resolve that matter, and that case would have be dismissed at that time.

This issue was brought before the Juvenile Justice Subcommittee. In order to come up with a solution we formed a small working group. That working group included the team chief for the Public Defender's Office in Clark County, Susan Roske, the team chief for the Clark County District Attorney's Office in juvenile delinquency, Teresa Lowry, and Fernando Serrano who is with the state Division of Child and Family Services and is involved with youth parole. The four of us worked on drafting the legislation that is before you this morning.

We believe the solution that we reached in S.B. 235 balances the interests of our state by making sure that there is a vehicle for dealing with these kinds of issues and providing some safeguards to the person who is charged. After the working group took it back to the Juvenile Justice Subcommittee, the Subcommittee looked at the proposed legislation and approved it for consideration, at which time it went to the Legislative Counsel Bureau.

Section 1 of S.B. 235 changes some definitions, which are necessary to implement the changes that are considered thereafter in the bill. Section 2 deals with situations where a serious class A or class B felony is committed by someone who is at least 16 years of age but less than 18 years of age. That person is identified by law enforcement, charged in juvenile court by the local prosecutor, but that person has not yet been apprehended. In those cases where the person is apprehended after his 21st birthday, section 2 allows the jurisdiction to stay with juvenile court for the purpose of having a hearing. In that hearing the juvenile court would first have to establish whether or not there is probable cause or legal reason to believe that the person committed the alleged offense. If there is probable cause, the juvenile court would have to consider whether or not the case should be dismissed or transferred from juvenile court to adult criminal court, which is also a district court function. With the help of Ms. Roske from the Public Defenders Office, we attempted to list every factor that, in our experience in juvenile justice, we thought would be important for a court to consider in determining whether or not the case should be transferred from juvenile court to adult criminal court. Because there were three practicing lawyers in the working group and because of the experience of Mr. Serrano, we also added paragraph (j), which says that the court can consider any other factor that the juvenile court finds relevant. We attempted to list, to the best of our experience and knowledge, the factors we think the court should consider.

Section 3 deals with those cases where a serious crime is committed by someone who is at least 16 and less than 18, but they are not identified until close to or after their 21st birthday. Last summer I learned that an individual, who had turned 18 and was in prison for a robbery, had his DNA submitted to the Washoe County Crime Lab. His DNA, as well as the samples of many other

individuals, was waiting to be tested at the Washoe County Crime Lab. Because of the very unfortunate experience with the disappearance of Briana Denison, the local community funded an effort to test all of the DNA samples that were waiting. As a result of that testing, the DNA sample of this young man was identified as being connected to a robbery and a sexual assault that had occurred years before when he was 17 years of age. At this point he was 20 years old. We were under a very short time frame, but with the assistance of the police department I was able to finalize the investigation and file charges on that alleged robbery and sexual assault. We filed a motion to certify the individual. He was assigned an attorney, and we conducted a hearing that resulted in a court order that transferred his case from juvenile court to adult criminal court. That court order was signed and filed approximately four days prior to his 21st birthday. Had that process been delayed by two weeks or less, at any point along the way, although we had evidence to show that this man had committed the sexual assault and robbery, there would have been no way he could have been charged or held accountable in the State of Nevada under our current law.

In section 3 we try to balance the need of the prosecutor to have time to finish investigations and file charges with the need to protect the individual who is charged, by giving his attorney sufficient time to investigate and defend. That is why, if the person is not identified by law enforcement and charged before he is at least 20 years and 3 months, but less than 21 years of age, or not identified by law enforcement as having committed the offense until after he is 21, the juvenile court does not have jurisdiction. That was a compromise between the prosecuting attorneys and the defense attorneys in trying to estimate how much time the lawyers would need in order to properly prepare their cases, prosecution and defense.

We were also able, in our workgroup and the Juvenile Justice Subcommittee, to answer the concerns of the juvenile justice administrators. Under the current configuration of Nevada juvenile justice, they did not feel that they would be capable of meaningfully handling someone who is identified as having committed one of these offenses close to or after his 21st birthday.

Kristin Erickson, representing Nevada District Attorneys Association, Reno, Nevada:
We urge the passage of this legislation.

Assemblyman Segerblom:
Did the person who you found through the DNA test go free?

Jo Lee Wickes:
Because he had not reached 21 years of age, we were able to file a petition in the juvenile court because it had jurisdiction. We filed a motion to certify, which was heard and granted by the District Court so he could be prosecuted in adult criminal court. Charges have now been filed in adult criminal court, and it is proceeding through the process.

Assemblyman Horne:
How often does this situation occur?

Jo Lee Wickes:
Within Washoe County there have been several cases during my nine and a half years on the juvenile team where we had warrants outstanding, and as we approached the individual's 21st birthday, we simply filed a motion to quash the warrant and dismiss the petition. That has probably happened in a handful of cases. There are other situations, probably four, that have come across my desk primarily as the result of advances in DNA technology. I think these cases are going to become more common than they were in the past because that is a scientific and investigative tool we did not always have at our disposal. It is not a large number of cases. Obviously, the victims of those alleged offenses suffer the same trauma that any victim would suffer in a case like that. I am not aware of how often this is happening in the rural areas or Clark County.

Assemblyman Horne:
Where you have had to file a motion to quash, are they all category A and B felonies, or are you talking about all felonies?

Jo Lee Wickes:
Cases are routinely dismissed if the person is not apprehended by age 21. This legislation is only designed to fill that gap for the serious class A and B felonies. We are not asking for continuing jurisdiction or to fill that gap for less serious offenses.

Assemblyman Horne:
I understand that. I asked, "How often is this happening?" You said, "Several." Are those several class A and B felonies, or are you talking about all felonies? I know that the legislation only proposes to capture this narrow group.

Jo Lee Wickes:
The numbers that I spoke about are in relation to serious class A and B felonies.

Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General:
The Attorney General was a member of the Juvenile Justice Subcommittee that came up with this proposal and wants to urge its passage as well.

Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada:
We have some concerns regarding the drafting but realize that our juvenile office was involved in it, and they are the ones who have to deal with it. If they are comfortable with it, then we are comfortable following their lead.

Chairman Anderson:
We will close the hearing on Senate Bill 235.

The Chair will entertain a motion.

> ASSEMBLYMAN CARPENTER MOVED TO DO PASS SENATE BILL 235.
>
> ASSEMBLYMAN MANENDO SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN OHRENSCHALL AND PARNELL WERE ABSENT FOR THE VOTE.)

Let us turn our attention to Senate Bill 35 (1st Reprint).

Senate Bill 35 (1st Reprint): Revises provisions relating to the prosecution of certain offenses. (BDR 15-272)

Keith Munro, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General:
Senate Bill 35 (1st Reprint) addresses a limitation Nevada has voluntarily placed upon itself regarding the jurisdiction of the State of Nevada. *Nevada Revised Statutes* (NRS) 171.070 sets forth a decision by Nevada, made a very long time ago, to defer its sovereignty in criminal matters to other governments. There are four levels to this deferment of sovereignty: the territory level, the country level, the federal level, and the state-to-state level. There are two sections of this bill. Section 1 lessens the effect of section 2, and section 2 repeals NRS 171.070.

This legislation seeks to repeal a statutory prohibition on our prosecution in Nevada if someone has been criminally charged in a territory, another country, another state, or by the federal government for an act against Nevada or a Nevadan. The United States Supreme court has determined that a state may

recapture its sovereignty if it so chooses. You will note from the Legislative Counsel's Digest that our high court has upheld the constitutionality of dual-sovereignty provisions. This legislation has been proposed because Nevada is changing. The world is changing. Crime today is transnational. The ability of people outside of this state to reach into Nevada and affect our citizens and our state has increased dramatically. Today we need to be able to protect our constituents, not just within our borders but beyond them as well. The Attorney General's Office has an obligation to bring weaknesses in our state policy to your attention in order to see if you wish to change that policy. We feel that it is better for this body to continually examine its policies and debate them, rather than have this be a reactive body that only changes when a tragedy happens, forcing you to then respond.

Our state should have the ability to enforce its own laws, the laws passed by the Nevada Legislature. Our constituents believe they are protected by the laws you pass. Unfortunately, the truth is that they are not always protected because of laws like this. I thought I would utilize the information presented by the American Civil Liberties Union (ACLU) and the Clark County Public Defender's Office when this bill was heard in the Senate, so we are both working from the same information. I do not want a difference of facts to interfere with the policy decision before you. The information presented by them makes the case for a policy change in the State of Nevada. The Clark County Public Defender's Office submitted an exhibit when this bill was heard in the Senate (Exhibit D). You will see their email, and following, you will see a chart they have prepared.

Here is what Mr. Frierson says: "Senator Care, as a follow up to the discussion on Dual Sovereignty proposed by the Attorney General's Office, I completed somewhat of a survey of all 50 states and their position with respect to dual sovereignty. From what I have been able to gather, there is a 50/50 split between those states which have adopted the federal "dual sovereignty" doctrine, and those states which have not."

If you turn the page you can see the Public Defender's chart. You can see 25 states in the column of "Dual Sovereignty recognized." That is where the largest grouping of states is on this issue. If you look at the column "Some form of a bar to multiple prosecutions," there are other groupings of how states handle this issue. "Some form" are the key words. Those states in the second column have chosen to adopt some form of the dual sovereignty doctrine. There are a lot of groupings within this column.

If you turn to (Exhibit E) you will see how the ACLU weighed in on where our neighboring states are on this issue. It highlights these other groupings. The

ACLU acknowledges that Arizona retains its sovereignty except as to those same offenses charged by another jurisdiction. The "same offenses" language is the operative term. It is unlikely that a foreign government or a foreign territory would have the same offenses as Nevada. The federal government rarely has the same offenses as Nevada. Other states are more likely to have the same offenses as we do, but it is more likely that they will have similar offenses. Arizona appears to have a reasonable way to handle this: the same offenses. The ACLU acknowledges that California retains its sovereignty with respect to other countries and if someone is acquitted either in a federal trial or in another state trial. The ACLU acknowledges that Idaho is like Arizona: it retains its sovereignty except as to those same offenses. That is reasonable. The ACLU acknowledges that Oregon is part of the largest grouping of 25 states which have adopted dual sovereignty. That is where we recommend that Nevada should be, in the largest group of states that handle this issue. Utah is similar to Arizona and Idaho, but Utah has retained more of its sovereignty by requiring the facts to be the same and the offenses to be the same.

We see that there are different groups among those states that have some form of dual sovereignty. If you want to see where Nevada falls, look at the wording of NRS 171.070. It is on page two of the bill down at the bottom. Where it says, "an act charged as a public offense" that is a bar to prosecution or indictment in this state. Nevada's bar applies to acts. That is much different than the same offenses. Nevada has really chosen to adopt no form of dual sovereignty. The Clark County Public Defender probably should have had a third column that said, "No Form," because that is where Nevada would be. Our neighbors are protecting themselves; we are not. We probably should.

Section 1 provides deference to another government's justice system. Section 1 answers the question "what if another state tries to bring another person to justice who injured a Nevadan?" Section 1 lessens the effects of dual prosecution. It allows an acquittal in another country to be brought into evidence in a Nevada trial. It allows a Nevada jury to know that fact. I think we should be able to trust Nevada jurors to be able weigh that fact while carrying out their duties in the search for truth.

In closing, criminal activity increasingly takes place across jurisdictional boundaries. NRS 171.070 was enacted during a different time, 1911. Interstate commerce now rules the day along with globalization. NRS 171.070 should be repealed. If you place states into groups according to how they handle this issue, we have recommended that Nevada should join that largest group. I believe that it is the most logical course of action for our state to follow. Nevada should recapture its sovereignty with respect to these levels.

However, to the extent you feel that NRS 171.070 should not be repealed, look to our neighboring states. Arizona and Idaho have reasonable minority approaches on how to handle this. They have changed with the times to meet the needs of their citizens. Nevada should keep pace with the changing world as well.

Assemblyman Horne:
I would like to hear a more practical fact pattern to which this would apply.

Keith Munro:
Let me give you an example: Dario Herrera, who used to serve on this Committee. Let us say that the person who was allegedly providing Mr. Herrera with compensation was in another state or another country. If that country or state plea bargained, we might not have been able to obtain justice. With respect to Mr. Herrera, let us say that there was a mistrial in the federal jury trial that was handled here in Nevada. The State of Nevada would have been prevented from seeking a prosecution in that case. These are Nevada elected officials. We should be able to get justice against our own elected officials if they break our laws.

Assemblyman Horne:
I still have a concern with our basic tenets of placing people in jeopardy more than once, particularly in your example with Mr. Herrera. New trials are tried all the time in federal court depending on the facts and circumstances of the mistrial. Assuming your facts to be true, you say that under current law he cannot be tried again for the exact same offense in state court. If he is charged in federal court with offense A, offense A requires that the prosecution has to meet certain elements, and if he is acquitted, you would like the state to be able to try him again for offense A, even if those same elements are required by state law and the prosecutors have the burden to meet them in state court?

Keith Munro:
The statute does not say offenses. That is part of the reason that we brought it to you. We have looked at some of our criminal justice statutes, and we think it is our obligation to bring potential weaknesses to you for debate. We think this is a weakness because, as you pointed out, you are talking about double jeopardy as it applies under the federal *Constitution* or the state *Constitution*. This law that was passed in 1911 does not have that. This does not affect our federal or state double jeopardy provisions that are already in effect. If you read the law closely, it says "act," so it does not have anything to do with offenses. That is why I pointed out Arizona and Idaho. They utilize the same offenses approach that you are talking about. That is a reasonable way to go, if you want to go that way. We recommended that Nevada join the largest number of

states that are handling this issue, but that does not mean that our sister states of Idaho and Arizona have a bad way. That is a reasonable way as well, but they have protected themselves and retained their sovereignty so they can step in if it is necessary. California rejected dual sovereignty as to foreign countries—Nevada has not—but allows prosecution for the same acts if there is an acquittal in another jurisdiction.

Assemblyman Horne:
You are telling me that when an act is charged it does not mean an offense is charged? If you charge somebody it is obviously an offense to that particular statute. An act, to me, seems interchangeable with an offense. You do not charge a nonoffense.

Keith Munro:
An offense is a type of crime. An act is something you do. If you take money from somebody that is the act. The offense would be the kind of violation of statute that could be charged for that act. That is the troublesome problem with this statute: it is so old that it did not change with the times. We are bringing the fact to your attention that Nevada has not kept up with the changing times as our sister states have. They have made changes as the world has changed.

Assemblyman Horne:
Simply changing that word from "act" to "offense" would not solve your problems?

Keith Munro:
If you change it to "offense," you would be going along with Arizona and Idaho, and I think that is a reasonable way. You would be with a minority of the states that handle the issue. A majority says, "We can do it for all cases." I think it is reasonable to change that word to "offenses."

Assemblyman Horne:
Section 1, where it says, "is admissible evidence in the trial," kind of puts the burden on the defendant. For an offense that maybe they should not have been tried in the other jurisdiction in the first place, they get to tell a Nevada jury that since they were acquitted before they should be acquitted now. That seems unfair.

Keith Munro:
We got that language from the bill we helped you with last session on grand juries and preliminary hearings.

Assemblyman Horne:
Do you want me to bring my grand-jury bill back?

Keith Munro:
Let us say that you are charged in another state, and you are acquitted. We are not afraid of your using that fact to defend yourself here in Nevada. We think that it adds to the search for truth.

Assemblyman Horne:
I think you are perverting my piece of legislation from last session.

Chairman Anderson:
I am having difficulty with the double jeopardy question. That seems to be basic to the overall process and the relationship between states of this nation, not with those of foreign countries. I recognize that represents a different set of challenges. I believe the process is that the event has to take place in the state, there is a violation of a state criminal statute, there is the probable cause for arrest, and the alleged perpetrator is put on trial. Whether he is a resident of this state or not has nothing to do with the event, because the event had to take place in this state.

In the modern world it is quite possible that a citizen of this state would have the ability to sue someone of another state in state court for a violation of a Nevada state law.

Keith Munro:
I think you are branching off into the civil area. This does not affect Nevada's double jeopardy clause or the federal one.

Chairman Anderson:
If someone is tried for a crime that takes place at Lake Tahoe on the California side, the victim of that crime is a Nevadan, the defendant is tried in a California court and found not guilty, is the victim going to be able to take a second bite of the apple?

Keith Munro:
This statute has nothing to do with that set of facts.

Chairman Anderson:
If somebody is selling drugs in Dog Valley off of Peavine Mountain, which is on the California side of the state line, they have violated both federal and state law by bringing drugs into the State of Nevada, and they are found innocent in a trial in federal court, do we get a chance to prosecute them for trafficking or for

sale in California? I am not talking about the possession in Nevada, which is a separate event.

Keith Munro:
The crime would have to be committed in Nevada and a violation of Nevada law.

I should talk about the country level. Let us say that someone from Poland cleaned out your bank account online, and he got a $50 fine in Poland. This current statute would prevent that person, should he come back to the United States, from being returned to Nevada and being prosecuted.

We talked about Dario Herrera. Let us say there was a mistrial in that case. Nevada would not have been able to do anything because of the current law. Under Arizona or Idaho's law, they could have done something. As to another state, if the charges are under dual sovereignty, Nevada could always have a decision. Let us say that someone from Arizona cleaned out your bank account online and was charged with theft in Arizona, and it was the same offenses provision, Nevada could not charge him with theft.

Assemblyman Segerblom:
You have given us these hypothetical situations, but you have no actual example of when this would have occurred?

Keith Munro:
We had a case where a University of Nevada, Las Vegas (UNLV) professor was found with a tremendous amount of pornography on his computer. Our office was getting ready to get involved in that case, but the federal government got involved instead. We are not sure what caused the result, but we felt it was a very minimal penalty considering the severity of the offense by a state employee on a state computer. This statute barred us from prosecuting him.

Assemblyman Segerblom:
Typically, the state or the county will negotiate with another state or the federal government to decide which one has the better jurisdiction and the better laws, and then they let that party go forward. It seems to me that you are trying to have two bites of the same apple. If a person has a trial and is acquitted, or there is a mistrial, and whoever is prosecuting him does not want to go forward, that is what justice is about; justice has prevailed. To bring him back here and do it again flies against everything I believe in.

Keith Munro:
Listen to the words that you used. Usually the law enforcement officials work together to determine who has best jurisdiction and how justice can best be served. Like you said, usually they talk about those things. That is the best way to handle it. This statute prevents Nevada from being part of that discussion.

Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General:
The statutory bar we currently have forces us to race to the courthouse steps to beat out anybody else, which seems to work against the interests of justice because our system should be predicated upon a thorough investigation and decision about what charges to bring against a person.

Assemblyman Segerblom:
As I read the statute, it is based upon a conviction or an acquittal. There is nothing that says another jurisdiction cannot withdraw so you can file your charges.

Keith Munro:
I probably need more facts about that, but potentially if the other state, the country, or the federal government deferred to us, we could proceed. I do not think that the repeal of this statute is going to affect a lot of cases. I think it is going to deal with catastrophic cases where justice is not being carried out.

Chairman Anderson:
I am obligated to point out that *Mason's Manual*, section 760.4, reads that it is a breach of order to debate what has been said on the same subject in the other house. Documents that are placed there are not supposed to be part of the record in the second house directly. That becomes a bit of an issue on an occasional basis. I recognize that it is part of the public record, but I need to point out to the Committee that it should not be considered any greater or lesser than any other kind of information that they would have been able to discover on their own. I think it is okay, but it falls on the edge because it is part of those documents that are placed on record in the other house.

Assemblyman Carpenter:
It seems to me that the way Idaho does it makes more sense. You cannot try them on the same offense. Concerning the situation that you mentioned regarding the professor, without all of the facts, how do we know that the same results would not be obtained if you were prosecuting the case? I think the same offense makes sense rather than not being able to do it at all.

Keith Munro:
We think that is a reasonable way to go.

Assemblyman McArthur:
My question is not about the dual sovereignty part. I have no problem with that. This bill really pertains to acquittal. Does Nevada choose not to prosecute someone who has been prosecuted in another state or federal court who has been acquitted?

Keith Munro:
This bar in NRS 171.070 prevents us from having any prosecutions for the same acts. It would not matter if it was a conviction or an acquittal. It is a complete bar.

Assemblyman McArthur:
I am not talking about this bill, not NRS 171.070. It looks like you can go after someone who has been acquitted. Why can you not go after them again if they have been prosecuted in another state? The federal and state governments do that all the time. Does the State of Nevada choose not to go after someone who has been prosecuted, or can we not?

Keith Munro:
We cannot because of this statute. If someone was acquitted and then prosecuted in Nevada, they could bring that acquittal up as a defense. Section 1 goes to evidence. By repealing section 2 you could prosecute someone who is convicted somewhere else. Section 1 brings that in as an evidentiary matter. If they are acquitted somewhere else you could bring that in. I guess you could also bring in the fact that they were convicted, but I do not think they would ever want to do that in their defense.

Assemblyman Segerblom:
Section 1 of the bill allows the acquittal to come into the trial. Section 2 repeals existing statute, which is NRS 171.070. You are reading section 1 and saying, "This allows acquittal to come in," but section 2 repeals our current law.

Lee Rowland, Northern Coordinator, American Civil Liberties Union of Nevada, Reno, Nevada:
We are here to oppose S.B. 35(R1). I think members of this Committee have asked many of the questions that would concern us. I would like you to consider the effect and prioritization that this bill has. If you were to pass S.B. 35(R1), the only time that it would go into effect would be in situations where somebody had already been convicted or acquitted. Although the bill has

no fiscal note, I would note that prosecutions are expensive. This bill is seeking to expand the prosecutions brought by the Attorney General's Office in a way that would increase costs only for people who had already been through the criminal justice process. It seems to me that that is a fairly small group of people you are targeting and a fairly inefficient use of resources, because you are going to spend money prosecuting somebody who has already gone through that process.

Regarding the evidentiary standard in section 1, we disagree that people would not want to be able to bring up the fact of conviction. We think it was better when it included that language. We oppose the bill, but with respect to that small issue, there is some indication that people in those cases may get jury sympathy for saying, "I have already been through this process. I have already been convicted by the government. I have already been punished by the state." We think they should have the same right to say that, if they want, as someone who is acquitted. It should be the defendant's right to say so either way. If the government has put you through that process twice, we think it is important for a juror to know that. We disagree with taking out the conviction in section 1 of the bill as stated in the amendment.

First and foremost we are a civil liberties organization, and while the courts may have given their approval to dual prosecution among different states and federal territories, we believe that the spirit of the double jeopardy clause is violated by undoing the current law. Whether there are 24 or 26 states in the column that permit this type of prosecution, clearly the policy choice is whether Nevada wants to be one of those. We think it is in keeping with our lineage to say that the government gets one shot at you. We are not going to use our limited resources to go back and retry you if the sentence was a few months too light. We urge you to vote against S.B. 35(R1), not only because it is not in the best spirit of the *Constitution* but also because it is not the best use of our resources at this time.

Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada:
We are in unanimous opposition to this bill. One of the dangers of relying on an exhibit from another hearing is the context in which it was provided. The chart that I prepared that surveyed 50 states (Exhibit D) was prepared in response to the suggestion that there was a trend and that this bill would be trying to further the trend. The point was that there is no trend; there is a split on the issue of retaining sovereignty.

We would maintain that this bill is not about retaining sovereignty. Nevada in 1911 or 2009 has not given up its sovereignty to proceed with criminal cases. Our concern is not that Nevada is not part of discussions among multiple

agencies. We do not believe that the current statute prevents Nevada from being part of that discussion at all. We believe that the current statute encourages discussion among other agencies, states, and the federal government. It is about efficiency. When agencies are in communication with each other, we get the best result. It is our position that S.B. 35(R1) actually discourages Nevada from even trying to communicate with other agencies. In the rare case where another agency has taken action, it is the cooperative and collaborative efforts by those agencies that allow us to get the most information and the most appropriate result. Simply discouraging that type of communication altogether means we are less likely to get information from other agencies that would help us in pursuing those cases.

There was a reference to our neighboring states and the verbiage in their laws. To some extent this is wordplay when we talk about an offense versus an act. In Arizona, their statute says that an acquittal or conviction and sentence, either one, bars prosecution for the same act or omission to the extent that the state's *Constitution* or the *United State*s *Constitution* addresses it. In California, they have a bar, but that bar was recognized in statute in 1974. It has been over 30 years, and California has not seen fit to make an adjustment because it is not an issue of adjusting to the times. It is an issue of collaborating with other agencies in more complicated cases in order to make sure that we have the most accurate information we can find. I would also like to point out that California also refers to the word "act." Idaho also refers to the word "act," when an act is charged as a public offense.

There was also the mention of mistrial as being something that would preclude us from being able to proceed. I want to clarify that that is not the case. Mistrials do not preclude the state from being able to proceed. There are certain circumstances that may, depending on the procedural posture of that case, but it is not an automatic bar against being able to proceed with a case.

This bill was presented before as a trend. When we pointed out that it was not a trend, it was then presented as something needed to protect citizens. It is our position that the best way to meet the needs of the citizens is to communicate with the other agencies to get the whole picture. It is our position that we do not need to change Nevada's laws, in particular a law that has been in place, successfully, for nearly 100 years, simply because the heads of two agencies do not communicate very well. It is not a matter of racing to the courthouse. It is a matter of picking up the phone. If agencies can communicate, contact each other and work things out as they did in the Laughlin case, and as they often do, we do not run the risk of wasting resources by trying, in a less than efficient way, to pursue the case. We can take our time. We can communicate with other agencies to get the most information. Otherwise, everybody is on a

different page, and we end up having a problem with the accuracy of the information we receive. It is our position that Nevada residents are best served by the law as it is right now.

Chairman Anderson:
In order to make my record somewhat clear I am going to need your cooperation. There was an email that you sent to Senator Care that has been submitted for our record. Do you mind if we place that within our record?

Jason Frierson:
I do not mind, granted I was given the opportunity to clarify the purpose of it and the limited scope of the comments, because had I presented it to the Committee in response to the introduction today there would have been different comments. I welcome the Committee's review of that chart.

Chairman Anderson:
I think it added to our ability to differentiate between several states around us that deal with the problem differently. It approaches the question of sovereignty. Several of us consider that to be an important issue in addition to those rights upheld by the *Constitution* relative to double jeopardy.

Assemblyman Hambrick:
It is interesting that you and the Attorney General's Office are using almost identical language to argue opposite sides of an issue. We have heard from the Attorney General's Office that there is a bar in place on certain communication with other authorities. You both used the term "racing to the courthouse." Can you explain why you disagree: we have prosecutors telling us they cannot do something, and you feel that they can do it.

Jason Frierson:
The bar language is with respect to whether or not there can be a prosecution. It is not with respect to whether or not there can be communication. It is our position that if another state has jurisdiction to prosecute a case and Nevada does as well, the current status of the law is that those states can communicate with each other and figure out which state is the most appropriate for prosecution. Oftentimes state judges see that there are multiple jurisdictions, and they try to coordinate so that a just result is reached and their resources are not wasted. They are not precluded from communicating at all. However, currently, if there is a prosecution in a jurisdiction for an act, then the next jurisdiction—if it was one of those states that recognizes such a bar—would be precluded from proceeding with a prosecution of that same act. It is not a matter of them losing sovereignty. It is a matter of resources and what makes sense. Some of the quotes from other states in the chart talk about concepts

of fundamental fairness, that it seems harsh to punish somebody multiple times for the exact same offense. There cannot be multiple prosecutions in one state: you could not be prosecuted for an act in Washoe County and then be prosecuted again for the same act in Clark County. That is a bar. In the same sense, if you are prosecuted in Arizona for an act, Nevada would not be able to prosecute you under current law for that same act, because that person has already been punished or subjected to jeopardy, whether they are convicted or acquitted. I think that we, in layman terms, have always been told that you have your day in court. When you have your day in court you answer to the fact finder, and that fact finder makes the determination. Once that determination is made, you either incur the consequence for that act or you walk away free. As a technical matter, the federal government has decided that states have sovereignty to handle criminal cases the way that they want to handle them, so the federal government is not going to tell a state what it can and cannot do. States decide, and Nevada has decided that it is not in our best interest to punish somebody multiple times for the same act. We believe that is the most appropriate way. The sponsors of the bill acknowledged that this situation rarely arises. It is our position that while you can communicate, and I think that the current state of the law encourages that communication, Nevada would be barred from prosecuting if another state or the federal government has already prosecuted that person for the exact same offense. We are not talking about different offenses. We are not talking about something that is similar but different. We are talking about the exact same conduct being prosecuted by two different bodies.

Assemblyman Segerblom:
Can someone explain to me why the federal government bar on double jeopardy in the Fifth Amendment to the *U.S. Constitution* does not stop all of this anyway?

Jason Frierson:
The federal government has decided that because they are different states, they are technically different elements. If the states want to treat it as such they are able to without being barred by the Fifth Amendment.

Assemblyman Segerblom:
The federal courts have interpreted it that way?

Jason Frierson:
The federal courts have interpreted it that way: that the states can choose to acknowledge the doctrine or reject the doctrine.

Orrin Johnson, Washoe County Public Defender's Office, Reno, Nevada:
I want to emphasize the fact that in a time of limited resources, at a time when the Nevada Supreme Court is ready to order county and state public defenders to not take on any more cases because we are already past our caseload limits, the idea that we need to retry somebody who has already been tried or redefend somebody who has already been defended seems odd as a matter of efficiency. This seems to be a solution in search of a problem. The concern is that right now there are people not being prosecuted that Nevada would like to prosecute, which means they need to be defended, and we need to spend the money to do it. The resource issues as well as the access to justice issues where we will be diluting our resources on people who do not need to be reprosecuted for something of prime importance.

It is important to know that bringing charges does not also bar someone else from also bringing charges. The image of racing to the courthouse, that one needs to be the first to file, is an old-fashioned property dispute issue, but it does not apply to criminal cases. It is only the final determination that ultimately bars it. Especially in more complex cases, the entire process takes quite a bit of time. There is a lot of time for cooperation. There is a lot of time to talk on the phone with the federal government or another state. There is a lot of time to determine what justice requires and where that justice is best sought. That, coupled with the resource issue, is something very important to keep in mind.

The other thing I wanted to add, and Chairman Anderson alluded to this earlier, is that just because someone is adjudicated or acquitted in another state does not mean that Nevadans are not without any remedy. There are still civil remedies available even if someone was actually acquitted. The O.J. Simpson case comes to mind. Even though a perpetrator has been punished in another state by the government, that does not mean that someone who has been harmed in Nevada cannot still seek his own compensation or that Nevada law prevents him from seeking compensation. Whether you are concerned about either resources or constitutionality, we believe that this bill is unnecessary.

Chairman Anderson:
It is interesting that you raise the question of resources because I am under the impression that justice is supposed to be the first thing we are after here, irrespective of resources. While I am concerned about the question of resources, I want to make sure that there is a proper prosecution and an adequate defense; we would eliminate some of that if justice was not our primary concern. Do you not agree with that concept?

Orrin Johnson:
If the question is whether or not we need to worry about it, because district attorneys are also strapped for cash and, therefore, will not go after something that is potentially unjust like a dual conviction, that may be the case. The testimony certainly indicated that this does not come up very often. We are saying that even just a handful of additional cases coming to public defense attorneys should not be divorced from the question of resources. Certainly there is the idealistic notion that every bad guy should be prosecuted to the fullest extent of the law and that everybody should have the best defense possible. But realistically, especially when we are facing these limits, we need to be concerned about resources. I think it couples with the justice question by noting that when we have to redefend somebody we are diluting the resources available to other people. When you start spreading out those resources, that is also a justice issue. It would be great if we had unlimited money, unlimited prosecutors, and unlimited defense attorneys, but unfortunately we do not, so we need to look at the issue of resources with regard to access to justice.

Jason Frierson:
It is our position that even if the defense bar and the prosecution were adequately funded to handle absolutely every case that was brought before them, S.B. 35(R1) is still simply wrong.

Chairman Anderson:
For a Nevada district attorney to bring a case that has already been tried in another jurisdiction he must have found that there was some unusual nature, or some high public interest. I would think it would be normal to challenge the district attorney, every time he brings charges on a crime, as to whether the use of public resources is appropriate. I appreciate the argument, but I think the issue is whether justice is being served.

Let me close the hearing on S.B. 35(R1).

[Recessed and reconvened.]

Let us turn our attention to the final bill of the day, Senate Bill 45 (1st Reprint).

Senate Bill 45 (1st Reprint): Revises provisions relating to certain criminal cases involving older persons and vulnerable persons. (BDR 14-262)

Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General:
[Read letter in support (Exhibit F).]

Chairman Anderson:
It is interesting that this particular legislation is back in front of us again. I am looking forward to learning why our statutes do not currently operate the way I thought they did. Also, how did 70 become the special number?

Karl S. Hall, Chief Deputy District Attorney, Criminal Divison, Washoe County District Attorney's Office, Reno, Nevada:
Initially in the bill an older person was defined as a person who is 60 years of age. That is how it was originally submitted for review. However, some members of the Senate Judiciary Committee did not believe that was old enough, so we went with California's age of 70. That is how we came to an agreement between ourselves and our opposition that 70 would be a more reasonable age.

With respect to whether or not the statute currently provides for adequate definitions relating to the taking of depositions, I do not think it does. I think the vulnerable person definition is a valuable addition to the bill as well as the older person definition. Based upon my experience with these types of cases, I think it is important to note that many times older people in their 70s and 80s die or lose their memories. I can think of a couple of cases where their testimony and recollection were not tested by the defense or by the prosecution. We were left with circumstantial evidence, and we did not have a case at all. I think the expansion of the definition is very important so that we can go to a judge and say, "We have good cause to believe that this testimony may not be available down the road."

I think the proposed amendment is very fair because both sides get an opportunity to test the veracity of the witness or victim in a courtroom context. To complain that the confrontation clause is violated is simply not true. If this person becomes incapacitated for one reason or another, that testimony is going to be lost forever, and we are not going to be able to proceed. I think the amendments are appropriate. I think they are a valuable tool to further the interest of justice, and I urge your passage of the bill.

Chairman Anderson:
In your experience as a Chief Deputy in Washoe County, have you had an opportunity to use the current statute?

Karl Hall:
I have not.

Chairman Anderson:
There is nobody in your office who has utilized it?

Karl Hall:
No, they have not; however, I have had some opportunities in the past when I think it would have been a valuable tool and would have liked to use it, and I think I am going to have the opportunity to use it in the future.

Chairman Anderson:
That begs the question: what is currently wrong with the statute the way it is currently operating? If it is not being used then, obviously, it is not operating.

Karl Hall:
Correct.

Chairman Anderson:
The district attorneys felt that it would be of importance to have at the time.

Karl Hall:
I supervise and prosecute most of the elder exploitation, abuse, and neglect cases in Washoe County and review many of them. I can tell you that I think it would be a valuable tool. That is why I sponsored the bill.

Chairman Anderson:
I am always concerned about the concept that you get to cross-examine witnesses against you in a court of law. I presume that we are going to hear from both sides that this is a compromise that has worked well in California?

Karl Hall:
This gives the defense an opportunity to cross-examine in a courtroom setting with a judge and a court reporter. It furthers justice in terms of allowing cross-examination, the best truth-finding engine ever devised by man, and preserves that testimony. I think it would be a good tool for everybody to have.

Assemblyman Carpenter:
In the letter we got from the Attorney General it says that part or all of a deposition may be used in a trial or hearing if the witness is dead. Does that mean that if somebody gives a deposition and dies, you can still use it? Is that what you are talking about?

Karl Hall:
Exactly.

Assemblyman Mortenson:
I was looking up the definition of a vulnerable person. Do you happen to know that?

Karl Hall:
I believe that is in NRS 205.4629.

Assemblyman Mortenson:
A vulnerable person is 18 years or older "who suffers from a condition of physical or mental incapacitation because of a developmental disability, organic brain damage or mental illness."

Chairman Anderson:
I think the most telling part of that definition is the restriction of the person's ability to perform normal daily and living activities.

Karl Hall:
I would agree with that.

Assemblywoman Dondero Loop:
Why did we choose to follow California? What definitions are the other states using to define an older person?

Karl Hall:
I did not research other states to determine whether or not they have a similar statute. I followed California because I became aware that they had that tool available to them, and I thought it would be a useful tool for us.

Brett Kandt:
I wanted to emphasize that even though an individual is 70 years of age or older, the prosecutor, in moving the court for the ability to preserve testimony under the statute, if it is so expanded, would still have to show good cause. We recognize that there are individuals over 70 who run marathons, jump out of airplanes, run Fortune 500 companies, and serve as very effective legislators. The prosecutor would have to demonstrate that there is something more than just the age of the person that compels the preservation of their testimony.

Section 2 in the bill, as it currently stands, would amend NRS 228.280 to expand the statutory authority for the imposition of a civil penalty against persons convicted of certain crimes against older persons or vulnerable adults. However, our office requests that section 2 be deleted in its entirety from the bill. That is because we have concerns over constitutional limitations on the imposition of a similar penalty against an individual actor, where that individual has been convicted and sentenced for a crime. That issue was addressed in another bill before this Committee. It was at that point in time that this issue came to our attention, and we felt that in order to be candid with the Committee about this bill, which had already passed through the Senate, we

should raise the issue. We felt it would be best to delete section 2 from the bill and allow section 1 to be considered by the Committee.

Chairman Anderson:
It would also take away the ability for an older person to receive compensation from the Fund for the Compensation of Victims of Crime, or not?

Brett Kandt:
No. While we are asking you to delete section 2 from the bill, we are not asking you to repeal the existing statute. We will take a closer look at the existing statute and make further determinations as to whether there are constitutional concerns. We are asking you not to expand the statute as requested in section 2 of the bill.

Nicolas Anthony, Committee Counsel:
In deleting section 2 you also want the deletion of the provisions related to the compensation of victims from the Fund for the Compensation of Victims of Crime?

Chairman Anderson:
This is on page 3 of the bill. Apparently, that was clarifying language. I was under the impression, Mr. Kandt, that you indicated that you wanted to retain the initial language. I presume that this was written to clarify that language.

Brett Kandt:
Section 2 would have expanded NRS 228.280 to include crimes under NRS 193.167 as crimes for which the state could seek a civil penalty upon a criminal conviction. On page 3 of the bill, lines 5 and 6, that amendment would have simply reflected the expansion of crimes under NRS 193.167. We are asking that the entire statute not be expanded in that regard at this time—all of section 2 would be deleted—due to our concerns about constitutionality.

Assemblyman Mortenson:
The defense can take advantage of all of these provisions also, right?

Karl Hall:
Absolutely. Everybody can take advantage of the statute and file a motion to request that a deposition be taken to preserve the testimony of an older or vulnerable person, or any other person who is provided for under the statute.

Chairman Anderson:
Let me close the hearing on S.B. 45(R1).

I like the bill, but I think we should be consistent in age.

[Meeting adjourned at 11:20 a.m.].

RESPECTFULLY SUBMITTED:

_____
Kyle McAfee
Committee Secretary

RESPECTFULLY SUBMITTED:

_____
Julie Kellen
Editing Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 22, 2009 Time of Meeting: 8:14 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 194(R1)	C	Lora Myles	Proposed amendment.
S.B. 35(R1)	D	Keith Munro	Email from Jason Frierson.
S.B. 35(R1)	E	Keith Munro	Email from Lee Rowland.
S.B. 45(R1)	F	Brett Kandt	Letter in support.