MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
May 1, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:40 a.m. on Friday, May 1, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington

COMMITTEE MEMBERS ABSENT:

Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblyman Ruben Kihuen, Assembly District 11

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

Barry Smith, Executive Director, Nevada Press Association, Inc.
Connie McMullen, Publisher, Senior Spectrum Newspapers

Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General
Kerry Benson, Deputy Attorney General, Office of the Attorney General
Philip K. O'Neill, Captain, Division Chief, Records and Technology Division, Department of Public Safety
Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada
Dennis Carry, Detective, Washoe County Sheriff's Office
Helen Foley, T-Mobile, USA
Russell Sarazen, Senior Manager, State Legislative Affairs, T-Mobile, USA
Jason Frierson, Public Defender's Office, Clark County

CHAIR CARE:
I will open the hearing on Assembly Bill (A.B.) 257.

ASSEMBLY BILL 257 (1st Reprint): Prohibits the taking of an excessive number of certain free publications under certain circumstances. (BDR 15-532)

ASSEMBLYMAN RUBEN KIHUEN (Assembly District 11):
I will read from my testimony (Exhibit C).

CHAIR CARE:
Thank you, Mr. Kihuen. Any questions of the Assemblyman? I do not see any, thank you.

BARRY SMITH (Executive Director, Nevada Press Association, Inc.):
Assemblyman Kihuen talked about a few examples in the south with free newspapers disappearing. There have been a few incidences in the north where one was an investigative story critical of a business and all the copies in the vicinity of that business mysteriously disappeared. Another one was a cover story critical of a former President, and a number of racks were emptied. It does not happen often, and you cannot say for certain why those copies were taken. If all your copies disappear, or if it happens repeatedly, you want to find out what is going and file a complaint with the police.

I want to talk about the importance of free newspapers, the content and magazines to the readers, but also to emphasize the value to the businesses. They are called free newspapers, but businesses have paid for the advertising, expect to get a return on their sales and coupons, and if those newspapers are

taken to be recycled or confiscated for some other reason as the bill outlines, that is a definite harm to the businesses that paid for the advertising.

It is important to realize free newspapers often cater to specialized audiences. You are talking about minorities, senior magazines and religious groups. In both the south and the north there are free newspapers printed in the thousands or hundreds of thousands. Many of these are small print runs that might be placed in a few locations. It would not be difficult for somebody to wipe out the week's entire edition and deprive people of that publication.

CHAIR CARE:
Thank you, Mr. Smith. As I mentioned, you and I talked about this the other day. I understand why California did it, and I do recall it has happened more than once at the University of Nevada, Las Vegas. People get passionate on that campus.

I question the enforceability. First of all, it requires specific intent. As you said, you do not always know why somebody does this. It seems to me somebody would have to witness a person taking this many newspapers. What happens if somebody takes nine and comes back five minutes later and takes nine from a rack right next to it, or he takes nine, but he has five people lined up, each of them to take nine. That is probably a case more for the prosecutors and law enforcement, because those are the issues they would have to look at.

MR. SMITH:
The analogy I was talking about was your city has a free bicycle program where they park their bicycles at one location and take their bicycle and ride it to another location. You might expect you would lose a few bicycles along the way. But, one morning all of the bicycles are gone and you went to a bicycle shop and they were all chained in the parking lot. Or, you went to the scrap dealer and they were all there, or they were at the pawn shop. You would not say, well, that is not a crime. They are free bicycles. It would be the same situation. You would have to make a case for it, but this has been prosecuted numerous times across the country where these laws do exist. Where it has not been prosecuted is where police or the district attorneys said it is not a crime.

CHAIR CARE:
It would be difficult; I think we all recognize that.

SENATOR WIENER:
It seems like this is the theme in my thought process for this Session, as we are getting more and more legislative measures where we need to tell people what we are doing. Maybe we should consider a notice that is put on each vending machine that says you are only allowed to take up to ten, and then at least you have provided notice to people. We often see punitive measures in *Nevada Revised Statutes* (NRS) attached to behaviors that are made illegal. The unknowing person says I only need five, but it does put people on notice that this is not appropriate behavior, for whatever reason.

MR. SMITH:
Yes, it is our intention to alert people on the racks and in the publication themselves what the situation is. And, to make it clear, this does not prohibit somebody picking up 50 copies to take down to the senior center because they are going to read them. It is not depriving someone of reading them. It is illegal when someone takes them for these specific purposes.

SENATOR PARKS:
My question deals with page 3, section 1, subsection 5, lines 16 through17. I have never seen anything like this language that, "A conviction under this section shall be deemed not to constitute a conviction for theft or petit larceny." Is that a somewhat standard provision in law?

BRADLEY A. WILKINSON (Chief Deputy Legislative Counsel):
No. That is included in the California law, so we included it here. I am not sure what the rationale is for not including that, except to be certain the penalties in this new section are the only penalties, and that it is not petit larceny under statute. So, it makes the penalty clear. But it is somewhat unusual.

CHAIR CARE:
Thank you. Any other questions for the panel?

CONNIE MCMULLEN (Publisher, Senior Spectrum Newspapers):
I am the publisher of *Senior Spectrum Newspaper* and another publication called *Generation Boomer* and *Golden Pages*, a senior resource directory. I support A.B. 257 regarding excessive numbers of free publications being taken. As a publisher of a free publication since 1993, A.B. 257 addresses a problem that has not been discussed in our State. I too would agree to a course of action.

I would put the *Nevada Revised Statutes* in the index of my paper, if it does go forward, and also in my indoor and outdoor racks.

Subsections 1 to 4, in section 1, are very real problems for our industry as they do interfere with the ability to do business, as well as provide the public with the resources of news and information which is their First Amendment right. I have experienced the takings of multiple stacks of papers, as well as newspaper racks, which are not addressed. It is costly and a repetitive occurrence. In our case, it does not happen every once in a while, it happens frequently.

Past attempts to seek recourse are viewed as a civil matter. I have two national distribution companies that circulate my papers. They attempt to catch the people. We also circulate in grocery stores. The grocery stores also watch the free publications because it is disruptive to their clients.

Publishers of free publications, which provide free trade of alternative news, often target specific demographics that address a public need and concern and should be protected as any small business in our State. Assembly Bill 257 can provide that protection under the *Nevada Revised Statutes*.

Senior Spectrum targets seniors, baby boomers, caregivers and retirees who are often hard pressed to find news that specifically addresses their concerns, especially those that come out of the Legislature. These readers sometimes are not able to afford the daily publications, as they are on fixed incomes or cannot get out to purchase the newspaper. We go directly to communities where people live and frequent. We often find our publication taken the very next day. To address some of the discussion we had earlier, we drop over 800 publications in one month at the Washoe County Senior Center, and we go through every single one of them.

In addition to competition, we have also found consumers themselves hoard the publication because of coupons, sometimes taking more than 50 at a time; we have also caught people selling them—seniors themselves.

These activities are very expensive. They are detrimental to populations who rely on the printed information, which can also consist of important public notices and change in government assistance programs, such as Medicare and Medicaid. We report on frequent scams, often at the request of the

Attorney General's Office. Assembly Bill 257 is good legislation, and I commend its author for bringing it forward. It is long overdue.

CHAIR CARE:
There is also a provision in section 1, subsection 2, where the takings would not be unlawful. One of them is by the owner or operator of the property on which the news rack is placed. Meaning if I allow you to come onto my property and put a rack there and then I ...

MS. MCMULLEN:
You often ask permission. We have had people take our rack. We have our phone number on it and often are not given the courtesy of a call. If it is on a public street such as at a bus shelter, it is a First Amendment right. We have been asked to remove the racks on public streets. The City of Reno has investigated this, and they cannot move them. We do get calls if people find them a nuisance. Sometimes they attract graffiti, and we remove them.

CHAIR CARE:
Yes, that is a traditional public forum. There has been all manner of litigation in Clark County about who owns the sidewalks, and even if you own the sidewalk, it is still a traditional public forum, and if that rack is there, then ...

MS. MCMULLEN:
Nobody wants to lose their racks. They are very expensive and hard to replace. Oftentimes if somebody calls us, we will remove it.

SENATOR WIENER:
To the sponsor of the bill, it is nice to see that an optional remedy is community service. Based on Ms. McMullen's testimony, we have seniors who do this over and over again, even for the reasons of economic gain because in tough times, they are sharing with the neighbors for whatever reason. If there is an ongoing or repetitive behavior and A.B. 257 goes through, the remedy would be community service for those who might not be able to handle time in jail or the fine.

You could be quite creative, such as working with the recycling center, but it would be a better match for some of the people who might be taking the periodicals. Also, if you are doing 10, 20 or 40 hours of community service, it is a lot of time to think about not wanting to do it again.

CHAIR CARE:
Any questions or comments?

SENATOR WASHINGTON:
Ms. McMullen, reading through your testimony, I was trying to pick up what my colleague from Clark County was saying regarding the penalties. You changed it from $250.

MS. MCMULLEN:
This is not my bill, this is Assemblyman Kihuen's, but I do support it. I would rather see people do community service. The crux of the bill is to provide some deterrent. Currently there is no deterrent; anybody can do whatever they want.

SENATOR WASHINGTON:
I pick them up and read them. My concern is the word "free." When you add the word "free," "free periodicals," "free newspapers," we do not want anybody taking excess, but "free" has a perception that you can take as many as you want. I know some people do it for various reasons, but I have a tough time putting the two together, "free" and people taking as many as they want. Now we are going to fine or penalize them for taking too many. Has anybody thought about putting a charge or cost, whether it is 25 cents or 50 cents?

MS. MCMULLEN:
Senator Washington, if you charge for your publication, it puts you in a different category with the State. People take the free publications. They provide a community service if there is an event or a public notice or article. Nobody wants to prosecute someone who wants to enjoy the publication. There are people, businesses, who aspire to do detriment to other businesses. That is the heart of the bill. We serve older Americans. For some reason they do not want to be reminded they are aged. It is a hard thing to say. We are attacked quite a bit with graffiti and similar things. This goes to that kind of behavior.

CHAIR CARE:
I would point out in section 1, subsection 1, it is a specific intent crime. What we have not discussed is this sliding scale of what constitutes a current issue. It may be that somebody sees the publications are free, and they are no longer a current issue by a few hours or a day or two. That goes back to enforceability. You have identified a problem. Any other questions from the Committee?

SENATOR WASHINGTON:
You are saying an intent that may be malicious at best, but I am not opposed to the bill. When you throw out the words "free" and "complimentary," it creates different behavior in different people. I am not sure you are going to change that by the bill. Free is free, and people will take as many as they want. Some will use them for the right purpose and some will use them for malicious purpose.

CHAIR CARE:
Senator Washington, there was testimony of the possibility of putting a label on the racks so the public would have actual notice that taking more than ten could constitute, depending on the circumstances, a violation of the law. We can put this to the next work session if that is what the Committee desires.

SENATOR WASHINGTON MOVED TO DO PASS A.B. 257.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION PASSED. (SENATOR AMODEI WAS ABSENT FOR THE VOTE.)

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CHAIR CARE:
I will open the hearing on A.B. 46.

ASSEMBLY BILL 46 (1st Reprint): Makes various changes concerning the right of certain persons to purchase or possess a firearm. (BDR 14-271)

BRETT KANDT (Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General):
The Attorney General's Office serves as the State's chief law enforcement agency. One of our unwritten duties is to monitor changes in federal law which potentially affect the laws and statutes of Nevada and notify the Legislature of those changes. We also think it is our duty to present you with a possible solution when a change in federal law has occurred.

One such proposal is A.B. 46. The bill responds to the National Instant Criminal Background Check System Improvement Amendments Act of 2007 (NICS), which was passed by Congress since the last Legislative Session. The NICS

Improvement Act encourages states to maintain a database of records related to mental health adjudications for the purpose of making a determination of whether a person is disqualified from possessing or receiving a firearm under federal law. There are important policy considerations for you to consider in determining if Nevada wishes to seek compliance with the NICS Improvement Act.

The Nevada Legislature has already decided that someone who is mentally ill cannot own or possess a firearm. That is not the issue before you today. Nevada law under NRS 202.360 subsection 2, paragraph (a) (Exhibit D) prevents a person from owning or possessing a firearm if he/she has been adjudicated as mentally ill or has been committed to any mental health facility.

While we have a mechanism for placing domestic violence convictions into the State Criminal History Repository, and domestic violence convictions also prevent a person from owning or possessing a firearm, there is no such mechanism under Nevada law for placing mental health adjudications into our State Criminal History Repository.

Therefore, if someone is involuntarily committed, guilty of a crime but mentally ill or incompetent to stand for criminal trial, there is no mechanism in place to transfer that information to our State Criminal History Repository.

In the NICS Improvement Act, Congress found that millions of needed records were missing from the NICS system. Congress has offered to provide grants to states for working toward maintaining a database of records related to persons who have been adjudicated mentally ill or have been adjudicated to a mental health facility. Noncompliance with the NICS Improvement Act could result in a withholding of federal funds under the Omnibus Crime Control and Safe Streets Act.

However, the United States Attorney may waive the noncompliance penalty if it is determined that a state is making reasonable efforts to comply with the requirements. To begin our State's good-faith efforts of compliance, our office has worked with State law enforcement officials, the Nevada Sheriffs' and Chiefs' Association, the Administrative Office of the Courts and the Criminal History Records Repository, Department of Public Safety. Assembly Bill 46 is the result of that collaborative effort.

With me is Deputy Attorney General Kerry Benson. She is the most knowledgeable person in our office regarding the NICS Improvement Act. She will provide testimony regarding the events that caused Congress to pass the NICS Improvement Act. And most importantly, she will cover the proposed bill, section by section.

KERRY BENSON (Deputy Attorney General, Office of the Attorney General):
As Mr. Kandt discussed, this is in response to federal law. You will remember the Brady Bill that was passed in the mid-1990s, a significant gun control measure which created NICS. It is a nationwide electronic database that federally licensed firearms dealers check before they sell a gun to make sure the buyer is not a prohibited person, whether that is because the individual has a felony conviction, a domestic violence-related crime, etc.

It has been more than two years since the shootings at Virginia Tech. That case highlighted one of the main problems with NICS. The NICS database depends on the states to send updated records to it. If the records do not get into the database, it simply does not work.

The Virginia Tech gunman went to two federally licensed firearms dealers, passed the background check and bought two handguns which he used to kill 32 people. None of those background checks showed he had previously been declared by a court to be a danger to himself or others in order to get outpatient psychiatric treatment. That event highlighted one of the main problems with NICS. Congress responded with NICS Improvement Amendments Act, which is designed to start filling those holes.

As Mr. Kandt mentioned, both federal and state law prohibit somebody who has been committed to a mental health institution or as the federal law terms it, adjudicated a mental defective, from owning or possessing a firearm. This bill is intended to ensure those records get into the NICS database.

The first five sections of A.B. 46 are straightforward. Section 1, subsection 8 states that if a person pleads guilty but mentally ill, a record must be sent to the database.

In section 2, subsection 3, if a jury finds a person guilty but mentally ill, that record must be sent to the record database. In section 3, subsection 4, if a jury acquits a person by reason of insanity, that record is sent. Section 4,

subsection 6, where a defendant is declared incompetent to stand trial, that record must be sent to the record database. Section 5 clarifies these amendments go into NRS 179A. Section 6 defines NICS so as to refer to the federal database.

Section 7 is necessary for compliance with the federal law. The federal law requires states to implement what they call a relief from disabilities program. Under federal law, previous to the NICS Improvement Amendments Act, if you were ever committed to a mental institution or adjudicated a mental defective, your right to own a firearm was forever lost; there was no way to ever get that right back, as opposed to somebody who was convicted of a felony who could get their record sealed in most states. At that point, the right to own a firearm, depending upon the state, could be restored and the federal law would recognize that.

What they have done here is require states to implement something so somebody who is no longer incompetent, who is no longer mentally ill, can petition to have their rights restored. It provides a process by which a person can petition a court to show the basis for the disqualification no longer exists and therefore getting an order restoring the right to own a firearm. Once that happens, the section also requires the new record stating the rights were restored gets sent to the Central Repository. The Central Repository, as the State Administrator for the NICS database, will take reasonable steps to remove the record from NICS within five business days. That is to make sure once somebody gets these rights restored, this will not get caught up in administrative red tape. It is not going to sit on somebody's desk for six months. It is going to get removed and the person's rights restored.

Section 8 clarifies the records are not public records. They are not to be used for any purpose other than keeping the NICS database updated. It also provides no cause of action for damages may be brought for failing to transmit the record, an incomplete record, etc.

Section 8.5 creates an administrative process for a person to inspect his/her records and to correct any errors in those records. This is a different process from section 7; section 8.5 is intended to address administrative errors. Section 9 is a technical section.

Section 11.5 deals with guardianships. Any time a court appoints a general guardian for a person, it requires the court to make a specific finding whether that person has a mental defect and is therefore prohibited from owning a firearm. There was much concern regarding guardianships. There are different types of guardianships. There are temporary guardianships and emergency guardianships. For example, when somebody is physically incapacitated, it is generally thought to be a temporary situation. We have attempted to clarify this bill so it only relates to permanent general guardianships. To clarify this even further, in those situations, the court is required to make a specific finding one way or the other. If the court does make that finding, it must be supported by clear and convincing evidence.

An example of a guardianship proceeding where the court would not make that finding is when dealing with a minor and the guardianship is being appointed because the minor's parents are not able to take care of the minor. In that case, it has nothing to do with the minor's mental health and it would be appropriate for the court to state the ward is not a person with a mental defect. So when that minor becomes of age to purchase a firearm, they would not be prohibited from doing so because of some record in the database. It is to make that absolutely crystal clear.

Section 12 clarifies that it is not unlawful to sell a firearm to a person who has had their rights restored under section 7. Section 13 requires a record be sent to NICS for a person who is involuntarily committed to a mental institution. Again, there are different types of admissions to mental facilities. This only deals with court-ordered involuntary admissions.

Section 14 states NRS 354.599 does not apply. Section 15 is the effective date, January 1, 2010. As you may have seen throughout, the bill refers to a form and regulations prescribed by the Department of Public Safety having to do with inspection of records. This will give them time to get up to speed.

SENATOR WIENER:
In section 7, which addresses the restoration based on a mental capacity that comes out of NICS, there is a timeline, a due diligence requirement to do so. In practicality, we deal in this Committee with sealed records. By taking it out, it is not immediately accessible with NICS for the background check, but is still with the Repository. What are the protections for that person? What would facilitate a sense of calm for that person if he/she is restored to a mental capacity that

the record would not be reintegrated into a system? It is still in the Repository, what level of protection is there beyond your taking it out of NICS, that the person's mental capacity has been restored? Is there some level of protection for that information?

MS. BENSON:
Once the record is removed from NICS, it will be destroyed. The only purpose of these records is to keep the database up to date. Once it is no longer relevant, or a court orders it be removed, it must be removed from the database. At that point is has no further use.

SENATOR WIENER:
When I see language removed, it means destroyed?

MS. BENSON:
It means removed from the national database.

SENATOR WIENER:
From NICS and then when the Repository gets it, they destroy it, or retain it without access? How does that work?

MS. BENSON:
I would assume it would be destroyed.

SENATOR WIENER:
I am trying to understand the steps. It is not that I am advocating for anything.

PHILIP K. O'NEILL, CAPTAIN (Division Chief, Records and Technology Division, Department of Public Safety):
Yes, destroyed. It is shredded.

SENATOR WIENER:
Unless this occurs again, it has a new life.

CAPTAIN O'NEILL:
Yes.

CHAIR CARE:
After two to five years, there is waiting period. Why is it necessary to have a waiting period? Is there some period before the petitioner can seek to have the records expunged?

MS. BENSON:
There is no requirement for that waiting period within the federal law. However, as a matter of practicality, it makes sense to have time pass between the court adjudication and having somebody petition to have their rights restored. This is to prevent an onslaught of frivolous petitions.

CHAIR CARE:
Take the standard on page 8, lines 2 and 3, "is not likely to act in a manner dangerous to public safety." Who makes that determination and how is that?

MS. BENSON:
That would be made by the court.

CHAIR CARE:
And the factors could be anything.

MS. BENSON:
I assume it depends on the evidence and a case-by-case basis.

CHAIR CARE:
Some sort of evidentiary hearing.

SENATOR WIENER:
I am looking at the floor statement from the Assembly and, when we talked about the guardianship, there is a provision that a repository must make available the records for review. That would be by the person or the guardian to review the accuracy of the record?

CHAIR CARE:
In section 8, any record described in section 7 of this Act is confidential and not public book or record. This does not really go to the bill but to Mr. Kandt, who has access to the records kept in the Repository? I know we have statutes on occasion that say certain people have access, and I have even read a reporter sometimes has access? Am I wrong on that?

CAPTAIN O'NEILL:
Our Division stores multiple records. Depending on what we are talking about, we have criminal history records with limited access. Yes, by statute, the press does have some authority to gain criminal history information in the course of their duties. The NICS does not allow that. Not even law enforcement can access information within NICS unless it is in the scope of their business. Their only business would be when they have a weapon seized and they are returning it to the owner from evidence, they run a NICS check. They cannot come in and say, can you tell us if so and so has bought any weapons, what he was denied last week, why did you deny him. They are restricted from any of that information.

CHAIR CARE:
We do not need to get into this today, but we need case law on this. It seems to me if a reporter can have access to it, which makes it public information, can anybody have access to it? I have never understood why that is in statute.

CAPTAIN O'NEILL:
That is an excellent question, and one we have bantered about at times too. I will say it is limited to what the reporter does receive. They will get the convictions, but they do not get a copy of the information. It is usually conveyed to them in a verbal or summary manner.

SENATOR PARKS:
Captain O'Neill, in looking at other bills, there seems to be a complicated process for individuals to get things removed from records or files and knowing the process they have to go through. Will individuals be notified that their records are put in the file, or will they know when they go to purchase a gun? That is my concern, as well as the process of getting their records removed.

CAPTAIN O'NEILL:
We do not notify anyone when records come in. Usually the person will know they have been convicted of a crime or have been adjudicated mentally incompetent. As I recall, the judge makes part of that record available to them. If you are denied, we give you notification at the time of denial and how to challenge the record or information. Then you can move forward if we have made an error, or we will talk with you and go over the records. I will say well over 90 percent of the records are correct.

CHAIR CARE:
In section 7, subsections 1 and 2, does existing law apply to what a petitioner would do about this record? Is there anything the person who has the record could do, absent the language contained in section 7, subsection 3 going forward? If we did not have that in there, what would be the procedure, or would there be one?

CAPTAIN O'NEILL:
I am going to let the Attorney General answer that. However, we submitted this bill with the amendment for approval to the U.S. Department of Alcohol, Tobacco and Firearms (ATF) to make sure it complies with their requirements and procedures, and they have come back acknowledging it does.

MS. BENSON:
Without this language there is a procedure in NRS 41. It is an archaic procedure called Declarations of Sanity. It is an old statute, but as Captain O'Neill mentioned, the federal law has particular requirements for the relief from disabilities program that states implement. I do not believe that older statute meets those requirements. That is what section 7 is intended to do, to make sure there is a process and the process puts us into compliance with the federal law.

CHAIR CARE:
Thank you.

SENATOR MCGINNESS:
In section 7, lines 30 to 31, on page 7 of the bill, "the petitioner may not file a petition pursuant to subsection 2 until 5 years after the date ...". Once my information goes in, I have to wait 5 years. Is that correct?

MS. BENSON:
Yes. That is correct.

SENATOR MCGINNESS:
Then I am looking at the page 8, lines 28 through 31, if I have been denied, I have to wait another two years for a rehearing. Is that correct?

MS. BENSON:
That is correct.

SENATOR MCGINNESS:
And you talked about within five business days, so it would be expeditious, but I am also looking in pages 8 and 9, lines 40 through 45, "no action for damages may be brought against the person or governmental entity for: Transmitting or ... failing to transmit ... or delaying the transmission ... transmitting or reporting inaccurate ... information. That is a "get out of jail free card" if somebody does not do anything with the information or does it wrong.

MR. KANDT:
This would preclude the State from being financially liable. It precludes an action for damages, but it does not preclude the individual, if it becomes necessary, from seeking a court order compelling the State to transmit the records, correct the records or remove the records as necessary. It does provide on page 8, lines 25 through 27 that if an individual has to resort to legal process to compel the Repository to do whatever they are supposed to do, the person can recover reasonable attorney fees and costs.

SENATOR MCGINNESS:
If, after the five-year wait, I was to file on the next day, how much time would it reasonably take to get that into court? Obviously, the courts are stacked up, so if I was trying to get this information out of the records, how long would it take for that to happen?

MR. KANDT:
I could not speculate. It would probably depend on the court.

SENATOR MCGINNESS:
Probably a year at least, right?

MR. KANDT:
Possibly.

SENATOR MCGINNESS:
Thanks.

CHAIR CARE:
I want to be sure of the relief from disabilities in section 7. Is it your contention that this language will be reviewed by whomever it was?

CAPTAIN O'NEILL:
We have submitted to ATF's legal staff for review to ensure compliance with their laws because it also ties into grant funding for us. To receive grant funding, we have to have a statute like this to work at improving and moving forward with our records improvement act. It is a very important bill that we get forwarded. Right now, $10 million has recently been announced. I found out at a meeting two weeks ago that we are probably one of only three states that will qualify for part of the $10 million grant to improve our records improvement maintenance, all of these various procedures discussed here and the business of our Brady unit.

CHAIR CARE:
I am not saying we would do this, but if we were to toy with the scheme in section 7, if that would somehow endanger federal grant funds, if we still had something in there that would address the fundamental issue but if we were to change the scheme ...

CAPTAIN O'NEILL:
The best I could do is work with the Attorney General and submit it back to ATF.

CHAIR CARE:
I am not saying we are going to do that, Captain O'Neill. Obviously, there is a concern on the Committee about that, but not with sections 1 through 6. Have I missed anybody who has signed in who is in favor of A.B. 46?

REBECCA GASCA (Public Advocate, American Civil Liberties Union of Nevada):
We signed in on the Assembly side in opposition to this bill because at the time it was introduced, there were no due process reductions for the individual whose information would be forwarded into the NICS system or to the Central Repository. I wanted to be on record to thank the Attorney General's Office for working with us in order to address those due process concerns, particularly because this affects a fundamental right, the right to bear arms. We appreciate the work they have put into addressing the concerns. If the Committee is interested in entertaining more scrutiny in regard to the five year limitation—that is an arbitrary number the office did assign—and you think that is an overly burdensome amount of time for somebody to move forward in their due process rights, we would support your scrutiny.

CHAIR CARE:
I am not saying we will, but I think there was concern about the vexatious litigator of the multiplicity of capricious petitions.

SENATOR WASHINGTON:
Ms. Gasca, I appreciate your testimony and being able to restore the fundamental rights of the Second Amendment. I am sure there are many listening to that, probably scratching the back of their head since it is coming from the ACLU. But nonetheless, you said the 5 years was an arbitrary figure that was pulled out of the air. I underlined that section too in section 7, the 5-year wait. Did the Attorney General's Office have any problem with reducing that number to two or three years?

MS. GASCA:
We did not discuss that number, but hearing their testimony today, they said it was an arbitrary number. They would be the best spokesperson for answering your question.

SENATOR WASHINGTON:
I thought you had been working with them.

MS. GASCA:
We did discuss some of the amendments that they put forward. Those were strictly related to the due process because that number was arbitrary. There are no federal standards coming directly from the NICS system or the administrators of that system. The Attorney General's Office and their guess would be as good as ours and yours. It is the duty of the Committee, and we would defer to the Committee's decision, as to whether that five years is appropriate or something perhaps less.

SENATOR WASHINGTON:
Because they mentioned the federal grant that was in compliance with the federal Brady statutes I wondered if that was a number fixed in the statute itself. But since you said it is an arbitrary number, perhaps we could ... five years is too long to wait.

CHAIR CARE:
I will close the hearing on A.B. 46. I will open the hearing on A.B. 85.

ASSEMBLY BILL 85 (1st Reprint): Provides for the formation of a committee to study laws concerning sex offender registration. (BDR 14-259)

Members of the Committee, you have copies (Exhibit E) of a Permanent Injunction Order issued by U.S. District Court Judge James C. Mahan last year. During the Twenty-fifth Special Session on December 8, I participated in discussions with Keith Munro. There is a need for this bill. I will let Mr. Kandt explain why we have to do this.

MR. KANDT:
I will read from my testimony, Exhibit E.

After the Permanent Injunction was entered, the Attorney General's Office concluded the statutory provisions governing sex offender registration and management that existed prior to the enactment of A.B. No. 579 of the 74th Session and S.B. No. 471 of the 74th Session would remain in effect unless and until the Injunction was lifted. The Legislative Counsel Bureau (LCB) agrees with us, and I have provided a copy of the LCB opinion (Exhibit F) concurring with our analysis and conclusions. It is our conclusion, due to the Permanent Injunction, it is as if those two bills were never enacted. We are where we were back before the enactment of those laws.

Since the commencement of the litigation, an informal working group, made up of the parties to the litigation and other stakeholders, has been working toward a solution. At the same time, Nevada has applied for and received an extension of time in which to comply with the minimum requirements of Title 1 of the Adam Walsh Child Protection and Safety Act, the Sex Offender Registration and Notification Act (SORNA). When granting this extension, the United States Department of Justice Sex Offender, Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) office indicated that federal technical assistance and funding may be available to assist Nevada in reaching compliance. In part that is because Nevada has taken greater steps than possibly any other state in the nation to attempt to comply with requirements of the federal Adam Walsh Act. The SMART office is interested in whether what we achieve can then be replicated in other states.

Assembly Bill 85 would assist in these efforts by formalizing the existing working group into an advisory committee to once again formulate solutions. The particulars of the advisory committee and the statutory provisions

governing its operations were drafted by LCB. We have no problem with those provisions in the bill as it is before you.

The American Civil Liberties Union (ACLU) has informed me they object to some of these provisions, even though the bill specifically grants the ACLU representation on the advisory committee.

The purpose of this advisory committee is to create a core group of stakeholders who are educated on the legal and technical issues regarding sex offender registration and management to enable our State to formulate solutions and propose any necessary legislation in the future. This is a pertinent part, where you will note there are Legislators included on the advisory committee.

The advisory committee will involve legal counsel to the parties in the pending litigation and will require input from some of the parties that have been named defendants in the litigation as well. This is going to require a delicate balance of the parties engaging in productive dialogue without compromising their respective litigation strategies. Nevertheless, the Attorney General is committed to working toward solutions for the benefit and safety of Nevadans, even as we continue to litigate this matter in federal court.

While the bill specifically grants the ACLU representation on the advisory committee, the ACLU is not compelled to participate if it does not want to join us in working toward solutions. They have been given a seat at the table. If they choose not to participate, then we need to move on without them.

Therefore, we encourage the Committee to adopt the bill in its current form without any amendments that may be proposed by the ACLU. The particulars of the advisory committee and the statutory provisions governing its operations as drafted by LCB are sufficient to enable the advisory committee to fulfill its intended purpose.

SENATOR WASHINGTON:
Is the concern, the registry and the compliance with the registry, as far as making sure that the confidentiality or the constitutionality of those individuals who have to register and maybe the longevity of how their names have to be on the registry, even their whereabouts or locations of residence?

MR. KANDT:
We are not quite sure what the concern is because, if you review the Order granting the Permanent Injunction, it is incredibly broad in scope. In fact, that is why we feel confident we will succeed on appeal. The Order is very brief and simply enjoins both the bills in their entirety as being unconstitutional. We felt that was highly unusual. Typically, when a law is enjoined, portions of it will be enjoined, not an entire law. We feel the Order was sweeping and overbroad. That is why we are confident we will succeed on appeal.

However, to answer your question, we are not quite sure what the concerns were because the Order was too broad and declared both laws unconstitutional.

SENATOR WASHINGTON:
There were no specific reasons as to why we are out of compliance?

MR. KANDT:
Once again, I can only refer to the Order because we only have the Order to go by. To follow up more, the Order does make reference to the issue of being retroactive rather than prospective in that issue and whether that creates constitutional concerns. It talked about various constitutional provisions that were referenced with regard to whether the statutes were constitutional, due process, ex post facto and a handful of other provisions in the Constitution. But that was the only degree of specificity. There is not a great deal of specificity in the Order. That is the best I can answer it.

CHAIR CARE:
Any other questions? I do not see any. Ms. Gasca left the room; I had her shown as being neutral on this one but not wanting to speak. There is nobody else to testify on this bill.

SENATOR WASHINGTON MOVED TO DO PASS A.B. 85.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION PASSED. (SENATOR AMODEI WAS ABSENT FOR THE VOTE.)

* * * * *

CHAIR CARE:
I will open the hearing on A.B. 88.

ASSEMBLY BILL 88 (2nd Reprint): Establishes a civil remedy for a person who was a victim of a sexual offense which was used to promote child pornography. (BDR 15-267)

MR. KANDT:
Before I explain why we are here on A.B. 88, for purposes of clarity, I want you to know that first I will talk about the bill in its current form. Second, I am going to discuss an amendment (Exhibit G) we are proposing to the current bill. Third, I am going to touch upon the fact that we believe an amendment is going to be brought from another party, and I will explain our position on their proposed amendment.

To begin with, Congress passed Masha's Law, which is part of the federal Adam Walsh Act which gives child pornography victims the right to seek civil damages in federally prosecuted cases, damages against the individuals that victimize them.

Assembly Bill 88 amends our statutory framework to establish a similar civil remedy under Nevada law. Our bill is modeled after a Florida law which gives similar rights. Section 1 establishes the prerequisites for bringing a lawsuit. The potential plaintiff must be under 18 or have been under 18 when they were a victim of a sexual offense. There must have been a depiction of the sexual offense showing particular sexual conduct and that depiction must have been used to promote child pornography. There must be personal or psychological injury to the victim. Finally, the victim must show the defendant possessed or promoted that depiction.

If we have a minor who was a victim of a sexual offense where that sexual conduct was filmed or photographed and then disseminated as child pornography, they could be a potential plaintiff under this civil cause of action.

Assembly Bill 88 constitutes good public policy because it allows victims to receive compensation for the horrendous acts committed against them. We also hope it provides some form of deterrence for those individuals who are interested in this type of material.

We have a proposed amendment, Exhibit G, to the bill. Our proposed amendment would create a new statute to address what we perceive as a current gap in Nevada law. That gap has to do with new technology on the Internet and the fact that individuals who seek child pornography on the Internet can now view it through technology called streaming video. They do not have to download anything onto their computer to view it. Our law prohibits downloading child pornography because that would be possession of child pornography in violation of Nevada law. But accessing streaming video does not appear to be prohibited under that law. With streaming video now readily available, our proposed amendment, Exhibit G, was intended to close this perceived gap in the State law. The federal government has already moved to close this gap as have several states. I have provided a copy of the federal government's statute (Exhibit H).

A similar amendment to the one we are providing to you was offered in Assembly Judiciary. There were some concerns with that amendment being possibly overbroad. In addition, there was an Assembly Bill offered by Legislators that would close this gap. I have provided a copy of Assembly Bill 315 (Exhibit I) to you. That legislation was modeled after the amendment we crafted and sought to have put into A.B. 88. As you can see, three Senators on this Committee signed A.B. 315, as did several other Legislators.

ASSEMBLY BILL 315: Revises the provisions pertaining to crimes relating to pornography involving minors. (BDR 15-880)

We believe the sponsors and supporters of A.B. 315 recognized that Nevada law needs to be updated because technological advances have changed the way child pornography is distributed over the Internet. However, because of a looming deadline, we told the Chair of Assembly Committee on Judiciary we would continue to work on the amendment language and submit the amendment to the Senate. Chair Anderson is aware we are here today. Because of that deadline, A.B. 315 did not get a hearing. Instead, as I indicated, we intended to work through this Committee.

We have addressed the definitional concerns raised in the Assembly side with our most current proposed amendment, Exhibit G. The amendment is extremely similar to the policy established by the federal government. The bill would add a new section, a new statute, making it unlawful to knowingly and willfully use the Internet to access any film, photograph or other visual presentation

depicting a person under the age of 16 years engaging in, simulating or assisting others to engage in simulated sexual conduct.

This new statute is vital because modern technology eliminates the need to download an image or a video to a computer as a precondition to viewing. Because of this gap in the law, Nevada authorities have to refer these cases to federal authorities for prosecution since they have updated their law to account for the change in technology.

We would urge the passage of this amendment as well. There is also another amendment going to be brought forward. Helen Foley of T-Mobile, USA contacted our office regarding a proposed amendment to NRS 603 on behalf of the telecommunication industry. She informed us her clients are unable to comply with a current provision in Nevada law regarding parental controls and handheld devices. It has been represented to us this inability to comply does not result from indifference but rather a shortfall in technology. It is our understanding this amendment is an effort to present a short-term fix which will sunseted in order to allow technology to catch up to the policy directives of the Nevada Legislature. We are neutral on this request. We will allow this Committee to determine if a technology shortfall exists and determine if the short-term fix should be placed into Nevada law.

I want to clarify that the Attorney General is committed to ensuring parents have all the tools they need at the earliest possible opportunity to control the content their children may be exposed to on the Internet. We want to see those controls and technologies provided to parents sooner rather than later.

CHAIR CARE:
Is it your contention that there is no cause of action at common law for the victim as contemplated in section 1 of the bill?

MR. KANDT:
I do not know if I would contend there is no cause of action. I do not know if anybody has attempted to pursue a cause of action. Once again, we wanted to create a statutory cause of action looking at the federal government's decision to do so and the decision of other states to create a civil remedy in statute. We felt it was worth this body's consideration as to whether Nevada wanted to provide the same remedy for Nevada victims.

CHAIR CARE:
In section 1, subsection 1, of A.B. 88, any person who while a minor was a victim of a sexual offense of which any depiction of sexual conduct of such offense was used to promote child pornography may bring action. To promote child pornography, I am not sure what promote means, but I am going to say engage in child pornography, undertake child pornography, doing something with it.

MR. KANDT:
I will provide more detail on all of the elements and how we view them. All causes of action of elements must be proven, and if they are proven, the defendant may be liable for damages. The civil remedy is narrowly tailored. It is limited to victims of sexual assault, which is NRS 200.366, or lewdness with a child under 14, which is NRS 201.230, and to "sexual conduct from the offense that was used to create the child pornography." So the bill focuses on explicit content because sexual conduct is defined in statute. It is defined in NRS 200.700 subsection 3, as:

> Sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another.

We are talking about explicit content. And remember, we are talking about children.

To answer your question, Mr. Chair, about what does "promote" mean. That is actually defined in statute as well. In NRS 200.700 "promote" is defined as "to produce, direct, procure, manufacture, sell, give, lend, publish, distribute, exhibit, advertise or possess for the purpose of distribution." So we are utilizing existing statutory definitions in crafting this civil remedy.

CHAIR CARE:
Then it is personal or psychological injury. I understand psychological, I think we all do psychological injury, which could be limitless in the depth of its trauma on somebody who has to live with that. What would personal injury be?

MR. KANDT:
Personal injury typically refers to physical injury.

CHAIR CARE:
Okay. Psychological would not need to be demonstrated by some sort of physical manifestation. It is not emotional distress. This is something that goes way beyond, I guess, emotional distress.

MR. KANDT:
That is what we are envisioning.

CHAIR CARE:
It says "any person who promoted or possessed." I think you just said the statute says the person possessed for distribution as opposed to simple possession. Is there a distinction to be made then between possession and possession for purposes of distribution as that language in the bill reads?

MR. KANDT:
It could be argued the use of the term "possession" would be subject to the definition of possession in the child pornography statutes.

CHAIR CARE:
Is there any requirement that someone who possesses has to know that victim is a child? That there is no mistake of fact issue?

MR. KANDT:
Once again Mr. Chair, ...

CHAIR CARE:
I am sorry, I am just trying. This is serious stuff ...

MR. KANDT:
It is serious, and that is why we envision it. Because this is a civil remedy, a victim is going to have to prove all those elements, and in any civil case, have to withstand any motion to dismiss or motion for summary judgment, carry their burden of proof at a trial and convince a jury of all of those elements. That is where the trier of fact would make those determinations.

CHAIR CARE:
Is this also in federal statute that you have actual damages, but they are presumed at a minimum to be $150,000?

MR. KANDT:
Once again, that was reflected in other statutes and other jurisdictions that there is a presumptive amount of damages, which makes sense in terms of the amount established. We took what Florida had established as presumed damages. We respect this Committee's decision if they want to change that amount upward or downward.

CHAIR CARE:
As to the statute of limitations, of course this is civil. We are not talking about a criminal prosecution. It is three years from the time the court enters the verdict in a related criminal case or the victim reaches the age of 18, whichever is later.

MR. KANDT:
Correct. And there was some discussion in the Assembly Committee on Judiciary whether that statute of limitations should be extended. Once again, we would defer to your judgment.

CHAIR CARE:
You read about these kids growing up, and they say they were—it is not the same as pornography. The molestation cases surface a decade or more later and still, apparently, in certain jurisdictions that falls within. I do not know if those Legislators extend or even revive a statute of limitations; I have no idea how that works. It is a different issue but the same in the sense that we are talking about what is the period for an action. But you would leave that up to this Committee?

SENATOR WIENER:
That would be restoration of memory or suppressed memory that has been the subject of debate for a few years in child molestation cases. Mr. Kandt, I am looking at the amendment. I want to make sure I am reading it right, your proposed amendment, Exhibit G. The history of A.B. 315: it did not make it through the Assembly all the way?

MR. KANDT:
No. It did not get a hearing.

SENATOR WIENER:
So this is language, that is the consensus of your amendment?

MR. KANDT:
It was communicated to us there were concerns with A.B. 315. The language we proposed to the Assembly Judiciary was the same as A.B. 315 as our proposed amendment. The concern was that it may be overly broad.

SENATOR WIENER:
Let me get this. I want to make sure. Assembly Bill 315 and the amendment were the same, or A.B. 315 and A.B. 88?

MR. KANDT:
We proposed an amendment to A.B. 88 on the Senate Judiciary side to address this gap in the criminal law. At the same time we proposed our amendment, Exhibit G, some Legislators took our proposed amendment and carried it as a separate bill which was A.B. 315.

However, there were concerns in our conversations on the Assembly side with the breadth, the scope of the proposal that it could address conduct we do not want to criminalize. We were asked to continue to work on it and craft something more narrowly tailored to address the conduct we want to go after from a criminal standpoint, and then to seek an amendment on the Senate side. Our proposal, Exhibit G, is our latest effort. We have narrowly tailored it to address those concerns that were expressed. Assembly Chair Anderson has seen it and he indicates it has addressed all the concerns that were expressed on the Assembly side.

SENATOR WIENER:
In sections 1, 2 and 3, in using the Internet to access film, photographic or other visual presentation, then depicting certain acts involving someone under the age of 16, this is the person who logs in, goes on line and accesses Websites and is viewing these. Is that the level of interaction, is that what it means? I am looking at a first offense as a Category B felony and the second offense as an A felony. Is this in line with other things that would get a Category A, B, C, D or whatever? Help me here—as I am seeing it as someone who hits a Website, looks and gets a Category B felony.

MR. KANDT:
You are speaking of proportionality, and that is a big part of it. Is the penalty proportionate to the crime? The reason we are seeking this is because our possession statute was enacted in the day when people had magazines showing

explicit sexual conduct. During the early advent of the Internet, although child pornography showed on the Internet and the individuals who seek out child pornography were accessing it through the Internet, technology was such that they had to download computer files in order to view the picture or the video. I am going to let Detective Dennis Carry from the Washoe County Sheriff's Department talk more about the forensic side of it.

Our law enforcement officials are finding, with technology, that individuals who access child pornography do not have to download it. They can view it online through streaming video or watch the act live through a Web cam, and they know they can take advantage of the technology and perhaps avoid criminal consequences. We want to address that gap in the law.

That brings up two questions. One, how do we prove they are visiting these sites? I will leave the forensic side to Detective Carry. Two, how do we prove the intent? We are not talking about somebody who types in the wrong Website address and hits something. It is explicit, and if it is not what they intended, they leave the site. That is not going to give rise to a criminal investigation prosecution. We are not talking about someone who receives a link from a friend in an e-mail that says click on this. They click on it, having no idea what they are going to see. They see explicit conduct; they quickly leave it and go on their business, whether or not they report it. Those are not the people we are seeking to prosecute.

You will see the individuals who seek out and view child pornography are obsessed with it. When we are building a case in the investigative phase and making charging decisions as prosecutors, we are talking about individuals who go to child pornography sites and view those dozens of times a day, hundreds of times a week, thousands of times over a month period of time. It is part of their life. That is how we build our case. That is what we were trying to focus on with the proposed amendment, Exhibit G, and narrowly tailor it so we are talking about the most explicit sexual conduct.

Instead of using the definition of sexual conduct that already exists in NRS 200.700 subsection 3, we use a different definition in our proposed amendment, Exhibit G, that removes lewd exhibition of the genitals. We did that specifically to address some of the concerns raised on the Assembly side regarding baby pictures, my child having their first bath, or the teenage, sexually active girl who takes a picture of herself and sends it to her boyfriend.

That is not conduct we are seeking to criminalize or prosecute, that is not the problem. So we removed lewd exhibition of the genitals, although that might remove our ability to go after some of the bad guys who are accessing child pornography, which is lewd exhibition of the genitals.

SENATOR WIENER:
We have worked on these issues for a long time in the cyber crimes arena. I have been involved with the Attorney General's Office since 1999, so these are the kinds of issues we discuss at our quarterly meetings. This Session we have been, and the Chair has taken the lead on this, substantially reviewing the proportionality. I am seeing a subsequent offense as a Category A. I would presume if you get one of those who view it a thousand times, it could be life with the possibility of parole, but are there not other crimes? How do we get a life sentence out of this?

MR. KANDT:
I do not have the possession statute in front of me in NRS 200, but the possession statute imposes similar penalties. We took the penalties imposed that the Legislature deemed appropriate and proportionate for possession of child pornography and used those same penalties for this proposed new statute on intentionally accessing and viewing child pornography. We are talking about the same conduct; we are talking about the technological gap created. But in terms of the penalties, we took them from the possession statute.

CHAIR CARE:
The proposed amendment in Exhibit G says, a person "who knowingly and willfully" and then it drops down to "visual presentation depicting a person under the age of 16" as opposed to of a person under the age of 16. Maybe it does not make a distinction, but I asked earlier about mistake of fact as an affirmative defense. It would be one in a civil action, but now we are looking at the criminal context. You know where I am going with this. The guy says, well I thought she was 18.

MR. KANDT:
Mr. Chair, if it would give the Committee a comfort level to change "depicting" to "of," I do not have a problem.

CHAIR CARE:
If that is what you intend, this has to be somebody who, in fact, is.

MR. KANDT:
Correct.

CHAIR CARE:
Okay, that was my question.

MR. KANDT:
We would have no problem with that word change. We still think it would fulfill the intent.

SENATOR WIENER:
That was a concern of mine too, based on those quarterly meetings; the depicting with emerging technology would also engage the whole new universe of avatars. I am still queasy learning about them in that committee, but I would rather see something "actual" rather than "depicting" which would engage the avatar piece, and that goes into a whole different universe.

CHAIR CARE:
Mr. Kandt, I know you wanted Detective Carry to testify.

DENNIS CARRY (Detective, Washoe County Sheriff's Office):
I will read from my testimony (Exhibit J). I have to state I am good at my job. I know that because I am told so and because I feel I am and I see the results. But that should scare everybody on this Committee and should scare everybody in this room behind me. The fact that I am good at my job is because of the exposure with the cases. We are drowning in cases in Nevada, and they are child pornography-related cases more than luring or anything else. These are people who are going out on the Internet looking for this material, downloading it in many cases, and many cases not.

One other example I would like to give you on accessing the Internet is, these offenders know what they are looking for. It is not just an accidental time when they clicked on one Web page or maybe received a link in an e-mail or spam mail and clicked on the link. We see that in the computer forensic aspect during the investigation that it was more than likely an accident. We may see 100,000 adult pornography videos and maybe one or two child pornography

videos we consider questionable. When I say questionable it is that, as a child pornography investigator, I look at a video and say, well, it is difficult to say the age, so we are not going to proceed with this case.

However, during the computer forensic exam, if I can see this person is going out on the Internet and intentionally entering key words which will bring child pornography to his computer, we have proved the intent. Many of these offenders are doing that. There are specific key words that will locate child pornography and nothing else.

One other example I think is important for you to think about besides the web cam streaming are public libraries. Public libraries have unlimited access to whatever you want to watch. Most public libraries have a system on their computer to clean it after a person uses it to prevent identity theft. Libraries do keep minimal logs, and in many cases, we may get information that somebody is going to Websites watching child pornography. Maybe we can get to the library in time to find evidence, but maybe not. In many cases, there will be logs of all of the Websites they went to, which we may be able to go to ourselves and see specifically what was there. The evidence is often going to be available on the computer. If we cannot prove it, we will unfound the case. In most cases, we know we will get him later.

I am a computer forensic examiner, so I can answer the technical aspects of it. I have investigated hundreds of these cases. I have a lot of experience interviewing these offenders, as well as people who had no criminal intent, and they walked out our door.

CHAIR CARE:
I do not have any questions but that does not mean I do not find your testimony compelling. Other members of the Committee?

HELEN FOLEY (T-Mobile, USA):
We appreciate the Attorney General and her staff for allowing us to offer this proposed amendment (Exhibit K). We appreciate the compelling testimony. As a mother of two young children, we are sickened by hearing what can happen on the Internet and are very sensitive to this issue.

In 2007, A.B. No. 526 of the 74th Session was passed, which was a large bill dealing with the Internet. On page 66, sections 106, there was a provision that

dealt with having Internet service providers block access in certain ways and give subscribers opportunities. This was the first in the nation. Unfortunately, it was very restrictive. The American Legislative Exchange Council (ALEC) produced model legislation based on this. They determined that rather than using each of these provisions with "and" between all of them, it would be more appropriate to use the word "or."

Mr. Sarazen will discuss the challenges the wireless industry faces, as well as the Wi-Fi industry, and why we are proposing the proposed amendment, Exhibit K, to you today.

RUSSELL SARAZEN (Senior Manager, State Legislative Affairs, T-Mobile, USA):
I am responsible for our government affairs activities in Nevada. As Ms. Foley mentioned, we as an industry and T-Mobile specifically take this issue very seriously. We have tools in place for our customers to make sure they can be comfortable that their children and they themselves can access the Internet in a way that they are protected. We have a trust we need to earn with our customers to keep them loyal to our company. Our competitors have the same issue.

In order to address this particular issue, T-Mobile has developed a service called Web Guard. Web Guard is a service you can sign up for that will block inappropriate content from your handheld device. It is something we do in our network. Those sites are a predetermined list. We work with a third party to identify and conduct an ongoing, regularly updated process. The services that were put forth in the law are suggested services you would be able to download and put onto a personal computer (PC). The types of software filtering and reporting software are simply not available for handheld devices. The industry is changing. We are seeing new devices. T-Mobile has a Google phone called a G1, AT&T has the iPhone and there are a variety of those types of new devices being developed every day with more and more capabilities.

On the PC side, we are also seeing a shrinking of those devices. There are new items called Netbooks. As those are becoming smaller, their capabilities are somewhat restricted. As technology is changing the availability of services is also changing. What we are hoping to do is bring new technologies that will help the consumers but also be in compliance with the law.

Frankly, I am here asking for your help so we are not in a situation where we are out of compliance with your current statute. We feel very confident our Web Guard service protects our customers, specifically right now. The law does not allow us to comply in our proposed amendment, Exhibit K, paragraph (d). What we have proposed to comply with is to restrict access to Websites designated by the provider of Internet service. That type of language would allow T-Mobile and other companies with the kind of filtering we have in our networks to be compliant with statute.

As Ms. Foley mentioned, there are no other states with this type of specific language on the books. Last summer, T-Mobile participated in the ALEC model legislation development. We were active in the creation of this. It is nearly identical to the language you currently have in Nevada statute with these changes. We have tried to make Nevada law compliant or consistent with what ALEC passed last year. We support the legislation as a whole and hope to have the opportunity to make what we see are minor changes to allow our industry to comply with your laws.

MS. FOLEY:
I would like to clarify what this amendment would do, which is to keep current law the same for all other Internet service providers and change it only for the wireless and Wi-Fi. For wireless and Wi-Fi, it would have the words “or” and would be a new section. Because 47 USC section 301 for the Federal Communications Commission only applies to wireless and Wi-Fi, the others would remain the same. This would sunset in 2013 and go back to “and” at that time.

CHAIR CARE:
Thank you. Mr. Kandt, your office is in accord with this?

MR. KANDT:
As I indicated in my initial testimony, Mr. Chair, our office is neutral on the amendment.

CHAIR CARE:
I said in accord.

MR. KANDT:
Once again, we wanted to see if the amendment, Exhibit K, was entertained. We encourage the Committee to consider a sunset provision for the amendment so when the technology allows parents to restrict the sites their children can access, that technology is made available to the parents at the earliest opportunity.

CHAIR CARE:
I think the testimony from Mr. Sarazen was they also wanted to make certain that wireless and Wi-Fi were in compliance with Nevada law. It is obviously a serious issue. Since you are neutral, I am going to assume that would be the case with this amendment, Exhibit K. Any questions?

SENATOR PARKS:
Wireless I understand. But Wi-Fi, you can get Wi-Fi on both the wireless device as well as a desktop computer. The comment made regarding 47 USC section 301 deals with both wireless and Wi-Fi?

MR. SARAZEN:
The issue is this device can access our network through the cell site and the Internet through a Wi-Fi system such as inside the Capitol.

The service that we provide currently, Web Guard as the example, will block the content on this device when on our network. We want to have the opportunity for the nondevice-enabled blocking to operate in both of those environments. We do not have control of the Wi-Fi space in this environment. We do provide Wi-Fi hotspots in Borders Books and the technology. If you are bringing your laptop or this device into a Wi-Fi environment, it becomes very challenging for us to comply. Say for the T-Mobile hotspot, you bring your laptop in and have not yet downloaded any of that software onto your laptop. We give you a disclosure that says, you are accessing the full Internet at this point. Under our proposed amendment, Exhibit K, paragraph (a), which says "block all access to the Internet," at that point we can block Internet access if you have not signed up or agreed to the terms under that agreement that you are getting access to the Internet. It is a way for us to say we have a number of tools for a parent in a variety of different environments.

CHAIR CARE:
We are going to hold this bill over for a work session.

JASON FRIERSON (Office of the Public Defender, Clark County):
We come in opposition to the amendment, Exhibit G, to A.B. 88. We do not and did not oppose the original A.B. 88. The language in this amendment was considered in two different versions, the exact same language, in A.B. 88 as well as A.B. 315. There was no reason to go forward with both since the same language was being considered. The Assembly Committee on Judiciary decided not to proceed with this proposed language for several reasons, which are not addressed in this version of the amendment, Exhibit G, to A.B. 88.

There was significant discussion in the Assembly Committee on Judiciary about efforts to crack down on people who access child pornography but not those individuals who they were not intending to target. There was testimony they were not targeting the people who accidentally click on a link or whose friends send them a link. There are also misspellings of Websites, such as <http:\\www.white house.com>, which is not the White House. This is not an accident; people type in the address, but that is not where they are trying to go. The testimony indicates they are not targeting those individuals, but it is our concern the conduct falls within the purview of this amendment.

CHAIR CARE:
But would not "knowingly and willfully" cover that?

MR. FRIERSON:
In about every trial where we have an intent element, "knowing and willfully" is something for the fact finder, the judge or the jury. In the criminal realm, we deal with individuals who are accessing pornography, albeit sometimes legal pornography. It is possible we could subject that individual to felony treatment and the judgment of a jury for accessing legal pornography and doing something that is actually legal conduct.

"Knowingly and willfully" is an element, an element with absolutely every crime. However, here there is no one inside the mind of the individual except for the individual. There was testimony today about evidence, handwritten notes and computer evidence that is left over. We believe that is the type of evidence necessary with technology to prove possession today.

On computers, cache files are left over when somebody actually downloads an image. There was testimony about child pornography and images. This amendment, Exhibit G, seems to directly deal with streaming video. The other

types of images and video, photographs, things of that nature, are evidence left over in temporary Internet files and cache files on computers that can be found. There is case law that discusses what possession is. If you view a photograph, it saves it in a temporary file. There are several cases that discuss if a file is saved that is accessible, it can be treated as possession. If it is in a form that someone can go through their computer memory and retrieve, it could be considered possession. But if it is not in that form, it is difficult to prosecute for possession.

The federal government has attached some legislation to their amendment that deals with a similar area. It is appropriate because oftentimes the individuals supplying these streaming videos are overseas. The federal government has a stake in that and involvement with other agencies overseas to deal with those individuals. It is still our concern, and I believe a couple members of the Assembly Committee on Judiciary asked specifically: Let us say I do not like my neighbor and decide to send him random e-mails I made up for this purpose with several links that he clicks on. Then I call the police and say he has child pornography on his computer. There is no way to distinguish between that person and the person who is intentionally doing it, other than the investigative process. When we talk about hundreds, thousands of attempts, we would agree that is deplorable behavior, but the statute and amendment do not require a foundation for those charges. We oftentimes see cases where individuals fall within language not intended to cover their conduct. We are concerned this net is going to be cast so broadly, especially in a continually developing Internet age, that we include people we are not seeking.

We heard testimony that language was changed to address the teenagers taking naked pictures of themselves on their cell phones. That is commonly referred to as sexting. While taking a single picture of themselves would not be covered, the language is subjective and includes “depicting,” but also “simulating.” If those teenagers are taking photographs of themselves simulating conduct, sending that to each other or sending it from their cell phone or e-mail, that type of conduct would also be included.

We are talking about Category A and B felonies in an area where we are still developing technology every day. The federal government is more appropriately involved with something like streaming videos, especially when it comes from overseas. There is no way to know whether or not that individual is intentionally accessing, because of a link, pop-up ads or e-mails individuals might send them.

In the criminal context, there have been issues of whether one has to know that the person is under the age of 16 in other areas of the law. That is something subjective which will be submitted to a jury.

In a civil context in the original bill, that is not a defense. If the individual does not know the person is underage, they can still proceed. That was the subject of the ACLU's concerns. Ms. Gasca had to leave; however, I suggested she contact members of the Committee with her specific concerns. This is as broad as it was on the Assembly side and is going to include conduct in individuals not intended; the Assembly Judiciary considered the same information and decided not to proceed with it.

CHAIR CARE:
In section 1, your concern is on the amendment and not the bill itself. In light of these people out there and the changes in technology, there ought to be a statute crafted in some manner that does what the Attorney General's Office wants to do but in a more strictly construed fashion.

This is a subject we need to tread carefully with, but at the same time we do not want ... . From what I heard today, Mr. Carry in particular, there is need for a statute. I appreciate your concerns as well. If you have any suggestions about the amendment and want to submit them in writing, please do.

CHAIR CARE:
I will close the hearing on Assembly Bill 88. The Senate Committee on Judiciary is adjourned at 10:52 a.m.

RESPECTFULLY SUBMITTED:

Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: