MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
February 5, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:34 a.m. on Thursday, February 5, 2009, in Room 2149 of the Legislative Building, Carson City, 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
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Brett Kandt, Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General
Samuel G. Bateman, Deputy District Attorney, Office of the District Attorney, Clark County; Nevada District Attorneys Association
Orrin J. H. Johnson, Deputy Public Defender, Washoe County Public Defender's Office
Lee Rowland, Northern Coordinator, American Civil Liberties Union of Nevada
Jason Frierson, Chief Deputy Public Defender, Clark County Public Defenders Office
Karl Hall, Chief Deputy District Attorney, Washoe County District Attorney's Office
James D. Earl, Executive Director, Technological Crime Advisory Board

Bill Uffelman, President and Chief Executive Officer, Nevada Bankers Association

CHAIR CARE:
Every session, the Business Law Section of the State Bar of Nevada comes up with changes and Chair Robert Kim testifies; they want to do the same this Session. I am willing to entertain a motion to request such a bill draft request (BDR).

SENATOR WIENER MOVED TO INITIATE A BILL DRAFT REQUEST REGARDING CHANGES TO NEVADA'S BUSINESS LAW, CHAPTERS 77 THROUGH 92A OF NEVADA REVISED STATUTES.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
The registered agents proposed an amendment to the Model Registered Agents Act regarding chapter 84 of the Nevada Revised Statute (NRS) to prohibit the future formation of corporations sole. The amendment could have cluttered the survival of the Model Registered Agents Act, NRS 77. The registered agents want to pursue this during Session. I will entertain a motion to request the BDR on behalf of the registered agents.

SENATOR AMODEI MOVED TO INITIATE A BILL DRAFT REQUEST PROHIBITING FUTURE CREATION OF CORPORATIONS SOLE UNDER CHAPTER 84 OF NRS.

SENATOR WIENER SECONDED THE MOTION

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
The hearing is open on Senate Bill (S.B.) 35.

SENATE BILL 35: Repeals the provision that prohibits the prosecution of a person in this State for a crime after the person is convicted or acquitted of the crime in another state, territory or country. (BDR 14-272)

BRETT KANDT (Executive Director, Advisory Council for Prosecuting Attorneys, Office of the Attorney General):
Senate Bill 35 would repeal NRS 171.070. This statute prohibits prosecuting a person for criminal conduct if they have been convicted of that criminal conduct under the laws of another jurisdiction. This statute is outdated. We ask this Committee to consider repealing NRS 171.070 and adopting the dual sovereignty doctrine (Exhibit C) upheld by the United States Supreme Court.

Approximately 25 states follow the dual sovereignty doctrine. The other states follow some form of a bar to dual prosecutions. However, the trend is to repeal these statutory bars in favor of dual sovereignty. With advances in technology and globalization, criminal activity takes place across jurisdictional boundaries. As a result, this statutory bar can yield results no longer in the interests of justice or in the best interests of Nevada citizens. The United States Attorney for the District of Nevada has been consulted on this bill, and he indicated his office has no opposition, Exhibit C, page C2.

In 2006, our criminal prosecutors filed a 26-count child pornography case against a professor at the University of Nevada, Las Vegas, who had over 20,000 images of child pornography on his State computer. At the same time, the United States Attorney's Office was investigating the case. They made a decision to proceed against this professor for the same criminal conduct. They filed a single count of child pornography in federal court covering all 20,000 images, and they obtained a conviction. At that point, the State prosecution could not proceed. Because of the conviction on one count in federal court, the professor received a minimum sentence of three years. The statutory bar worked against the interests of justice in this case.

SAMUEL G. BATEMAN (Deputy District Attorney, Office of the District Attorney, Clark County; Nevada District Attorneys Association):
The Nevada District Attorneys Association supports S.B. 35. Every April, Laughlin hosts the Laughlin River Run, which is a gathering of motorcycle enthusiasts. In 2002, The Hells Angels and the Mongols arrived in Laughlin and decided to have a physical encounter in one of the hotels. Weapons were used, and some individuals were killed. Clark County filed criminal charges in Laughlin

Township Justice Court on state crimes, such as murder, battery with a weapon and assault with a weapon.

At the same time, the federal government had been investigating these gangs for racketeering. The United States Attorney's Office indicted these same individuals under 18 USC section 1959 for violent acts in aid of racketeering. Those very crimes were the same as those charged by the State of Nevada. As a result of proceedings in State court, the State case ended up trailing the federal criminal trial. Essentially, a racketeering charge in federal court, whether convicted or acquitted, would have precluded the State of Nevada from going forward on those charges.

A floodgate to dual prosecutions would not be opened. Since the early 1900s, two cases have gone to the Nevada Supreme Court regarding this particular statute. However, the Laughlin case demonstrated an absurd result where the state could not further the interests of justice.

CHAIR CARE:
Could a defendant be convicted for certain conduct under federal law and still not be charged under Nevada law, even though that conduct might be a different crime under Nevada law?

MR. BATEMAN:
The statute refers to acts because crimes across different jurisdictions often have different names and different focuses. The statute has been interpreted to mean you must look at the underlying acts that are required to be proved to support the crime charged.

Sacco v. State, 105 Nev. 844, 784 P.2d 947 (1989) determined the statute applied to the federal government. There is another case called *Turner v. State*, 94 Nev. 518, 583 P.2d 452 (1978) that dealt with a California ... .

CHAIR CARE:
Bookmaking case? It was the same conduct, but it was an unlicensed book.

MR. BATEMAN:
The Nevada Supreme Court determined the way you look at it is to say, "State of Nevada, what are all the relevant acts you have to prove that the crime you charged occurred? Are there any of those acts that are not required to be

proved in the other state that is prosecuting?" The one act they mentioned in *Sacco* was unique to Nevada—legalized gaming which requires a license. They said that particular act of not getting a license was specific to Nevada and not required to be proved in California, so the State was allowed to go forward. Southern Nevada is a place where people often come for short periods of time. They can commit crimes and easily return to their locales. With changing technology, crimes occurring across state lines could happen more frequently in the future.

CHAIR CARE:
You said it would not open the floodgates. How would a district attorney determine whether to charge a State crime if we adopted the dual sovereign doctrine? For example, Terry Nichols was convicted in federal court for the Oklahoma City bombing. Either an attorney general in Oklahoma or district attorney from the county said they were going to try him and seek the death penalty. That did not happen.

MR. BATEMAN:
The general process in Clark County would depend on which local law enforcement agencies were involved in the investigation. Crimes on behalf of the Office of the District Attorney are not charged if not referred by a local law enforcement agency. For example, if the Las Vegas Metropolitan Police Department (LVMPD) is involved in an investigation simultaneously with the Federal Bureau of Investigation, law enforcement may recommend that the Office of the District Attorney charge State crimes as well as the federal crimes charged by the federal law enforcement agency investigating the conduct. We would make the decision whether to go forward. When this happens, there would have been discussion between the law enforcement agency, federal government and prosecuting agencies.

A defendant could also be in custody on separate federal felony charges or have charges pending in another state. We work with those other jurisdictions. The vast majority of cases are negotiated, and negotiations often contemplate that certain defendants do concurrent time between jurisdictions.

CHAIR CARE:
You cited *Turner,* where the statute did bar prosecution. However, a footnote in *Turner* states, "Due to the statutory prohibition we therefore need not decide whether under Nevada Const. art. 1, § 8, such multiple prosecution for the

same offense violates double jeopardy principles." Even if we eliminate the statutory prohibition, does that implicate the State Constitution?

MR. BATEMAN:
It has not been litigated. Our position is that it does not violate the Nevada Constitution because it does not violate the United States Constitution.

SENATOR MCGINNESS:
You have given us two examples where people were convicted, and you were able to charge them. Give me an example of someone who has been acquitted in another jurisdiction, and you are going to prosecute them on the same conduct. What about double jeopardy?

MR. KANDT:
I cannot give you an example. I will get back to you.

MR. BATEMAN:
If the acts are the same in the crimes charged in the other state and the crime charged in Nevada and if the person is acquitted in the other state, the State of Nevada cannot go forward under the statute. If Nevada prosecuted first and the other state does not have a similar statute, the other state can prosecute regardless of what happened in Nevada. That is part of the problem.

MR. KANDT:
Repealing the statute would avoid prosecutors racing to the courthouse to file and prosecute the charges. They could collaborate and make decisions in the best interests of everyone involved.

SENATOR COPENING:
When you were talking about the Laughlin River Run, you indicated that if a person was acquitted on the federal charge of racketeering, you would not be able to charge that person with battery or murder on the State level. In the second example, if a person is charged with the same crime, the two agencies would work together, and you would not prosecute on both the federal and State level. Is that correct?

MR. KANDT:
That is correct most of the time.

SENATOR COPENING:
The issue is that you need to be able to prosecute for crimes not federally prosecuted.

MR. KANDT:
I emphasize that the statutory prohibition is on prosecution for the same criminal acts, not the same crimes. That is where the statutory bar can sometimes yield unfair or unjust results.

ORRIN J. H. JOHNSON (Deputy Public Defender, Washoe County Public Defender's Office):
This bill raises a question about resources. If we prosecute people dually for the same act, additional costs are incurred for law enforcement, the district attorneys, the public defenders, the jail, witness fees and court time. The child pornography case mentioned earlier could have been resolved if there had been more cooperation between State and federal agencies. Both agencies could have legitimately prosecuted on different counts and different child pornography charges. A single case should not sway the entire statutory scheme.

In the Laughlin River Run example, the federal and State entities cooperated. The State got the chance to charge the motorcycle gang members with State crimes, and the federal government got a chance to charge them with racketeering crimes because there was cooperation. Everyone is interested in making sure people are properly prosecuted.

The Oklahoma City bombing is a perfect example of why we should be careful before overturning this century-old statute. Old does not mean outdated. Often it means well-settled. We have well-settled case law because it works.

The Laughlin River Run case is an example of our concern. Motorcycle gangs are organized crime organizations. The federal government had been investigating these two gangs for years. A careless and overzealous state prosecution, while well-intentioned, could upset years of delicate federal investigation. We are not concerned about the cases where state and federal prosecutors cooperate.

CHAIR CARE:
Testimony showed the states are evenly divided. Twenty-five states have adopted the dual sovereignty doctrine. Do you know the rationale for the statute adopted in 1911 and why the other 24 states have adopted it?

MR. JOHNSON:
No. I will do some research.

SENATOR WIENER:
Will you address the state-to-state rush to the courthouse?

MR. JOHNSON:
If we repeal this statute, keeping in mind the financial crisis, California could slough cases off on Nevada for crimes that occurred in California or primarily impacted California. Two prosecutors can cooperate with federal and other state agencies. People want to please their constituencies, make good use of resources and promote justice. There will be instances where cooperation does not happen.

SENATOR WIENER:
If we change this, is there potential for jurisdiction shopping for settlement of cases? Someone's crime may affect many states, and the penalties may vary between states. Could you address this?

MR. JOHNSON:
That situation would be in opposition to this bill. The plaintiff in a criminal prosecution is limited in their jurisdiction because of their job. They can negotiate with someone else to prosecute. One jurisdiction may have a harsher penalty than other jurisdictions. That is a legitimate conversation for two different prosecutors to have.

However, you could have someone bringing a small quantity of drugs between California and Nevada. If this statute is repealed, that person could be charged in Nevada, in California and at the federal level. That person could serve decades in prison rather than a shorter sentence considered reasonable in each of those jurisdictions for that particular offense.

SENATOR WASHINGTON:
As you mentioned earlier, prosecutors are elected officials. In a high-profile case where a crime affects Nevada and Arizona, for example, could you see a rush to convict to boost a prosecutor's political position?

MR. JOHNSON:
Yes. Whether we adopt the dual sovereignty doctrine or not, there will be examples of injustice. That is an argument against the bill too. It is not unconstitutional for two sovereigns to prosecute. Prison sentences should not be disproportionate to the crimes committed because of simple justice and the cost of long prison sentences.

LEE ROWLAND (Northern Coordinator, American Civil Liberties Union of Nevada):
We oppose S.B. 35. This is a question of resources. I will address Senator McGinness's question about someone who is acquitted in another jurisdiction. Mr. Chair, you questioned whether there would be State constitutional issues. You also wondered why other states have gone the way they have.

In my written testimony, I have included a footnote listing the 24 states that do have a jurisdictional bar (Exhibit D, page D2). I argue with the characterization that there is a clear trend in reducing these bars because 24 states still maintain them. Our position is that these state bars rose out of a sense that even if the Supreme Court has approved dual jurisdiction, people prize the double jeopardy doctrine. Nevada has a long tradition of a critical check on government power, particularly in the situation Senator McGinness mentioned where someone has been acquitted in another state.

You should look at the potential benefit versus the potential harm. The potential benefit is minimal. In the Laughlin River Run case, prosecutors worked with the dual sovereign to make sure Nevada's voice was heard. The potential damage done by repealing this is much greater than the potential benefit. There would no longer be a bar to reprosecute someone who has been acquitted in another state court process.

Nevada should remain in the group of states rejecting the idea that the government gets a second bite of the apple if someone is acquitted in another jurisdiction. We urge you to look at the negative effects of dropping this ban.

This bill should have a fiscal note. This bill would open up prosecutions barred under statute and create an increased demand on the resources of any law enforcement office.

CHAIR CARE:
When did a state last establish a statutory prohibition as to dual sovereignty, and when did a state last adopt what we are asked to do this Session?

MS. ROWLAND:
I do not know. I will find out for you.

JASON FRIERSON (Chief Deputy Public Defender, Clark County Public Defenders Office):
In Clark County, we prosecute approximately 80 percent of the cases referred to our office from local law enforcement, while most similarly situated counties prosecute approximately 50 percent. If a case can be prosecuted in Clark County, it will be prosecuted in Clark County.

I agree this is about collaboration. The presenters of this bill also spoke of competition and racing to prosecute. They do not go together. The court in *U.S. v. Zone,* 403 F.3d 1101 (2004) stated, "In an era when close collaboration between state and federal prosecutors has become 'the conventional practice throughout the country ... .'" In that case, there was an exception to the double jeopardy clause, and the court reaffirmed that was applicable.

The best way to use the resources we have is collaboration. To deviate from that would expose someone to dual prosecution from another state, the federal government or additional time. Our concern is if another jurisdiction is prosecuting an individual for the same crime—not separate elements to a crime—that person receives penalties for that act. It is a waste of resources to further prosecute that individual.

The majority of states have some bar, whereas 24 states recognize the dual sovereignty doctrine. If this statute is repealed, the Nevada Constitution bars dual prosecutions. We would litigate that issue.

CHAIR CARE:
How does The Nevada Constitution, Article 1, section 8 differ from the Fifth Amendment? They are not the same word for word.

MR. FRIERSON:
I would have to review it, and I will provide the Committee with a summary. The Nevada Constitution is a straightforward bar to dual prosecution.

SENATOR PARKS:
Arizona and Oregon have adopted the dual sovereignty doctrine. Have they adopted that recently or has it been long-standing?

CHAIR CARE:
Ms. Rowland, will you include that in your research? The hearing is closed on S.B. 35. The hearing is open on S.B. 45.

SENATE BILL 45: Revises provisions relating to certain criminal cases involving older persons and vulnerable persons. (BDR 14-262)

MR. KANDT:
Senate Bill 45 makes two revisions to existing law relating to criminal cases involving older persons and vulnerable adults. These terms are defined by statute. First, S.B. 45 allows a prospective witness or victim in a criminal case who is an older person or vulnerable adult to have his or her deposition taken for use at trial when they might be unavailable later. Second, the bill allows the imposition of a civil penalty against a person convicted for crimes against an older person or vulnerable adult.

The Attorney General's Office is working closely with local prosecutors to develop better lines of communication between State and local agencies and improve the reporting, investigation and prosecution of crimes often committed against our older or vulnerable citizens.

Section 1 of the bill amends NRS 174.175 to include cases involving older witnesses and vulnerable adults. That statute allows prospective witnesses to have their deposition taken to preserve and use that testimony if they are unavailable at trial. Several other states permit this practice, which is called the conditional examination of a witness. California permits this practice.

This bill promotes judicial economy and serves justice. Many criminal cases involving older persons or vulnerable adults cannot be successfully prosecuted because many of the victims or witnesses die or become physically or mentally incapacitated before trial.

KARL HALL (Chief Deputy District Attorney, Washoe County District Attorney's Office):
I have been involved in the prosecution of many criminal cases involving elder abuse. Conditional examination of a witness would be a valuable tool for the prosecution and defense.

I prosecuted a woman who operated a home for individual residential care. The people she cared for were older and many times vulnerable as well. They suffered from dementia of varying types and severity. She took advantage of them financially. When the financial problems came to light, these people were unable to communicate with us regarding their credit cards and bank accounts.

One of the individual victims was able to communicate. He said he did want to give everything he owned to the defendant. He died before we brought this case to trial. This is an example where either the prosecution or defense would like to obtain that testimony by deposition.

The defense has argued it is more beneficial to see testimony in person. However, this provision is conditional. The State or defense would have to file a motion to allow the deposition. All parties are present at a deposition. The deposition can be video recorded, and that video recording of the witness—who must be material to the case—can be presented to a jury.

There is no downside for either party. Many times as older people progress, they lose their ability to communicate and/or their memory. You may have degradation in their ability to testify. I urge you to pass this bill.

CHAIR CARE:
Videotaping a deposition would require a motion by the State or the defense. Does another statute govern videotaping depositions in criminal cases? Would there be any objections to having those depositions videotaped?

MR. HALL:
There may be objections by defense, but I urge they be videotaped and recorded. It would be just like a trial, and the jury could watch that. If the defense objects to that, we would let a judge decide whether videotaping would be the best way to preserve and present that testimony if the witness is unavailable.

CHAIR CARE:
Does the bill mean there would be grounds for seeking a person's deposition because that person is 60 years old—just on the basis of age—as opposed to that person appearing live at trial?

MR. KANDT:
Yes, because they meet the statutory definition of an older person or a vulnerable adult.

CHAIR CARE:
Would a vulnerable person be a competent witness? The statutory definition of a vulnerable person includes physical or mental incapacitation or limitations.

MR. HALL:
They may or may not be. This allows us to preserve the testimony. At the trial stage, a judge can make a determination of whether the witness is capable of testifying. A comparison could be made between a witness's ability to testify at the time of the transaction and his ability at the time of trial, which can be a year or more.

CARE CHAIR:
There is a statute on the civil side where a party who is 70 years or older goes to the head of the line. A person can be excluded from jury duty if they are 70 years old, not 60.

MR. HALL:
There will be a finding at the time of the jury trial whether we need to play the testimony of a person who is 60 years old. Preserving testimony is the key.

MR. KANDT:
Section 2 of this bill would expand the ability of the Attorney General's Office to seek civil penalties against persons convicted of crimes against older persons or vulnerable adults. The statutory limitation on the ability to obtain civil penalties is narrow. However, the majority of convictions for criminal conduct against elder persons and vulnerable adults are outside the scope of that statute. Most of those convictions fall under NRS 193.167.

I provided you with statistics on crimes against older persons showing most criminal convictions fall outside the scope of the elder abuse, neglect and

exploitation statutes in Exhibit E, pages E5-E8. The best example is in the area of mortgage fraud. The Attorney General formed a Mortgage Fraud Task Force. The majority of the victims of mortgage fraud are senior citizens. We are obtaining convictions for mortgage fraud, but we have no ability to get civil penalties from those convicted.

The ability to obtain civil penalties promotes justice by imposing civil penalties against all criminals who commit crimes against older persons or vulnerable adults. Civil penalties provide compensation for victims of crime. Civil penalties provide resources to the Attorney General's Office to prosecute crimes against older persons and vulnerable adults.

MR. FRIERSON:
The Clark County Public Defenders Office is concerned this bill not only allows for the deposition of a witness 60 years of age or older but for that witness to be impeached by virtue of their age alone if their testimony is different at trial.

CHAIR CARE:
If age is the sole basis, why the number 60?

MR. FRIERSON:
I am not certain. Other criminal statutes that address crimes involving the elderly have been reduced to 60 years of age.

CHAIR CARE:
This is a witness and maybe the victim of a crime.

MR. FRIERSON:
I presume the number came from that. The Clark County Public Defender's Office would not have taken a position on this bill if not for the ability to impeach that witness without any regard for unavailability.

CHAIR CARE:
Assuming the witness is competent, do you have any objection to some threshold age, perhaps 65 or 70?

MR. FRIERSON:
I have no opposition to the State taking the deposition of someone at the age of 65 or 70, if they were not able to impeach that witness later and treat them as

a hostile witness. If the witness is available and competent for trial, the defense is put at a disadvantage if the witness can be impeached later.

Often, we get all of our discovery just days before trial. If a witness is unavailable for trial, we have no opposition to their deposition being taken. If there is no need for the deposition and its admission into the record for trial, our concern is that we conduct a deposition without information necessary to ask the right questions. That testimony could then be used later at trial when we have more information.

CHAIR CARE:
There is a deposition and everyone gets to examine the witness. After that, you come across a document that contradicts what the witness said in the deposition. What do you do with that?

MR. FRIERSON:
We would have to question the witness at trial with that information. Our issue is a set of testimony, likely to be admitted later, where we were not able to ask those questions in a controlled environment. The bill could work in favor of both sides because the defense could impeach too. However, if that witness is available and competent to testify, there would be no need for the previous testimony.

SENATOR AMODEI:
The language states that a motion must be made to do this. Why would you not fully discuss your concerns with the judge at the motion hearing? There is no language in the proposal stating that if the judge grants this, it could not be revisited later if something changes.

MR. FRIERSON:
Nevada Revised Statute 174.215 expressly says that the deposition can be used at trial to impeach the witness. The judge would not have the authority to bar the State from using that testimony to impeach a witness under NRS 174.215. If NRS 174.215 did not apply to the amendment in this bill, there would be no risk of it being used later at trial if that witness was available anyway.

SENATOR AMODEI:
If you think someone has given conflicting testimony, nothing prohibits a motion from being filed.

MR. FRIERSON:
Unfortunately, it does happen. Often a party is not aware until it happens on the stand.

SENATOR AMODEI:
A motion requesting a deposition will have to state why the witness will be unavailable. This would be a high standard, especially in a criminal case where you could be taking away someone's liberty.

MR. FRIERSON:
That is exactly our concern. There are no other determinations. The threshold is 60 years of age and that is all.

SENATOR AMODEI:
It says "on motion." You could argue against it. There should be a good reason the witness is not available for trial.

MR. FRIERSON:
The reason for taking an early deposition needs to be established by either side. If 60 years of age or older is the only requirement that must be shown, we would have to litigate the prejudice associated with that.

SENATOR AMODEI:
Does this bill prohibit you from asking the judge to leave the motion open to continuing review based upon potential impeaching evidence discovered later?

MR. FRIERSON:
I am not certain the language is permissive. A separate provision addresses impeachable evidence. I will look into that, and if it can be prohibited, we will step back from our position on the bill.

MR. JOHNSON:
We have a concern with the ability to take these depositions. Are we committing resources to solve a problem that does not exist? We are fine with the way it is. Nothing prevents the State, if they fear their witness will not be

available because of continuing dementia or terminal illness, from doing this deposition right now. If this becomes the default position, we would litigate over taking depositions. That is a resource issue.

It could be devastating if the State is in the position of impeaching an older or vulnerable person and a judge or jury could pick and choose between the stronger of the two testimonies.

CHAIR CARE:
How would a determination be made before any deposition that the witness is a vulnerable person? I am focusing on the mental limitations or incapacities. Would that prospective witness come before the judge or would we rely on doctor reports? If the judge determines the prospective witness is a vulnerable person, what kind of witness would he be, anyway?

MR. JOHNSON:
You go to trial with the witnesses you have, not the witnesses you wish you had. The term "vulnerable people" is statutorily defined. That statutory definition is broad. It includes anyone with a mental illness. That does not necessarily mean they will not be a good witness. From my experience, judges tend to be liberal regarding a material witness.

Regarding the confrontation issue, we are most concerned about vulnerable and older people. Their testimony may not be reliable. The judge must look these people in the eye and at their body language to see how they interact with the attorneys who question them. Some witnesses, like children, want to please the attorney and officers, which can make the testimony less reliable. Even if there is a videotape, the finder of fact is not there. You cannot see the body language as well in a videotape as you can at trial with live testimony.

Resources would be spent unnecessarily if the bill expands so the default position has anyone over age 60 take a deposition. It should remain as is where protections exist for vulnerable people who might not be there. The judge has the discretion.

MS. ROWLAND:
If you take a deposition in this situation, the deposition would be used instead of live testimony. It would be a Sixth Amendment violation (Exhibit F) to expand this beyond the existing law. Many judges would interpret the legislative intent

to be a presumption that anyone over age 60 or vulnerable people would have their deposition taken. Once done, that testimony would be available at trial in lieu of actual presence. All that is required is the person be out of state or sick. That would present perverse incentives not to ensure people are there.

Impeachment and cost problems arise when depositions are taken and used at trial. The amount of extra resources required to take all those depositions is huge. Most criminal cases include the broad class of anyone over age 60 or a vulnerable person. There should be a fiscal note on this bill.

CHAIR CARE:
Mr. Hall and Mr. Johnson may submit any letters or documents in rebuttal. Share them with the opponents of the bill. I would also like to see them before we schedule this for a work session. Mr. Frierson, I would like to see copies of statutes from other jurisdictions that have an age threshold. The hearing is closed on S.B. 45 and opened on S.B. 82.

SENATE BILL 82: Makes various changes relating to technological crime. (BDR 14-266)

JAMES D. EARL (Executive Director, Technological Crime Advisory Board):
I present my written testimony on behalf of the Office of the Attorney General (Exhibit G).

Almost 15 months ago, the Attorney General, in her role as Chair of the Technology Crime Advisory Board, asked Sheriff Douglas C. Gillespie of LVMPD to assess how changes in technology would affect his Department's ability to investigate crimes in the future. Sheriff Gillespie and Lieutenant Bob Sebby, who heads LVMPD's Economic Crimes Unit, made a detailed presentation. One of Lieutenant Sebby's concerns is criminal use of prepaid cards. His Economic Crimes Unit alone has 14,000 prepaid cards in its evidence locker.

Jack Williams is President of eCommLink, a processing firm for prepaid cards. A group consisting of civil and criminal attorneys in the Office of the Attorney General, representatives of LVMPD and Mr. Williams drafted the text in the amendment to S.B. 82 in Exhibit G, pages G3-G5.

Mr. Williams sent me an e-mail that says, "To give you a view on prepaid cards, estimates average $645 billion were loaded in 2008 in the United States alone."

Prepaid cards are used by criminals as well as for legitimate commercial purposes. Detailed procedures are included in the amendment to provide specific guidance for law enforcement in dealing with this emerging technology. The standard of probable cause is included in the amendment to recognize legitimate interests, which far outnumber criminal use of prepaid cards.

SENATOR WIENER:
Prepaid cards are the new form of transaction. Mr. Williams demonstrated the importance of probable cause and the ability to get to these transactions quickly. He reached into his pocket and pressed three keys on his cell phone. That was all it took to transfer whatever amounts were on the stripes of those prepaid cards. Does the language in the amendment address the concerns expressed by law enforcement about having the tools to best intervene at the appropriate time?

MR. EARL:
There is always a trade-off. From a law enforcement perspective, you would want to take immediate action on the slightest suspicion a card was either the instrumentality or fruits of the criminal enterprise. There are concerns relating to the Fourth Amendment. The amendment reflects a probable cause standard at the basic stage, which is to read the information on the card. Anyone can purchase a device that will erase all information contained on the stripe of a card and encode new information on the stripe.

Any card could be a prepaid card issued by an offshore nonbank that holds electronic funds for a drug cartel. Law enforcement cannot tell what these cards are without a device and the associated network to read information on the magnetic stripe. Even that only contains routing information to a bank, financial institution or nonbank. Law enforcement can read information on the magnetic stripe of the card only if they legitimately take possession of the card with probable cause that card has been involved in criminal activity. With probable cause, the amendment would allow law enforcement to take appropriate action to electronically freeze the funds. They could seize the funds if a search warrant is issued during the ten days the funds are frozen.

There is an important trade-off between law enforcement denial of use of funds associated with prepaid cards and the expectation that our rights be protected by a probable cause standard.

CHAIR CARE:
Under what circumstances would prior notice occur and when not?

MR. EARL:
Let me reiterate that I have not prosecuted in a number of years, and I have never prosecuted in Nevada. There might be circumstances where law enforcement would not want to alert the potential target of the investigation that an inquiry into their records was under way.

BILL UFFELMAN (President and Chief Executive Officer, Nevada Bankers Association):
We fully support S.B. 82. We are always about four steps behind the bad guys. Recently, some people globally hit automatic teller machines (ATM). Someone on the inside got information they needed from the network to override the $500-per-day withdrawal limit. There is video of people going to ATMs and making cash withdrawals using the legitimate network. Several million dollars were stolen within a matter of minutes. With handheld devices being used for banking, all someone needs is a telephone number.

MR. EARL:
The first paragraph in Exhibit G, page G3, defines "pre-paid card" and "stored-value card." The inclusion of the term "or device" specifically attempts to address the situation Mr. Uffelman mentioned. Both cell phones and personal digital assistants (PDA) can be used to access funds or monetary value represented in any digital electronic format. In the United States, using a PDA or cell phone to address an account located in a U.S. financial institution or nonbank also involves a physical piece of plastic. That is not the case for accounts at banking institutions or nonbanks located and organized overseas.

CHAIR CARE:
Ms. Rowland, have you had an opportunity to review the proposed amendment?

MS. ROWLAND:
Even though sections 5 and 6 have been stricken, S.B. 82 creates acute constitutional problems because it penalizes a financial institution for not going along with a subpoena or letter from a law enforcement agency when they may be under conflicting legal obligations not to divulge such information without a warrant.

This bill involves effectuation of search warrants without notice or secret seizure of personal property and the seizure of financial assets without a warrant. Warrantless seizures and secret seizures do not have an illustrious history in law enforcement.

A broader issue is detailed in my written opposition (Exhibit H). Section 1 of this bill assumes secrecy is permitted in any case that has a warrant to seize this kind of information. The bill as written permits a lack of notice to the person whose assets are being seized. Anytime law enforcement obtains a warrant, that default is precisely wrong.

CHAIR CARE:
This is a tough balancing act. Is there any merit to their argument?

MS. ROWLAND:
Yes. If you look at the proposed amendment in Exhibit H, page H2, we have been reasonable. We have suggested an amendment that does permit a seizure without notice, but only if facts are presented to a magistrate along with the search warrant to justify that. Obtaining a warrant is not that difficult. We are skeptical about a suggestion by law enforcement that they need to circumvent the warrant requirement.

We suggest the default position for any seizure by search warrant should require notice rather than secrecy. Any prosecutor could argue to a judge that secrecy is required in an individual case. We contend the default is switched where you do not opt out of secrecy, you opt into secrecy because the Fourth Amendment is so critical. This safety valve will give law enforcement an opportunity to do so without notice.

I am not aware of any area of Nevada law where a seizure of assets is permitted without a warrant other than the amendment submitted today. The Fourth Amendment requires a warrant. Litigation would result if someone's assets were seized simply based on probable cause and a lack of notice. I oppose sections 2 and 7 of the proposed amendment. Reducing the protections of the Fourth Amendment in no way tackles the problem they are trying to solve.

MR. JOHNSON:
This really is Nevada's Patriot Act; 18 USC section 2703 is actually part of the Patriot Act. You have to compensate the Internet service providers for gathering all that information, which could be reams of paperwork the State would have to fund. We will appeal these. It has already been litigated. We would rather not appeal and spend these resources. Is law enforcement jeopardizing their own convictions because we are taking a shortcut?

This case has been litigated before federal court twice—first, in *Warshak v. U.S.*, 490 F.3d 455 (6th Cir. 2007). That court found it facially unconstitutional and issued a preliminary injunction against further handing out the person's e-mails. The Sixth Circuit has recently reviewed and vacated that decision and taken it en banc. That does not necessarily mean there are no constitutional issues. They just said it is not facially constitutional. The District of Columbia Circuit looked at it a few months later in the case of *U.S. v. Ferguson*, 508 F. Supp. 2d 7 (D.C. Cir. 2007). They declined to rule on the facial constitutionality, determining that even if it was unconstitutional, it would not necessarily lead to suppression of the evidence.

There are concerns with evolving technology and speed at which criminals move. Warrants are critical when it comes to this. The default position should always be to get a warrant. There are times when secrecy is essential. That should be done through a judge, not law enforcement.

CHAIR CARE:
The hearing is closed on S.B. 82.

SENATOR WASHINGTON:
I want to introduce a BDR dealing with subdivided parcels and codifying what is done in California for titling those subdivisions.

SENATE BILL 121: Makes various changes concerning the sale of subdivided land in certain circumstances. (BDR 10-250)

SENATOR AMODEI MOVED TO INTRODUCE BDR 10-250.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
There being no further business to come before the Committee, the hearing is adjourned at 10:50 a.m.

RESPECTFULLY SUBMITTED:

_____
Kathleen Swain,
Committee Secretary

APPROVED BY:

_____
Senator Terry Care, Chair

DATE:_____