MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Sixth Session
March 10, 2011

The Committee on Judiciary was called to order by Chairman William C. Horne at 8:06 a.m. on Thursday, March 10, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Steven Brooks
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Jason Frierson
Assemblyman Scott Hammond
Assemblyman Ira Hansen
Assemblyman Kelly Kite
Assemblyman Richard McArthur
Assemblyman Tick Segerblom
Assemblyman Mark Sherwood

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Lucy Flores, Clark County District No. 28

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Nancy Davis, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Robert Shomer, Ph.D., Forensic Expert, Encino, California
Deborah Davis, Professor, University of Nevada, Reno
Katherine "Kate" Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas,
Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice
Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada
Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association
Chuck Callaway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Department
Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association of Nevada
Mark B. Jackson, District Attorney, Douglas County District Attorney's Office
Connie S. Bisbee, Chairman, State Board of Parole Commissioners
John McCormick, Rural Courts Coordinator, Administrative Office of the Courts
Julie Butler, Records Bureau Manager, Records and Technology Division, Department of Public Safety
Alan H. Glover, Carson City Clerk-Recorder

Chairman Horne:
[Roll was taken.] We have four bills on the agenda, however Assembly Bill 135 has been pulled and will be heard at a later time. We will begin with Assembly Bill 107.

Assembly Bill 107: Requires the adoption of certain policies and procedures regarding the eyewitness identification of criminal suspects. (BDR 14-614)

Assemblywoman Lucy Flores, Clark County District No. 28:
Assembly Bill 107 is entirely gone, although today, you will be hearing testimony about different procedures that were outlined in this bill. The

decision was made to scrap the bill because it was too procedural. That is one of the concerns that the law enforcement community had. The intent of the bill was never to create procedures. It was to create a statewide policy to implement best practices, based on over thirty years of solid research. These best practices would reduce the likelihood of a misidentification occurring in the eyewitness identification process of a law enforcement investigation.

I have worked very hard with the law enforcement community, and I believe that we are going to get the best reform and the best policy if we continue to work together. In doing that, there has been a lot of back and forth discussion, and I think we have gotten to a point where we can move forward. There is a proposed amendment that deletes the entire bill, which was submitted by the Nevada Sheriffs' & Chiefs' Association which allows each law enforcement agency to adopt policy and procedures applicable to identification procedures (Exhibit C). I then amended that amendment, (Exhibit D) which is on Nevada Electronic Legislative Information System (NELIS). This amendment adds "each law enforcement agency shall adopt policy and procedures that are designed to aid law enforcement in reducing the potential for erroneous identifications by eyewitnesses in criminal cases." I submitted this amendment because, after I accepted the proposed amendment, I found out that several states had adopted statutes that were similar, and then ended up with subpar policies because of the fact that it said "applicable to identification procedure." That meant they could create a policy to simply "not do anything suggestive" and that is their policy. They were abiding by statute.

The original intent of the bill was not to specifically state that X, Y, and Z must be done, but to require the use of, at a minimum, procedures that are known to reduce the potential of misidentification. Eyewitness identification is a human-based system and errors will occur. It is also a judicial-based system and errors will occur. We know there are tried and proven ways in which you can reduce the likelihood of misidentification.

Today you will hear several witnesses discuss the social science and legal background that deals with wrongful convictions and misidentifications. Nationwide we have had 267 post-conviction DNA exonerations. Seventeen of those 267 exonerations were people who were waiting to be executed by the state. These are factual exonerations, not loopholes, or someone who was released because someone did not abide by something. These are factual exonerations where biological evidence has proven these people are innocent. The average sentence served by a DNA exonoree is 13 years. In approximately 40 percent of the DNA exoneration cases, the actual perpetrator has been identified by DNA testing. Oftentimes, the real criminal will commit

another crime and leave behind biological evidence. They are put into a database and they find that they are actually the person who committed the first crime. Exonerations have happened in 34 states and one in Washington D.C. Because of these exonerations, we know that eyewitness identification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75 percent of those convictions. That is why using the best practices is so important. We know that when we have a case of wrongful conviction, it is very likely that it happened at the beginning stages with a misidentification.

Many of the policies that law enforcement currently has in place include several of these best practices. You will also hear some of those practices in the testimony from the witnesses. One of the more effective best practices is a blind administration, where neither the administrator nor the witness knows whether the suspect is actually present in the line-up. The instructions to the witness, at the time of the line-up, are that the suspect may or may not be there. It is a very simple thing to do. When there is no suspect present in the line-up, 72 percent of the time the witness will pick someone. Being told that the suspect may or may not be there reduces that number. Other best practices are taking confidence statements afterwards asking, "How confident are you that you picked the right person?" Also using sequential presentations instead of simultaneous ones reduces misidentifications, relatively simple things that most of the law enforcement community is already doing in the State of Nevada.

In closing, I would like to mention again that I have worked very hard with law enforcement to get to the point where we are satisfied with the progress we have made. We have discussed creating a working group afterwards, so that the interested parties can come together and agree to something that everyone is comfortable with. The intent of this bill and the amendment is not to specify exactly what it is that each law enforcement agency must do. We recognize that the rural areas are different from urban areas, that there are circumstances requiring different actions. Again, my amendment is designed to aid law enforcement and reduce the potential for erroneous identification by eyewitnesses in criminal cases. This amendment does not, in any way, suggest they are currently doing anything wrong. As I said, many of their policies already include much of what you will hear today. My amendment is simply to keep the intent of the bill, which is to ensure that we are at least using some of these basic practices that I have mentioned. It is proven that they reduce the likelihood of someone potentially picking the wrong person. I have never been misidentified or falsely accused of something, but I have met rape victims who subsequently found out that they wrongly identified someone. They were responsible for that person going to prison for

15 to 20 years, and then had to relive that rape all over again during the exoneration. The exoneree had lost their freedom. Freedom is something that is of the utmost importance to an American. That is what we value the most. That freedom can be taken away simply because we did not implement what we know could reduce the chance of having that freedom taken away wrongfully. It is not fair. It is not right. We should be doing absolutely everything that we can to ensure that does not happen. We know it has happened. This is not something that happens once in a blue moon, there are close to 300 DNA exonerations. That does not include the wrongful convictions where we do not have biological evidence to prove that someone was wrongfully convicted. You have many victims when the correct person is not chosen.

Robert Shomer, Ph.D., Forensic Expert, Encino, California:
I have been working professionally in this area for the last 36 years. I first qualified and testified as an expert on eyewitness identification 36 years ago in California. I have testified in 17 states, in military courts-martial, and federal court. My background is a doctor in experimental psychology from University of California, Los Angeles (UCLA), five years as an assistant professor of psychology at Harvard University, and ten years at the Claremont Colleges, where I taught at graduate and undergraduate levels. I headed a large medical group, retired from that, and am now focusing on forensic psychology.

One of the key things I want to say is that there is a very emotional issue involved in this field. The emotional issue is cost. I have been doing this for a very long time and I will tell you that the way eyewitness identification is currently being done is costing states more money. I appreciate the stories about people who have been wrongly convicted, have served time, and have been exonerated. I have been involved in those types of cases. Someone in my family was wrongfully identified. Fortunately those charges were dropped. I come from a state that is essentially bankrupt: California. No states are having an easy time right now. The judicial system is expensive to maintain. A court day in California is approximately $20,000, which is a considerable amount of money. There are several cases going to trial that should not be going to trial. It is not because anybody is purposely trying to do something wrong. One of the areas in my background is systems flow and efficiency. One thing that would save us a lot of money and make systems more efficient is if practices and policies were different, not because anybody is interfering, or wants a false identification, but because of models that we were all exposed to as kids.

The first model is the eye is a camera. The real belief is that when we see someone, later we will be able to accurately identify them. That model is the

source of the problem. The second erroneous model is the notion that the memory works like a videotape player. All you need to do is press a button. You ask someone, "Who did you see? What did you see?" Press the button and it comes back in an accurate fashion. You will forget some things, sure, but basically it is all there. Nothing could be further from the truth. Memory is reconstructed, like putting together the pieces of a jigsaw puzzle. Many pieces are missing so people make assumptions. When confronted in a sudden, unexpected, stressful event, people do not work at their highest level of efficiency. The very processes needed to form accurate memories are interfered with. The third model is stress. People believe that for the victim of a crime, stress kicks in, victims are more accurate, and there is an imprinting in the brain. Exactly the opposite is true. Stress "stamps out," and people are less accurate under highly stressful situations. There was some very good research done with special forces troops, who were only 30 percent accurate in recognizing the person seated across from them for 45 minutes in a stressful interrogation. Special forces troops are not your ordinary citizens.

So, you have a victim of a crime and you want to find out who committed this crime. I will say to you that policies and procedures are not the way to go. I believe that training is the way to go. None of you would take medicine that was approved based on the way eyewitness identifications are accumulated. None of you would consume a product that is tested the same way eyewitness identifications are tested. It is in no way a reflection of the fine officers of this state or any other state. It is a matter of the conceptual training of what eyewitness identification is all about: the models used; the eye is a camera; memory is a videotape recorder; and just presenting photos or people in a line-up; and somebody will dredge up their memory and identify a suspect. It does not work that way.

I was a psychologist for a police department for over five years for the City of Hawthorne, near the Los Angeles International Airport. It is my absolute belief that police officers want to do the right thing. I do not mean any fancy training, just a conceptual orientation. What is eyewitness identification? Turns out it is a unique process; it exists only in the mind of the witness. It is not like a blood sample, not like some kind of physical evidence that can be sent out for testing. There is no external reality to eyewitness identification. None of us have a wand to wave over a witness's head and know when the witness is accurate. I do not know, and I have been doing this for a long time. Whenever I testify, I never come to the ultimate conclusion about whether I think an identification is good or bad. That would be presumptuous of me. I testify about the factors that go into this process. When the police attempt to do an eyewitness identification procedure, they are, in essence, trying to read the mind of that witness. There is no other

way. There is no testing by laboratory equipment, no technology involved. Law enforcement needs to have the right conceptual models, and understand how fragile this evidence is. Erroneous identifications do not benefit anyone. It makes more work and it raises our costs tremendously. When a case is presented to a prosecutor with an identification made, the prosecutor goes forward with the case, and if it is a very fragile or fallible identification, all of our money is going to waste. Eyewitness identification has the human factor and has people wrongfully convicted. It could be you, me, or a family member. It can also be a matter of cost. Eyewitness identification under the very best of circumstances works like flipping a coin. When officers know the nature of this evidence, they will want to use best practices. That is why I am so happy that this bill is aimed at encouraging best practices rather than a whole set of procedural issues. Training at a conceptual level will do the same thing.

Chairman Horne:
Any questions?

Deborah Davis, Professor, University of Nevada, Reno:
[Witness showed a slide presentation (Exhibit E).]

As you know, the bill that outlined all the procedures that would help eyewitness identification be more accurate has been withdrawn. What I would like to do today is talk about some of the procedures that we know are effective. I would also like to point out that this is not anything we have to reinvent for Nevada. We have a good model that was developed by the United States Department of Justice. Although this model does not contain all of the best practices of eyewitness procedures, it is much better than average. This model is called the *Eyewitness Evidence: A Guide for Law Enforcement*. There is also a trainer's manual that is available at the Department of Justice's website. Both the guide and the training procedures can be directly imported for use in training police officers. This guide is based on over 100 years of research on eyewitness evidence and what tends to make witnesses more or less accurate. In particular, the research deals specifically with how police procedures can affect accuracy.

There are several things that can affect accuracy, including the conditions under which someone originally witnesses something, the circumstances and so on, and you cannot control that. What you can control are the procedures used when an eyewitness makes an identification. This guide is based on a long history of research in cognitive experimental psychology, social psychology testing in a laboratory, and which works best. In the nineties, when Janet Reno was the United States Attorney General, there became more and more concern about the issue of misidentifications. There have been a

number of published studies. The one that Assemblywoman Flores refers to, *Reevaluating Lineups* (Exhibit F) an Innocence Project report, is one of a number of studies on wrongful convictions. They all find the same thing: eyewitness errors are the number one cause of wrongful convictions. Janet Reno convened a panel to study this issue and make recommendations about solutions for law enforcement to reduce this kind of error. The original panel consisted of law enforcement personnel, legal professionals, and eyewitness researchers. It is not something that psychologists came up with. The panel was made up of 33 percent law enforcement, 22 percent prosecutors, 11 percent defense attorneys, and 33 percent researchers who ultimately developed the guide. These people came from all over the country. *Eyewitness Evidence: A Guide for Law Enforcement* has four different sections. One specifically includes eyewitness identification procedures; other sections include procedures for interviewing witnesses prior to any identification process to get other facts of the case, and how to get the most accurate information. Right before this committee convened in 1999, the American Psychology-Law Society had published a report on eyewitness research designed to review the procedural issues and what procedures make a difference in accuracy. That review was circulated to the American Psychology-Law Society members, was approved as a white paper, and later was also published.

I will give you a few examples of the kind of research that demonstrate the principles that underline the *Eyewitness Evidence: A Guide for Law Enforcement* model. There are four general goals that were addressed by this. Some of them had to do with pre-identification procedures, to avoid biasing interviews and help preserve the witness's memory as best as possible. Others involve identification procedures. There are different kinds of identification procedures, there is a line-up, and there is also a show-up, where the witness looks at one person and is asked whether this is the suspect or not.

I would like to review the four goals with respect to line-ups. The first goal is to promote the construction of what is called a fair line-up in which no single person naturally draws attention as a likely suspect for reasons not having to do with actually being the suspect.

The second goal is to ensure that the witness chooses on the basis of true memory of the perpetrator. One thing that has to be emphasized is that a lot of guessing goes on with eyewitnesses, despite the importance of the task. This is one of the reasons why there is such a high rate of witnesses choosing someone when the perpetrator is not actually in the line-up. Seventy percent of the time is not unusual at all. In my studies, I get at least 70 percent of

people choosing somebody in the line-up when the perpetrator is not there. It is very important to get them not to do that, but to base their choices on an actual memory of the perpetrator.

The third goal is to ensure nobody influences his choice, and that no one does anything that might be suggestive, or that might encourage the witness to choose a particular person, independent of their memory.

The final goal is to ensure the witness's reported confidence in his choice is not artificially inflated. One of the things that we know, as eyewitness researchers, is that jurors base their assessment of the accuracy of the witness on how confident that witness says he is. If you have a witness who says, "That is the person. I am 100 percent certain," it is likely to ensure a conviction. We do not understand that people can be extremely confident and completely wrong. Eyewitness researchers looked at the relationship between confidence and accuracy in great detail and found that there is a very small relationship between confidence and accuracy. Yet that is what people base their judgment on, almost exclusively. That is going to happen. We need to make sure that at least their confidence is not artificially inflated. We know that confidence is easily inflated by police saying things like, "Oh good. That is who we thought it was."

Many of the concerns reflected in the guide are based on the idea that if a person is not sure of his memory, he is going to guess because he really wants to help prosecute the person who committed the crime. He is often afraid that if he does not make an identification, the case might end and the perpetrator will go free. He tends to look at the line-up and picks out the one that best fits what he remembers. Some of the recommendations in the guide are designed to avoid that process and make it an "absolute judgment" rather than a "relative judgment."

The guide provides very explicit instructions about how to construct line-ups, how to deal with the witness, and so on. A fair line-up means one that does not cause any of the members to stand out and, therefore, to provide a basis for guessing that the person is probably the perpetrator. Eyewitness researchers identified a number of different kinds of problems that can lead people to stand out in a line-up. The primary problem in a line-up is the suspect being the only one that really fits the description given by the witness. If a witness says the suspect is really tall with a dark complexion, long hair, and a noticeable scar, everyone in the line-up should look like that. Everyone should have a scar, everyone should be tall, and have the right kind of hair. Otherwise, the suspect is the only one that fits the description the witness gave, and if they are going to guess, they are going to go right to that suspect.

You do not want them to guess. You want them to really know who it is. Different photograph characteristics can also be a problem. If all the photographs have the same background, but one stands out with a different background, that will immediately draw attention. In a live line-up, behavior can make a difference. Someone can stand out because he behaves differently.

I scanned these examples from the guide telling how to compose line-ups. In each case it gives you the principle they are trying to pursue and the general policy. The principle is that you want to make a more accurate identification and that you have to compose the line-up in a way that does not cause any one person to stand out. An identification procedure should include only one suspect. There is very good logic behind that. For example, if you have a line-up full of suspects and we know that 70 percent of witnesses are going to pick somebody out, a person will be chosen. If you have six suspects, at least five of them are innocent. So, you should only have one suspect, and everybody else in the line-up should be known to be innocent. This way you do not pose a risk to more than one innocent person. Also, you want everyone to fit the general description given by the witness. The line-up administrators should review what the witness originally said about the perpetrator, and ensure that everyone in the line-up has those same characteristics. If you come up with a suspect that does not look like what the witness said, then you go to the second level and try to make people generally resemble the suspect.

Another thing to be aware of is to make sure the photographs you use in the line-up are the most recent available. You can see that there are very specific instructions. If a suspect has a scar or a tattoo, you can cover up the area on the suspect and put a Band-Aid on the same place on everybody else, or you can get people with marks in the same area. If you have a witness who said the suspect has a big scar on his face, and there is only one person in the line-up with a big scar, naturally, the witness will assume it must be him. If there is a suspect acting different, looking like he is spaced out and drunk, that will draw attention.

[Speaker showed several different slides of line-ups, explaining the differences in each (Exhibit E).]

These examples are all from the last five years. I have many more examples from just the last six months. Law enforcement has not quit making bad line-ups. Law enforcement agencies need training on how to ensure a fair line-up so that the suspect is not the only obvious person who fits the description. A common thing I have noticed in California is that the police

think it is real cool to let the suspect pick out his foils; that way he cannot complain about his line-up. Well, of course, the suspect does not know how to do this. Talk about someone with no knowledge of how to pick a line-up, it is the suspect.

Equally important is recording the identification procedures. When you have an actual recording of the procedure, you can see what the witness does when he looks at the photograph array, and you can hear him talk about it. You can hear him using relative judgment. If you do hear relative judgment, that is a good clue that you should not rely on that eyewitness identification.

[Speaker returned to slide presentation with more examples (Exhibit E).]

Instructions to the witness may minimize the likelihood that he would be guessing. I have a recording in which the policeman actually tells the witness to pick out the one that "most closely resembles" what he remembers. Investigators need to provide clear instructions to the witness to ensure he understands that it is important to exonerate the innocent as well as convict the guilty.

[More examples are shown.]

Another recommendation is to use a sequential line-up, which means present people one at a time, asking if it is the suspect. This prevents him from going back and forth between photos and guessing. Do not do anything that suggests who the suspect may be. Police can exert influence, either consciously or unconsciously, on the witness. This can be apparent if there are recordings.

Another very important thing that we recommend is not letting the line-up administrator know who the suspect is. He will not know who to bias the witness toward. Just like in medicine where you have double blind placebo controlled trials, we want a blind administrator who really cannot influence the witness.

The last issue is not to inflate the witness's confidence. As I mentioned, that is the primary thing that jurors pay attention to, and what they should not pay attention to. We have shown that a number of things inflate confidence, but very prominent among them, is the policeman who says, "Good. You have got our suspect," or who does something to confirm with the witness that he has identified the right suspect. When the policeman does that, the witness's confidence goes up. With that inflation, the witness sounds better and better to the jury that has to judge whether or not the witness was accurate with his

choice. He sounds more like he could be accurate because he is more confident.

Eyewitness Evidence: A Guide for Law Enforcement does not cover everything that eyewitness scientists believe it should. We have 12 more years of research to back up our recommendations, some of which was not incorporated, but if everyone in the country did what the guide already says to do, it would help a great deal.

Chairman Horne:
Thank you. Do you know how many police academies adopted this guide and provide this training?

Robert Shomer:
There are about five states that have adopted this guide. New Jersey probably has the most detailed training program. The problem is that if you go for the policy and procedure legislation, and there is no implementation, there is no penalty if it is not done. I think training along the lines of the concepts of the guide, instead of policies and procedures, will assist all police officers. I believe the academy is absolutely the best place to start. Start with training about what kind of evidence this is. DNA evidence is not that old; remember police procedures before DNA. They had to change their procedures to preserve the DNA evidence. The same kind of model can be used for eyewitness identification; training to preserve the evidence, and training to obtain that evidence in the best possible manner.

Assemblywoman Flores:
Wisconsin has something similar to what the amendment is proposing. It says the policy has to be in statute, but does not dictate what the policy is. North Carolina and New Jersey do have policies in statute. Texas just passed a very similar version of my original bill through the House, and recently had a hearing on the Senate side. There has not been a vote on the Senate side yet. Massachusetts has actual procedures. It varies on what approach the states want to take.

Assemblyman Hansen:
This presentation seems to imply that Nevada law enforcement people are not already encouraging current best practices. You have not presented any evidence that there is actually a problem in Nevada that we need to address through statute. As Assemblywoman Flores said, we already recognize that we have these procedures in place. We recognize that in Nevada, because of our great diversity between urban and rural, there needs to be a great deal of flexibility, yet we are proposing an amendment that basically is one size fits all.

It seems to be unnecessary and redundant. I have not heard a thing that says Nevada is not already following best practices. Unless there is some evidence to present that law enforcement is not following reasonably current practices, what is the purpose of the law?

Deborah Davis:
I showed you a line-up from Nevada with the neon background. I have never received a recorded eyewitness identification procedure in any of my cases in Nevada. I have never seen a sequential identification procedure in Nevada. I have seen many bad line-ups. Of course, I am only hired for the bad ones. I think it is a difficult task to make a good line-up. Nobody is saying the police are bad or incompetent but a lot of this training has not been given to them. The recordings and sequential identification procedures have not been done in any of the cases I have gotten so far. I see line-ups that should not occur. Also, we see a lot of eyewitness identifications come in that actually are truly impossible.

Robert Shomer:
I have testified in Nevada for decades. The best practices are not followed in your state. They are not followed in California, and they are not followed anywhere in a systematic way. This is not singling out Nevada. There has been a massive improvement over the last decade or so. There used to be one-on-ones, where they would have multiple eyewitnesses travel together to the site where the suspect is illuminated by police spotlights, in handcuffs, surrounded by police officers, and the witnesses could hear each other's reports. New York probably has the worst practices. Louisiana has better practices than New York. This is a matter of awareness of the problem. We go through school, we learn about the eye is a camera, and no one tells us any different. It is not rocket science to inform people of how these things actually work because they are professionals and want to do a good job. They then want to know how to do it. I testified yesterday in Los Angeles. Frankly, my testimony eviscerated the procedure the police officer used. After I finished, the police officer came up to me because he wanted to know how to do it the right way.

Assemblyman Frierson:
I want to clarify where we are, based on Assemblywoman Flores' presentation. We are no longer talking about imposing policy and procedure at this point. We are now talking about working with law enforcement to allow for the development and growth in the area. This is a discussion that is ongoing, evolving, and we need to allow the ability to evolve with it. Correct?

Assemblywoman Flores:
Yes, that is correct. The bill is entirely off the table. We are now considering my amendment to the Nevada Sheriffs' and Chiefs' Association's proposed amendment. My amendment reads, "Each law enforcement agency shall adopt policy and procedures that are designed to aid law enforcement in reducing the potential for erroneous identifications by eyewitnesses in criminal cases." It does not specifically state mandatory procedures. It is designed to aid law enforcement in reducing potential misidentification based on years of research and what has been proven to work.

We know that to varying degrees, all of the law enforcement agencies are doing some of this. Some of the law enforcement agencies do not have any policies for eyewitness identification at all. Some of them, such as the Las Vegas Metropolitan Police Department, have very good policies. They have blind administration in their definition, but I did not find it anywhere in their policies and procedures where they are required to use a blind administrator.

Katherine "Kate" Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas
I would like to start out with a story about a woman that some of you had the pleasure of meeting, Jennifer Thompson. In 1984, Jennifer Thompson was sexually assaulted. She identified Ronald Cotton as the man who had broken into her home in the middle of the night and raped her. She had paid particular attention to the perpetrator, tried to get as good a look as possible because she knew that she would need to identify him later. She picked Ronald Cotton out of a photo line-up. Later she picked him out of a physical line-up. She was absolutely convinced that he was the man who raped her. When he was convicted at trial, based on her testimony, she toasted the justice system with a glass of champagne. Eleven years later, DNA proved that she was wrong. Now she tours with Ronald Cotton speaking to people all around the country about the importance of accurate and sound eyewitness identification policies. It was devastating to her to be put in the position of fingering the wrong man and sending him to prison. She is not alone. Statistics show that in terms of DNA exonerations, about 75 percent of them are affected by mistaken eyewitness identification. The reason it is so important to have law enforcement agencies develop policies that are designed to minimize the risks of mistaken identifications is that the system of trial by jury does not do a very good job of correcting those mistakes.

One of the things I do, in addition to directing the Innocence Clinic, is to teach an evidence class. The whole system of trial evidence is based on a high preference to have in-court testimony by someone who has personal

knowledge of what they have seen. The idea is if we can get an eyewitness on the witness stand in court, subject to cross examination, that we can test the accuracy of his knowledge. Eyewitness identification during court testimony is just not conducive to determining the accuracy of what is being said. Once a misidentification has occurred, the level of confidence is going to grow. Putting an eyewitness on the stand in a jury trial confirms to him that he has identified the right suspect because, on the basis of his identification, the person has been charged, a jury has been empanelled, and he is going to testify. His confidence level on the witness stand is going to be much higher. According to studies, so is his memory: his memory of how long he was able to see the perpetrator, how good the lighting was, et cetera. Studies show his confidence in those factors changes as well; it increases. The trial system is not set up to reveal those inaccuracies through the basic methods of trial evidence.

One option is to exclude the testimony entirely. You could say this witness should not be able to testify at all because the police used an identification procedure that was unduly suggestive. That is a pretty extreme remedy. It is a remedy that courts are not anxious to use. They are not anxious to keep an eyewitness from testifying and keep his testimony away from the jury. There is a standard for excluding a witness entirely if he has been subjected to an unduly suggestive procedure, but the standard is pretty high, and some of the factors that the judge is going to look at in making that decision are based on the same inaccurate testimony. If there is a mistaken identification made, testimony on the stand is going to be inflated compared to the actual confidence felt at the time the identification was made. Excluding the testimony is possible, but not very likely.

Another possibility is to allow an expert, like the ones we have heard today, to come and testify and educate the jury. Even though the person who was on the witness stand sounded very confident, the experts can express concerns about the photo line-up, or what else may have affected the witness's testimony. The Nevada Supreme Court has not always allowed the experts to testify on these types of issues. There is a conflicting case law and the Nevada Supreme Court has been deferential to the decisions that trial courts make and have upheld trial court decisions not to allow experts to testify. In a 1996 case there were three witnesses, all of whom had been unable to pick someone out of a line-up and then later saw the suspect's picture on TV. The witnesses then identified the suspect during a preliminary hearing. They could be cross examined about their prior identifications, but the trial court did not allow an expert to explain to the jury why it was that their confidence might have grown. The Nevada Supreme Court upheld that exclusion.

I think what people have come to understand is that the memories that an eyewitness has of what happened at the scene of a crime are like trace evidence that is found at a crime scene. They are delicate and can easily become contaminated by other images. It can be shaped and changed by the way it is handled by the police. No one believes that law enforcement intentionally encourages eyewitnesses to make misidentifications. However, police agencies have not fully studied the vast area of research and applied the best practice procedures.

I would like to end with another story, the story of a police detective in Madison, Wisconsin, who was a law student at the University of Wisconsin Law School during the time that I taught there. She became very interested in eyewitness identification. She was able to hear Professor Gary Wells speak about some of the causes of mistaken identifications and some of the important policies and principles we have heard about. Particularly she heard about blind and sequential presentations in a photo line-up. She learned that instead of showing people a little card with six or eight pictures on it, it is better to show the pictures one at a time, and do it in a way where the detective does not know which person is the suspect. She was trying to figure out how to do this in her department, because they were not going to pay for another person to administer photo line-ups. They relied on the investigating detective to do it. She actually came up with a system for doing this for the cost of six manila folders. She figured out how to create a blind sequential photo line-up procedure by shuffling the photographs, slipping them into six separate folders and handing the folders to the eyewitness, one by one. She did not know which picture was in which folder. She could record the witness's reactions to the pictures, she did not know which picture he was seeing. It was inexpensive, innovative, and effective. This procedure has been picked up as a statute in Ohio and is recommended by a task force in North Carolina. It all started with a detective who understood the principles and was trying to add those principles to the procedures in her department in Wisconsin.

I would also like to speak in favor of the idea that law enforcement already has motivation to do this. Law enforcement agents probably know more than this legislative Committee on how to implement these policies. If agencies develop policies themselves, they understand the principles and can train and develop the policies they want to follow. I would rather see these agencies understand the principles and believe in them and develop procedures that conform to them, than to see a Legislature pass a bunch of detailed procedures for them to follow. I think there should be policies that are designed to aid law enforcement in reducing the potential of misidentification by eyewitnesses in criminal cases.

Chairman Horne:
Thank you.

Assemblyman Ohrenschall:
From the presentation, it seems to me that if a law enforcement agency adopts these best practices, it reduces the chances of misidentification and wrongful convictions. I am wondering, in the jurisdictions that have adopted these best practices, have the law enforcement agencies found it to be very costly, time consuming, or cumbersome, as opposed to the benefits gained? Is there any report that it is difficult for them to adopt these best practices? Would it be difficult for us to adopt it here?

Kate Kruse:
I mentioned the folder system that was developed in Wisconsin. That was done by a very innovative detective who understood the principles and figured out how to implement them in a cost-effective way. I know that Wisconsin has a statute that is slightly more than this amended statute proposes, but it states that law enforcement agencies shall adopt written policies for using an eyewitness to identify a suspect. Wisconsin's statute says law enforcement agencies shall include practices such as blind administration, sequential presentation of images, minimizing factors that influence the eyewitness to overstate his confidence, and documenting the procedure. It does not say you have to have those policies, but that you should consider them. I know that Wisconsin was doing a follow-up study to determine the success since the law was passed. I could find more about that if you are interested, but it is a very similar bill to what you are considering.

Robert Shomer:
A carefully controlled field study in Hennepin County, Minnesota, addressed the cost of sequential line-ups and found them to be minimal, with no perceived drop in suspect identification rates. This specific study was done in 2006. The information is contained in a very informative study called *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, by Sandra Guerra Thompson, University of Houston Law Center. She is extremely aware that one of the major issues here is cost. The one controlled study we have so far shows that costs are essentially minimal, there is no drop-off in problems with identifying the correct suspect, and you get an improvement in identifying the right person.

Deborah Davis:
There have been studies of police reactions to recordings. With respect to interrogations, police like it because it protects everyone, not just the innocent suspect. But it also protects police, in that, if there are later claims of bad

behavior of any kind, everything is on the record and it can be discounted right away. Originally police were resistant to that, but they have come around and they like it. I would like to say that there are a number of jurisdictions that have adopted these procedures voluntarily. More and more states are doing sequential line-ups, even though it is not mandatory.

Chairman Horne:
Anyone else in favor of A.B. 107?

Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice:
I want to address a couple of issues in regards to what I know from my practice in Las Vegas. I currently have a pending case where a witness has identified someone wearing an orange T-shirt, and there is only one orange T-shirt in the line-up. I would like to think that best practices are being followed. I have long complimented Las Vegas Metropolitan Police Department for doing such a good job of recording interrogations and witness statements. Not every agency does. The feds do not record witness statements. It would be very helpful if we could have recordings of eyewitness identifications. These small measures would make a huge difference in the resolution of cases.

Because I am the defense lawyer, I get the case sometime later, and I start looking back and trying to reconstruct what actually happened during the witness identification process. Oftentimes there are cases where we are going to have to bring in an expert. I am appointed by Clark County, and I have to make a request for fees for an expert to come testify about the eyewitness process. If the procedure had been recorded, I could probably eliminate the need for that, or the case might resolve. It is not an issue of us trying to put the policy in statute. It is a matter of us trying to take a practical approach: what is most cost-effective, what is most easily doable, and how can we do this together to ensure that people are not wrongfully convicted. Unfortunately, with regard to misidentification, the appeal process is not as effective as it is with DNA cases. Mr. Cotton is very lucky that DNA exonerated him, but think about the cases where all you have is eyewitness testimony. There is probably not going to be some science that comes along later to save you.

I would encourage the Committee to, at a minimum, approve the bill as amended by Assemblywoman Flores. If there will be a committee to work on best practices, I would relish the opportunity to be a part of that committee. I think that our law enforcement agencies do a lot of things right, but I think this is an area where we could all work together and get some improvement that would greatly help.

Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada:
I would like to speak briefly in support of the bill. We hope that the Committee does move forward with this as amended. We see it as important to ensure due process rights for individuals who are dealing with the criminal justice system. We believe this amendment supports governmental transparency as well.

Chairman Horne:
Anyone else in support of A.B. 107? Anyone opposed?

Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We represent the 17 elected sheriffs and 13 chiefs of police and other law enforcement administrators throughout the state. As agreed, we will limit our opposition to this bill with just three testimonies. Nevada has over 10,000 commissioned law enforcement officers; only 3,000 of those are in the Las Vegas Metropolitan Police Department. Realizing that is the largest department, however, we do have many other law enforcement agencies throughout the state.

We are opposed to the bill as it was introduced. We first became aware of this bill in January 2011. We did not see the bill until early February, and Assemblywoman Flores was not able to work with us until last week. Law enforcement in Nevada is guided by a number of different things when it comes to eyewitness identification. One is law, one is the district attorney's review, and one is our training. We feel that putting procedure into law is not a way to do that. Good practices in Nevada do not need to be law. We advised Assemblywoman Flores that Nevada law enforcement is working towards a standardized policy on eyewitness identification.

Nevada law enforcement has engaged the services of a company called Lexipol, which is developing a statewide policy manual that covers all the major issues throughout law enforcement and that all of our agencies are going to adopt. One of those issues covered is eyewitness identification. Assemblywoman Flores is invited to participate in the working group as we develop this policy. I submitted an amendment which says that Nevada law enforcement would adopt policies and procedures with regards to eyewitness identification. We also maintain in that amendment the definition of the different types of identification. We do not believe that putting procedure into law is necessary. Assemblywoman Flores added additional language to our amendment. We feel the language we submitted in the original amendment is sufficient, but we are willing to work with Assemblywoman Flores to see what we can do.

Chairman Horne:
You stated that because of the large contingency of your members that you needed to confer with them on Assemblywoman Flores' amendment. Are you still willing to do that?

Frank Adams:
Yes. We have about 120 members and with this short notice, I cannot speak for all of them.

Chairman Horne:
I understand. For the record, we will be hearing three testimonies in opposition to the bill, but all of law enforcement that signed in is in opposition.

Chuck Callaway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Department:
You have heard a lot of information this morning, a lot of good information about eyewitness identification. I would like to briefly tell you that the Las Vegas Metropolitan Police Department has an in-depth policy related to eyewitness identification. Our policy is over four pages long. We believe in best practices, and we do everything in our power to follow best practices. Our agency averages 200,000 arrests a year. I have been a police officer for over 20 years. I have worked the streets and have been involved in hundreds of eyewitness identifications. I am not aware of any eyewitness identifications that I have personally been involved in being overturned in court due to faulty eyewitness identification.

You were given some numbers earlier that 276 people in the nation have been exonerated due to DNA. I would like to mention that there are 1.6 million people that are incarcerated in prisons in the United States. I am not so naïve as to believe there are no innocent people in prison, and we all know that our system is not perfect. Of those 276 exonerated through DNA evidence, I would like to know, were any of those cases the result of confessions, or the result of circumstantial evidence? How many of those 276 cases were directly related to eyewitness identification? Were any of those cases in Nevada? In addition, there are checks and balances in place. Supervisors have to review cases when officers conduct eyewitness identifications. The cases then go to another supervisory level, and then to the district attorney's office. Juries are also given instructions. There are a lot of checks and balances that are put into place. With the one photo you saw today—where one guy was bald and everyone else had hair, and the instructions said the suspect was bald—I would surely hope that those checks and balances would have recognized that and addressed the issue prior to someone being convicted.

I would also like the Committee to know that the Las Vegas Metropolitan Police Department receives six hours of training in the academy in regards to eyewitness identification. We do receive training in that area and we do try to stay on top of the current trends and the latest scientific data and incorporate that into our training. That is one reason why putting policy and procedure into law is, in our opinion, a bad idea. Once something is put into law, it is no longer flexible. We cannot change as the times change and new technology becomes available. We would have to come back to the Legislature to change the law. Policy and procedures can be updated. There is a lot of new technology coming out. I just found out that there is now computer technology that randomly picks the photographs, so that the human element is taken out and there are no allegations that someone picked certain people to put into the pictures to try to persuade the victim to pick that person out of the line-up.

I would like to close by saying that we support the amendment submitted by the Nevada Sheriffs' and Chiefs' Association. The amendment submitted by Assemblywoman Flores, in our opinion, adds subjective language. One person's opinion of what might be an effective or practical procedure for witness identification, someone else may disagree with. I do appreciate Assemblywoman Flores taking the time to speak with me on at least three different occasions, and to consider my concerns with the bill.

Chairman Horne:
I think the crux of your presentation is not whether Metro has best practices, or that the ones you do have are not doing a good job, but can we do a better job.

Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association of Nevada:
I am here on behalf of all professional peace officers in Nevada. I have more than 26 years with the Reno Police Department and retired as a major crimes detective. I have put together a number of photo line-ups, stand-up line-ups, show-up line-ups, and the like. I appreciate the testimony and I appreciate Assemblywoman Flores coming forward with this bill.

I can tell you that the professional peace officers in this state have done an outstanding job to protect evidence and use the checks and balances in place. There are several people on death row right now that I was directly responsible for putting there through this process. I can assure you that we have had people come in and make false confessions, and we have gone out of our way to make sure that those people were vindicated. We do not want to put somebody away that does not belong there. The checks and balances, starting

with a photo line-up, are crucial. To my knowledge, there is nothing in Nevada that has shown that we have done something wrong. To fix something that is not broken is difficult. However, we too, like the Nevada Sheriffs' and Chiefs' Association, stand ready to work with Assemblywoman Flores in coming up with the best policy for law. We support the Nevada Sheriffs' and Chiefs' Association amendment in total. [Written testimony also provided (Exhibit G).]

Chairman Horne:
I appreciate your willingness to continue to work with Assemblywoman Flores. I think the issue is not that you are not doing a good job, but that possibly we can do it better. I do not think anyone will tell you that there has never been a misidentification in the State of Nevada and in various jurisdictions in our state. I think it is fair to look at the procedure and see where we can make it better.

Assemblywoman Diaz:
I appreciate the intent of the bill. It has been reiterated that best practices are already being done. I see this as a win-win situation for the citizens of Nevada, so that anyone who is going to be put in a line-up is given the best shot that they will not be misidentified. I do not understand why putting it into statute is an issue if you can come together and work on the language that everyone feels comfortable with. As school teachers, we constantly have to be retrained, and be aware of changes in light of our clientele. There may be people who are not aware of these best practices and everyone should be trained and up to par. I do not think this bill is to state that the right thing is not being done. We commend you for the job that you are currently doing, but I think that it behooves everyone in the state to use best practices, and that they be carried out equally, whether it be rural or urban.

Mark B. Jackson, District Attorney, Douglas County District Attorney's Office:
I signed in as opposed to A.B. 107 as introduced, and I have not had an opportunity to review the two amendments. I do appreciate all the comments and testimony that have come before this Committee. As I understand this issue, it is not about the policies and procedures; it is about the training. Both these amendments start out stating each law enforcement agency shall adopt policies and procedures. If it is about training, why would you consider enacting legislation requiring the adoption of these policies and procedures? I think the record should reflect that training, as a whole, is not solely dealing with law enforcement. I appreciate the best practices approach and the policies and procedures that were contained in the original bill. It could almost be used as a checklist for criminal defense attorneys. These are things that a good, trained criminal defense attorney would want to go into on cross-examination of any witness who testifies to the identification of a

suspect. As a prosecutor, there are four things that I have to establish in every case. First, the defendant, on or about a certain time, within the jurisdiction of my county, committed a crime, and then establish the elements of that particular crime. Identification occurs in every single case. In a lot of cases, it is never an issue. When it is an issue, where the victim did not know the suspect beforehand, the case will probably go to trial because the suspect says he has been misidentified. I would ask the Committee to look at language more along the lines of training, and to get rid of the language that has requirements about adopting the policies and procedures, especially since law enforcement is already going in that direction.

Chairman Horne:
Anyone else to testify in opposition to A.B. 107? Anyone neutral? Seeing none, I will close the hearing on A. B. 107.

[A letter of opposition was submitted by Robert D. Davidson, Chief of Police, Winnemucca Police Department (Exhibit H).]

I will now open the hearing on Assembly Bill 18.

Assembly Bill 18: Clarifies that meetings of the State Board of Parole Commissioners are quasi-judicial and clarifies the rights of prisoners and other persons who appear before the Parole Board. (BDR 16-460)

Connie S. Bisbee, Chairman, State Board of Parole Commissioners:
During the 2007 Session, the Legislature enacted provisions to provide certain rights to inmates at parole hearings.

[Read from written testimony (Exhibit I).]

The Legislative Counsel Bureau 2010 Audit of the Board found us to be in compliance with the *Nevada Revised Statutes* as was enacted in 2007 and the regulations regarding parole hearings.

Chairman Horne:
So, changes were made in 2007. The United States District Court, District of Nevada said the bill was enjoined, and you are now taking the section that dealt with parole board changes, repealing them and then putting them back in. Is there any change in the language from the 2007 bill to this one?

Connie Bisbee:
It is exactly the way the Legislature changed it in 2007.

Chairman Horne:
Have you had a legal opinion on whether or not the U.S. District Court, in enjoining the bill, intended to enjoin the actions of this particular section dealing with the Board?

Connie Bisbee:
The unofficial opinion that we received was that it was clear that the intent of the Legislature is that this was not part of The Adam Walsh Child Protection and Safety Act of 2006, (Public Law 109-248). The U.S. District Court never separated the two issues. They were unhappy with the sex offender Adam Walsh portions, so they stopped us from enforcing the entire bill. There is nothing that was ever said during that, that had anything to do with the parole actions that were changed in 2007. But because it did not specifically state that, you cannot enforce Senate Bill No. 471 of the 74th Session, except for the parole part. This is the advice we were given to make that very clear, that they are two separate actions, so that we can continue to do what the Legislature intended us to do in 2007.

Chairman Horne:
Any questions? Anyone here to testify in favor of A.B. 18? Anyone in opposition? Anyone neutral?

Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada:
We are neutral on this bill. We do not see it affecting ongoing litigation. Those portions of the bill that are enjoined had a very different intent than these portions that Ms. Bisbee just spoke to. We have no problem with this bill moving forward, but we do not take a position on it as a whole.

Chairman Horne:
Any questions? I will close the hearing on A.B. 18. I will entertain a motion.

> ASSEMBLYMAN OHRENSCHALL MOVED TO DO PASS ASSEMBLY BILL 18.
>
> ASSEMBLYMAN FRIERSON SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Assemblyman Ohrenschall, you can present this bill on the floor.

We have two Committee introductions; first is Bill Draft Request (BDR) 41-657.

BDR 41-657—Enacts provisions governing the licensing and operation of Internet poker. (Later introduced as Assembly Bill 258.)

ASSEMBLYMAN OHRENSCHALL MOVED TO INTRODUCE BDR 41-657.

ASSEMBLYMAN SEGERBLOM SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

The second one is Bill Draft Request (BDR) 2-817.

BDR 2-817—Requires a portion of certain existing fees to be used for certain programs for legal services. (Later introduced as Assembly Bill 259.)

ASSEMBLYMAN FRIERSON MOVED TO INTRODUCE BDR 2-817.

ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chairman Horne:
We will now move to our final bill, Assembly Bill 195.

Assembly Bill 195: Revises provisions governing the destruction and storage of court records. (BDR 19-550)

John McCormick, Rural Courts Coordinator, Administrative Office of the Courts:
There is an amendment to A.B. 195 in NELIS (Exhibit J). When this bill was originally considered by the Study Committee on the Retention of Court Records of the Nevada Supreme Court, there was no intention of including the justice and municipal courts in the provisions of the bill. The amendment would remove them from the provisions of the bill to conform with the Records Committee's intent to look at only district and Supreme Court records. Also, the amendment makes a small technical change to acknowledge that in the Second and Eighth Judicial Districts, the county clerk does not serve as the clerk of the courts.

I will review this bill very quickly. Section 1 modernizes the rules on how district courts and the Supreme Court retain their permanent records. It allows electronic storage of the records. Section 1.5, which is the bulk of the amendment, page 2, puts the records retention statute for justice and municipal courts back to the status quo. Having to permanently electronically retain every

traffic ticket issued in this state is neither feasible nor possible cost wise. Section 2 is a technical change to a definition. Section 3 allows the Division of State Library and Archives to archive historical district court and Supreme Court records, archive records by the order of the Supreme Court, and to enter into agreements with the Supreme Court and the district courts to retain their records. The State Library and Archives had a representative who acted as chair of the subcommittee that crafted this specific bill for the Records Committee. To the best of my knowledge, they support it.

[Chairman Horne left the room. Vice Chairman Ohrenschall assumed the Chair.]

Vice Chairman Ohrenschall:
Will this do away with microfiche and microfilm and require that all storage will be on digital media?

John McCormick:
The bill permits the continued use of microfilm, but it also allows electronic storage, recognizing that because of its ease and cost-effective nature, people are moving towards electronic storage.

Assemblyman Sherwood:
Regarding the storage of traffic tickets from non-law enforcement or nongovernmental agencies, I am referring specifically to the traffic fixers. It seems they always have access to tickets. Are you aware of the private storage of tickets and how long they are kept?

John McCormick:
I am not aware of any private storage. Basically, the current records retention schedule is that those tickets are retained by the justice court for approximately seven years. They are a public record. After seven years, those tickets can be destroyed.

Assemblyman Sherwood:
So, it is possible and even probable that there is a more accurate reservoir of all this information privately.

John McCormick:
It is certainly possible. I have no knowledge of such a repository.

Assemblywoman Diaz:
As we are moving more to electronic media, do we have a backup system, so that these records are not lost?

John McCormick:
That is always a concern and there is a requirement in section 1 of this bill that, in order to destroy the record after it has been converted to an electronic format, the court must backup the electronic format and store it in a manner and place so as to reasonably protect it from loss and damage as prescribed by the Supreme Court rule. So, there will be an electronic record and an electronic backup as well.

Assemblywoman Diaz:
Then in dealing with the traffic tickets, after they have been scanned and are in electronic form, how do you then dispose of the physical tickets?

John McCormick:
They are shredded and made inaccessible.

Assemblyman Hammond:
For clarification, is this legislation proposing that all past records be converted to electronic files, or will you start now?

John McCormick:
It is my understanding that we would start now, and archive when practicable. For example, in Lincoln County, there is a beautiful old court house that had a pipe burst which flooded the records. This bill would have allowed those records to already be at the State Library and Archives. As far as going back to convert records, they are being permanently retained on microfilm already.

Vice Chairman Ohrenschall:
Anyone else in support of A.B. 195?

Julie Butler, Records Bureau Manager, Records and Technology Division, Department of Public Safety:
We support A.B. 195. The repository's records retention schedule mandates that we keep criminal history records until the death of the person or until the person's 100th birthday, whichever comes first. However, many courts destroy their records in as little as seven to ten years. Court records are critical to us when making determinations for employment and for firearms eligibility. However, there are times when we cannot get the court disposition information that would be critical to these determinations because the court has destroyed the record. Requiring the courts to convert to microfilm or other digital means before destroying the paper copies will help ensure that those records are available to our office, and to job applicants and potential firearms purchasers who need such documents to challenge or complete their criminal history records.

Vice Chairman Ohrenschall:
Any questions? Anyone else in support? Neutral?

Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada:
I am in support of the bill. I appreciate the clarification as to why this is important. We have actually seen cases throughout the nation in which court records being destroyed have inhibited the due process rights of individuals. It has also prohibited people from getting their rights restored, not only their Second Amendment rights, but also their voting rights. By ensuring that this type of data is maintained, we think it will be best for the preservation of justice.

Alan H. Glover, Carson City Clerk-Recorder:
I am neutral on this bill. I would like to share my 25 years of experience in the records management field to put on record my deep concerns about having public records kept only in electronic format. I can almost guarantee that a certain percentage of these records will be lost if they are only kept in electronic format. For example, last year we lost 42 records when Carson City changed its server. We thought that these were backed up. They were not. We have since added a double backup to our system.

In another instance, as we were cleaning things out in the court house, I found a floppy disk. It had minutes of the Carson City Board of Supervisors from the late 1960s. We had transcribed those minutes, digitized them and put them on film. If we would have only had that floppy disk, we would have lost that record. The problem comes in conversion from one format, a CD, to something new.

If the court house is keeping records, they tend to download everything onto CDs to conserve space on their server. These CDs get stored somewhere. People change, court clerks change, personnel changes. You forget that you have them, and at some point, you cannot find them. We had a PC that had uniform commercial records on it. We cannot extract that information from the PC. I realize the problem; the sheer volumes of records in a court are unbelievable. Scanning has a lot of advantages. It is very cost effective. It allows judges in the future to bring cases up at their bench, and they do not have to have a hard copy. My only concern is with permanent records. I believe those records should also be converted to film. Losing a certain percentage is going to happen. You just hope that it is not your divorce case with child custody information. I hope that as you go further, that you do it knowing exactly what is going to happen. I do have a lot of confidence if these records will be stored at State Library and Archives as they do an excellent job.

Vice Chairman Ohrenschall:
Currently, microfilm is required. If this bill passes, it will be up to the local court to continue to use microfilm or have everything on digital media, correct?

Alan Glover:
That is the way I understand it. It would definitely be in digital form only because film is so expensive.

Vice Chairman Ohrenschall:
How much can it save the courts to go to digital instead of film?

Alan Glover:
We scan now, and if you take an image that is scanned and convert it to film, it is much less expensive than taking a hard copy, going to film, and then to digital format. Carson City is digitizing their permanent records, then going to film. I would need to review the budget for this, but it is pretty expensive. We had a good deal when State Archives converted files for us. I believe they charged about four cents an image. If Archives can no longer do that for us, we will be paying substantially more per image to have it converted to film. In our case, the film is stored at Lake Tahoe in a separate facility, so it is not within the jurisdiction, in case something catastrophic happens. There are statutes that deal with all of that.

Vice Chairman Ohrenschall:
Any questions? Anyone else neutral? Anyone opposed? I will close the hearing on A.B. 195.

[Chairman Horne reassumed the Chair.]

Chairman Horne:
Is there any other business for the Committee? Seeing none, we are adjourned at [10:13 a.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 10, 2011 Time of Meeting: 8:06 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 107	C	Nevada Sheriffs' & Chiefs' Association	Proposed Amendment
A.B. 107	D	Assemblywoman Flores	Proposed Amendment
A.B. 107	E	Deborah Davis	Identifying the Perpetrator slide presentation
A.B. 107	F	Assemblywoman Flores	*Reevaluating Lineups: An Innocence Project Report*
A.B. 107	G	Ron Dreher	Written testimony
A.B. 107	H	Robert D. Davidson	Letter in opposition
A.B. 18	I	Connie Bisbee	Written testimony
A.B. 195	J	John McCormick	Proposed Amendment