

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-sixth Session
March 7, 2011**

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 9:04 a.m. on Monday, March 7, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

GUEST LEGISLATORS PRESENT:

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

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

Lauren Scott, Executive Director, Equality Nevada
Elvira Diaz, Progressive Leadership Alliance of Nevada
Andrew Davey, Stonewall Democratic Club of Southern Nevada; Secretary,
Stonewall Democratic Caucus of Southern Nevada
Lynn Chapman
John Wagner, State Chairman, Independent American Party

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Orrin J. H. Johnson, Washoe County Public Defender's Office
Nancy E. Hart, Nevada Coalition Against the Death Penalty
Bobbie Gang, Nevada Women's Lobby
Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 180.

SENATE BILL 180: Expands provisions governing criminal and civil liability for certain crimes to include crimes motivated by the victim's gender identity or expression. (BDR 15-414)

SENATOR DAVID R. PARKS (Clark County Senatorial District No. 7):
I will read from my written testimony ([Exhibit C](#)).

LAUREN SCOTT (Executive Director, Equality Nevada):
I will read from my written testimony ([Exhibit D](#)).

ELVIRA DIAZ (Progressive Leadership Alliance of Nevada):
I have been a community activist for many years. Six months ago, I discovered my baby, Jessie, is a transgender child.

As the mother of a transgender child, it is difficult to see statistics that your child can be the victim of a hate crime just because someone does not like the way he expresses himself. I am pleased to see transgenders in this bill to reduce hate crimes. I do not agree with the death penalty.

I want to stop hate of any kind. This is a country of freedom. God made us all the same, and we are children of God. I believe Jessie has the right to express his opinion. I am so happy that in his school, he can wear the dress he wants, and he can go to the bathroom he wants. If he is made fun of, someone will let me know.

I admire Ms. Scott. She has opened my eyes. It has been a difficult process. If you are not familiar with transgender issues, we will have many of them this Session.

ANDREW DAVEY (Stonewall Democratic Club of Southern Nevada; Secretary, Stonewall Democratic Caucus of Southern Nevada):

When a violent crime is committed, it may seem like a no-brainer to call the police. When the victim is transgender, the situation becomes more complicated. The victim might be treated as the criminal, or the victim's case might not be taken seriously. Perhaps, the victim is too afraid to report the crime. This is why S.B. 180 is needed. The bill should not be considered to be special treatment. Rather, it levels the playing field and ensures everyone in our State is treated equally. Many local law enforcement agencies have had problems handling crimes against transgender victims. Perpetrators of these crimes have used excuses, such as a gay panic defense, to seek leniency from the courts. We need state guidance to ensure transgender people are no longer easy targets for violent crime.

Human Rights Campaign recently analyzed Federal Bureau of Investigation crime statistics and estimated that 1 of every 1,000 homicide victims in this Country is transgender. At least 15 transgender people are killed nationwide in hate crimes each year. In 2002, 27 known transgender people were killed in hate-motivated murders. These are real people, not just statistics.

I know people who have survived attacks. I have friends who have lost friends and family to this kind of violence. This is not to be taken lightly. The passage of S.B. 180 may mean the difference between life and death for a number of Nevadans. I urge you to pass S.B. 180.

SENATOR PARKS:

I bring your attention to section 4 of the bill, which is the death penalty statute. You will hear opposition to this bill because it adds to the potential for the death penalty in gender identity and expression cases. I hope you will consider this bill for the protections it affords and not get lost in a discussion of the death penalty. I am opposed to the death penalty. I was surprised when I learned it had been included in this bill.

CHAIR WIENER:

Counsel, which parts of this bill mirror federal law? Senator Parks, did you intend to mirror federal law in proposing this bill?

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SENATOR PARKS:

Yes. The definitions used in this bill are generally accepted by states with this law and the federal government.

BRADLEY A. WILKINSON (Counsel):

I have not specifically compared this bill to federal law. I will do that.

LYNN CHAPMAN:

It is hard to hear stories of those who have been murdered. I understand their loss and pain. My brother was murdered seven years ago. He was driving into the parking lot on his way to work. An individual who did not like my brother was in a log loader, a machine that takes logs off logging trucks. He backed over my brother and crushed him to death. All murders are hate crimes.

I oppose S.B. 180. My brother did not fit into a special group afforded enhancement by this bill. Why would there only be enhancements for some? All Nevadans should be treated the same. The individual who killed my brother was not prosecuted because we could not prove it was murder. It was illegal for him to have a log loader in the employee parking lot.

JOHN WAGNER (State Chairman, Independent American Party):

No individual should be murdered for any reason. No group should be more privileged than another. Murder is murder, and the full penalty of the law should be applied. I do not agree with Senator Parks, and I do not agree with him on the death penalty.

ORRIN J. H. JOHNSON (Washoe County Public Defender's Office):

We oppose S.B. 180. A crime of violence against an individual is a crime against society. We should not diminish one group of victims and elevate another. The penalties for many of these crimes are harsh, and they should be. We should not accept hate and violence for anyone.

We oppose any penalty enhancer. It has nothing to do with the type of crime in this bill. We oppose the death penalty enhancer. The additional time and expense associated with capital cases are profound. It is expensive to seek a death penalty enhancement. It can break the budget, particularly in the rural areas, and take funds that could be used for more standard prosecutions and necessary defenses of those crimes.

We have a problem with enhancing the intent behind the crime as opposed to the crime itself, which goes beyond our general opposition to further enhancing penalties. Gender, race or religion are recognized as protected classes and have been for decades. However, gender expression is vague, real or perceived. It is difficult to determine whether someone is actually attacking a person based on that. This would create extra litigation and cost. Section 1 of the bill says "... gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth." This language could potentially criminalize everything or enhance everything. At some point, it becomes meaningless as a way of protecting, even if that is your intent.

We have heard about hate crimes committed against people. Murder is potentially a death penalty case or life in prison, usually without the possibility of parole, and it should be for anyone. Most of these crimes—murder, mayhem, sex assault, kidnapping, robbery, battery, false imprisonment, assault with a deadly weapon and child abuse—carry an element of hate. We should not elevate some victims over others. Crimes affect all of us. The penalties should be applied evenly.

SENATOR COPENING:

Is there a definition of gender identity that would help in prosecuting or defending a crime like this?

MR. JOHNSON:

Section 1 of the bill includes the definition. It is broad and vague. There are other definitions, and courts will look at other jurisdictions to narrow it down. However, that is shaky ground in terms of adequate statutory construction. You invite further litigation and appeals.

The different types of this expression make it difficult to craft a definition to target only these specific cases. The better approach is to recognize all these crimes are crimes against a human being. The human being should be protected from someone who commits a hateful crime against the person, regardless of the status of that victim.

All criminal cases are fact-specific. A broad range of penalties can apply, and judges have broad discretion particularly for the more violent crimes. For example, robbery carries a penalty of 2 to 15 years. Sometimes, the appropriate sentence for a robbery is 2 to 5 years, and sometimes, 6 to 15 years.

SENATOR COPENING:

It is vague. I favor making it more specific so there is no question we are talking about gender identity or expression. Is there a difference when trying a case involving a protected class versus any other person? Is a death penalty case involving a protected class different from any other death penalty case?

MR. JOHNSON:

The Nevada Supreme Court has recognized the death penalty is different. There is a higher standard for effective assistance of counsel in death penalty cases. These cases require more money, time, experts, witnesses and investigation. Many rural counties cannot afford to prosecute death penalty cases. The additional expense takes resources from effective defense of our clients. This leads to appeals and further expense.

We oppose any death penalty enhancer. When more cases are eligible for the death penalty, we are forced to expend more time and money on those cases. A hate-crime death penalty case is not necessarily different from a cop-killing death penalty case.

CHAIR WIENER:

Counsel, is this the federal definition of gender identity?

MR. WILKINSON:

This is slightly different from the federal definition. The definition in the bill appears to be widely used in a number of states for a number of different purposes, such as employment discrimination laws and legislation just like this. The federal definition of the term "gender identity" says, "The term gender identity for the purposes of this chapter means actual or perceived gender-related characteristics." It is slightly different. The definition in the bill is more commonly used.

MR. JOHNSON:

Criminal law is different. The standard is beyond a reasonable doubt. Different rules apply, such as the rule of lenity, which gives the benefit of doubt to a criminal defendant in statutory construction. Something that might be adequate in employment discrimination would not necessarily be adequate in a criminal case because of the heightened due process concerns.

NANCY E. HART (Nevada Coalition Against the Death Penalty):

The Coalition is concerned about S.B. 180 because it expands the application of the death penalty in Nevada. Section 4 of the bill would add to the aggravating circumstances that make a defendant eligible for the death penalty. While it may be appropriate and important to increase penalties for crimes motivated by the victim's gender identity or expression, it is unnecessary and unwarranted to make these crimes subject to the death penalty. The death penalty violates fundamental human rights and has no place in this bill.

Nevada has a broad list of aggravating circumstances. Testimony during the legislative study concerning the death penalty in 2001 and 2002 established that virtually all first-degree homicides in Nevada could involve at least one aggravating factor. This means that prosecuting offices have discretion to decide which cases will proceed with aggravators and possible death sentences and which will not. This system leads to wide disparities in the fairness of the death penalty, who gets death and who gets life. Apart from the general unfairness of this system, one more aggravator will not make the death penalty in Nevada more reasonable or defensible. Adding another aggravating factor will increase the already enormous cost of maintaining Nevada's death penalty.

Capital punishment is a waste of limited government resources. It would be better to allocate more resources to meaningful services and support for individuals victimized by their gender identity and expression. That would be more consistent with affording them the extra protections this legislation proposes. If the Committee moves forward with this bill, we urge you to remove section 4.

I brought a letter from the Reno-Sparks Chapter of the National Association for the Advancement of Colored People ([Exhibit E](#)). They are concerned about section 4 of the bill.

SENATOR BREEDEN:

Do you know the cost of a death penalty case versus life in prison?

MS. HART:

There are many studies across the Country. Nevada has not done a specific study about those costs. Studies done around the Country show it costs anywhere from two to five times more to prosecute a death penalty case. A homicide case may cost tens of thousands of dollars. A death case could cost

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\$1.5 million to \$2 million a case. Each study is different. It depends on what you look at. The cost to prosecute a death penalty case involves not just the trial, which is more involved, but also the appellate process and a wide array of factors.

SENATOR BREEDEN:
You are saying approximately in the millions of dollars?

MS. HART:
A death case can run two to five to ten times as much as a regular homicide case.

SENATOR BREEDEN:
Is that because of appeals?

MS. HART:
It can be partly attributed to appeals. The Nevada Supreme Court has said a death penalty case is different. All death cases are considered as a very serious matter by the courts that hear those appeals. At the trial level when the case is charged, more investigators are assigned to these cases. These cases involve more attorneys, and the jurors must be more carefully selected. Security at the trial must be different. Many layers at the trial level lead to the extra expenses long before you get to appeals.

CHAIR WIENER:
I have a letter submitted by Janine Hansen, State President of Nevada Eagle Forum, opposing this measure ([Exhibit F](#)).

BOBBIE GANG (Nevada Women's Lobby):
We are in favor of S.B. 180, with reservations. I will read from my written testimony ([Exhibit G](#)).

CHAIR WIENER:
This bill is bigger than section 4. There are other parts of the bill.

REBECCA GASCA (Legislative and Policy Director, American Civil Liberties Union of Nevada):
This bill is complicated. I signed in as neutral and opposed, but I should have checked the in-favor-of box as well because of the multitude of components and

points of view of the American Civil Liberties Union of Nevada (ACLU) regarding how this bill was drafted.

The ACLU supports the collection of data relating to hate crimes. The federal government has been collecting this data for quite some time and has noted that hate crimes are serious and are occurring with some frequency around the Nation. I do not have the numbers with me, but will be happy to provide them. In order to be responsive to such an important issue, the State should collect data. It would provide more transparency about the criminal justice issues occurring in Nevada.

We do not know about the costs for death penalty cases in Nevada because there is a lack of data. Last Session, the Legislature did not move forward with data collection and study regarding the death penalty. The data collection component of this bill is one small step forward the State could take to ensure our citizens understand the laws and complexities of the criminal justice system. We support the Committee inquiring about furthering data collection in the area of death penalty.

Classes of people have suffered discrimination for far too long. Transgender individuals are no exception. Protections for such a minority population is warranted with much regard. Public accommodations, employment and housing are good examples.

This bill raises concerns for the ACLU regarding protected speech. We understand and support protections for transgender individuals based on their gender identity or expression, but it is complicated because these kinds of hate crime laws tend to criminalize motivation rather than acts of violence.

The ACLU went back and forth for many years on the federal front regarding hate crimes legislation. U.S. Congressman John Conyers, Jr., added an amendment to the House of Representatives' version of the Matthew Shepard Hate Crimes Prevention Act that would have protected First Amendment expression by ensuring constitutionally protected speech would not be incorporated in the criminal prosecution of individuals relating to hate crime acts. That amendment was dropped in the House of Representatives and not included in the federal version of the bill. If the Committee desires to move forward with this bill, we would provide an example of Congressman Conyers' amendment the ACLU supported in the federal push for hate crimes.

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Even if the Committee were to approve or amend the bill to include such protections, we remain opposed to section 4.

CHAIR WIENER:

Sixteen people supported this measure, six people opposed it, and three were neutral. This bill has three fiscal notes, all of which show nothing.

SENATOR PARKS:

Regarding the fiscal notes, the cost was inconclusive because everything would have to be done on some degree of speculation. This bill seems simple and ends up invoking the First Amendment and the rules of law. The First Amendment to the U.S. Constitution gives the U.S. Supreme Court authority to interpret that amendment. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court unanimously upheld the position that hate crime enhancements are not a violation of the First Amendment.

Mr. Johnson testified criminal cases are fact-specific. This statute would require district attorneys or prosecutors to present overwhelming and compelling fact-specific information that a hate crime was committed. It would require justification.

CHAIR WIENER:

I will close the hearing on S.B. 180 and open the meeting for public comment.

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There being nothing further to come before the Committee, we are adjourned at 9:57 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE: _____

<u>EXHIBITS</u>			
Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 180	C	Senator David R. Parks	Written testimony
S.B. 180	D	Lauren Scott	Written testimony
S.B. 180	E	NAACP	Letter
S.B. 180	F	Janine Hansen	Letter
S.B. 180	G	Bobbie Gang	Written testimony