MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
April 8, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:09 a.m. on Friday, April 8, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 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 Elizabeth Halseth, Clark County Senatorial District No. 9

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

David Jenkins, Deputy Coroner, Washoe County Medical Examiner/Coroner
Terry McCarthy, Deputy District Attorney, Appellate Division, Washoe County District Attorney's Office
Bridgette Denison
Dennis George
Ronald P. Dreher, Peace Officers Research Association of Nevada

Wayne Teglia
Gary Steven Eubanks
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office
Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada
Nancy E. Hart
Lisa Rasmussen, Nevada Attorneys for Criminal Justice
Michael B. Charlton, Assistant Federal Public Defender, Federal Public Defender's Office, District of Nevada
Michael Nance
William T. Anton, Lieutenant Colonel, U.S. Army, Retired
Brian O'Callaghan, Las Vegas Metropolitan Police Department
Daryl E. Capurro
Mark A. Lipparelli, Chair, State Gaming Control Board
Sally Ramm, Elder Rights Attorney, Aging and Disability Services Division, Department of Health and Human Services
Lora E. Myles, Carson and Rural Elder Law Program
Bill Uffelman, President/CEO, Nevada Bankers Association
Matt Watson, Executive Committee, Real Property Section, State Bar of Nevada

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 283.

SENATE BILL 283: Revises provisions governing the appointment of counsel for a postconviction petition for habeas corpus in which the petitioner has been sentenced to death. (BDR 3-1059)

SENATOR DON GUSTAVSON (Washoe County Senatorial District No. 2):
I will read from my written testimony (Exhibit C).

DAVID JENKINS (Deputy Coroner, Washoe County Medical Examiner/Coroner):
I am a retired Reno Police Department detective and have worked in the Robbery/Homicide Unit for the past 20 years. With me today is Bridgette Denison, the mother of Brianna Denison. She is one of the individuals who represents a family impacted by this bill. Also with me this morning is Dennis George, a member of a family also affected by S.B. 283.

Terry McCarthy is a Deputy District Attorney for the Appellate Division of the Washoe County District Attorney's Office and is well versed in this specific area of the law. He will explain the legal consequences of the existing law and what benefits would be achieved by the proposed amendment to the existing statute.

TERRY MCCARTHY (Deputy District Attorney, Appellate Division, Washoe County District Attorney's Office):
I toil in the relative anonymity of the Appellate Division for the Washoe County District Attorney's Office, and half of that work involves postconviction actions. The law of the State allows after an appeal that any prisoner can file a petition for a writ of habeas corpus seeking to expand the record and show different problems with his conviction, to get a new trial or even to go home. That comes after the review by the Nevada Supreme Court.

Ninety-five percent of the claims is ineffective assistance of counsel. That is, the prisoner claims, "The reason I am in prison is because my first lawyer was incompetent." A lawyer is appointed to advocate the position that the first lawyer was incompetent.

There is a significance to the proposed change in this statute. The statute provides that the court in a capital case must appoint counsel. It is optional in a noncapital case. Significantly, the Nevada Supreme Court has ruled that where the appointment of counsel is mandatory, the prisoner is also entitled to the effective assistance of counsel appointed by mandate. Which means 15, 17 or 20 years after the fact, we are going to deal with the question of whether the first postconviction lawyer was ineffective, claiming and demonstrating the first trial lawyer or first appellate lawyer was ineffective. It does not stop there and it goes on forever. As long as the appointment of counsel is mandatory, that type of argument will go on.

When I go back to my office today, I will deal with a case that is 17 years old. The claim is that the first postconviction lawyer did a lousy job in showing the first appellate lawyer did a lousy job and showing that the first trial lawyer did a lousy job.

Changing the appointment of counsel in postconviction cases to discretionary call instead of a mandatory call will not completely fix that. It is a step toward fixing it and it will remove part of the absurd, but nothing more than that. If the appointment of counsel is discretionary instead of mandatory, we no longer

have to deal with the question years later of whether that newly appointed counsel was effective. I urge your Committee to approve this bill.

CHAIR WIENER:
What would your expert guesstimate be as to how often it would go from mandatory to discretionary appointment and counsel is appointed?

MR. MCCARTHY:
I would say in excess of 99 percent. There are several reasons for that. One of them is unrepresented prisoners are a big pain; they are inconvenient. The other is that every court I am familiar with takes it seriously. The 1 percent where it would not happen is when the prisoner does not ask. I notice this statute, and it is a theoretical problem, not allowing for the possibility that the prisoner has money to hire a lawyer. It requires the appointment of a lawyer whether the prisoner wants it or not and whether the prisoner can afford to hire a lawyer or not. That is a theoretical problem because most prisoners want a lawyer and they do not have the money, but it is a problem nonetheless. In almost every case, the judge would appoint counsel. The difference is that some years after the fact—15 years later, perhaps—we will not be questioning whether the postconviction lawyer did an adequate job of showing the appellate lawyer did an adequate job.

SENATOR COPENING:
If it is no longer mandatory and is at the discretion of the court to appoint counsel, how will that stop the process you just talked about? Could the prisoner say—20 years down the road—that the counsel appointed was ineffective?

MR. MCCARTHY:
The prisoners can say it, they just cannot say it effectively. Any number of circumstances excuse a late petition. There are limits on prisoners' abilities to seek postconviction relief. It has to be timely and they cannot keep repeating the same claims. Those bars can be defeated in several different ways, created by legislation. One of those ways is to claim that the first postconviction lawyer was ineffective. That, if true, will not excuse the procedural bar unless the appointment of counsel was mandatory. Nevada already gives more process than is due. We are not removing that. We are removing a theoretical possibility that is so far removed, its only purpose is delay.

SENATOR COPENING:
By making it discretionary, the prisoners understand that they cannot go through this process, that they cannot continuously state their attorneys are ineffective. It is part of the deal?

MR. MCCARTHY:
The law requires courts to inform prisoners they get one shot, although we are lying when we tell them that now because they get multiple shots, almost unlimited shots. We should discourage courts from lying to prisoners when they say you only get one shot.

BRIDGETTE DENISON:
I am Brianna Denison's mom. In January 2009, my daughter was kidnapped, raped and murdered. The man who murdered Brianna also kidnapped and sexually assaulted two other young women in Reno. A jury on a capital offense rightfully convicted this man. The impact this has had on me, my son, my family and Brianna's friends is everything you can possibly imagine and so much more. For a month, all I felt was overwhelming pain and panic. Then I found out the truth. I had lost my sweet baby girl forever, and she had died afraid and suffering. I knew law enforcement would find out who had done this, but the anticipation of him doing this to someone else was unbearable. The wait before the trial time arrived put my life on hold for two years. The sentencing and knowing this man would not affect other women and their families brought some relief. Knowing that my parents, and most likely myself, will not live to see this man's final sentencing is not right.

In Nevada, a person convicted of a capital offense has a guaranteed and automatic court review of the trial and conviction. At what point is there an end for my family and the families of other murder victims? How many times will we have to be subjected to what seems to be a never-ending legal process? Is it 18 years or 35 years? Are victims' families not entitled to justice too?

The proposed change in S.B. 283 is modest. It allows protection of due process for a convicted person. The current law is unfair to my family and me. It means we will be victimized again and again by the never-ending process of appeals.

MR. JENKINS:
Dennis George is from the family of Reno Police officer, James B. Hoff. Officer Hoff was murdered early in my career, in 1979. His killer is a death row

inmate who is the longest tenured member of death row in Nevada. His appellate process continues unabated because of the problems previously discussed.

DENNIS GEORGE:
My stepbrother was Jimmy Hoff. There is little I can add to the comments from Mr. Jenkins. I want to tell you how hard it is for the period of time the family has to continue to watch the convicted. In our case, the killers pled guilty nearly 32 years ago. This just cannot be the system we live with in our State. Senate Bill 283 provides assistance to render a completed process and a form of closure for the families. Jimmy's mother lived 18 years after he died. She died sadly, in part because she had not seen the closure of the justice system. Our family joins all other families in asking for your support on S.B. 283.

RONALD P. DREHER (Peace Officers Research Association of Nevada):
On behalf of all of the professional peace officers of our State, I echo a few things Dave Jenkins, my ex-partner in Homicide for a number of years, said. I retired 12 years ago. Over the past 30-plus years, we worked a number of cases together, very horrific crime scenes. Those victims have to relive this over and over again. A measure such as S.B. 283 may prevent the prolonged due process rights people have. None of us are anti-due process, but this has gone way beyond someone's right to continue to say my counsel was ineffective. How many years does that have to go on?

I can only tell you about the victims we represented in those horrific murders as will the two senior detectives, Bob Pentagor and Gary Eubanks, who worked some of the most horrific murders we have had in Reno and northern Nevada. Dave Jenkins worked some of the most serious ones as well.

No one is suggesting we take away the due process rights of a person accused of a crime. If someone gets up here and says anything different, that person is mistaken. That is not why we are here. What we are here for is to ask, how much is enough? How many years does a person get due process rights? How long do the victims' families have to go through the repeats of these horrific crimes people have committed? Enough is enough. This bill is only one part to that; it would start that process to help people have closure. We would certainly appreciate your support on S.B. 283.

WAYNE TEGLIA:
I previously worked on the case involving the murder of Officer James B. Hoff and the subsequent arrest and prosecution of John Olausen 33 years ago. I was 33 years old at that time; I am now 65 years old. The other investigators Mr. Dreher mentioned are even older than I am and have worked similar cases, many are 25 years past and still in the appeals process.

I was formerly a homicide investigator with the Reno Police Department. I was in charge of the Attorney General's Office Investigations Unit for three years and the director of the Departments of Motor Vehicles and Public Safety for nine years. This all took place after my career with the Reno Police Department. I am currently an adjunct professor in criminal justice at Truckee Meadows Community College. I have paid, and must pay, attention to these cases because we keep getting brought back into court or deposed in cases that are on appeal. They are always on the same issue of due process being afforded. I want to stress that we are not here to diminish or do away with due process in any way, shape or form. We are talking about undue process. It is no longer about guilt in these cases, it is about process. That is what continues to carry this on.

As explained by Mr. McCarthy, it no longer matters whether the person's rights have been violated in any stage of the investigation. It no longer matters whether that person has had due process or effective counsel. We are on a merry-go-round and cannot get off. New information or new evidence is never provided, and there is no reasonable ground to grant a new trial because the representing attorney cannot win an unwinnable case. It automatically goes back on appeal. That is what I am talking about when I refer to a merry-go-round.

Without the current law in effect, we would still be looking at 25 or more years of appeal. That is opposed to what is now an endless process. As Ms. Denison pointed out, there is a good likelihood that she, other relatives and friends will all die long before justice can be served.

I want to reemphasize what everybody has already said—we can no longer carry out the death penalty in Nevada. I know there is legislation being considered in Assembly Bill 501, proposing to put a moratorium on death penalties until the costs can be studied. There is no death penalty in Nevada. Putting a moratorium on something that does not exist sounds like a frivolous

waste of time. I know people are going to say we have to make sure every defendant's rights are protected, and nobody is opposed to that.

ASSEMBLY BILL 501: Establishes a moratorium on the execution of sentences of death and provides for a study of issues regarding the death penalty. (BDR S-1103)

Due process still remains in effect from the date an investigation is launched from the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments all the way through this process. All these cases are followed and scrutinized closely since every death case results in an automatic appeal to the Nevada Supreme Court, which now takes from four years to six years to get through. The State level appeal process is just the beginning. During this entire process and beyond, the defendants' due process rights are observed and evaluated. In the event of police misconduct or prosecutorial error, they have the opportunity to bring these issues to the level of appeal. But that is no longer the issue; guilt is no longer the issue. We have gotten into a situation where it is all about process, and we have created an endless cycle of pain and suffering for the victims and their families.

GARY STEVEN EUBANKS:
I am a retired Reno Police Department detective. I was an officer from 1972 to 1994. I worked robbery, homicide and major crimes from 1980 to retiring in 1994.

I wish to bring to you one case that brings this to a head. In May 1983, 26 years ago, two little girls, 9-year-old Carly Villa and 10-year-old Maggie Schindler were kidnapped in the most public place in Reno on the busiest day of the week—Saturday, during the afternoon—at the Meadowood Mall. They were taken for a one-way ride out into the desert, had their heads beaten in with a shovel and little 10-year-old Maggie was sexually assaulted after she was dead. Her father was William "Bill" Schindler and her mother was Doris Schindler.

I did not have contact with the Villa family. Bill Schindler told me his greatest fear in life was that he would never see justice served within his own lifetime for the monster who killed his little girl. Since Mr. Schindler was not a witness, he sat in the courtroom the entire time because he was not excluded as allowed by law. He listened to the entire thing and watched the videotape of myself and

my partner interrogate Ricky Sechrest—who confessed, including using the girl as a sexual object after he beat her to death with a shovel. Mr. Schindler was right; seven years later, he died of cancer. Twelve years later, Maggie's mother Doris called me to her home many, many times and held on to me and cried and cried. As a veteran of the armed forces of this Country during the Vietnam War and as a long-tenured policeman, I have seen pain in people, my own people, other people; this was a case all by itself. I will never forget Doris holding on to me and feeling her rib cage literally almost shaking apart, she was wailing and screaming, she could not sleep at night. For 12 years she could not get a good night's sleep because the monster came out every night, and it was the face of that man who murdered her little girl. I was going to see her the next weekend—she had a heart attack in the home while her family was going to the grocery store.

All of you, think of this one thing, and take it with you tonight and as far as you have to. What good is justice when it does not serve the people most directly affected by the matter of the most horrendous affair imaginable, the ultimate parental nightmare of the kidnapping, murder and rape of your own little girl? If you do not see that justice within your lifetime, then what good is it?

I do not know who coined the phrase originally, but it was heard many times from former Washoe County Deputy District Attorney Don Nomura, "Justice will only be served when those who are not affected by violent crime are just as outraged as those who are." That is a very good point. It is not as if we are just talking about a lot of paper, procedure and statistics; put that aside. It boils down to the human element, human people, innocent victims. Mr. Nomura said in the case of Officer Hoff, yes, that was terrible what happened. He was a police officer, working a dangerous job, and he knew the dangers of that. We are talking about a couple of grade school girls in just this one case, he said, who were taking an ice-skating lesson and lured out of the Meadowood Mall under a pied-piper subterfuge. Maggie saw her friend beaten to death first, managed to run maybe 40 yards, looking over her shoulder while the man was chasing her down with a shovel and got her too.

I do not know you folks' level of terror, but that is mine because after the confession, arrest, preliminary hearing and so on, myself and the other officer went back to the crime scene. We sat on the spot where it happened and as big, grown men and armed police officers, we went back to our childhood as young boys and imagined one of us seeing the other one murdered and being

chased down in a situation like that, in a place where you have never been before, a place where you had no idea where you are. You cannot see the road that you came in on, the car, nothing. There is absolutely nothing whatsoever that you could even run to, let alone from, to get away from something like this. I am not afraid to say this; I was scared. I mean really scared because I relived that experience, not as a man, as a young boy watching this from the perspective of the victim. I went to both of those funerals, I watched both sets of those parents go through excruciating terror.

I know we have to follow procedure, and I know the rights of the defendant must be followed the best we can so we do not have kangaroo courts where the rights of the defendant are overlooked. Yes, it is very important to see that. But let us take all of those paper statistics and move them aside. It is the human element. Murder defined anywhere in this Country is the "unlawful killing of a human being by another human being with malice aforethought." Now the aggravating circumstances of the death penalty are robbery, rape, kidnapping and anything else. There is no such thing as a single victim in any murder; everybody has family, friends.

You have already heard from Mr. George. I have talked to him many times. Jimmy Hoff's mom died a long time ago waiting for justice and never got to see it. Her first-born son died. She died and the man who did it is safer than you or me. He cannot get hit by a drunk driver going home, he cannot walk into a convenience store in the middle of a robbery and get shot or any of those things. He is as safe as can be; he has a hospital right there. This starts and ends with the human element. Legal procedure is absolutely essential, and I applaud that.

When I took an oath of office, the same as Detective Dreher and everyone else, I solemnly swore to uphold and defend the *Constitution of the United States of America* to the very best of my abilities and to protect and defend the people of the State of Nevada, even unto the peril of my own life. I said it; Detective Dreher, Detective Jenkins, Detective Pentagor, we all said it and we meant it. It starts with the human element and ends with the human element.

I want you to remember, anyone murdered affects a lot of other people. That includes the man in this suit and all of the other suits. You cannot take a job like this and forget about it at the end of the day like working as an accountant. These things are bound to rub off on you.

When you work for the government for a very long period of time, the collective effects of it, we as policemen know how to distance ourselves. But I put my pants on one leg at a time and my boots on one at a time. I have consciousness; I have stared at the ceiling many a night trying to pretend to go to sleep because I cannot. I am still seeing faces of people, faces of pictures of people gone, what they looked like in the crime scene, and the sneer on Ricky Sechrest's face as he was reliving the ultimate sexual fantasy of having sex with a ten-year-old dead little girl. And her parents heard that sitting in the back of the courtroom. They are both dead, and the guy who did it is still safe and sound on Death Row 26 years later. I want all of you to remember that.

ORRIN JOHNSON (Deputy Public Defender, Washoe County Public Defender's Office):

We are here in opposition to S.B. 283 because we agree with Senator Gustavson's goals that justice delayed over too long of a period of time can often be justice denied. We are afraid if this bill passes, we would see more appeal. We would build more error into the system and would see more federal issues—particularly in due process issues being brought before future appellate courts—without this initial process.

Multiple appeals happen when prior appeals miss issues and screw things up. The most likely way to miss issues is to not have a trained attorney in a difficult area of law such as death penalty cases. If you are acting on your own behalf without an attorney, you almost certainly will miss those issues, even if you are a smart individual who has access to law libraries. We want to dot the i's early. The earlier in the process we ferret out the issues, address them and get them resolved, the faster we can get to the ultimate sentencing phase. By not having an attorney in what would be the middle of that process because there would still be opportunities for federal appeals, pro bono attorneys might volunteer later to pick up issues missed on those first initial appeals. We anticipate we would see more of those appeals over a lengthened period of time. That does not meet the goals of the bill. That does not help the victims of these crimes.

The second issue involves serious constitutional concerns. I want to note the Legislative Counsel's Digest cites *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). *Giarratano* has been cited for the proposition that the U.S. Supreme Court says you are not entitled to an attorney for a habeas claim, but *Giarratano* does not say that. The case is called a plurality opinion. A plurality opinion means that a majority of the justices agreed on the outcome of the case, but a majority of

justices did not agree on the reasoning. In *Giarratano*, only four justices were of the opinion an attorney need not be appointed for the habeas postconviction appeals. The swing vote was U. S. Supreme Court Justice Anthony Kennedy; he agreed that on the facts of this particular case, where in fact the prisoner had access to multiple attorneys, the overall scheme was enough to protect the prisoner's due process rights.

When you have a plurality opinion, the precedent value of that case is limited to the narrow scope of what a majority of the justices agree on in the opinions. That is as far as it went. In that opinion, Justice Kennedy, concurring in the judgment of the court, noted his great concern that death is different. That extra process needs to be observed, and he said that as long as other processes are involved in protections for the prisoner, then potentially that is enough. In Virginia, where the case began, there was access to attorneys throughout that process. We are not certain that this law would be constitutional. In fact, that would be an area for both state and federal litigation based on the fact that it is a plurality opinion and not entirely clear.

Finally, we want to note that we need to be absolutely sure before we put somebody to death. This is not an anti-death penalty position but a position that says death is different. It is final. You cannot let somebody out; you cannot say oops after a death penalty has been carried out. That is simply the fact. That is why these appeals are unnecessary.

Nevada Revised Statutes (NRS) only requires the attorney for the first habeas appeal. Perhaps some clarification of the law which says you are not required to have an attorney for multiple appeals, later on down the road as a conceptual thing, is the way to address it before you address the first one. But this is the first opportunity any court has to hear, and that is what I am testifying against, personal self-interest. No trial attorney ever wants to be postconvicted; no trial attorney on the planet wants to have some other attorney digging into the work that he or she did and saying to another set of judges that attorney did a bad job representing the client. It is a nasty process; it unfortunately happens to public defenders in particular. But because of the finality in death penalty cases, it is so important. We need to make sure the trial attorney dotted every i and crossed every t and everything was done right.

In the dissenting opinion in *Giarratano*, Justice Kennedy cited these statistics specifically as some of his concerns, which is why he did not join with

U.S. Supreme Court Justice William Rehnquist and the others who announced the judgment of the court. I want to quote: "Federal habeas courts granted relief in only 0.25% to 7% of noncapital cases in recent years; in striking contrast, the success rate in capital cases ranged from 60% to 70%."

That means in 60 percent to 70 percent of capital cases, postconviction habeas appeals were successful on some level. That is stunning, scary and chilling when talking about taking somebody's life. And what is further chilling is that since 1973, at least 138 exonerations have taken place from people who have been, with a full panoply of due process, sentenced to death in this Country.

This is not an anti-death penalty argument. This is an argument to ensure we get it right before the finality of the death penalty is executed. And the average time period between the sentencing of the death penalty and exoneration is 9.8 years. We understand that time is wrenching to everybody involved, but justice sometimes demands that we take things slower and proceed with extreme caution—especially with the death penalty.

Those are our arguments. We will always work with any bill sponsor. We agree with the goals of the bill sponsor, and that is why we oppose this bill.

SENATOR ROBERSON:
I want to talk about a couple of points you made. It is your position this bill really does not, will not have the intended effect of shorting the number of years in the appeals process. We heard the passionate testimony today from victims' families and others involved in this process. I ask you because you did say up front that you agree that there is a problem with the delays. We want to get it right, we do not want to ever put an innocent person to death. Having said that, do you have suggestions as to how we can make the system better in this State, constitutionally make it more effective so we can shorten these delays so victims' families do not have to wait decades to see justice occur?

MR. JOHNSON:
The one that I mentioned is to clarify that the prisoner gets the attorney for the first habeas appeal, but that does not mean he or she gets an endless cycle of free attorneys for every other subsequent habeas appeal where the issues have already been ferreted out.

I am hesitant to offer specific solutions. The system is not perfect because it is run by human beings, and human beings are themselves imperfect. I like to joke when people complain to me about the criminal justice system except for everybody else's. It is not perfect, and it is not going to be perfect. These appeals go to judges who make decisions that we disagree with, especially in the federal courts, and it gets out of hand.

I would like to get back to you and the Committee and talk to the people in my office who do more death penalty cases. I have worked peripherally on death penalty cases but not defended them. If I can get back to the Committee over the weekend, I will talk to other attorneys who may have other suggestions that could do that, but we think this bill would have the opposite effect.

REBECCA GASCA (Legislative and Policy Director, American Civil Liberties Union of Nevada):
We echo the concerns of Mr. Johnson with regard to the idea that this could extend the appeal process and the constitutionality of this bill is in question. However, we have to respectfully disagree.

Throughout the course of my work, I have had opportunities to look at the various sides of the spectrum. As you know, the American Civil Liberties Union (ACLU) has differing opinions as to what helps bring people together. I had the opportunity to speak with murder victims' family members, as well as people who have been released from death row. Taking into consideration those perspectives, this bill will not accomplish the laudable goal of helping families recover. No matter what the justice system does, it is not going to take away the pain of the lost person. That will not help; the family has to go through that healing process regardless of what happens to the person who is found guilty of having committed that crime.

From our perspective, the State should move in a different direction, which is to abolish the death penalty entirely, to ensure that those people who are found guilty of having committed a certain crime be put in jail for life without the possibility of parole so the victim's family does not have to go through any lengthy appeal process that coincides with the death penalty. That will allow the family, friends and those loved ones the opportunity to know the finality from the beginning and then move on.

Additional arguments can be made on both sides of the aisle about the appeals process in and of itself. But from our perspective, the fact that death is different is one of the largest reasons why this bill should not move forward.

NANCY E. HART:
I am a licensed Nevada attorney. I am here representing myself. Though I am not a litigator on capital cases, I have been involved in death penalty policy work for over 20 years. I am a long-time human rights activist with Amnesty International USA.

I am here to convey serious concerns about S.B. 283. This proposed legislation is an unwise effort to lower the standard of legal representation in capital cases. As you have heard, poor legal representation in death penalty cases only leads to a higher chance of errors and later reversals. This not only adds to the cost of death penalty cases, but it also increases the risk of wrongful convictions.

Furthermore, most, if not all, inmates on Nevada's Death Row are indigent and would not be able to hire their own counsel. If this bill were to pass, we would either have unrepresented litigants, which is a burden in itself on the courts, or defendants who simply do not file appropriate and applicable claims. Senate Bill 283 presents the very real danger of defendants going through an appellate process that does not comply with constitutional standards.

When someone's life is at stake, the American judicial system demands that the defendant be given every opportunity to raise valid, available claims. Frankly, just plain common sense and decency requires that we provide legal representation at the first postconviction or habeas appeal.

Last but not least, Nevada Supreme Court Rule 250, as well as the performance standards under ADKT 411, issued by the court in 2008, are premised on the appointment of counsel in State postconviction proceedings. It is quite possible that the Nevada Supreme Court would insist on appointment in capital cases, despite the provisions in this bill, making this legislation a waste of time. In the period between 1987 and 1993, when appointment in the first postconviction proceeding was discretionary, there were only two cases in which a district court did not appoint counsel, and the Nevada Supreme Court ended up reversing both on that point.

I did confer with Michael Pescetta about this bill. Many members of this Committee probably know that Mr. Pescetta is one of Nevada's premier habeas practitioners. He is out of state at a conference and unable to be at the hearing, but my testimony conveys the concerns that both of us have with this bill.

LISA RASMUSSEN (Nevada Attorneys for Criminal Justice):
We are an organization of criminal defense lawyers in Nevada. I want to first echo the comments that were made by Nancy Hart, Orrin Johnson and Rebecca Gasca. I join in on those arguments.

In order to understand the process and to attribute delay is a complicated process. It does not just start and stop in our courts, and there is a federal component. When I am done speaking, you will hear from Michael Charlton, who is with the Federal Public Defender's Office. He will raise additional points in that regard.

It is a complicated process, and it is death, the ultimate penalty. When we want to impose the ultimate penalty on someone, we cannot be too careful. In many of these cases, you have heard testimony from victims and advocates on behalf of victims. They are old and span an era where we did not have performance standards. We did not have ADKT 411 or the Nevada Supreme Court Rule 250. That is, in part, why those cases are still here. The performance standards that the Nevada Supreme Court and the most recent ADKT 411 have adopted only helped to expedite the process, if nothing else. This bill—if it passes—would be contrary to Nevada Supreme Court Rule 250 and ADKT 411. It would put us back to a place where we were 25 years ago. I am not sure that is where we want to be.

The resources or manner of having competent counsel represent you on a first postconviction habeas cannot be emphasized. Mr. Charlton will tell you this is when the nightmares come in. This is where the problems and delays start, when you have to go back and analyze who did what and who did not do what. If counsel is appointed, we have many more safeguards against all of those inequities. I will let Mr. Charlton explain the process and some of the other details the Committee needs to hear.

MICHAEL B. CHARLTON (Assistant Federal Public Defender, Federal Public Defender's Office, District of Nevada):
The bill before you has been proffered because people complain of inordinate delay. We are not unsympathetic to the impact that our litigation has on victims and their families. We understand their tragedies. We understand the pain they go through. But the bill before you needs to be placed into a better context.

It is true that the Nevada Supreme Court has given postconviction defendants in capital cases the right to challenge the competency of their first postconviction lawyer. What has not been brought up, however, is that the Nevada Supreme Court has limited those defendants to one year. In other words, if a defendant on death row wants to complain he had a bad lawyer in postconviction, he has one year to present that claim. If he does not present that claim within one year, he can never raise it, it will be summarily dismissed. You can argue it, you can make all the fancy, most eloquent arguments about the ineffective postconviction counsel, but it falls on deaf ears because that claim was not raised within one year. The most you would accomplish by this enactment would be to shorten the process a matter of months. That does not begin to address the issue of delay.

The other question you have to answer is who do you want making the decisions about whether counsel was effective—the State courts of Nevada or the federal courts? I agree with Senator Gustavson and the representative of the Washoe County District Attorney's Office and their citations to *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) to the effect of the *Giarratano* case and also to a case not brought up, *Coleman v. Thompson*, 501 U.S. 722 (1991). However, those cases are now questionable. The U.S. Supreme Court in the last month has stayed three executions and granted certiorari on one of those cases regarding whether the claim of effective postconviction counsel can now or in the future be allowed to be raised in federal courts. It is a complex legal argument, but it essentially says that a defendant has procedurally defaulted a claim because he had incompetent postconviction counsel. In years past, under *Finley, Thompson* and *Giarratano*, you could not argue that you had a bad or incompetent postconviction counsel. Now, the U.S. Supreme Court has agreed to review the effect of *Finley, Thompson* and *Giarratano* and possibly overrule those cases. The outcome is far from certain, and it will not be decided for at least another year.

Nevertheless, because of the sheer number of complaints that have come across the Country from incompetent postconviction counsel, there is at least an opportunity for that case to be resolved differently in the U.S. Supreme Court, and the issue would be decided by federal judges rather than state judges.

Finally, concrete suggestions and steps can be taken to effectively address the issue of delay. Delay occurs when these cases end up in one court, the Nevada Supreme Court, an overwhelmed judicial body that has to deal with a great many cases, not just death penalty cases.

Procedures can be adopted to streamline that process. Steps can be taken to ensure competent postconviction counsel. And not all of those steps cost money. Our office, for example, puts on training at least six to eight times a year where we train our lawyers on how to be competent habeas practitioners. We easily make those programs available to State lawyers. They are welcome to attend, and it costs them nothing to attend. Making that continuing education mandatory results in no cost to the lawyer, no cost to the system and an upgraded standard of representation for inmates, obviating the need to address it by statute.

There are some things we can do. We can meet with the applicable parties and work with the relevant parties to address some of the inequities to come up with a process that will address some of these concerns.

Expediency comes with a cost. Ron Milligan was convicted 32 years ago of a horrible murder in Humboldt County. Last fall, a well-respected State judge, not a federal judge, concluded that Mr. Milligan was likely innocent, that Mr. Milligan had spent 32 years on death row for a crime he did not commit. This process took almost 30 years to uncover, when a good, young lawyer started pointing out all of the forensic issues that had arisen in the case and persuaded the State judge to conclude Mr. Milligan was likely innocent.

A process based on expediency runs the risk of executing innocent people—it happens. It does not happen frequently, but it does happen, and you have to ask the question: do we sacrifice that for the sake of expediency? Personally, I do not think we should. We can come up with a system that moves a little bit faster, which ensures the rights of everyone in the process. But it is a

complicated issue, and this statute and amendment before you will not bring the kind of resolution that the victims have argued for today.

SENATOR GUSTAVSON:
Mr. Charlton, we are talking about the process. We are here to try and fix the process. You sit there and say we can get together and work things out. Well, why have we not done this in years prior? This is why I am here today—so we can do something about this process. It might not be the cure-all, it might not be the perfect process, but it is a step in the right direction to help cure the process. I would like to hear your suggestions, but I do not want to hold up the bill because of that. You have had plenty of opportunity to come up with solutions. We are here today for the victims and their families of those people who have killed people horrendously. We need to do something now to shorten this process. If you have any suggestions, I would like to hear them. I am not an attorney, and I would ask Mr. Jenkins to respond to the comments made.

CHAIR WIENER:
We could probably plague ourselves why something has not been done before. But the very nature of bringing a bill to the Legislature prompts those conversations. I cannot respond why nothing has been done, but we have an opportunity now to have a conversation as we have done with so many measures before this Committee. I encourage people to talk offline and at least have a conversation. This is very serious policy making, and we want to make sure we are prepared with all of the information in front of us as we move forward.

Dialogue now may be the incubation process that starts the conversation. If you would be willing to do that and keep us in the loop, I would be more than happy to participate as well.

MR. CHARLTON:
I went through this whole process in Texas. We met, through the auspices of the State Bar of Texas, both representatives of the Texas State Attorney General and various prosecutorial offices and defense lawyers. It was not a pretty discussion at all times, but we sat down over a long period of time in a process of approximately a year and began to come up with a system. It took a long time to put it into place because of historical resistance to the concept of public defenders in Texas.

Senator Gustavson, I will make you this promise—if you name the time and the place, I will be there to start that discussion with you. I will do that with any member of the Committee and with any member of the prosecution who wants to have that discussion. If you want to genuinely resolve this issue, we are in favor of it. I can promise you that I will be there. I give you my word on that. I think I can speak for people in my office that we would be happy to do the same. That offer stands any time.

MR. MCCARTHY:
Some things are not quite correct. One of them is an assumption that a prisoner has his lawyer before he files his petition. That is untrue. A prisoner must file his petition first, then the court appoints counsel. We do have training for postconviction and qualifications for postconviction lawyers. We do not take attorneys fresh out of school and have them represent prisoners in capital cases. It is not done; we have the best in the business in handling this important work.

To the suggestion that we should look to Texas as a guide, I would reject that notion. They have their own serious problems.

The delay we have been talking about is not the delay that occurs because of actual ineffective postconviction lawyers. The delay that arises is because of the allegation of ineffective postconviction lawyers. The allegations are always unproven. But to resolve that allegation adds many, many years to the process. So I would urge the Committee ...

CHAIR WIENER:
We have done this many times in this Committee because we have grave issues about constitutional rights, property rights; we have personal issues in our Committee. I would encourage that you also be part of a conversation, sooner rather than later. Senator Gustavson would take the lead on putting a team of people together to have a conversation—this is serious policy making, and we want to make sure we hear all of the voices, maybe at the same place, at the same time.

MR. MCCARTHY:
As you wish, I will be there. I would point out the U.S. Supreme Court has said the right to counsel extends to the first appeal and no farther. How much not farther, we do not need to debate.

CHAIR WIENER:
We will continue that dialogue.

SENATOR GUSTAVSON:
As soon as possible.

CHAIR WIENER:
We will close the hearing on S.B. 283 and open the hearing on S.B. 284.

SENATE BILL 284: Makes various changes concerning the custody of children. (BDR 11-785)

SENATOR DON GUSTAVSON (Washoe County Senatorial District No. 2):
I will read from my written testimony (Exhibit D).

CHAIR WIENER:
Did something happen that prompted you to bring the measure, or did someone share a story with you that inspired you to introduce the bill?

SENATOR GUSTAVSON:
One of my constituents mentioned this to me and brought this to my attention. The state to the west of us had passed a measure recently dealing with the same situation. I have one member of my family who is in the U.S. Navy. She was serving on the U.S.S. Reagan and was deployed a few times to the Middle East. She is not serving on the U.S.S. Reagan now, but is still serving in the military. Many people are going through custody battles all the time. If they are deployed, we do not want the court to make a final determination when they are away on deployment and unable to respond. This bill would say they could make a temporary situation but not a permanent decision.

MICHAEL NANCE:
I would like to bring you a more optimistic epistle than the last measure you heard. That is like closing the barnyard door after the cow has gotten out. I am trying to prevent people from being raised in single-parent families with the father marginalized to the edge of his children's lives. A child who comes into Family Court with two parents should leave with two parents, not one parent and one visitor or one custodial parent and one noncustodial parent. That is a recipe for disaster; you are raising menaces to society with this kind of system.

This bill helps men and women serving in places like Afghanistan, Iraq and other distant locales. Custodial parents have impeded and completely eliminated their contact with their children. Last year, there was Alec Baldwin and Kim Basinger. You probably heard the tirade that Alec Baldwin had a specific time he was to call his daughter, and Kim Basinger released that to the press. The court put a gag order on them. That is not as uncommon as you may think. Letters are written that may never reach their children.

It is extremely difficult for a deployed service member to effectively overcome this visitation interference. Given the length and frequency of current deployment, many soldiers lose all contact and sometimes even their relationship with their children, particularly if the children are young. Other service members return from serving to find that while they once had a custody arrangement which allowed them to play a meaningful role in their children's lives, a new custody arrangement allows them only a marginal role, if any role at all.

To regain their previous custody arrangement, these parents must engage in costly, time-consuming litigation, which increases conflict and consumes much of the time and money that would otherwise be spent on their children. Assembly Bill 313 and S.B. 284 will address these concerns. Thirty-six states have passed similar legislation. Once again, Nevada does not lead, it follows. Assembly Bill 313 and S.B. 284 will address service member custody issues in several ways. One, they authorize courts to issue orders granting grandparents, stepparents, and extended family the ability to exercise a deployed soldier's normal parenting time. By encouraging courts to issue such orders, we allow children to preserve their loving bonds with their deployed parents and also protect the important relationships children share with their grandparents, stepparents and other extended family.

ASSEMBLY BILL 313: Revises provisions governing the custody and visitation of children for persons who are members of the military. (BDR 11-627)

This bill will substantially reduce the current problem of deployed service members being unable to enforce visitation contact orders. These bills create a rebuttable presumption that upon a service member's return from deployment, child custody and visitation orders will revert to the original order. This protects the crucial role parents play in their children's lives and helps prevent a military parent from having to relitigate a case.

One instance in the bill refers to the Hague Convention and wrongful abductions to foreign countries. Right now, the United States has made it so both parents have to be present for the passport process of minor children. It used to be one parent could take the child to get a passport and then abduct the child—a misuse of the system. But officials are closing loopholes, making it more difficult to do that.

We have the winner-take-all system. That is why you get people who abduct their children and take them to foreign countries. If the system were more equitable in this court of equity that we call Family Court, we would not have to put this kind of language in the bill.

I am not in favor of Sharia law any more than I am in favor of the laws we have in place. We make it where one parent has all of the power—the custodial parent. Given that, we have to add language that says we keep the system the way it is and give all the power to the custodial parent. When these people move to Arab countries, Sharia law applies. The child is usually abducted before there are any court proceedings in this Country, and the father has all of the rights. In the last census, 82.6 percent of the women were given custody in cases of divorce, which is down 84 percent from ten years ago. Fathers generally have an uphill battle when it comes to being part of their children's lives.

As a final note, this bill does little for the economic problems that Nevada faces. To create a better economic climate—to bring businesses to Nevada—a presumption of shared parenting would have to exist in this State. If it does not exist, Nevada and its schools will continue to suffer; gang activity, tagging, teen pregnancy, drug use and poverty will increase; and tax revenues will fall. Businesses that would otherwise consider relocating to Nevada would move to states that do not discriminate against children, states that allow children two parents in their lives.

I would like to plant a seed today. If you take a survey of those people who are serving in your prison systems, you will find that over 90 percent of those people either have no father in their lives or they hate their fathers. We need to catch these children at a young age and give them two parents. One judge in Georgia said, "I always give custody to the mother." When he was asked why, he said, "Well, I have never seen a calf follow a bull around." This kind of

mental attitude says fathers have no role in their children's lives. I have four children, two girls and two boys.

I want a safe system, first of all. I do not want my daughters to get a temporary restraining order and worry about being in that situation. I also want my sons to have access to their children as they grow up. These children have to have two parents in their lives in order for our basic building block of society to succeed.

MR. JOHNSON:
I signed in neutral.

CHAIR WIENER:
The references made no mention to the Hague Convention and the abductions relate to current law; they are not in the mandatory language we are considering today. On page 6, section 13 of S.B. 284, it is nice to presume that family members care about the children. The court will consider a balance as appropriate because there is a healthy relationship.

I will close the hearing on S.B. 284.

SENATOR COPENING MOVED TO DO PASS S.B. 284.

SENATOR BREEDEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR WIENER:
I will now open the hearing on S.B. 356.

SENATE BILL 356: Establishes the crime of stolen valor. (BDR 15-999)

SENATOR ELIZABETH HALSETH (Clark County Senatorial District No. 9):
It is my pleasure to present S.B. 356, which will establish the crime of stolen valor in our State.

In 2006, Congress passed, and the President signed, the Stolen Valor Act of 2005, which made it a federal crime to lie about receiving medals or decorations

from the United States military. Unfortunately, the U.S. Court of Appeals for the Ninth Circuit recently ruled the stolen valor unconstitutional, citing it violates the First Amendment to the U.S. Constitution.

Circuit Judge Milan D. Smith, Jr., found that if the court upheld the Act, there would be no constitutional bar to criminalize lying about height, weight, age or financial status on Match.com or Facebook.com. Whether you agree with Circuit Judge Smith's logic on the issue or not, I hope you will agree with me that lying about receiving military honors does a disservice to the brave men and women in uniform who have earned their decorations.

It is important that we take steps to protect the honor of Nevada's heroes. Their accomplishments and sacrifices should not be diluted by other's false claims. I hope you will also agree with me that we cannot stand idly by while individuals lie about fake accomplishments and false actions for personal gain. It is important that charlatans and liars not obtain things of value through misrepresentations and fraud that cheapen the valor of our military men and women.

On a more positive note, a ray of hope did come from the Ninth U.S. Circuit Court's ruling. The Court suggested that while the Act as drafted restricts free speech rights, the statute could be modified into a constitutional antifraud statute. It was with this suggestion in mind that I sponsored S.B. 356. Nevada has a law that prohibits a person from willfully wearing and using the badge, button, insignia or rosette of any military order or any secret order or society to obtain aid, assistance or any other benefit or advantage if the person is not entitled to wear or use any such item. This bill repeals the existing provision. In its place, S.B. 356 provides that a person commits the crime of stolen valor if the person knowingly, with the intent to mislead or defraud in order to obtain some benefit or something of value, misleads or defrauds another person by committing various acts concerning the false representation of himself or herself with relation to military service.

In general, this bill provides that a person who knowingly and with the intent to mislead or defraud commits the crime of stolen valor is guilty of a misdemeanor. However, forgery and counterfeiting would carry the increased penalty of a gross misdemeanor.

Additionally, a person who wears or falsely represents himself or herself to have been awarded certain medals would also be guilty of a gross misdemeanor. Those medals include the Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star and Purple Heart. Finally, a person who wears or falsely represents himself or herself to have been awarded a Medal of Honor, the highest military decoration awarded by the United States government, would be guilty of a Category E felony.

I firmly believe this is the kind of antifraud statute the Ninth Circuit Court had in mind.

In closing, I would like to remind members of the Committee of the old saying, good policy will always survive. Senate Bill 356 represents good policy, and I urge your support of this measure.

I have Lieutenant Colonel William Anton in Las Vegas. He is the first Nevadan inducted into the U.S. Army Ranger Hall of Fame. He would also like to discuss this measure with the Senate Judiciary Committee.

CHAIR WIENER:
You reference committing this act to obtain something of value. How do you perceive something of value?

SENATOR HALSETH:
When we talk about something of value, we can specifically talk about food stamps, that is something of value. When someone is a veteran, it is my understanding they receive additional food stamps; that would be something of value if they misrepresent being a veteran.

CHAIR WIENER:
Mr. Wilkinson, have we had references to that in statute?

BRADLEY A. WILKINSON (Counsel):
The term "something of value" is not defined in this statute or elsewhere. The way I would interpret it is we are talking about something of tangential value, something of monetary value that you can place an actual monetary value on.

WILLIAM T. ANTON, Lieutenant Colonel (U.S. Army, Retired):
I would like to thank Senator Halseth and Assemblyman Scott Hammond, Assembly District No. 13, for cosponsoring this bill. I would also like to thank Counsel Bradley A. Wilkinson from the Legal Division of LCB with whom we have worked closely to ensure this is following the Ninth U.S. Circuit Court's suggestion on fraud and does not touch on freedom of speech.

The Ninth Circuit Court said it is okay to lie. What does that mean for our judiciary when we go to court? We have anti-perjury laws, but we do not have anything in the Nevada statutes that addresses military fraud. That is why this bill will help address this issue. We have other fraud statutes, but we want to close the loop and make sure we address this for our men and women in uniform and those of us who are veterans.

If people claim to be judges or law enforcement officials, they are arrested, put into jail and can receive long-term sentences. We do not have that protection for veterans and those in the military. Should the military not be accorded the same respect? I say the answer is yes. This bill is precise in its language and does not need to be expanded, reduced or changed in any way.

I recommend the Committee look at today's *Las Vegas Review-Journal* where page 14A covers the material addressed in S.B. 356, section 1, subsection 1, paragraphs (a), (b) and (c) where an individual who had no military service claimed all sorts of combat time and decorations. The article also relates to section 1, subsection 4, paragraph (a) of the proposed bill stating the person was finally arrested because he could not prove his credentials. The person in the news story had presented a false DD Form 214 Report of Separation, lied through his teeth and was made the commandant of a military academy in North Carolina. You asked the question, is there anything of value? Yes, this individual got a job and received a paycheck. I hope that helps to answer your question.

Subsections 6 through 8 of section 1 of S.B. 356 give the proposed punishment as either a misdemeanor, gross misdemeanor or Category E felony. Some may say to strike that section, and I say read Title 18 of the U.S. Code, section 704. This amplifies this and we are in consonance with federal law, but we are codifying it here in Nevada and I am proud to be a Nevadan.

This bill does not touch on freedom of speech. It was crafted to avoid this issue. This is an issue of fraud. Nothing in the NRS will protect the active duty or the veteran military.

I urge you to adopt S.B. 356. I laud the Senate for having 21 cosponsors of 21. Please give the military and veterans the honor and respect they deserve.

CHAIR WIENER:
Colonel Anton, you are correct, the language of S.B. 356 does specify seeking employment or being elected or appointed to office and obtaining something of value, so it is even more specific than that.

LT. COLONEL ANTON:
We made sure that was in there. If you remember, this past election there was an attorney general in Connecticut who had honorable service as a member of the U.S. Marine Corps Reserve, but then went on to lie and amplify three times—so it was no misspeak—how he had served in Vietnam. He remembered when he came back and what the people did and he is now the governor. I think that is pitiful. I am a Vietnam veteran and that is why we put that in the bill.

SENATOR COPENING:
Colonel Anton, I am agreement with this bill, but it seems that military also have certain law enforcement privileges or least perceived privileges. I do not know if it is true or if it is a perception. Another aspect of this brought to mind the ability of someone to fraudulently use this to gain the type of access as someone in law enforcement. Does the military have certain law enforcement privileges?

LT. COLONEL ANTON:
We do not have law enforcement privileges, but this bears on the point of falsification of records. One could falsify the records. As you know, discharge from the military is called DD 214. It tells whether you have honorable service or not. One of the problems is you can buy these forms on the Internet. If you read the bill, it says falsification of records.

Senator Halseth also mentioned food stamps. Those of us by certain percentage from the U.S. Department of Veterans Affairs have to provide documentation, and then we get relief on our automobile tax and real property tax. We have to

register and provide official documentation. If we have people falsifying those documents, they are getting benefits from this as well. They are riding on the backs of those of us who did all the hard work.

BRIAN O'CALLAGHAN (Las Vegas Metropolitan Police Department):
We are in support of S.B. 356. I was not going to testify, but since Senator Copening raised the question regarding law enforcement privileges, I want to respond. We are concerned with fraud and veterans' preference points. This will help eliminate those two areas. Also, we can put that on the job applications for future applicants.

On a personal note, my father served three services and I myself served. I know how important it is to earn those medals. My son called last night advising he was being deployed for the first time.

CHAIR WIENER:
Thank you for your generations of service. When I think of Donal Neil "Mike" O'Callaghan, I think of him as the former Governor. I also remember the ultimate service he provided, giving up part of who he was physically but never giving up part of who he was mentally and spiritually. I further recall all he gave to the State as well, through you and your family.

DARYL E. CAPURRO:
From February 1967 to February 1968, I served with the Ninth Infantry Division of the U.S. Army in Vietnam as a platoon leader for seven months and a reconnaissance field officer for five months. I am here today in support of S.B. 356 and was amazed the Ninth Circuit Court would take the position they did with respect to people who lied about their military records and the awards they received.

Whereas I feel that Court made an egregious error, it is not so much for myself. I have submitted for the record my DD 214 (Exhibit E), which contains the awards and commendations I received during that tour. I came back with two arms, two legs and everything else attached, but many who did not, not just in the Vietnam era but in other wars we have fought over the years. It is an insult to these people to have those who claim to have been awarded commendations they did not receive. Not only did they not receive them, but they were never in the military nor achieved the ranks shown in the testimony previously given. It seems more than a little white lie. It would be tough for the members of the

Ninth Circuit Court, this Committee or anybody else to sit in front of people who had lost loved ones in one of those conflicts who had been awarded the Congressional Medal of Honor and tell them it is okay if someone lies about the fact he or she received a medal.

It is important that people recognize the service for those who took part in the conflicts this Country has been involved in. It is important to understand it is not fair, not advisable nor reasonable for someone to claim awards never received.

MS. GASCA:
I want to agree with Mr. Capurro, Senator Halseth and Assemblyman Hammond that lying about awards does a disservice to our honorable veterans. It is a shameful thing to do. But from the ACLU's perspective, those freedoms in our Constitution mean that we should have to put up with things that are distasteful, that we get to put up with things that are distasteful. Even if someone is lying or bragging about something they did not receive, the Constitution says that is okay unless there is demonstrable harm. That is what was at heart of the Ninth Circuit Court's decision.

Yesterday, the Assembly Judiciary Committee heard Assemblyman Hammond's version of this bill, which is essentially identical. The testimony lasted approximately 45 minutes. There were approximately 15 veterans who testified, shared their stories and were there with good reason to support the bill. I really appreciated their presence with Lt. Colonel Anton who was in Carson City. I appreciated the opportunity to explain that all too often the ACLU is seen as supporting the distasteful acts of individuals rather than the constitutional right of those individuals. It is with good intention I am here to clarify that because we defend the rights of individuals who say distasteful things does not mean we agree with those things.

I will go into the decision of the Ninth Circuit Court. As was previously mentioned, the Congressional Stolen Valor Act was declared unconstitutional in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). It is an interesting opinion because it directly ruled on section 3, subsection (b) of the Stolen Valor Act. While it seemed to state the entire Act was unconstitutional, it only specifically addressed subsection (b) with great detail. In that ruling, the Court relied heavily on the recent U.S. Supreme Court ruling in *United States v. Stevens*, _____ U.S. _____, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010),

which notes there are few limited categories of expression left unprotected by the First Amendment, and false speech standing alone is not among them. In fact, they said that in order for false statements' effect to fall outside constitutional protection, there must be palpable harm. Defamation and fraud are certainly examples of unprotected speech. However, S.B. 356 attempts a Nevada version of the Stolen Valor Act by presenting it as an antifraud statute. From our perspective, however, this bill criminalizes passing oneself off as having received a military medal or decoration through either written or verbal expression, or by wearing an item in order to obtain something of value. That phrase—something of value, as Chair Wiener noted—is not defined. Since there is no monetary amount set forth in S.B. 356 nor does something of value even have to actually be of monetary gain or value, we are in opposition to S.B. 356.

I want to note that in his concurrence to the order denying rehearing in *Alvarez*, Chief Judge Alex Kozinski of the Ninth Circuit Court enumerated many types of false assertions of fact that are constitutionally protected. Those mentioned by Senator Halseth were included regarding Facebook and Match.com. But Chief Judge Kozinksi's concurrence goes on for approximately one and one-half pages of situations in which lying is legal. I believe that "I will still respect you in the morning" is one of those. I think it also addresses cheating on one's girlfriend is okay by law. What about stealing, cheating on your taxes? No, that is a different story. Stealing someone's boyfriend is a whole other issue. As for the impersonation of officers in order to carry out those duties, that is already covered by law. I would definitely disagree with Lt. Colonel Anton that military veterans do not have any of the powers invested within themselves that are given to police officers to carry out laws of the State.

But neither the federal or proposed State's Stolen Valor Act adequately addresses the tangible harm requirement that the Ninth Circuit Court said must be there in order for it to be not declared unconstitutional.

Yesterday, there was talk about the existing fraud statutes and how they are inherently tied to monetary levels. The ACLU says that something like that would be necessary in order for this bill to move forward. Assemblyman Mark Sherwood asked the same questions with regard to the monetary value issue. He also suggested the removal of section 1, subsection 1, paragraph (a) would accomplish the goal to clarify that it is not necessarily about what medal or lie was said. From our perspective, getting rid of that section would do little to save this bill.

Under section 1, subsection 6, paragraph (a), a person who is able to obtain $10,000 or some value of good or service that is equated to $10,000 is guilty of a misdemeanor by claiming that he or she is a veteran. But in contrast, a person who claims to have been awarded a Medal of Honor would be guilty of a Category E felony even if that benefit was a breakfast at Denny's or something of that nature. That is very problematic, and this scheme clearly runs counter to Nevada law concerning obtaining money under false pretenses.

Finally, I want to reiterate the intent of this bill. The ACLU by no means agrees with the act of putting oneself forward as something you are not. But the tie to the palpable harm must inherently be there, and in this drafted bill, it is not.

The Assembly Judiciary Committee, which was full of questions, had noted that by states passing different versions of what was deemed unconstitutional by the Ninth Circuit Court, you could essentially see 50 disparate laws in which it is illegal to purport oneself as having received certain medals in one state but not in another. That is reason enough why we think the State should hold off from moving forward with this bill.

Congress certainly has the right to amend the Stolen Valor Act according to the suggestions by the Ninth Circuit Court, but we believe there is a high probability that it would preclude the State from being able to address the awarding of federal medals and the act of putting oneself forward as having achieved those medals. Due to the federal preclusion issue, and the fact that this bill does not state the palpable harm created as a result of somebody engaging in an act like this, we believe this bill should not move forward.

CHAIR WIENER:
I will close the hearing on S.B. 356 and open the work session.

We will be taking the bills out of order. There are overlapping issues and drafting work done on both of the measures. Mr. Lipparelli will explain what has been done with S.B. 218 and then will address S.B. 103.

SENATE BILL 103: Authorizes a licensed interactive gaming service provider to perform certain actions on behalf of an establishment licensed to operate interactive gaming. (BDR 41-828)

SENATE BILL 218: Revises provisions governing the regulation of gaming. (BDR 41-991)

MARK A. LIPPARELLI (Chair, State Gaming Control Board):
What we have attempted to do in S.B. 218 as well as S.B. 103 in this work session is to pull language that was in S.B. 103, as brought by Bob Faiss, and move the communalized language into the definitions of a service provider. We will also take out the tax measure of S.B. 218 that we briefly discussed at the opening of this bill, so that the amended S.B. 103 beginning on page 2 of the work session document (Exhibit F) now stands alone to hold the tax language and relocate the language of an interactive service provider from S.B. 103 into S.B. 218 (Exhibit G). We defined an interactive gaming service provider within section 1.7. We also make reference that an interactive gaming service provider will be a service provider under the law, which is a new categorization of licensure. In addition to that, we also added section 1.3, which was a request to define the cash access and wagering instrument services provider as a service provider in our bill.

Section 3, subsection 5 of our revised language starts at the bottom of page 6 of Exhibit G. Now, as used in this section, a service provider will include the language we had introduced to you previously. An interactive gaming service provider, which is the language from S.B. 103, as well as new language defining a cash access and wagering instrument services provider are included.

In addition to that, we made the other changes contained in S.B. 103. We have adopted those changes into our bill, including section 6.5, on page 9 of Exhibit G which amends NRS 463.160 referencing the cash access and wagering instrument provider. Page 16 is revised language in section 12, and a new section 11.5, page 17, Exhibit G, references the language from S.B. 103 relating to an interactive service provider.

CHAIR WIENER:
Committee, as you will recall, during the hearing we heard both of these bills on the same day. There were some distinctions between the interactive service provider. This is that integration processing under the regulators' bill. What was in S.B. 103 has been brought into S.B. 218 under the Gaming Control Board's bill. Are there any questions of Mr. Lipparelli on S.B. 218?

SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 218.

MR. WILKINSON:
There was something I noticed. Looking at the definition of service provider in the amendment on page 7 of Exhibit G, there are references added of an interactive gaming service provider and a cash access and wagering instrument services provider. That section reads in paragraphs (a), (b) and (c) as someone who acts on behalf of another licensed person, is authorized to share in revenue and meets such other additional criteria. Paragraphs (a), (b) and (c) are required to go together as opposed to being separated into "or" statements so someone would be a service provider with paragraphs (a), (b) and (e) or (c) or (d).

MR. LIPPARELLI:
It is our intention that we will, as time goes by, identify other categorizations of licensed applications that fall within something. If you remember, last time we talked less than a manufacturer-distributor, so we would want someone to act as an interactive gaming service provider, or someone to act as a cash access and wagering instrument provider, or someone to be authorized to participate in revenue. Those would all be classified as different areas of someone acting as a service provider.

MR. WILKINSON:
To simplify, right now it is paragraphs (a), (b) and (c). In the amendment now, you could be either paragraphs (a), (b) or (c) or (d) or (e).

CHAIR WIENER:
Is your intention that it could be any one paragraph because in the original ...

MR. WILKINSON:
It was all three ...

CHAIR WIENER:
... combined as all three paragraphs were required. You are changing your intention then for it to be any one of those paragraphs?

MR. LIPPARELLI:
Yes. I have one more change before you. We received industry comment about one particular section, and I did not get it to your staff.

CHAIR WIENER:
To clarify, this provision was originally brought to us as the three together. Now it is any of the five in the amendment. What was your intention of having the three combined as a requirement that is now separate? That is a shift.

MR. LIPPARELLI:
It is one of the challenges of trying to move these two bills together. The original notion was our definition of service provider would have enveloped what was contained in S.B. 103. It was our view that an interactive gaming service provider would have been covered by our definition of service provider. Now we are combining these two classifications—an interactive gaming service provider and a cash access and wagering instruments provider—and calling them out for distinction.

CHAIR WIENER:
If paragraphs (a) and (b) were important in your original definition, we included another paragraph Joshua Hicks brought for the cash access and wagering instrument services provider that was not even on your radar in the hearing. Is there a reason that paragraphs (a) and (b) would not still be joined, and then it could be any of the other paragraphs that follow?

MR. LIPPARELLI:
I am sorry, I see your point now. That is correct.

CHAIR WIENER:
So it would be paragraphs (a) and (b) and then any of the other paragraphs that are categories now being included.

MR. LIPPARELLI:
Absolutely. That is accurate.

CHAIR WIENER:
So it is not any of those; it is paragraphs (a) and (b) plus anything that follows?

MR. LIPPARELLI:
I think that is correct, yes.

CHAIR WIENER:
Mr. Wilkinson, can we draft that? For clarity, that would help because this is a huge shift from what you originally brought to us.

MR. LIPPARELLI:
One industry comment came with respect to the changes we made to section 13, Exhibit G. It is an insert on Exhibit G, page 20, line 35 that reads, "except as permitted by the Commission." The new included proposed language would change that to read, "except as may be made available as part of an approved game or otherwise permitted by the Commission." We agree that is a suitable change.

An item approved by the State Gaming Control Board and Commission for deployment would make it clear this law would not prohibit such a product from being introduced in the field. I agree that it adds better clarity to the law.

SENATOR ROBERSON:
I withdraw my motion.

CHAIR WIENER:
I will close the hearing on S.B. 218.

SENATOR ROBERSON MOVED TO AMEND AND DO PASS S.B. 218 WITH THE TWO PROPOSED AMENDMENTS.

CHAIR WIENER:
That would address both the "and" and the new language in section 13 for clarity.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR WIENER:
The motion carried unanimously with the amendment provided by Mr. Lipparelli and the additional two changes made during the work session.

I will now open the work session on S.B. 103.

MR. LIPPARELLI:
Amended S.B. 103, Exhibit F, eliminates all of the prior language shifted to S.B. 218 and now moved to S.B. 103, which was known as the tax language from the State Gaming Control Board's bill. This is the language relating to the clarification warranted relating to the application of taxes.

CHAIR WIENER:
Committee, you will remember concern in the hearing regarding what is called the Live Entertainment Tax (LET), part of the tax package of the 2003 Session. That is what we are discussing. Mr. Lipparelli is offering this language to clarify language passed in the 2003 Session.

SENATOR ROBERSON:
I have concerns with this bill. I was persuaded by the testimony of the attorney for Anschutz Entertainment Group (AEG) as to whether the statute intended to apply this tax in this matter to AEG. The court should resolve this given the fact that there is a pending Nevada district court case on this issue. We should not be asked to determine whether this is an existing tax or a new tax that should be applied retroactively. That is my position on the bill.

CHAIR WIENER:
There needs to be a technical amendment at the end of the measure to also amend it effective upon passage and approval.

MR. WILKINSON:
As I understand, the amendment would track the current language in S.B. 218 which says, it becomes effective upon passage and approval and applies retroactively from January 1, 2004.

SENATOR COPENING:
For clarification, would this new language change anything being done today, or is it also clarification relating to what is in the courts right now?

MR. WILKINSON:
That is the issue in dispute. The way it is presented in the bill, it is a clarification of existing law. This is what the law means and was intended to mean at the time of enactment. I cannot speak to the current practices or what taxes are

being collected. But it is intended to carry forth existing law—not change the law but clarify it.

SENATOR COPENING:
Are the problems collecting the tax because of the vagueness of the law?

MR. LIPPARELLI:
Our belief is that by providing this language, it is a continuation of the practice of how we apply this law today. It makes it clear on its face that we believe it was the Legislature's intention that parties other than a casino licensee cannot use a methodology to create a fee other than those already called for—credit card fees, or when you purchase a ticket if it is a Ticketmaster fee that does not end up rebating money back to the licensees—and accepted from the Department of Taxation. We believe that was clear. There was some discussion, and I will defer to counsel Jennifer Roberts who is representing the people who have an adverse position to us in this case. We think that was the Legislature's intent; they have a different argument. They believe that was not the intention of the Legislature. We believe this language helps to clarify that. Obviously, that case will be resolved in court as to whether they have the right argument or the State does. This is an application of what we do today. The law was clear before and this makes it more clear.

CHAIR WIENER:
Others have been subject to the Live Entertainment Tax since its passage after the long summer we spent resolving some of the economic needs of our State. Concerns with the application of the LET were brought before our Committee. Have others been paying it?

MR. LIPPARELLI:
We apply this law across the board. The one exception I would take to Ms. Robert's testimony is that this is not directed at her client; it would be directed across the board to all clients. There are many others who have similar arrangements with other third parties that conduct operations on behalf of a casino licensee. This is not directed at Ms. Robert's client or its case, it would apply to how we view those tax payments in all cases.

CHAIR WIENER:
Have they been participating as payers?

MR. LIPPARELLI:
They have been.

SENATOR ROBERSON:
To respond to Senator Copening, if we all look at the amendment, Exhibit F, page 6, section 3, this new language amends NRS 368A.200. In subsection 2, paragraph (b), the language is pretty simple—it is not complicated. We can all read it and interpret for ourselves what we think it means. But I did not hear —and I went back and watched the video last night of the original testimony—anyone talk about what the legislative record said at the time. I was not here, most of us were not here at the time. I am uncomfortable now looking at this language and trying to decipher the intent, especially given the fact that there is a pending court case. I would at least like to see what the court decides on this.

Now, if we all agree that was the intent and a good policy to enact a new tax, both prospectively and retroactively in some cases, that is fine. I am not comfortable doing that. Based on this language, the intent when this law passed is unclear to me.

CHAIR WIENER:
Enacting a new tax is certainly part of the debate. But having been one who was there and experienced this, the debate is if it is being presented to us to clarify an existing tax. Your concerns are that it may be enacting a new tax; that is the debate, whether this is for clarification on something passed in the 2003 Session or not in enacting a new tax. Clarifying the intention of the Legislature in those special sessions to generate new revenue is part of the debate of whether it is an enactment or clarification on a tax intended to be honored with payment through the years.

SENATOR GUSTAVSON:
I do not know if I am getting more confused or less confused as we go along. If the original intent was this, that is one thing. But as Senator Roberson said, there is a court case to decide this right now. I am not sure we are doing this at the proper time and place. If we had not been collecting this tax is one thing, but sometimes I have a problem with making a law retroactive.

CHAIR WIENER:
As I verified with Mr. Lipparelli, the LET is being collected; many vendors have been paying it. Since we have more work sessions ahead of us and to give us

time to do our homework and study the language, I will schedule this for a future work session. We received our work session binders yesterday. We will schedule this for one of our work sessions next week. Whenever we have this much debate, we have more work to do.

I will close the work session on S.B. 103 and open S.B. 128.

SENATE BILL 128: Revises provisions governing guardianships. (BDR 13-156)

LINDA J. EISSMANN (Policy Analyst):
Senate Bill 128 was heard on February 15. This bill came out of the Legislative Committee on Senior Citizens, Veterans and Adults with Special Needs. You will recall we heard this bill and then a complete rewrite amendment was proposed at the first meeting. It was then revised again for the first work session; that has now been withdrawn. The final amendment eliminates the bill, excepting sections 7, 8 (Exhibit H), page 2 and 13, Exhibit H, page 3. A summary, Exhibit H, page 4, shows you the sections that were removed, as well as the three sections remaining.

In the original bill, section 7 requires a private professional guardian to agree to comply with certain standards of practice and ethics and requires such a guardian who is not an attorney to submit to a background investigation as a condition of appointment.

Section 8, as written, requires every guardian to file a verified acknowledgement of the duties and responsibilities of a guardian before performing duties as a guardian.

Section 13 prohibits removal of a guardian by the court if the sole reason for removal is lack of money to pay the compensation and expenses of the guardian. Sally Ramm has slightly tweaked those three sections from the original bill.

CHAIR WIENER:
Ms. Ramm and I had a conversation, and one of the suggestions in our conversation was in Exhibit H, page 2, section 7, next to the last line, "guardian shall pay the cost of the background investigation," and you have "the court shall devise the manner." Were you going to agree to make that permissive, or do you feel that still needs to be mandated?

SALLY RAMM (Elder Rights Attorney, Aging and Disability Services Division, Department of Health and Human Services):
Evidently when I wrote this section, I did not write it simply enough to convey the intent of the Legislative Committee on Senior Citizens, Veterans and Adults with Special Needs. I do have a handwritten, subsequent short amendment (Exhibit I) to that if you would entertain it. Otherwise, I agree with what you said; it should say "may" I thought I had sent one that said "may," but evidently I sent the wrong one.

MS. EISSMANN:
I think there was some miscommunication between Ms. Ramm and myself as to who was inserting "may," but yes, that was the agreement.

CHAIR WIENER:
As Ms. Eissmann has given the history, it was a very large measure brought from the Legislative Committee; it was amended in a big way and we had questions about pieces of it. Then I had suggested to see what would be workable to Ms. Ramm that she would like to go forward within the measure so something important could be brought back to us.

MS. RAMM:
The addition to NRS 159.0595 is an effort to qualify professional paid guardians further. The U.S. Senate Committee on Aging had the General Accounting Office do an investigation on how people became private professional guardians around the Country. The office focused on Nevada as one of the four states studied. Right now, the only requirement for a private professional guardian to be appointed a guardian, usually over someone they do not know, is certification by the National Guardianship Foundation. The investigators went to the Foundation with entirely made-up background information, took and passed the test. Now they are certified guardians according to the requirements of the Nevada statute. But we do not know anything about them and any background information they gave was erroneous.

The Legislative Committee suggested that was not a good law for Nevada, as there was not enough protection for the wards. This particular addition adds a background check to the statute for an additional layer of protection. The original objection was that the courts thought it was going to cost them a lot of money to do this. One of our tweaks was to make sure that the court had the ability to make its own rules so that the private professional guardians would

keep their own background checks. When the court required the background checks, the guardians would have them. If they did not have them, they presumably would not be appointed guardians. This is just another layer of protection for the wards.

Julie Butler is here from the Central Repository for Nevada Records of Criminal History. She was telling me this does not get us quite where we intend to be. If it is possible, I want to replace these words with a few different words. The intent is the same, the result is the same, but Exhibit I makes the intent more clear.

CHAIR WIENER:
What is it you are suggesting?

MS. RAMM:
Exhibit I states: "A private, professional guardian shall undergo a fingerprint-based background investigation through the Central Repository for Nevada Records of Criminal History and the Federal Bureau of Investigation at his or her own cost and expense and shall present the background investigation to the court on request."

CHAIR WIENER:
And that is to replace the offering you have before us?

MS. RAMM:
Yes.

Section 8 is one of the issues that comes up, especially when Elder Protective Services is looking at whether there is exploitation in the guardianship or not. The guardians will say, "Well, we did not know we were supposed to report to the court on an annual basis," or "We did not know we were supposed to keep the funds separate." Section 8 is an addition to the statute that would make every guardian—family guardians, professional guardians and public guardians—sign an affidavit saying they know what their duties are and they would get a copy of the document. The courts could come up with the rules they wanted. For example, public guardians would probably have to do it once for the cases they were working on. But for family guardians, this would be as good as we can get for required training. We would like to require training, but it is too expensive. This is an alternative.

CHAIR WIENER:
Is this language reflective of that?

MS. RAMM:
Yes, it is.

CHAIR WIENER:
There are no edits, no amendments?

MS. RAMM:
No edits.

CHAIR WIENER:
And your third change is section 13.

MS. RAMM:
The third change is because in the past, a private professional guardian was appointed by a third party in order to get a ward out of the hospital or to have the ward admitted into a long-term care facility. The guardian would be appointed just for that, but the guardian would keep the ward as long as the assets covered the expenses of the guardian attorney and guardian. Then when the assets were gone, they would petition the public guardian to take over because the ward could not afford the private guardian anymore. The best practice is the private guardian would not take a client who does not have enough assets to cover expenses during the period of the guardianship. This is to try to enforce the best practices. If a ward only has a few thousand dollars and the private guardian gets and depletes the estate, the taxpayers end up paying for everything because the assets are gone. This solves that issue.

CHAIR WIENER:
For clarity, a private guardian serves until the money is not there anymore and then wants to send that ward back to the public system.

MS. RAMM:
Or the ward enters the public system for the first time.

CHAIR WIENER:
This engages or reengages the public system for guardianship.

MS. RAMM:
Correct.

CHAIR WIENER:
This would say that wards could be put in the public system from the beginning.

MS. RAMM:
Exactly. That would conserve the ward's assets because there are no guardianship fees in the public system. The guardianship fees come out after all of the ward's expenses are paid, usually after the ward has died.

CHAIR WIENER:
Is there a threshold as to when someone can have the public guardian versus a private guardian?

MS. RAMM:
There is not now unless individual counties have set that, but I am not sure.

CHAIR WIENER:
Meaning that at some point you would not have to use a private guardian because of the means test. At some threshold, would someone be required to use his or her own assets, and when that is depleted or goes under that threshold, the ward would qualify for a public guardian anyway? Is there a threshold where you cannot use a public guardian because of the assets?

MS. RAMM:
In some counties, the public guardian is considered the guardian of last resort. If somebody has assets to pay a private guardian, the public guardian has the person pay for his or her own guardian. In some counties, that is not true. It is a county-run program, and the county gets to decide.

CHAIR WIENER:
How would this bill affect that circumstance, since each of the counties has its own policy about those assets?

MS. RAMM:
Say the ward has $20,000 in assets and needs a guardian and a private professional guardian takes the ward on; $20,000 will probably not last more

than three or four months. If the ward goes to the public guardian, that $20,000 will pay for the care longer because there will not be any guardian fees. Some counties insist their guardians take wards with funds because they charge the wards and that is how they pay for the public guardian system. In some counties, you have enough assets to go to a private guardian at X number of dollars per year. The public guardian would say you need to go to a private guardian and save the public guardian's assets for people who really need them.

CHAIR WIENER:
That would be until those assets are used up and the ward goes to the public guardian anyway. We do not have that in writing, but this measure has been before us more than once.

SENATOR MCGINNESS:
I am not sure I am comfortable with this measure. Could I ask Lora Myles to comment?

LORA E. MYLES (Carson and Rural Elder Law Program):
Under NRS 253, which governs public guardians, there is no requirement for the ward to be indigent to qualify for a public guardian. At this time, no counties use that as a factor to determine whether those wards are eligible for public guardian services. The issue is the ward may be under a private guardian for two or three years or even a few months—the ward develops a relationship with that private guardian, the ward runs out of money, and all of a sudden the private guardian says, "Oops, I cannot take care of you anymore" and transfers the person to the public guardian system. What we are saying is, even family guardians are doing this, not just private guardians. The family guardian uses up all of the assets, then says we do not want to take care of mom anymore, we want the public guardian to handle her because she does not have any more money. If you made the commitment to be the guardian for this individual, you need to stay in for the long run.

CHAIR WIENER:
The language is here that the lack of money cannot be the sole reason. To me that is pivotal; it cannot be the only reason to give up guardianship, and there may be other things going on. That is at the discretion of whoever makes those decisions.

SENATOR BREEDEN:
I am happy to see that Ms. Ramm was able to bring part of the bill forward because it is important. We need to protect those who are wards. I would support this measure wholeheartedly.

CHAIR WIENER:
I will close S.B. 128.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 128 GIVEN THE DISCUSSION THAT ENSUED IN THE WORK SESSION TODAY.

CHAIR WIENER:
For clarity, that would be the amendment as presented to us with corrections made today, changing the "shall" to "may" and the additional dialogue that has taken place, Exhibit I, using the changes made in the work session today, amending with the discussion that ensued.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

CHAIR WIENER:
I will open the work session on S.B. 346.

SENATE BILL 346: Revises provisions governing deficiency judgments on obligations secured by certain residential property. (BDR 3-276)

MS. EISSMANN:
I will read from the work session document (Exhibit J). An amendment was suggested during the meeting and has been provided to me via Assemblyman Tick Segerblom, Assembly District No. 9. David Guinan, an attorney, suggested the proposed amendment, Exhibit J, pages 2 and 3, to apply antideficiency protections to all purchase money obligations, whether or not they are secured by the first deed of trust or a junior deed of trust, and to eliminate the retroactivity aspect of the bill. Assemblyman Segerblom is happy

with Mr. Guinan's amendment, but he wants to keep it retroactive and ensure that the lienholder cannot sue separately.

SENATOR BREEDEN:
Assemblyman Segerblom had to testify on other bills. I am in support of his recommendation for the amendment, Exhibit J, pages 2 and 3.

SENATOR COPENING:
I wonder if you would allow for Mr. Uffelman to tell us how this amendment, Exhibit J, pages 2 and 3, will impact his earlier testimony.

BILL UFFELMAN (President/CEO, Nevada Bankers Association):
The proposed amendment, Exhibit J, page 2 and 3, will still be retroactive, and we will have our opposition to it.

SENATOR COPENING:
If it was not retroactive, what would your position be?

MR. UFFELMAN:
If it was not retroactive and said antideficiency judgments relative to purchase money and junior liens going forward, we have already conceded that to this legislative body. In the last two years, we have conceded no deficiency judgments relative to the purchase of a residential dwelling in Nevada.

SENATOR BREEDEN:
This measure is to help people who have been affected during the downturn. I understand what happened in the 2009 Session, and I appreciate that, but there are many individuals who have been affected prior to 2009. This measure is to help people prior to that.

SENATOR ROBERSON:
I am vehemently opposed to this bill. I think it is unconstitutional; it undercuts basic contract law. It has been one of the foundations of this Country and this State since its inception. I will just warn my colleagues, if this gets passed into law, I can guarantee you this concept will be used to attack existing public sector collective bargaining agreements. Everyone should think about that.

CHAIR WIENER:
It looks like we still have some ongoing debate with this measure, considerations that might not have been before us. I will schedule S.B. 346 to a future work session.

I will open S.B. 402.

SENATE BILL 402: Revises provisions relating to real property. (BDR 9-1090)

MS. EISSMANN:
I will read from the work session document (Exhibit K). Senate Bill 402 was a Senate Committee on Judiciary bill presented by Karen Dennison, Executive Committee, Real Property Section of the State Bar of Nevada. She is out of State today. Matt Watson with the Executive Committee, Real Property Section, State Bar of Nevada is in Las Vegas to address any issues the Senate Committee on Judiciary may have.

Ms. Dennison had requested an amendment, Exhibit K, page 2, to section 7 of the bill. Her testimony was that it would clarify the language in NRS 40.451 to make it consistent with the legislative history.

MATT WATSON (Executive Committee, Real Property Section, State Bar of Nevada):
The amendment to NRS 40.451 is a sentence—we did not know what it meant—at the very end of that section. It refers to limiting the amount of a lien to the amount of consideration paid by a lienholder. After reviewing the legislative intent, we found that the reference to such amount in that sentence really refers to the other amounts secured by the mortgage or other lien. The amendment Ms. Dennison suggested that was drafted as a collaborative effort by the Executive Committee limits the other amounts expended by the lender to amounts actually paid out of pocket by the lienholder or its predecessor.

In doing the research on the legislative history, we looked at the now 42-year-old law that was A.B. No. 493 of the 55th Session to determine what the last sentence meant. There is not much in the legislative history, but then-Assemblyman Richard Bryan had moved to pass the bill saying the following: "If definition of indebtedness and waiver of subsection 7 lender being limited to actual out-of-pocket expenses that he may recover." That reference is relevant regarding the other amounts.

I had a chance to speak with my now-partner Richard Bryan about when he made that statement. He, not surprisingly, did not recall the specific motion he had made, but was certain it did not mean that an assignee lender who purchased a loan at a discount could only recover the amount he had paid or the lienholder had paid for that loan.

We believe the amendment accurately reflects what was meant those many years ago and will resolve confusion about what someone may think it means today.

CHAIR WIENER:
I will close S.B. 402.

> SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 402.
>
> SENATOR GUSTAVSON SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

* * * * *

CHAIR WIENER:
I will open S.B. 403.

SENATE BILL 403: Revises provisions relating to the information which must be provided by a unit's owner in a resale transaction. (BDR 10-1126)

MS. EISSMANN:
I will read from the work session document (Exhibit L). Senate Bill 403 was a Senate Committee on Judiciary bill presented by Rocky Finseth, Nevada Land Title Association. This bill revises the information that must be provided in a resale package by a unit's owner to a purchaser. Specifically, the statement concerning assessments must come from the homeowners' association (HOA) and must include information on any unpaid assessment such as management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees, and attorney's fees due from the seller. The statement remains in effect, as the bill is written, for at least ten working days, and the HOA may deliver a

replacement statement if it becomes aware of an error before a completion of the resale.

Mr. Finseth had proposed an amendment, Exhibit L, page 2, changing that from 10 working days to 15 working days. Everyone who testified at the meeting that day was in agreement with that amendment. I have received nothing else.

CHAIR WIENER:
I will close S.B. 403.

> SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED S.B. 403.
>
> SENATOR GUSTAVSON SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
The meeting is adjourned at 11 a.m.

RESPECTFULLY SUBMITTED:

Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Rosters
S.B. 283	C	Senator Don Gustavson	Written testimony
S.B. 284	D	Senator Don Gustavson	Written testimony
S.B. 356	E	Daryl E. Capurro	DD 214 of Daryl Eugene Capurro
S.B. 103	F	Linda J. Eissmann	Work session document
S.B. 218	G	Linda J. Eissmann	Work session document
S.B. 128	H	Linda J. Eissmann	Work session document
S.B. 128	I	Sally Ramm	Handwritten amendment
S.B. 346	J	Linda J. Eissmann	Work session document
S.B. 402	K	Linda J. Eissmann	Work session document
S.B. 403	L	Linda J. Eissmann	Work session document