

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY**

**Seventy-Seventh Session
March 26, 2013**

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:11 a.m. on Tuesday, March 26, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Peggy Pierce, Clark County Assembly District No. 3



STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Karyn Werner, Committee Secretary
Brittany Shipp, Policy Assistant
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Jim Shirley, Pershing County District Attorney
Eric Spratley, representing the Washoe County Sheriff's Office
A.J. Delap, representing the Las Vegas Metropolitan Police Department
Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association
Steve Yeager, representing the Clark County Office of the Public Defender
Chris Frey, Deputy Public Defender, Washoe County Public Defender
Bob Bayer, Private Citizen, Reno, Nevada
Keith Uriarte, representing American Federation of State, County and Municipal Employees Local 4041
Vanessa Spinazola, representing the American Civil Liberties Union of Nevada
Clifton C. Maclin Jr., Private Citizen, Carson City, Nevada
James "Greg" Cox, Director, Nevada Department of Corrections
Gawain Guedry, representing the Las Vegas Metropolitan Police Department
Bill Ames, representing the Washoe County Sheriff's Office
Paul Villa, representing the Peace Officers Research Association of Nevada, Inc.; and the Reno Police Protective Association
Robert Lawson, representing the Las Vegas Metropolitan Police Department
Kristin Erickson, representing the Nevada District Attorneys' Association

Chairman Frierson:

[Roll was taken. Committee protocol and rules were explained.]

We have four items on the agenda today, so we will have to be swift. We will go in order. The first bill is Assembly Bill 212 and I will invite Mr. Hansen to introduce his bill.

Assembly Bill 212: Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Assemblyman Ira Hansen, Assembly District No. 32:

I am here today to present Assembly Bill 212 which prohibits the possession of portable telecommunication devices by prisoners in a county jail or other local detention facility. [Read from written testimony ([Exhibit C](#)).]

It was a surprise to me when I was contacted by the Pershing County District Attorney, Jim Shirley, and found out that there was a case on this issue that went all the way to the Supreme Court of Nevada. I would like to have Mr. Shirley give us some background on why this law is necessary.

Jim Shirley, Pershing County District Attorney:

A little bit of history so you will get a grasp of where we are. In 2003 the Office of the Attorney General, on behalf of the prison system, came before the Legislature with Senate Bill 299 of the 72nd Session and asked for the law that became *Nevada Revised Statutes* (NRS) 212.093, which does not allow prisoners to have items that can be used for escape. During the testimony for that statute, Mr. Gerald Gardner testified that the trick with an escape is to catch it before it happens, because once the escape has started, serious consequences can happen, such as harm to the correctional officers, the inmate, or the public at large.

In 2005 there was an escape from the state prison system when a social worker brought a cell phone to an inmate with whom she had fallen in love. He then used that phone to coordinate his escape with people on the outside. He escaped, which resulted in the deaths of two or three other people before he was caught.

In 2007, as Assemblyman Hansen told you, a bill was presented to the Legislature by the Nevada Department of Corrections (NDOC) prohibiting portable telecommunication devices in the prison system. Unfortunately, it was so narrowly defined that it only applied to the prisons.

Around 2010 we had a case in Pershing County in which an inmate possessed a cell phone, which he hid in his Bible in his cell. We discovered it because he threatened other people by using that cell phone. When we prosecuted him, the District Court ruled the statute unconstitutionally vague. We appealed that decision to the Supreme Court of Nevada and they overturned the vagueness ruling, but then found that cell phones did not qualify as devices for escape.

Assemblywoman Fiore:

Was the social worker who gave the inmate the cell phone charged and arrested?

Jim Shirley:

I do not know what happened to her. If you look at the current version of NRS 212.165, it has provisions for noninmates. That is the reason those provisions are in there, so no one can take a cell phone into a prison.

Assemblywoman Fiore:

Mr. Cox is behind you nodding his head yes, so they have apprehended her.

Jim Shirley:

I do not know what happened to her. I only know what happened with the escapee.

We went to the Supreme Court and they said that the escape device would not apply, so our alternative was to correct this small oversight from when NRS 212.165 was originally enacted. When I was growing up, it was the file in the cake; cell phones are the new files. What they have discovered worldwide is that we are having an epidemic of cell phones getting into correctional facilities. For example, in Brazil they have carrier pigeons carry the cell phones into the inmates. The inmates are then able to use those phones for escape, for continuing their criminal enterprises, threatening people in the public, and those types of things. In Italy, they downloaded blueprints for the prison. In the case at hand, the cell phone was used for threatening people in the community. Of course, escapes are the real problem.

We are asking that you pass this bill so the inmates can no longer bypass the regular phone system—where they are recorded—to communicate with others about jail security and such, or make threats, or perform other criminal acts while in the confines of the jail.

I have also been notified that the Nevada District Attorney's Association is in full support of this bill.

Chairman Frierson:

I understand what you are trying to accomplish; I have spoken with Mr. Hansen about this issue. We were both surprised that this was not already a prohibition. I understand the Supreme Court's rationale in that an escape tool is usually only an escape tool. Cell phones can be used for this purpose, but can also be used for threatening witnesses, contacting girlfriends, and other less nefarious things.

The felony characterization jumps out at me because we have inmates under local government jurisdiction that are now going to be subject to felony treatment for things that the local government jurisdiction could have prevented.

I relate this to a situation ten years ago. I was prosecuting someone for escape because a handcuff key was found in his shoe. A screening found the handcuff key, so if we have an ineffective screening process, we are allowing something to happen that we could have prevented. My concern is local government not doing an adequate screening resulting in a cost to the state. That is a longwinded way of asking if you are open to a penalty that is not a felony if they are in for a misdemeanor or gross misdemeanor.

Jim Shirley:

The proposal is that a misdemeanor would be guilty of a misdemeanor. I would not have a problem with throwing the gross misdemeanor in there as well. I think the felony issue is, if it is that serious of a crime and they actually have a cell phone in the jail, the crime should be the same as it would be in prison. I understand what you are saying about the screening process and I agree. The problem in the rural jurisdictions is that the jails do not have the money to put in some of the things that we should have, like updated camera systems. We are looking at that now, but it is over \$50,000 and that is a lot of money for a local jurisdiction. What happened in the case I was talking about is a confederate threw the cell phone over the fence while no one was there, and the inmate came and retrieved it later.

Chairman Frierson:

Are there any questions for Mr. Shirley or Assemblyman Hansen? I see none. You are right. This is a straightforward bill. I think jails should be able to prohibit inmates from having anything that is not approved by the jail.

Assemblyman Ohrenschall:

According to the bill, someone would be guilty at the same level as their custody. My concern is if someone is arrested and in custody on a charge of felony burglary and he has a cell phone offense, but later the burglary is pled down to a misdemeanor petty larceny, would he still be facing a felony because of the cell phone? It worries me that a cell phone could be missed by a detention facility when someone is brought in and no one realizes he has it and it does not get taken away and inventoried.

Jim Shirley:

Most of the booking processes require them to change clothing, so they would not have the same clothing on. They would have surrendered their personal effects. As to the burglary scenario that you addressed, most people in the jails are felons who are awaiting trial and are generally not given a plea deal. They stay in jail because it is going to stay a felony. The people like you are talking about usually bail out. The bail is not set very high, especially in the rural jurisdictions. We "O-R" a lot of people to get them out of our jails and keep

only the really serious offenders. I am sure it is even more so in the larger jurisdictions because of budgetary constraints in housing so many people.

Chairman Frierson:

Are there any questions? I realize there is a great deal of discretion involved here as well. We understand that the state charging officers do some screening. The questions directed to you are designed to find that balance and ensure we retain that opportunity. We do not want to expose people unnecessarily to felonies. It sounds like your goal is to prohibit cell phones on inmates, and we have room for discussion on how to accomplish that.

Jim Shirley:

Yes, that is the main issue. I understand that plea bargains can change the nature of the underlying charge. Ultimately, you go back to the old saying about what a prosecutor's duty is, and that is to do justice, not harm. By and large that is what we try to do.

Assemblyman Wheeler:

In your experience, if a person is in for a class A felony and is being held over for trial, do you think convicting him of a misdemeanor for having a cell phone would be a deterrent?

Jim Shirley:

It would not be a deterrent because the nature of a misdemeanor is jail; it is not a severe punishment. We also looked at administrative remedies, but once again, since he is staying in jail, it would not affect what is going on in the prison at all if they are convicted of a felony and they go on to prison. It needs to be something that wakes them up to the fact that they cannot have a cell phone while incarcerated.

Chairman Frierson:

I will now open the hearing for those testifying in support of A.B. 212 both here and in Las Vegas.

Eric Spratley, representing the Washoe County Sheriff's Office:

I am here to express our support of A.B. 212. As you have heard, loopholes in existing statute can be addressed by this legislation which further enhances the safety of our jails and our communities throughout the state. The penalty, as has been pointed out by Mr. Wheeler, does need to have enough teeth to prohibit that conduct if possible. We are asking for your consideration not to limit it to just a misdemeanor penalty, but it should fit the current level of charge so there is something that would make them think twice about trying to get a cell phone into the jail. We have a thorough screening process, especially

at the Washoe County Jail, and our sister agencies across the state. The idea that inmates could accidentally end up with a cell phone in their possession is a very low possibility. It would be cause for concern if someone does get a cell phone into a jail system. He would be using it for a nefarious purpose, not just to contact his girlfriend.

We thank Assemblyman Hansen for bringing this important legislation forward. Please consider this bill the way it is intended.

Chairman Frierson:

You mentioned that you were in support of the penalty matching the underlying charge. Would you be in support of someone in on a gross misdemeanor being charged with a gross misdemeanor for possession of a cell phone?

Eric Spratley:

Yes, Mr. Chairman.

Chairman Frierson:

Please address the circumstances that Mr. Ohrenschall brought up about a person who is arrested on an offense that is negotiated down to a misdemeanor. Technically, if he is arrested for an offense and is then ultimately acquitted, or the offense is dismissed, under the existing bill he would still have a felony charge. How do you imagine that circumstance being dealt with?

Eric Spratley:

Going back to my other comments, an inmate cannot accidentally end up with a cell phone in the jail. He is going to have it for a specific purpose. He is going to obtain it through some means for a purpose more than communicating with his girlfriend. Even if the original charge of felony was pled down to a misdemeanor or a gross misdemeanor, the fact is he is still charged with a felony and is in possession of a cell phone. We have rules that are laid out in the very beginning of their time with us. If he ends up with a cell phone in a cell that he is in, or any other contraband, he knows he should bring it right to the deputy and turn it in. If we find it during shakedown, he should be appropriately charged and he knows he has that hanging over his head whether or not the original charge gets pled down, dismissed, or adjudicated otherwise.

A.J. Delap, representing the Las Vegas Metropolitan Police Department:

We are in support of this measure. We are in support of the suggested changes to the classification based on the conviction. In summation, it is a quick "me too." We are on board with it.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We would like to add a "me too" to A.B. 212.

Chairman Frierson:

Is there anyone else in support in Las Vegas? [There was no one.] We are back to Carson City and invite those in opposition to the bill to come forward. [There was no one.] Is there anyone in Las Vegas? Seeing no one we will come back to Carson City for anyone wishing to testify in the neutral position on the bill, including in Las Vegas.

Steve Yeager, representing the Clark County Office of the Public Defender:

I am neutral on the bill, but as has been raised by some members of the Committee, it would be appropriate where someone is pending a gross misdemeanor charge that they would face another gross misdemeanor for having a telecommunication device. In that way, the statute would be in line with the charge and custody. I would recommend that change. It sounds like everyone is amenable to that. Other than that, we remain neutral.

Chairman Frierson:

I am hesitant to bring this up, but in the context of escape, the sentence is required to be consecutive. What are your thoughts on that? It is complicated because this is only arrests, not necessarily convictions. Would this be appropriate in cases where there is already a conviction? When someone is just in custody? Would that be unnecessary?

Steve Yeager:

In a case like this, when this charge is leveled against someone, we do not know if there is going to be a conviction. The best way to do it is to leave it for the sentencing judge to decide whether this charge should run consecutively or concurrently. That would be best since it allows both the district attorney and the defense attorney to argue their positions, and the judge to look at the underlying facts to decide which sentence is appropriate. I would not be in favor of making it mandatory consecutive.

Chris Frey, Deputy Public Defender, Washoe County Public Defender:

I want to express my support for the recommendation that there be parity between the penalty and the underlying offense. It sounds like that is a noncontroversial recommendation. We would support that.

I signed in as neutral and nonspeaking, but I want to make a comment with respect to Assemblyman Wheeler's hypothetical scenario about someone who is facing a category A felony. Under the language of the bill, and even with the

parity recommendation, the penalty would not be a misdemeanor; they would be facing a felony.

Chairman Frierson:

Is there anyone else who is neutral? I see no one, so I will invite Mr. Hansen back up for closing remarks.

Assemblyman Hansen:

We are open to any suggestions on the parity issue. We will be happy to work with anyone so we will all be on the same page.

Chairman Frierson:

I will close the hearing on Assembly Bill 212. We will now move on to Assembly Bill 299, open the hearing, and invite Ms. Fiore to introduce her bill.

Assembly Bill 299: Makes various changes relating to the provision of medical and dental services within the Department of Corrections. (BDR 16-749)

Assemblywoman Michele Fiore, Clark County Assembly District No. 4:

When I was elected last year, as a new legislator I looked at what I could do to help the state. Although this is a policy committee and not a financial committee, sometimes the policies we enact affect finances. As I started touring our prisons, schools, and hospitals, I found issues that could help our directors implement better statutes and to help policy matters make our state budget more efficient. I also became aware of certain issues that we have with our medical staff.

We will go through the bill very quickly. I will state each section in simple layman's terms. [Read from written testimony ([Exhibit D](#)).]

Since this is my first time presenting, there were two words that we changed that did not get into the Nevada Electronic Legislative Information System (NELIS) in time. In section 1 where it says, "The director shall . . . ," it was changed to "may." Section 1 also says, "facility must . . . ," which was also changed to "may."

This basic bill has very simplistic language that gives the director the ability to hire doctors on a private contractual basis because, as it stands now, our doctors are exempt from working the ten-hour shifts. [Read from written testimony.]

Chairman Frierson:

Under what circumstances did you say the doctors were not there?

Assemblywoman Fiore:

Under the federal law that we have to abide by here in this state, they are exempt. Originally, when they enacted that exemption, they actually did it to allow the doctors to work overtime without burdening the state. In the last ten years, some doctors—but we do have some great doctors—have figured out that they are exempt, so they do not have to work ten hours. Some of them show up at 9 o'clock in the morning, but sign in that they were there at 7:30. We have this on camera from the facilities.

Chairman Frierson:

You just mentioned there was a circumstance where the physician was not there.

Assemblywoman Fiore:

When I toured the prisons, the physicians were not there, and the dentist clocked out at 2 o'clock in the afternoon. That is what is happening and what I saw. This is an example of what I am talking about. [Continued to read from written testimony].

Bob Bayer, Private Citizen, Reno, Nevada:

I started working in the prison when inmates were used as dental technicians. We had inmate clerks keeping records. They were doing schedules and pill call. They even took vitals at night. I have seen vast changes over the years.

I am here to testify and provide insight into A.B. 299, which is under discussion today. Let me stress that I am not employed by any private company. That is important to bring out whenever the word "privatization" comes up. I have seen some situations where people have been paid to come up and testify. I am not. I am just here as a citizen to testify on this bill and to give you some feedback.

My dissertation was on the topic of privatization, so I am very familiar with it and my experience may help you study the bill. I have another important qualification for discussing the topic: while I was director, I successfully privatized medical care in 1995, and for almost six years we ran a parallel privatization contract in Ely. Consistently, we ended up with considerable savings every year. We had no problems. The reason we privatized there was because we had hard-to-recruit positions. We could not find doctors or other skilled staff, but the company that had the contract had all positions filled all of the time. There was a penalty if they did not. I also privatized the first full

facility in the state of Nevada, and that was the women's facility in Las Vegas. While I was working as director, that was a very successful contract.

I want to stress that privatization—and that is a buzz word that gets both sides riled up—is a tool, nothing more and nothing less. Sometimes a tool stays in the toolbox and sometimes it is taken out. I am neither pro nor con on privatization in general, but you have to realize that the important part of it is the contract. Everything is in the contract. That is where you fail or succeed, and it is how you follow up on the contract.

We have perceived notions about the term "privatization." What I would like you to think about for a moment is that you probably have a mindset one way or the other. I like to call it "outsourcing" or "hiring an independent contractor." The point I want to make is that every major detention facility in this state is using private medical on contract. We have not broken into that, but I have to ask how is it that all of your major detention centers are all contracting to provide medical care. As you know, our county commissioners are bright people and they would not be doing it if they were losing money. I would ask you to think about that. Why is the state not doing it, but all of the counties are? That is something you have to weigh.

Assembly Bill 299 provides for the utilization of independent contractors for medical and dental care to replace state employees. I think the change that Assemblywoman Fiore has suggested makes the bill very workable. You have changed the "must" to "may." Now all that it does is give the director one more option. I was an exempt employee as director, but cannot picture myself working for two hours and then going home. I have a feeling the governor would have called me into his office and asked me how badly I wanted the job. There has to be a benefit to the state when you make an employee exempt. It should not all go to the employee. In a situation where tough choices have to be made, this gives the director one more tool where he can say that he wants to outsource a position and out comes a red pen, and he replaces the employee with someone who really wants the job. I would probably allow the director to circumvent the purchasing process. The Legislature gave me the authority when we privatized the women's prison to pick a vendor, and that shortened the process by probably a year. The request for proposal (RFP) process is very extensive, detailed, and long.

Chairman Frierson:

Before we get way down the road, that is a fiscal matter.

Bob Bayer:

I will move off of that now. This is a win-win situation for the Nevada Department of Corrections (NDOC). I would not be testifying here if I did not think it was a win-win. I see no downside to this bill.

Assemblyman Carrillo:

There were a couple of newspaper articles regarding an audit ([Exhibit E](#)). It seems to me if the people who are running the prisons are not watching the employees, and they are supposed to be keeping track of them, why do we have to wait for an audit to take place? I know after a while the person who keeps track of those individuals should say something instead of waiting for an audit to be done. That is just taking care of your employees. To me this looks like a ploy to throw in privatization even though you sit there saying that you are neither for nor against it, but all I am hearing from you is privatization, privatization, privatization. To me, it is accountability, accountability, accountability. It should not have to go through the audit process to get there. At the end of the day, who is watching the farm? Where is the accountability?

Bob Bayer:

You have asked two questions. I apologize if it sounds as if I am saying to privatize. What I would rather stress is a tool, a tool, a tool. I can understand where you could get the other opinion.

One of the problems is that the law about exempt status ties the director's hands. Sometimes that happens when we have laws that are passed with all of the best intentions in the world, but then there are unintended consequences to that law. Then you have to come up with another strategy. That is why I stress that this is a tool and with "may" rather than "shall" it gives him leverage should he run into a brick wall when he deals with employees who claim their exempt status.

As far as why it takes an audit ([Exhibit F](#)), I can only tell you that I have been gone from NDOC for a long time and I have watched Director Cox testify. I look at the way the department has evolved over the years and the complex issues that you have to deal with; there is so much. When I worked as director, I worked seven days a week and I could never cover every base. When I first took over, I had medical employees who were out of state and never set foot in the prison, but were collecting full paychecks. I was appointed three days before the legislative session, and opened a huge investigation. I ended up having no medical director, no mental health director, and I terminated a whole bunch of employees which made it difficult to right the boat again. Why did not someone bring it to my attention? I do not know. Someone has to bring it to your attention, since you are so busy as a correctional director. You look at the

budget, at how many employees you have, and at the issues, not to mention how many times you have to appear in federal court. We are bigger than most city governments. The director is like a city manager dealing with a lot of issues. Things like that happen and all you can do afterward is to try to fix it. I am sure Director Cox can speak more to that issue.

I ask you to understand that the business is so complex you cannot have eyes everywhere. The director does not prowl around the medical department all of the time; he is in his own office doing all of the things directors do. You have to rely on your people to bring these issues to the floor, and sometimes the law puts a brick wall in front of you and you have to figure a way around it. Assembly Bill 299 is one way of doing that.

Assemblyman Martin:

My biggest concern with this is that we talk about privatization as a policy, but you have a more substantive issue. When you make someone a contractor, you can bring in the wrath of the Internal Revenue Service (IRS). The IRS is on the warpath and they can deem all employees de facto and expose the state to payroll taxes, penalties, and bad publicity. The question that I would still have if you can get past all of that is on the aspect of control. You have independent contractors who are really de facto employees, but are acting independently. The issues that were discussed about employee management are all valid about people working two hours a day, but contractors can cheat the clock too. I am still very concerned about having contractors be a "tool" as you put it to contract out these services. It is a loss of control and has the potential of tax consequences and IRS issues. Please address these concerns of mine. I have to admit that I do not like this.

Bob Bayer:

I would say that we are looking at it from a myopic point of view. I am sure we have numerous independent contracts in the state, so the issue of whether the IRS will view it one way or another is on the table anyway. I do not see that as making a difference. I can tell you from the literature I have read, and obviously that is not my field, that is not a problem, or when I talk to other people who are weighing whether they want to use independent contractors. I have to get away from saying privatization. You are not going to avoid that issue.

As far as accountability goes, it can help you when you go to federal court, and you are going to be in federal court since the director has lots of litigation facing him, because that is what inmates do. We recognize that, and that is how we sort some of these things out. One of the issues the courts look at is the standard of care. Are you giving the standard of community care to the

inmates? I would probably argue that, in most cases, using independent contractors is a good thing because you are using community doctors.

We want doctors to practice medicine. We do not want doctors who determine medical diagnoses by being told what they will find. We stay out of that and do not practice medicine. There is a benefit to having an objective person in there. I am not saying the existing doctors are like that. This will help us; not hurt us.

Assemblywoman Dondero Loop:

I would like to go back and ask a couple of questions. First, you were talking about the audit, and then you talked about not having an RFP. That is a conflict to me because the RFP process is put into place in all public entities, and many private ones, to make sure that you not only get the best possible product, but also good prices and a clean process without favoritism. I have a problem with not going through the RFP process. You are talking about audits and then about not doing an RFP, and that is conflicting to me.

The second thing is that I would like a direct answer to whose job it is to oversee what is going on. We can all sit and say I am really busy and I have a lot on my plate, but the bottom line is that the buck stops with the director. Frankly, I was a public employee. Now I am a private employee. I do not think I was less of an employee because I was a public employee. In fact, I think it is something in me that says that I have to do the best job I can do. Does whether I am a public employee or private employee determine if I am going to be a better employee? That is the message I am getting, and I am sensitive to that.

Bob Bayer:

First, as I pointed out, there are exceptions. I understand what you are saying about why the RFP process is in place. I also noticed that part of the audit issues were issues where this exhaustive hiring process takes too long to fill a position, and time is money. Sometimes you get salary savings out of that, but not when you are talking about professionals. You are talking about lives and care and you want to shorten that process.

As I mentioned, the Legislature wanted to privatize the women's facility and they exempted me from the RFP process recognizing that it was going to cause delays. What you want to do is shorten the process. Let me stress one thing: that is not in A.B. 299 and I should not have brought that up. That is something that should be discussed in another committee. That is certainly not part of the bill.

As far as private/public employees go, I agree with you. I was a public employee and I am proud of it. I worked my butt off and generally public employees work hard, too. I understand what you are saying. When I see most of the physicians doing the same thing, I ask myself if they are doing it as a group. I have not done a study myself; I just know there is a problem.

As far as accountability goes, if it was me, I would expect my medical director to be on top of this and bring it to me saying that he has a problem. The buck always stops with the director. I would not shirk from that, but in fairness, someone has to bring it to his attention. From my point of view, the medical director is the one, and he has several ways to track employees.

Assemblywoman Dondero Loop:

Generally, both private and public employees are good employees because that is called "people." My suggestion would be that it is generally the rule of humankind, not whether they are public or private.

Chairman Frierson:

My questions were alleviated with the proposed amendment. However, would not the proposed amendment revert back to what the existing law already is? It says that the state "may," but is not required to contract? Are they allowed under existing law?

Bob Bayer:

This bill has been drafted because the current law does not allow the director the flexibility that he needs. That is the way I perceive it. I feel the director does not have the ability to walk in, take a position, and contract it out. It seems to me that this bill allows the director to do that and not worry about the personnel fallout.

Chairman Frierson:

Can you fire an employee?

Bob Bayer:

I am speaking for myself. If I had an employee who refused to do his work every day, the first thing I would do is schedule his work. I would make sure there was a routine. From my perspective, if they are working a ten-hour day, the first thing I would look at is five 8-hour shifts. If they come to work at 8 o'clock in the morning, nothing happens between 4 o'clock and 6 o'clock in the afternoon. We are counting the inmates and feeding them. There is no movement at night. If I have an employee who is adamant about being an exempt employee and insists on leaving after two hours, I would have a heart-to-heart talk with him and if he does not get the message and is not going

to be a good employee, I would definitely get a new one. You can run afoul of a lot of personnel laws unless the law gives you the authority to do it.

Chairman Frierson:

I do not know that I got an answer, but my question may be more appropriate for Director Cox. If the state is already authorized to do this and we go from mandatory to permissive, it seems that it codifies what is already the law. The scenario that you mentioned involves an employee who, under contract, would have certain procedures for discipline. That is not a practical reality. Of course, if they are contract employees, you certainly could fire them. At the end of the day, my question is, are we proposing a bill for something we already have the authority to do? I hope we will get that answer at some point.

Assemblywoman Spiegel:

The question that comes back to me is related to oversight and management. With this, if you are privatizing, this puts another barrier in place in terms of oversight. The director's ability to oversee what is going on is hampered by someone else in the middle, and he cannot have close oversight. I also work in the private sector. I have worked as a private contractor both individually and through a corporation. When it is as an individual, I know the person at the company will be my direct supervisor, similar to being an employee. If I am working through another company, I have additional management and it takes me a step further away from the client and the people responsible for the work. Rather than giving more accountability, sometimes it gives less accountability. It is much like playing telephone when you are a child: by the time the secret gets to the end, the whole message is changed. I wonder if you would speak to that.

Bob Bayer:

I understand what you are saying and it is a valid concern. However, when you look at the way the organization is structured, the medical director is responsible for the physicians. The medical director would have a discussion with the physician saying that there is a problem, and then do what needs to be done. I would expect that medical director to do what he should be doing with all of the employees. I have already said that. He should ensure everyone is doing what they are supposed to be doing and that there is a team effort.

I can tell you how I privatized when we did it. For example, at the women's prison, I had an auditor right there. I gave him benchmarks of what I wanted to know on a daily basis. I had a report submitted to me so I could check things off as they were done. He was an on-site auditor paid for by the company doing the privatizing. In this case, I would use the medical director because you do not want to add any more costs. Certainly I would have a discussion with

the medical director about what kinds of benchmarks I want to see. That is what a medical director should be doing anyway. It is a team. Just because the person is being paid out of a different account does not mean they are not part of what we are trying to do in the prison system.

Assemblywoman Spiegel:

The question that keeps going through my mind is, if you work with a private for-profit entity—which is what we are talking about—and you add in an additional layer, how is it possible to achieve any cost savings for the state?

Bob Bayer:

That is a great question and I can give you an example. There are reasons private companies can make money when the state cannot do it for the same cost. Private companies that contract medical services are large, wealthy companies. One example is Ely. You will have a doctor who is recruited for a certain period of time in Ely. How do they recruit? They can tell a doctor if he gives them two years in Ely, his next assignment will be Miami. The doctors like that.

Another incentive is that some doctors do not want to have the stigma of working for the state. By working under contract, they are still considered private doctors although they are being paid by the state. They are also given bonuses. If I am a doctor at home on a Friday night in Ely and an inmate gets cut, I will get the call and will go in to stitch the inmate up. Why? Because I know that if I send him to the hospital, I am going to get a \$4,000 to \$5,000 bill, and I would only stress out the warden because he would have to call in overtime help to transport to the hospital. The doctors get their bonus based on what is spent, or rather what is not spent. Public employees get nothing for saving money and in most cases, they will simply answer the phone and say to send them to Carson Tahoe Hospital, or wherever. Chances are they will not go in and do the stitch up.

I think pharmaceuticals are another example of saving money on a larger scale. They blister pack, which is great for security and control. There is no waste and they buy in volumes that you cannot imagine. They lower their cost, and it gets cheaper, and that is why you privatize.

Assemblywoman Spiegel:

It certainly answers my question. I think I have solved some issues with that and we can talk about that after the meeting.

Assemblyman Ohrenschall:

My question has to do with the sampling. They sampled 48 percent of the full and part-time physicians, dentists, and psychiatrists. I wonder if the results may be skewed since we did not audit every physician in all NDOC facilities. How reliable is it? Can we really count on that since we did not look at all of the physicians, dentists, and psychiatrists?

Bob Bayer:

I think you will find that when you do surveys, sampling is the best, most efficient, and reliable method. However, as you pointed out, this is a small group of about 33 doctors. The director would probably be better to respond to that, but that is why sampling is used and why it is usually done on a random basis. You see it all of the time in politics because it is pretty accurate.

Assemblyman Ohrenschall:

I can understand if there were 10,000 doctors, but with such a small group, it worries me.

Chairman Frierson:

I invite those who are in support of the bill to testify now. Please come forward, both in Carson City and Las Vegas. Seeing no one, I will go to the opponents to the bill.

Keith Uriarte, representing American Federation of State, County and Municipal Employees Local 4041:

I have submitted my testimony ([Exhibit G](#)) and you have a copy of it. I want to add a few things. In my written statement I attempted to avoid the historical events that took place with Nevada's experiment in privatization. However, hearing the previous testimony as examples of success, I would encourage you to do a Google search on health care at Ely Prison, or the privatization of the women's facility in Nevada—both disasters. If this is the expert on how privatization works, please. Those two examples speak for themselves.

Regarding the audit, I was present at the Executive Branch Audit Committee when this audit was presented and I heard the same type of "excuses" why this issue is before you today. Some federal law says if someone is exempt, they do not have to work. There is another 1,000 state workers who are exempt from the Fair Labor Standards Act. By no means does that law say that exempt employees can collect a paycheck, but not perform the duties that are expected of them. This is an issue of a word that is used throughout the audit, and that word is "oversight." In the audit, on page 2, there is an organizational chart of the prison system. You will note immediately under the director on the far right side is the medical director, and then the medical division. It is not a complex

division. I have made this presentation in a number of committees and in front of the Board of State Prison Commissioners. This is an issue of oversight; this is an issue of administration and management failing to do what they are charged to do. If there is a question of physicians not performing their work, take a look at who is not performing his work by allowing the physicians not to perform theirs. This is the administration and this is an issue that needs to be addressed administratively by the Board of State Prison Commissioners. This is not an issue that should be legislated.

Vanessa Spinazola, representing the American Civil Liberties Union of Nevada:

I will admit my testimony is slightly deflated by the change to "may" in this bill, but there are a couple of things worth noting.

The American Civil Liberties Union (ACLU) of Nevada is here because, when the state deprives an individual of his liberty, they are constitutionally required by the Eighth and Fourteenth Amendments not to inflict cruel and unusual punishment. In the past, the NDOC has failed to ensure basic levels of medical treatment. The oversight of former Director Skolnik allowed at least one man to die. Patrick Cavanaugh was deprived of insulin for three years and he basically rotted to death of gangrene in Ely State Prison. The ACLU filed suit against Ely State Prison in 2008 challenging these constitutional violations. It is a settled case and there is a copy of our statement online. We have since monitored the medical treatment of prisoners in Ely and the NDOC, and we have seen an increase in the level of care. The NDOC has made a lot of effort to improve their care.

As a result, there has also been a decrease in the number of volunteers on death row. I point this out because you may have heard that 11 of our last 12 death row executions have been volunteers. Nevada is an extreme outlier. Across the nation, normally there is a 12 percent volunteer rate for death row. Here it is the exact inverse. The reason is that death row inmates are kept at Ely State Prison, and they basically volunteer to die because most of them have been sick and have not received medical treatment, so they would rather die. That is the correlation between those two things. That is how bad the health care has been at Ely State Prison.

I said all of that to say that a private company is going to do this as the lowest bidder. They are going to give less medical care at the prison than what the NDOC is already giving.

I also want to point out that the state is still on the hook for care that a private company will provide. If a private company lacks oversight as is suggested by

this bill and continues to provide horrible care, the state will get sued as the responsible party.

I realize this is a discussion of a tool, but we propose that you do not pass this bill, and permit the NDOC to continue the increased levels of care they are now providing. We have not had any volunteers on death row in the last two years and that shows the great steps they have made. We have been monitoring their progress.

I have a couple of other points to make about privatization. Private companies will be less accountable to the public because we will not be able to make public record requests. Right now, we can do a public records request from the NDOC to see what is going on. We will not be able to do that. If this has to do with one or two bad employees, that is a management problem and not something that needs to be legislated. There was discussion that the director cannot have eyes everywhere; if you privatize, he cannot keep his eyes on the private company. This bill provides for contracting, but does not provide for minimum standards, or provide that the state can break the contract if the contractor is not compliant or is not providing proper care. If you believe this is a good idea, I suggest you include those two provisions, and that the state is not responsible for paying lawsuits that may ensue. At the end of the day, private companies are here to make money—taxpayers' money.

Assemblyman Duncan:

I am curious about your assertion that death row inmates volunteer to be put to death. Is your assertion documented anywhere that they would rather die than face the dire health care? Where are you getting your information and where is that documented? I would appreciate your providing that information to me.

Vanessa Spinazola:

It is a correlation that has been made. There are people who have studied this issue, and there is a podcast you can listen to. In the course of the lawsuit, Dr. Noel, a doctor practicing in the area around Ely, went into the state prison and looked at 35 individuals who have terminal illnesses and are near death. There is a 21-page report that he wrote, which was submitted as part of the lawsuit that I can also send to you.

I want to point out that, to my knowledge, no specific individual has said that he wants to die because of the medical care, but it is a strong correlation between the two.

Assemblyman Duncan:

Issues such as these get emotionally charged. There are merits on both sides of the argument. As a matter of policy and the process that we are going through, sometimes the assertions are unfounded. I do not know if these are unfounded assertions since I still have to look at the documents. Throwing those statements out makes it a very charged statement and we should caution ourselves from doing that on both sides. At the end of the day, both sides want to be able to provide care for inmates, and that is the heart of the argument. We are making a policy argument about what the best way to provide care is. Also, we need to look at the needs of the state, because there are lots of state needs, and we have limited resources. This is a policy debate and I would hate to ascribe mal intent to anyone in this, so we need to keep to the policy arguments.

Vanessa Spinazola:

It is not an unfounded assertion and I will send you the information that you requested. I said all that to show how far the NDOC has gone on their own with the budget that they have. A private company that is paid less money may do a worse job than what we have seen in the past. It is a correlation.

Assemblyman Wheeler:

What I am seeing is a tool that middle management and upper management can use to go either way, especially with the change that Ms. Fiore brought up in the amendment of "shall" to "may." With the assertions about oversight and management, would this bill not give you better oversight, better management, and more tools? With money aside, would it not actually allow the director to get the best possible care at the best possible price?

Vanessa Spinazola:

I am not sure. My understanding of how the RFP process would work, and Assemblywoman Dondero Loop pointed out some information on the RFP process that I am not familiar with, is that the state is required to take the lowest bidder. My concern is that with the lowest bidder you are going to get the lowest level of services. Additionally, as the bill and NRS Chapter 209 stand, they do not provide what the state should look for in a contract, and they do not provide for oversight. If the Committee is interested in Assembly Bill 299, I hope the state would build in oversight in the contract, because I do not see it in the NRS. I am particularly worried that it could ultimately cost the state more money if there is no accountability and oversight. If the lowest bidder does not do a good job, the state can still get sued and would be in violation of the ongoing monitoring that we have.

Assemblyman Wheeler:

I understand your answer, but where we are off kilter here is that we are looking at employment contracts, not bidding for organizations to come in. What we are looking at is employment contracts where the administrator can go out and find an employee and do a contract with that employee. We are not looking at bids. We are looking at hiring different employees, but doing it under contract. I do not think there is any "lowest bidder" involved here.

Vanessa Spinazola:

The same principle applies. If the state's goal is to save money, the underlying incentive is to find the person who will do it for the cheapest amount of money.

Assemblyman Wheeler:

I do not think the state's goal here is to save money as much as it is to improve efficiency and get the most for our dollars. I think that is the intent of the bill and we are getting away from that. I hate to say it, but Mr. Bayer got us away from it with erroneous testimony talking about privatization. This is not privatization. To me, this is hiring the best employees. They may not be members of unions, but they may be the best employees.

Chairman Frierson:

Is there anyone else in Carson City in opposition to Assembly Bill 299? What about in Las Vegas? I see no one. We will now hear testimony in the neutral position.

Clifton C. Maclin Jr., Private Citizen, Carson City, Nevada:

As full disclosure, I am Dr. Karen Gedney's husband, but I am here as a private citizen.

I have lived in Carson City for 27 years. I have been a financial advisor to Carson Tahoe Regional Health Center for the better part of the last 25 years. For the last eight years, I served on the Board of Trustees. I still serve on the Investment Committee, Finance Committee, and Health Care Quality Committee. I am educated as an accountant and have a master's degree in finance. Prior to starting my own investment management business I was an investment banker for 13 years in New York City. In that capacity, I want you to understand that my mindset is that of an analyst. As a financial analyst and investor, my mindset is to always look for an opportunity, to look at things from the point of view of when things do not fit, or when there could possibly be a problem.

The reason I am here is because I want to address the issues of the process that you, as my representatives, are going through. What I really want to ask

you to do is to ensure that you do not throw out the baby with the bath water. In that context, particularly because of the changes that have been made in Assemblywoman Fiore's bill, you have the option of keeping what works and getting rid of what does not work.

That is part of the reason I am neutral on this bill. When you go through the process of deciding what works and what does not work, I am concerned about your calling people who have expertise in corrections and health care, but do not have a financial interest. If you are going to talk to people who represent independent contractors or private contractors, I would recommend that you ensure they have at least a five-year track record. I say that from my experience on the hospital board. The greatest dangers you will find when making an investment decision, or a policy decision on how a department will operate, is making that decision based on things that seem to provide an immediate advantage; however, the real problems may not show up for five years or more. As an investor, when I am looking at a company I may want to invest in, if it does not have a five-year track record of success that I can measure literally on a monthly or quarterly basis, I am not going to invest in it. When making a decision about going with this bill as proposed or changing it, I would do it with that mindset. Stick with things that you can measure, and things that you can subsequently investigate on your own.

I am going to give you one fact that I became aware of a couple of years ago through my work on the hospital board, because the hospital provides medical consulting services to the prison. From 1982 to 2010, the Nevada prison system had the lowest rate of increase in health care costs than any state in the Union. Overall, in that period of time, health care costs in Nevada dropped by 17 percent. When I learned that you were considering making major changes, the first thought that came to my mind was that this is a system that has basically worked. My wife would be the first to say that if there is a way to make the system more efficient, and to make people accountable—everyone must be accountable—do it. As a taxpayer, I see it as your responsibility to ensure everyone is accountable, and that is what I expect to see.

Chairman Frierson:

Now is the time for everyone who wishes to speak on Assembly Bill 299 to come forward.

James "Greg" Cox, Director, Nevada Department of Corrections:

First of all, I have listened to questions and testimony today. I understand that this is a very complex issue. We identified this problem some time ago. Yes, there was an audit; yes, there is a Fair Labor Standards Act (FLSA) that was passed by Congress; and yes, the FLSA does talk about hours for specific

people, including physicians. The state and the NDOC, as employers, have the ability to deal with specific staff due to the FLSA. Assemblywoman Fiore explained the issue of the exempt status of those employees. It is a critical problem for us, but this is not a problem with all of our physicians. We believe in accountability and have implemented work performance standards, scheduling, and job specifications for our medical staff. I can tell you that we have had the same process for years. The process that we currently have with exempt employees is how the NDOC has managed its physicians, psychiatrists, and dentists for a while. We believe in responsibility for those individuals and are holding them accountable and responsible. We have looked at other options and, as I have said before and testified before other committees, in this instance I have the ability to go to a private entity or contractor and hire physicians. We have been trying to do that for one of our facilities for the last ten weeks. Unfortunately, I have not been able to fill that position. Chuck Schardin, our medical administrator, will tell you that another difficulty with the position is that it pays more than we currently pay our physicians.

There has been a lot of discussion that Dr. Gedney is one of our better physicians, and I would agree. I would think public or private she is a very good physician and it would not make a difference. As the ACLU has testified, in the last two to three years, the department has moved forward with providing good medical care and services for the inmate population. That is our responsibility and what I am held accountable for. [Chairman Frierson left the room. Vice Chairman Ohrenschall assumed the chair.]

We have testified frequently on this topic. I will assure you that we are administrating and managing our operation. The difficult part of our current situation is replacing those physicians whom we are holding accountable and responsible with contractual positions. We have not yet been able to do it, but have contacted the Department of Health and Human Services and they have locum agreements with eight other companies, and we will continue to work with them in providing physicians for our operations.

I certainly would agree with the audit. I believe audits are generally fair; however, as Assemblywoman Dondero Loop's and Assemblyman Ohrenschall's comments regarding the audit, we know some of our other higher performing doctors were not in the audit. We have seen improvement. Those who are not improving are being held accountable and are looking for different positions because of the scheduling, work performance standards, and job specifications that we provided our physicians.

Vice Chairman Ohrenschall:
Are there any questions for Director Cox?

Assemblywoman Diaz:

When we currently contract doctors to be employees with the Department of Corrections, are they expected to work full shifts? Are they on call? Can you please shed some light on that? [Chairman Frierson reassumed the chair.]

Greg Cox:

Yes, they are scheduled. The contracts with them would include the hours that they are being paid. We would not pay them for any hours that they did not work. The medical administrator, Chuck Schardin, did look at the cost per hour, the physician costs, and dental costs. What we found from our initial snapshot is that we would pay contract doctors more than we currently pay our people.

Assemblyman Carrillo:

When they found the problem, why did they not look at the entire group for the report versus making assumptions based on a small sampling?

Greg Cox:

We did not conduct the audit. I certainly appreciate the fact that they did. We looked at the information they provided and we have looked at each individual physician, dentist, and psychiatrist that we have. I have asked them to come back again in six months and look at all of the medical providers.

Assemblyman Carrillo:

I would assume that, being the director, you would want everything to come out on the table unskewed.

Greg Cox:

I agree with you. I have a number of very good physicians, including Dr. Gedney and others. They work the specified hours and schedules and work very hard for the state.

Chairman Frierson:

Is there anyone in Las Vegas who wishes to offer testimony in a neutral position? There is no one, so I will come back up to Carson City and invite Ms. Fiore back for any closing remarks she may have.

Assemblywoman Fiore:

This is my first bill testifying in front of my own Committee, and it is scary, but I would like to thank everyone for testifying, including my opposition. Kudos to our director, Mr. Cox, who is doing an incredible job. He has returned \$7 million to our General Fund. That says a lot for how he runs our state prisons. This bill was supposed to be simple, basically excluding the exempt status and giving our director a tool to continue his great service to our great state.

Chairman Frierson:

With that I will close the hearing on Assembly Bill 299. I will open the hearing on Assembly Bill 313. I see Assemblywoman Pierce here and invite her up to introduce her bill.

Assembly Bill 313: Prohibits the installation or use of a pen register, trap and trace device or mobile tracking device without a court order in certain circumstances. (BDR 14-421)

Assemblywoman Peggy Pierce, Clark County Assembly District No. 3:

Assembly Bill 313 has to do with cell phone tracking by law enforcement. What the bill says, in a nutshell, is if law enforcement wants to track a cell phone, they need to get a warrant.

A year ago, the national American Civil Liberties Union (ACLU) requested a lot of information from law enforcement agencies across the country. They received the information and what it said was that law enforcement agencies across the country—local agencies—were randomly tracking cell phones in ways that had nothing to do with a particular investigation. They were casting a very wide net. That is what brings this bill.

The United States Congress and about a dozen states are considering legislation to tighten the restrictions on the use of cell tracking, as this bill will do. The one I read about is a bipartisan bill in Texas and is currently moving through the Texas Legislature. *The New York Times* did an extensive article on what the ACLU search found, including the documents found. I will highlight a couple of paragraphs. This is from *The New York Times* of March 31, 2012:

In cities in Nevada, North Carolina and other states, police departments have gotten wireless carriers to track cell phone signals back to cell towers as part of nonemergency investigations to identify all the callers using a particular tower, records show.

In Nevada, a training manual warned officers that using cell tracing to locate someone without a warrant "IS ONLY AUTHORIZED FOR LIFE-THREATENING EMERGENCIES!!" The practice, it said, had been "misused" in some standard investigations to collect information the police did not have the authority to collect.

There has been some abuse. I think law enforcement should only be tracking cell phones if there is an ongoing investigation. I do not think they should be on a fishing expedition with the cell phones of everyone in this room and everyone in this state.

I have the written testimony from the Maryland General Assembly Hearing on House Bill 887, which is the testimony of Julian Sanchez, Research Fellow, Cato Institute on February 26, 2013. Mr. Sanchez ends up by saying:

Mobile tracking is clearly a powerful and valuable tool for law enforcement—and, indeed, for citizens in emergency situations who wish to be found, and suspects who will welcome an additional means to establish their innocence by voluntarily granting access to location data. But without a carefully crafted system of judicial checks, subject to appropriate exceptions, it creates an architecture for government surveillance of the citizenry—on a potentially unprecedented scale—no less inimical to ordered liberty than the general warrants condemned by our Founders. With balanced legislation, happily, we can preserve the legitimate uses of this tool for law enforcement without sacrificing our core right to be free of unreasonable government scrutiny.

That is the impetus for bringing the bill. I will go through the bill quickly. The first part of the digest talks about deleting some federal statutes. The federal statute has not been updated and there is a bipartisan effort in Congress to do that, but it has not been done. That is why we had to get rid of the federal part so we could update this. Throughout the whole bill, there are references to things called "pen registers." My understanding is that they are the old way in which someone could listen in on a landline and determine who you were calling or where the call was coming from by the little clicks. This is old technology, including track and trace devices which is another similar device that deals with landlines.

Sections 2 through 9 are basic definitions. The part that I wanted to ensure is in here is the part that talks about communication from a mobile tracking device. Section 10 is exceptions to getting a warrant that has to do with the communication carriers. Section 11 and 12 talk about how to get a warrant, what the parameters of the warrant are, and how to get an extension. Section 15 talks about what happens when a request for a warrant is denied, and what the judge is required to do. Then it goes on to say you cannot share the information that you get from the tracking. The text of the repealed sections is next, and that is pretty much the bill.

As I said, the ACLU did a lot on this on the national level. I invited the ACLU to join me today, but I did not get my ducks in a row in time.

Assemblyman Ohrenschall:

Right now, as far as you know, if a law enforcement agency wants to listen to someone's phone conversations, do they have to go to court and get a warrant?

Assemblywoman Pierce:

That is the implication from what *The New York Times* article says.

Assemblyman Ohrenschall:

Has a good reason been given that tracking someone using his cell phone should be warrant free?

Assemblywoman Pierce:

No, I have not heard one.

Assemblyman Ohrenschall:

The research I have done on this shows a lack of uniformity. Some law enforcement agencies seek the warrant, while others do not. Sometimes there is a lack of uniformity within the same agency. The phone providers are not sure if they should cooperate without a warrant or if they should not. This bill will bring uniformity to this area so everyone will know what the rules are, which will be better for the phone companies, the law enforcement agencies, and for our civil rights.

Assemblywoman Pierce:

Certainly, the best solution would be federal legislation. It would be good for Congress to update the federal legislation to include cell phone tracking, but things are moving pretty slowly back there.

As for uniformity, the Texas bill goes further than mine does.

Assemblyman Ohrenschall:

I do not mean uniformity among the states, but uniformity among law enforcement agencies in our state. I think your bill would bring that. At least phone companies would know what a proper request would be.

Assemblywoman Pierce:

Yes, there should be a statewide rule in statute, which involves law enforcement. One of the things that came out of the ACLU study was that some of the phone companies were making some serious money doing this. We cannot count on the carriers to tell police officers that they need to get a warrant. They charge for every search at varying degrees across the country. The amount of money they are making is significant. This needs to be in statute.

Assemblyman Wheeler:

I agree with you, but have a couple of questions for clarification. Right now, a police department must have some type of warrant for any electronic surveillance. I assume this would fall into electronic surveillance. I assume that this cleans up the language. Is that what this is about?

Assemblywoman Pierce:

This modernizes it. The things that are mentioned in current statute are old technology.

Assemblyman Wheeler:

I look at section 10 where it says "a person shall not" and I wonder if this will preclude me from tracking my grandchild around Reno on Pub Crawl night.

Assemblywoman Pierce:

I do not know. I will have to get back to you on that.

Assemblywoman Spiegel:

I was glad to see that this was written broadly enough that it includes technologies such as OnStar, and other types of automotive-related technology that we may have in the future in this state. This would also cover people who come from other states that have things like E-ZPass installed. Even though we do not have it here, they could still be tracked by law enforcement from other states. I like that this is included.

Chairman Frierson:

My only question involves section 15 and where the provisions came from that require notice to the person being tracked. Why would law enforcement need to notify a person who was subject to this. It looks like, in section 15, if the application is denied, the person has to be notified; and if the application is granted, upon the termination of the period for which the application was granted, they would have to be notified. Was that in the Texas legislation and what value does that bring to the process?

Assemblywoman Pierce:

This did not come from the Texas legislation. Texas' is more extensive. I think this came from Maryland. I would have to get back to you on that. I assumed that this was boilerplate verbiage about warrants so I will get back to you.

Chairman Frierson:

I have a vague recollection of this being the case when it comes to bank accounts and search warrants. I am not certain if it exists in any other search or surveillance scenario.

Assemblywoman Cohen:

I believe you mentioned in passing about emergency situations. Does this affect the police's ability to find a person who has gone missing through the pings on their cell phone? Are they forced to jump through any hoops to get the warrant?

Assemblywoman Pierce:

No. This makes it still possible in an emergency situation.

Chairman Frierson:

I see no other questions for Ms. Pierce, so I will now invite those who are here in support of the bill to come forward. I see no one, so I will invite those in opposition to Assembly Bill 313 to come forward.

A.J. Delap, representing the Las Vegas Metropolitan Police Department:

From our perspective and our knowledge of it, this bit of legislation is very technical, far more technical than the skills I have to relay it. With that being said, we have Lieutenant Guedry in Las Vegas who will be able to address some of the issues that are brought up in this measure. I am going to ask him to make his comments, and then Sergeant Ames from Washoe County will speak. Lt. Guedry is the lieutenant over the technical surveillance section. Their bread and butter is directly affected by this measure. He is our expert on this.

Gawain Guedry, representing the Las Vegas Metropolitan Police Department:

I am the section commander for the technology section of our agency that supplies tools in support of both criminal investigations and public safety responses.

There are several comments of Assemblywoman Pierce that I would disagree with. If you will afford me the opportunity, I will go through some of the primary concerns that I have, then cover some questions that came up today.

As communication platforms advance, there are differences in terms of technological capabilities and statutory provisions. Currently, the United States Congress is hearing matters on the Electronic Communications Privacy Act, which includes pen register information. What concerns me is if we make some changes to our state law before having a full understanding of what may take place at the federal level, it may preclude what we can do. I will give you a couple of examples. Our current pen-register law, codified under *Nevada Revised Statutes* (NRS) 179.530, references the Pen Register Act and federal laws, which are in Title 18 of the *United States Code* (U.S.C.), Sections 3121-3127. I believe a member of the Committee spoke specifically about emergencies and our ability or inability to continue with that practice. I

can tell you that the federal law specifically states that our state law has to authorize us to do an emergency scenario. The redaction of NRS 179.530 would eliminate that, and from what I can see, that is not included in the new draft.

Let me give you a couple of examples. In my business, we are called upon frequently to help locate endangered individuals. A couple of quick references that I can tell you about is that we helped find a teenage juvenile who had intended to cause harm to himself. When we located him, he was in a playground with a .357 gun ready to end his life. It was our ability to declare an emergency and use the investigative resources from the phone company that enabled us to find this individual. From an investigative aspect, we helped resolve a case where a female had been taken hostage by a pretty serious offender. It was the emergency provision that allowed us to do that. We successfully helped this lady get away from that individual.

In addition to the emergency provision, under the definitions of "pen register" and "trap and trace," we have removed several aspects that are included in the federal law. I do believe the federal laws are updated frequently, maybe not as much as we would like. In the Patriot Act, there were provisions made to the Pen Register Act. Specifically, it talks about signaling, processing, and encoding information. I am not an attorney, but if our law does not include that, and my read of our current draft shows it does not, it would limit us to tone analysis. A pen register in its simplest form is the numbers being dialed by an individual, and a trap and trace are the numbers calling into an individual.

I believe the new draft just talks about a device; federal law talks about a process. In the old technology, many years ago, a pen register and a trap and trace were pieces of hardware that were placed inside switching stations with the phone companies. They do not capture content. Content would be any message discussed by the parties in the communication. They only capture the numbers dialed to and from. The current law, when it talks about a device, may cause a problem for us as well, as most of this is a software-based solution. There are no more devices that are actually placed in a phone company's switching station. It is more just a software solution.

My second concern deals with the amount of time in A.B. 313. Federal law allows up to 60 days for a pen register to be provisioned. I believe a tracking device under 18 U.S.C. § 3117 is 30 days. Our current draft would restrict that to 30 days. Some of our investigations take a while and if this bill passes, we would probably have to provision numerous pen registers depending on the type of investigation. There is no standardized fee structure with the phone companies, so that means they may charge us a full set of fees every single

time we provision a new pen register. Obviously, we are having some financial concerns across the state and some agencies may find it difficult to do the investigations at the level that needs to occur simply based on financial decisions that would occur if they have to provision more than one pen register.

One of my other concerns deals with jurisdiction. In the federal law, you will find a reference to a "court of competent jurisdiction," which I believe specifically refers to district courts. It looks like one provision in the current draft talks about limiting jurisdiction on a pen register to the geographic region of the court, but the mobile tracking device would be expanded. Technology knows no borders. A person with a cell phone can easily travel from Clark County to a jurisdiction in California. If we have a pen register provisioned and are receiving data, but we do not have the authorizations listed in this law, we may not know that we are going to violate it until such time that a phone call is made. Then we would determine that it was outside of the jurisdiction of our local court.

Those are a few of our concerns. We have several more with this draft. We understand the desire to establish privacy protections in our ever-evolving digital world; we are also concerned with placing cumbersome restrictions on our ability to utilize digital evidence to investigate crimes and ensure public safety.

We welcome an opportunity for open dialogue between all stakeholders as we progress. We look forward to helping craft legislation that enables all of us to be comfortable with the needs of those we serve.

Chairman Frierson:

Are there any questions? I see none. I have to say that most of your comments seem to be offers of amendment language as opposed to opposition. You said you had other concerns. If others do not address them and you want to reduce them to writing, it would be more helpful than a blanket statement that you have other concerns. If there is an appetite to offer some suggestions or modifications that have occurred at a federal level, it is customary to talk to the sponsor and I am sure Ms. Pierce would be open to having that conversation. It sounded like most of the concerns were of a technical nature.

Gawain Guedry:

That is not a problem. We are more than willing to work as we advance any possible legislative changes.

Eric Spratley, representing the Washoe County Sheriff's Office:

I am here in opposition to A.B. 313. As you have heard, this is a very technical bill and has a number of broad-reaching mechanical and procedural issues,

which would move our state statutes away from established and tested federal law and policy in spite of law enforcement's critical and often life-saving investigative ability in this arena. This is an arena that is outside of my wheelhouse, so I have with me Sergeant Bill Ames to discuss particular points of our opposition.

Bill Ames, representing the Washoe County Sheriff's Office:

I currently supervise the narcotics task force in Washoe County.

First, I would like to acknowledge the comments from the lieutenant from Las Vegas. I agree with everything he said, and I have some additional comments. The most important issue in this bill for Washoe County is the inability to obtain data from a mobile tracking device in the event of an emergency. The bill does not contain any type of language that allows for that, but the federal law does. That gives us the ability in an emergency—if someone is out hiking in the hills and gets lost—to locate him and his phone in the hills. If we had to follow this bill, there would be a delay of a number of hours. This would all have to be done during regular business hours because the contacts, the cell phone companies, have legal departments that are only open during business hours, and we have to provide them with copies of search warrants before they will give us the data we are looking for. Attorneys are not going to be in the office if we have to go out in the middle of the night.

My second comment is that I share the concerns regarding section 15. If a denied affidavit has to be turned over to the target of an investigation, this would compromise that investigation and endanger the lives of any undercover officers or informants. The federal government realizes this and does not require this type of notification.

My next concern is about the pen register. Looking at NRS 179.530, it was an actual device that was installed on a phone line. Again, we do not use that type of technology any more. It was 1989; 24 years ago. We are now using computers that are able to get this information. Under this current bill, the way the pen register is defined is that it is only a device, not the process that is currently being used to obtain that data. Under the federal statute it has been modified and includes the process in which you obtain that data.

Next is the number of unintended costs for courts and law enforcement that the lieutenant has already spoken about. As technology changes, we need the ability to respond to those changes in a timely manner. If new court decisions arise, we are able to immediately comply with any new decisions on the federal level within the appropriate time frame. If we have a bill that limits us, we

would have to wait until the Legislature convenes before we could come back and make legislative changes.

Chairman Frierson:

With respect to some of those, would you be amenable to an emergency provision being added to allow for those instances?

Bill Ames:

I think we should rely on the federal law. The federal law gives us that ability, and that is what we have been complying with since we started doing these.

Paul Villa, representing the Peace Officers Research Association of Nevada, Inc.; and the Reno Police Protective Association:

We are also in opposition to this bill. I will rely strongly on the commentary of Sergeant Ames. I would just add that, in my 23 years of experience as a Reno police officer—17 of those years dedicated to investigations on gangs or financial crimes—I can only recall two instances where these tools were used. In both instances, we relied on federal law. I would ask that you very strongly consider Sergeant Ames' plea at the end to rely on federal law.

Chairman Frierson:

There is no one else in Carson City in opposition. Is there anyone in Las Vegas who would like to provide testimony in opposition? I see no one. Is there anyone who would like to provide testimony in the neutral position?

Vanessa Spinazola, representing the American Civil Liberties Union of Nevada:

We are neutral at this time. I have corresponded with Assemblywoman Pierce about a number of amendments that we might want to include. I wanted to flag for the Committee that Senator Ford has Senate Bill 268, which is called the Kelsey Smith Act. That deals with all of the emergency situations that we are talking about. It is being heard Monday in Senate Judiciary. We have also worked with him, so perhaps there would be some way to work together with these bills.

Assemblywoman Peirce:

I had no intention of removing the ability to use this technology in case of an emergency. That is certainly something that we will fix. I will look at Senator Ford's legislation and I would be happy to work with everyone who came up on the technological fixes.

Chairman Frierson:

With that I will close the hearing on A.B. 313. For our last bill, I will open the hearing on Assembly Bill 352.

Assembly Bill 352: Revises provisions governing hoax bombs. (BDR 15-510)

Brittany Shipp, Policy Assistant:

I will give you a brief overview, as well as introduce Mr. Bob Lawson with the Las Vegas Metropolitan Police Department to provide some insight into the need and the intent of this legislation.

Existing law provides that it is a gross misdemeanor for a person to manufacture, purchase, possess, sell, advertise for sale, or transport a hoax bomb if the person leads another person to believe that the bomb is real. This bill adds that, in order to be guilty of this crime, that person must have the intent to make a person believe that the hoax bomb is an explosive or incendiary device; cause alarm or reaction by an officer or other agent of public safety; or cause the evacuation of a building.

The bill also revises the definition of a "hoax bomb" as anything that by its design, construction, content, characteristics, or representation appears to be or to contain an inoperative facsimile or imitation of an explosive or incendiary device.

This bill also increases the penalty to a Category C if the person commits a crime or the furtherance of another felony, or a Category E felony if it causes the evacuation of a building.

I would like to invite Mr. Bob Lawson in Las Vegas to provide some background on the necessity of this legislation.

Robert Lawson, representing the Las Vegas Metropolitan Police Department:

One of the reasons that we are looking at the hoax devices is that we have had numerous incidents where a felony was committed where they brought a device into say a bank and said, "This is a robbery and I have a bomb." It creates a whole other situation of response for public safety and closure of other businesses or roads. In itself, a bomb threat is a felony, but having a suspected device is just a gross misdemeanor. We have had situations, such as at a hotel casino where the device was placed on the power box outside of the theater doors right after the Aurora, Colorado, shootings, which caused evacuations and lockdowns. Another incident was when a drug dealer in Sandy Valley caused closure of one of the main roads for five hours when he set out several suspected devices to keep other drug dealers away from his property. There was no threat to the public, but he placed these devices which caused a response and taxed the volunteer fire department to shut down the roads and stand by while mediation was taking place.

In essence, with these devices, it is now a gross misdemeanor on a felony and we would like to enhance that due to response, business closures, residential closures, school lockdowns, et cetera. We have had numerous incidents of this in the last several years.

Chairman Frierson:

This bill is straightforward and we can see what is trying to be accomplished. I will invite anyone to the table who is here to testify in support of A.B. 352.

Kristin Erickson, representing the Nevada District Attorneys' Association:

We are in support of this bill.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:

We are in support of this bill also.

Eric Spratley, representing the Washoe County Sheriff's Office:

We are also in support of this bill.

Chairman Frierson:

Is there anyone else in support? I see no one. We will hear anyone in opposition to the bill. [There was no one.] Is there anyone to testify in the neutral position? Seeing no one, does Ms. Shipp have anything else she would like to offer? [She shook her head no.]

I will now close the hearing on A.B. 352 and open up for any public comments if there are any here or in Las Vegas. Seeing no one, I will adjourn the meeting [at 10:30 a.m.].

RESPECTFULLY SUBMITTED:

Karyn Werner
Committee Secretary

APPROVED BY:

Assemblyman Jason Frierson, Chairman

DATE: June 4, 2013

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 26, 2013

Time of Meeting: 8:11 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
<u>A.B. 212</u>	C	Assemblyman Ira Hansen	Written Testimony
<u>A.B. 299</u>	D	Assemblywoman Michele Fiore	Written Testimony
<u>A.B. 299</u>	E	Assemblyman Richard Carrillo	Newspaper/Media Articles
<u>A.B. 299</u>	F	Robert Bayer	Department of Corrections Audit Report
<u>A.B. 299</u>	G	Keith Uriarte, AFSCME	Written Testimony