MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 27, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:04 a.m. on Wednesday, March 27, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 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 Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lindsay Wheeler, Committee Secretary

OTHERS PRESENT:

James G. "Greg" Cox, Director, Department of Corrections
E.K. McDaniel, Deputy Director, Operations, Department of Corrections
Peter C. Neumann
Christopher Frey, Washoe County Public Defender's Office
Robert Crowell, Nevada District Judges Association
Steven Yeager, Clark County Public Defender's Office
John T. Jones, Jr., Nevada District Attorneys Association
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General; Executive Director, Advisory Council for Prosecuting Attorneys
Lisa A. Rasmussen, Nevada Attorneys for Criminal Justice

Julie Butler, Records Bureau Chief, Records and Technology Division, Department of Public Safety
Thomas Moreo, Clark County District Attorney's Office
Mercedes Maharis

Chair Segerblom:
We will open the meeting and continue testimony regarding Senate Bill (S.B.) 107.

SENATE BILL 107: Restricts the use of solitary confinement on persons in confinement. (BDR 5-519)

We have already heard testimony in support of the bill, and today we hope to hear testimony from the Department of Corrections (DOC).

James G. "Greg" Cox (Director, Department of Corrections):
I am here to discuss the position of the DOC regarding disciplinary segregation and what the DOC is doing nationally in regard to the Association of State Correctional Administrators (ASCA).

Chair Segerblom:
Do you see any changes that could be made regarding solitary confinement?

Mr. Cox:
Yes, I have submitted the DOC's regulations (Exhibit C). I have been working with Director Tom Clements from Colorado and Director Christopher Epps from Mississippi in collaboration with the ASCA and the Arthur Liman Public Interest Program from Yale Law School regarding the practices of solitary confinement. It is a complex issue, and directors throughout the Nation are trying to make it consistent throughout the states.

Nevada's practice of reviewing an inmate's placement is somewhat ahead of other states. The Nevada DOC Classification Committee reviews placements within 72 hours, while some states review placements within 30 or 60 days and some states do not even have a review process. An inmate may be able to appeal a decision up the chain of command, possibly to the Director's office.

Chair Segerblom:
Is there a national association you belong to that develops model policies or regulations?

Mr. Cox:
Yes, I am a member of the ASCA which thoroughly reviews national standards and best practices in accordance with the American Correctional Association (ACA) and is influential with directors across the Country.

Senator Brower:
Can you give me an overview of the DOC's policies and practices regarding solitary confinement?

E.K. McDaniel (Deputy Director, Operations, Department of Corrections):
We oppose S.B. 107 as written because of its definition of solitary confinement. The passing of this bill would not allow for the normal operations of a correctional institution. Section 3, subsection 4 defines solitary confinement as "the involuntary holding of an offender in isolation from any other person, other than staff and an attorney, for 16 or more hours per day." This definition does not correctly define solitary confinement. Modern correctional terminology, adopted by the ACA, defines solitary confinement as the "involuntary holding of an offender in total isolation." This includes isolation from sight, sound and any form of outside communication. Nevada does not have any cells or areas that would be defined as such. All of the DOC's cells are identical. A regular, general population cell is the same size as a restricted housing cell. The DOC does not have solitary confinement because it is not isolating inmates other than by physical barriers so they cannot attack or be attacked.

The DOC utilizes three types of segregation: protective, administrative and disciplinary. Protective segregation isolates inmates from others for fear of their own safety or the safety of others. Administrative segregation applies to inmates who for various reasons do not have disciplinary charges but are considered to be threats to themselves, others, staff or the public. The Classification Committee meets and makes determinations regarding the circumstances of those inmates. The DOC has several inmates in administrative segregation because they killed their cell partners. Those inmates have proven to be threats to others, making it difficult to find people who want to be housed with them.

Chair Segerblom:
Is there disciplinary segregation for inmates who are not a threat to themselves or others, such as those who fail to rat on others or those who do not eat their meals?

Mr. McDaniel:
No, our disciplinary procedures are clear. An inmate must receive a write-up or a notice of charges for a violation within the facility. The DOC has an internal court system where an inmate is subject to due process. A disciplinary committee meets with the inmate, goes over the charges and makes a decision as to what disciplinary sanction should apply. I have provided some statistics which reference the types of solitary regulations (Exhibit D). The Department does not have segregation for an inmate refusing to provide information or eat meals. Segregation occurs when inmates pose threats to themselves, others or staff or refuse to cooperate with the regulations.

Senator Brower:
The bill seeks to prohibit certain things that the DOC states do not occur. Would S.B. 107 change the way you do things, and if so, do you feel these changes would be bad public policy?

Mr. McDaniel:
The portion of the bill which contains the 16-hour time limit would cause issues. The DOC has inmates who for various reasons must be isolated from other inmates 24 hours a day. If this bill passes, I do not know what the DOC will do with those inmates for the other 8 hours.

In the previous hearing, a film was shown that depicts situations in prisons that have not happened for the last 40 years, which causes confusion regarding the DOC's practices. The cells have windows to provide sunlight. Inmates have the option to receive televisions or radios, and phones can be brought to them to make calls. Inmates have visitation rights; they have total communication with other inmates living in the same area; and they can check out books from the law library. Inmates in administrative segregation have all the same amenities as general population inmates. The only exception is the inmates are isolated due to being threats to themselves or others.

Senator Brower:
It seems the bill is based on false premises or assumptions. Apart from the juvenile aspect, explain what particular parts of the bill, if passed, would change how you run your facilities. What in the bill do you object to that would be bad policy?

Mr. McDaniel:
There are two areas of the bill that concern the DOC. The definition of solitary confinement is not correct because the DOC does not totally isolate inmates. The portion of the bill that limits the hours that an inmate could be isolated needs to be at least 23 hours or more; otherwise, we would be unable to manage the rest of the inmate population.

Chair Segerblom:
I do not read the bill as limiting the time of isolation. The bill defines solitary isolation as being confined for 16 hours or more a day. The bill allows for additional time if the offender presents a serious and immediate harm to himself, others, staff or to the security of the institution. You stated that is the definition the DOC uses to place these individuals in administrative confinement.

Mr. McDaniel:
I read the bill as limiting the confinement to only 16 hours a day.

Chair Segerblom:
I interpret the bill as stating that if an inmate is not in administrative confinement, the inmate cannot be constrained for more than 16 hours. But if an inmate is being held under administrative confinement, there is no limit on the time frame, and the inmate could be constrained for 24 hours.

Senator Brower:
What is the point to this bill if it allows the DOC, in certain circumstances, to continue its current practices?

Chair Segerblom:
Is there anything in the bill that is different from the DOC's current practices? If disciplinary confinement is only used when an inmate presents a danger, then there would be no problem with the bill. My understanding is that discipline is also used for other circumstances, such as violation of prison rules, where an inmate would not have to be in disciplinary segregation. If segregation is used

strictly for the protection of an inmate or others, then there would be no issue with this bill as written.

Senator Brower:
It is my experience, with respect to a prisoner informing on a suspect in a case, the DOC has no control over that situation. That issue falls under the control of the prosecutors and others outside the prison system. If the DOC received a call from the Federal Bureau of Investigation (FBI), a prosecutor or another law enforcement agency stating that an inmate is not complying with an investigation, would that inmate be put into segregation if requested by the agency?

Mr. McDaniel:
There are times when outside law enforcement agencies inform us that they need inmates to be isolated from others due to the nature of their cases. At that point, an inmate is placed in administrative segregation because that is the only place the DOC has for isolation from the general population. Generally, that is a rare circumstance, but an agency may give us a subpoena or court document directing an inmate to be segregated or moved. On occasion, investigations do occur within the prison system, but the DOC does not have a sanction or charge for a violation if an inmate refuses to provide information in an ongoing investigation.

Senator Hammond:
It is my understanding that the Classification Committee meets to review the history of an inmate and makes a determination on how to classify that inmate. Can you explain the procedures the DOC uses to arrive at the decision to administratively or protectively segregate inmates?

Mr. McDaniel:
In reference to protective segregation, if inmates inform staff that they fear for their safety, the DOC has a duty to immediately protect those inmates until the claim can be investigated. At that time, the inmates will be placed in holding cells away from the potential danger. The inmates are asked to provide information stating why they feel they are in danger. Within 72 hours, the inmates' caseworkers, associate warden and other essential staff meet to review the information and determine if the inmates should be placed in segregation. If the inmates are in fear at their current facility, they may be moved to another facility. If that is not possible, the inmates will come to

a meeting to discuss the issue and the Classification Committee will determine whether the inmates should be placed in permanent protective custody status. Nevada has only a few locations to which inmates can be moved for protective custody.

Senator Hammond:
Is paperwork generated throughout this process that can be reviewed by outside sources?

Mr. McDaniel:
Yes. We have a computerized notice system containing all the information and documents that are used and reviewed, including the Committee's decision for the best location of the inmates.

Administrative segregation works in several ways. If an institution feels inmates are threats to themselves, others, staff or the public, the inmates will be isolated and placed in a 72-hour holding status to determine if segregation is appropriate. Paperwork is filled out to determine why the inmates are security threats. Often, administrative and protective segregation go hand in hand. Inmates who may qualify for protective segregation but cannot be placed in a protective segregation unit due to the severity of the issues may be placed in administrative segregation. When this happens, the Classification Committee meets with the inmates to determine the right placement and location. After placement, the inmates are reviewed every 90 days to determine whether that placement is still appropriate.

Senator Hammond:
Who are the normal members of the Classification Committee?

Mr. McDaniel:
The Classification Committee normally consists of an inmate's caseworker, a security supervisor who understands the security of the situation and the associate warden of programs.

Senator Hammond:
Is the Committee different for each inmate?

Mr. McDaniel:
Yes.

Senator Ford:
At the last hearing, I gave an example from Arizona where the leader of the Aryan Brotherhood was held in solitary confinement for many years due to an incident that occurred inside the prison and his unwillingness to divulge that information. If an incident, such as a riot or murder, takes place within a Nevada prison and the DOC has suspicion of the individual or cause, can solitary confinement be used under the guise that the inmate has threatened the security and safety of the institution?

Mr. McDaniel:
I am not familiar with the Arizona case you mentioned, but if the Nevada DOC felt an inmate's continued presence was a threat to the facility or another person, the inmate would be placed in administrative segregation.

Senator Ford:
Could the DOC classify that inmate as a continued threat due to the inmate's failure to disclose particular information?

Mr. McDaniel:
The main concern of the DOC would not be that the inmate did not disclose information but rather that the inmate's continued knowledge of the information could be used as a security threat within the institution. People might be afraid of the inmate's knowledge, or other inmates may be aware of the inmate's situation and may not want the inmate to disclose the information. In that case, the DOC would protect the inmate. If the inmate controlled other inmates in the yard by telling them to conduct violence, the inmate could be placed in administrative segregation.

Senator Ford:
That appears to be a yes. Attachment 1 of the DOC's policies, Exhibit C, states that inmates who threaten the security and orderly management of the institution shall be removed from the general population and placed in special units. It seems to me that the prior example would fit into that criteria. How long could you retain an inmate in administrative segregation under that situation?

Mr. McDaniel:
The reason an inmate would be placed in the segregated area would not be because the inmate failed to give up information but because the inmate has

information that could be a threat to himself, others or the institution. Every 90 days, a review is performed by the warden, caseworker, and security officers in charge of that unit.

Senator Ford:
Do you know the longest amount of time that an inmate has been held in administrative segregation in Nevada?

Mr. McDaniel:
I cannot give you an exact number, but we do have inmates with ten life sentences without the possibility of parole who have repeatedly attempted to murder or have murdered other inmates once taken off segregation.

Senator Ford:
How long have those inmates been in segregation?

Mr. McDaniel:
I have been with the DOC for 20 years, and there are inmates who have been placed in administrative segregation for that same length of time.

Senator Hutchison:
Section 4, subsection 2 of the bill states that you cannot hold someone in segregation, as we seem to be calling it now, without a serious threat. You call that administrative segregation, but I do not see a place in the bill for the other two types of segregation. According to S.B. 107, someone can be held in administrative segregation but not for disciplinary purposes or because someone has asked to be held. Based on current operating procedures, is this a concern for you?

Mr. McDaniel:
Yes, it is a concern. Since there is no solitary confinement in the DOC, this definition of solitary confinement limits our hands as to how we can manage this population using the accepted standards for which the ACA currently holds us accountable.

Senator Hutchison:
You testified that you do not keep inmates segregated or isolated from other people or staff, but you do hold them for longer than 16 hours. Is that correct?

Mr. McDaniel:
Yes, that is correct.

Senator Hutchison:
No matter how we define the term, segregation or solitary confinement is only appropriate under this law for administrative purposes. According to the definition, solitary confinement is used when inmates are an immediate threat of harm to themselves, other inmates, staff or the security of the jail. The two other types of segregation are not included in this bill. Is that how you understand this bill?

Mr. McDaniel:
Yes, Senator.

Senator Hutchison:
Section 4, subsection 3 states that a prisoner held in solitary confinement may be held for the minimum time required to address the threat only if the mental or physical health of the prisoner is not compromised. How is that determination made, and which staff member makes that determination?

Mr. McDaniel:
Inmates who have medical and mental health issues are evaluated by the medical and psychiatric staff. We have several inmates who have to be isolated because of prediagnosed mental problems for which they are receiving medication or are under the care of a psychiatrist.

Senator Hutchison:
Under your current operating procedures, is there a way to determine if segregation would be a detriment to someone's mental or physical health? Do you go through that analysis every time you place someone in segregation?

Mr. McDaniel:
Inmates have a medical and mental health evaluation within the 72-hour period to determine if there is a problem with their housing.

Senator Brower:
I prosecuted members of the Aryan Brotherhood and other violent gang members, so I know this is difficult and that certain things need to be done. I do

not want to pass a bill that imposes unreasonable restrictions and limits the DOC's ability to run its facilities, which this bill seems to do.

Mr. McDaniel:
I agree with you.

Chair Segerblom:
If the Committee is agreeable, I want to end the hearing on S.B. 107 for now. Based on the information presented, it appears the DOC is already doing everything the bill requires. We need to talk to other people and review this issue again in the next few years.

Mr. Cox:
I would like to work with members of the Committee regarding the DOC's practices and procedures. There is a great deal of litigation regarding solitary confinement, and I want to review national best practices and standards. Our regulations are approved by the Board of State Prison Commissioners.

Chair Segerblom:
We will close the hearing on S.B. 107 and open the hearing on Senate Bill 421.

SENATE BILL 421: Requires a court to excuse a juror for cause under certain circumstances. (BDR 2-1109)

Peter C. Neumann:
I am here in support of S.B. 421. The statutory language that determines whether a juror should be allowed to serve on a case dates back to 1911 and has not been looked at in more than 100 years. This bill improves statutory language so that judges and litigants will have a better guideline as to what disqualifies a person from serving on a particular case.

Chair Segerblom:
Are we talking about jurors who would be excused for cause only?

Mr. Neumann:
Yes. To clarify, a juror can be excused for cause if he or she does not meet the basic elements of qualifications. Some examples for being excused would be if the juror is not a citizen, is under the age of majority, is drunk in court or has a financial interest with one of the parties of the case. Upon questioning, if a juror

makes a statement that indicates he or she has decided who should win the case before hearing any evidence, the judge should dismiss that juror for cause.

Chair Segerblom:
You have preemptory challenges, too.

Mr. Neumann:
Yes. Lawyers on both sides of the case, whether criminal or civil, have four preemptory challenges. Even if a judge thinks a juror passes the test for cause, each attorney can exercise up to four preemptory strikes. I have tried over 150 jury trials, and I have never had a case where I had enough preemptory challenges. Under Nevada law, the judge and attorneys meet in either the chambers or the courtroom to review the list of prospective jurors and the number of people who can be preempted. The clerk hands the list to the plaintiff's side first which exercises its first preemptory challenge, and a line is drawn through that person's name. The list is then passed to the other side for its first challenge. The list is passed back and forth until both sides exercise their four challenges. The remaining names make up the jury.

I advocate statutory change because some judges in Nevada do not want to excuse a juror for cause because attorneys can use their peremptory challenges. It is not fair to the litigants to make attorneys use one of their preemptory challenges when a juror has demonstrated in open court to be incapable of judging that particular case. I would like to see *Nevada Revised Statutes* (NRS) 16.050 and 16.060 changed so that there is a guideline for the judges that codifies caselaw. In that event, if a juror has been shown to be incapable of being fair, the juror can then be excused for cause.

Senator Jones:
Are you aware of other states that have similar provisions in law for their jury selection?

Mr. Neumann:
I have not researched other states, but I would be willing to do so.

Senator Jones:
This bill sounds good in theory, but it may have unintended consequences in practice. I have seen jurors pick up cues from other jurors who have been excused for a biased statement. As it stands right now, the judge determines

whether or not a juror cannot judge the action. I interpret section 1, subsection 2 as creating a presumption that a juror is biased if he or she simply expresses any interest in a case or has formed or expressed any opinion or belief as to the merits of the action. This could bring about the need to increase a 60-member jury pool to a 100-member jury pool. If this bill is passed, I do not know if Clark County could get enough people to serve on juries because there would be an impetus for prospective jurors to say they are biased in order to be immediately dismissed.

Mr. Neumann:
Those few judges who will not excuse a person for cause may share the view that S.B. 421 will cause a run on the system and that prospective jurors will want to be dismissed. My experience has found that most people who are summoned to jury duty want to serve because they feel it is an honor and their civic duty.

Three weeks ago, I observed a trial in Washoe County where one potential juror stated that serving would be inconvenient because she had a health problem. The judge told the juror that she could not excuse her under law forever, but she could give her a deferment for that day. The judge then explained to the juror that she would have to go to the Jury Commissioner, check in and be subject to call for the remainder of her 6-month term. An experienced judge can handle this type of situation effectively. The few judges who will not excuse a juror for cause are worried about a run on the system, which is a false worry in my opinion.

Senator Jones:
I do not know if enough jurors could be found in Clark County who want to exercise their civic duty; therefore, I have serious reservations about this bill. Have you spoken with jury coordinators in Clark or Washoe County to see how this might affect their ability to manage large jury pools?

Mr. Neumann:
I spoke with the Washoe County Jury Commissioner, not about the specifics of this bill, but about this philosophy, and I am of the opinion she agrees with me. I also spoke with retired District Judge Jerry Whitehead, and he authorized me to convey his feelings of support for this bill. He would have testified in favor of it today, but he had to attend a mediation.

When the system does not work and a judge erroneously leaves a juror on the case who is truly biased and has a built-in desire for one side or another to win, this information will come out during an appeal. This takes a great deal of time, resulting in a huge expense to the taxpayers. In a number of cases, trials have been reversed when a judge makes a mistake regarding a biased juror. There should be a standard of practice where a person should be excused and made to come back for another trial if it has been shown in court that the person is likely to be biased for or against any party. Many times a juror may be biased on a criminal case but not on a civil case. Just because a juror is disqualified on one type of case does not mean the juror is a bad juror.

Senator Jones:
I have issues with the word "any" because it is so broad.

Chair Segerblom:
We can strike "any."

Mr. Neumann:
You might want to consider adding "rebuttable presumption."

Senator Ford:
If you are amenable to "rebuttable," that will address one of my concerns. I have a second concern about tying the hands of a judge who is making the determination. Section 2 of the bill states, "The court shall excuse any juror who the court determines is more likely than not to be biased for or against any party to the proceeding." What is your opinion on what happens next?

Mr. Neumann:
Do you mean once the court excuses a juror?

Senator Ford:
Yes.

Mr. Neumann:
If a juror is excused, the clerk is then directed to call the next name and another juror comes up to fill that place.

Senator Ford:
My question was not clear. Section 2 states, "Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge." You added language that states, "The court shall excuse any juror who the court determines is more likely than not to be biased for or against any party to the proceeding." What standard is being applied now relative to the court's determination?

Mr. Neumann:
That is the problem. There is no standard.

Senator Ford:
Do you think there is caselaw that talks about the standard that we could apply, or at least compare to what you are suggesting?

Mr. Neumann:
I cited several examples of caselaw in my letter (Exhibit E). In the annotations to present statutes, you will find two dozen cases over the years, one dating back to 1880. There is caselaw but no statutory law, which is the purpose of this bill.

Senator Ford:
Is your amendment a codification of caselaw?

Mr. Neumann:
Yes.

Senator Ford:
Please address my concern about tying the hands of a judge regarding the discretion he or she currently has in making a determination.

Mr. Neumann:
The judge tries the issue of whether or not a juror should be excused for cause. The bill does not attempt to change that process. It only suggests a standard that the court would use in making the determination if a juror is going to be fair in a particular case. It does not limit the discretion of the judge in trying that issue.

Senator Ford:
Section 1, subsection 2 states, "There is a presumption that the juror is biased if the court finds that any provision of paragraph (e), (f) or (g) of subsection 1 applies." To me, that seems to be tying the hands of a judge. "Rebuttable presumption" would restore some of the discretion. As the bill reads, presumption tells the judge that a juror is presumed disqualified. The attorneys would not get to make a determination as to whether they agree with the ultimate determination because it is codified in statute.

Mr. Neumann:
Adding the word "rebuttable" will take care of your concern. There is no attempt to limit the judge but rather remind the judge that he or she has a duty to challenge a juror for cause. I have seen cases where jurors will state they cannot be fair, and a judge will question that juror in a way that rehabilitates the juror into stating he or she can be fair. This means the lawyer whose client is being aggrieved by that juror is going to have to use a preemptory challenge.

Senator Hutchison:
You have articulated multiple reasons for a judge not dismissing a juror for cause, but sometimes the lawyers play games by trying to get a juror excused for cause in order to save their challenges. In Nevada, you do not have to have a unanimous jury for conviction.

Mr. Neumann:
That is correct in a civil case.

Senator Hutchison:
I also get frustrated with judges who do not understand my reasoning and intellectual argument to excuse a juror for cause. Do you agree that there are checks in the system that accommodate for some of those mistakes?

Mr. Neumann:
Yes, I do. I wrote an amicus brief on a case, which is in the Supreme Court right now, where a juror had a financial interest in the case and the judge would not excuse that juror.

Chair Segerblom:
Can you send that amicus brief to the Committee for review?

Mr. Neumann:
Yes, I will. In this particular case, both sides ran out of preemptory challenges before the juror in question showed up. This juror was a veterinarian, and a member of the law team for the aggrieved side was married to a veterinarian who referred cases to the juror in question. The judge was asked to excuse the juror for cause, but the judge refused. Since both sides had run out of preemptory challenges, the juror ended up on the case and even became the forewoman of the jury. Ultimately, the jury decided against the aggrieved side that initially wanted the juror excused.

Chair Segerblom:
Mr. Neumann, do you have anyone here in support of your bill?

Mr. Neumann:
No.

Chair Segerblom:
You changed the word "shall" to "must" in sections 2 and 3.

Mr. Neumann:
No, the Legislative Counsel Bureau did that.

Chair Segerblom:
Is there anyone here in opposition to the bill? Is there anyone to testify as neutral to the bill?

Christopher Frey (Washoe County Public Defender's Office):
I signed in neutral because I do not know exactly what change the intent behind this bill will make. During testimony, I noticed an ambiguity was pointed out regarding section 2 with respect to how the presumption would work. Our office could support this bill with the rebuttable language inserted. The person and the party charged with rebutting that presumption would be the opposing side and not the judge.

Robert Crowell (Nevada District Judges Association):
I represent the Nevada District Judges Association, and I am testifying as neutral on this bill. The Judges Association has not taken a formal position, but it does have concerns and would like to discuss this issue further with Mr. Neumann.

Chair Segerblom:
We will close the hearing on S.B. 421 and open the hearing on Senate Bill 420.

SENATE BILL 420: Revises provisions relating to the issuance of subpoenas. (BDR 14-1108)

Steven Yeager (Clark County Public Defender's Office):
I want to thank Chair Segerblom for bringing forward this important piece of legislation regarding how criminal law is practiced. I have submitted materials (Exhibit F, Exhibit G, Exhibit H, Exhibit I and Exhibit J). The bill can be separated into two parts. Part one, which relates to section 2, deals with the contempt power that arises from the Sixth Amendment of the United States Constitution, Exhibit F. The Sixth Amendment allows a criminal defendant to have compulsory process which means the criminal defendant can present witnesses on his or her own behalf at a trial.

As the law is written, no one disputes that defense attorneys have the right to issue subpoenas for trial cases pending in district court. The problem with the contempt statute is that it only references court or district attorney subpoenas as being subject to contempt. It does not make sense that defense attorneys would be able to issue a subpoena on their own for attendance at trial or for documents to be produced, yet there would be no mechanism for the court to enforce that subpoena if a party disobeys it.

For the most part, defense subpoenas are complied with at the district court level. But over the last few years, there has been some reluctance on the part of independent parties to comply with defense subpoenas because they are not subject to contempt. The first part of S.B. 420 fills that gap in statute. Almost every defense attorney that I have spoken to has expressed surprise that defense attorneys are not included in the current contempt statute. I could not find anything in legislative history to explain the reason for this oversight.

Part two in Exhibit F, which may be more controversial, also arises out of the Sixth Amendment, which gives criminal defendants the right to cross-examine witnesses. This section of the bill will give defense attorneys subpoena power in justice court at a preliminary hearing. I provided two recent judicial opinions from Judge William D. Jansen, Exhibit H, and Judge Deborah J. Lippis, Exhibit I, of the justice courts in Clark County. The way the statute is being construed, the defense attorney does not have subpoena power at a preliminary hearing.

The defense attorney can only subpoena if there is a trial in justice court with a misdemeanor charge. According to law, if the charge is a felony or gross misdemeanor, defense attorneys do not have subpoena power.

Nevada law specifically gives a defendant the right to participate in a preliminary hearing either by cross-examining witnesses or by presenting evidence on his or her own behalf. This is in contrast to other states. In Colorado, a defendant can only ask something that goes through a probable cause determination. In Wisconsin, a defendant does not have the right to ask anything that would go to bias or motive at a preliminary hearing. By contrast, Nevada has a more expansive statute where a defendant is entitled to ask these sorts of questions. However, if a defendant does not have the subpoena power to obtain documents or evidence, the cross-examination at a preliminary hearing may not be effective.

Preliminary hearings are limited to probable cause determination. The statute provides that a defendant has some right to participate, but if there is no ability to subpoena, then that right has little meaning. For example, if someone allegedly committed a crime at a casino equipped with surveillance cameras, the videotape may be important to the defendant. However, under statute, the defense attorney can only obtain the videotape if the district attorney has it on file. If the district attorney does not need the videotape to show probable cause and does not ask for it, then the defense attorney cannot obtain the videotape. And if the defense attorney does not have the ability to issue a subpoena to get the videotape, he or she will not have the evidence for preliminary hearing. This is important because if the videotape shows that what the complaining witness said did not actually happen or shows that the defendant was not involved, that evidence is relevant to a determination of probable cause and could lead to a dismissal. Also, if the videotape shows something different from what was stated by the complaining witness, then the judge would be able to look at the credibility of the witness and perhaps dismiss the case.

The ability to subpoena is an important tool for defense attorneys. As the law stands, defense attorneys are required to rely entirely on how the district attorney wants to structure the preliminary hearing, which is not a fair way to conduct preliminary hearings.

Senator Ford:
The first portion of this bill regarding contempt power makes sense. Tell me how the use of testimony from a preliminary hearing at trial interplays with the subpoena power, giving defense attorneys a more rigorous and robust preliminary hearing opportunity to cross-examine.

Mr. Yeager:
These two areas do interplay. You have heard previous testimony stating that defense attorneys have the right to cross-examine at a preliminary hearing, and you also heard district attorneys testify that there would be no problem using testimony from preliminary hearings at trial. But this is not always what happens. Prosecutors present their side of the story, while defense attorneys are handcuffed by statute when presenting exculpatory evidence. The law is an impediment to preliminary testimony being used later if a witness is unavailable. Every time we defense attorneys argue before a district court judge about whether preliminary hearing testimony is admissible, we hope that the judge recognizes that we do not have discovery or subpoena rights, and therefore the cross-examination may not be effective. Unfortunately, these determinations often favor the other side.

Senate Bill 420 may solve this problem in serious cases where defense attorneys want to use preliminary hearing testimony later at trial. These tend to be cases that do not get to preliminary hearing quickly, so there is an opportunity to subpoena some evidence and have a thorough discovery process. However, a district court judge will always make the determination about whether preliminary hearing testimony is effective for cross-examination. There is some value for a jury to see witnesses offer their testimony in person. In terms of using preliminary hearing testimony, I prefer to use a videotaped deposition, if necessary, so the jury can see how a witness interacts and answers questions. Having built-in protections at the preliminary hearing stage for defense attorneys may allow less of a challenge later for testimony to be allowed.

Senator Ford:
What kind of abuse may occur if this amendment is approved?

Mr. Yeager:
I do not think there will be any abuse since defense attorneys are already issuing subpoenas in justice courts and safeguards will be built in. If a subpoena

is issued in a civil case, an attorney can move to quash the subpoena. If the subpoena is not obeyed, the defense attorney is going to move for an order to show cause. There will be a hearing in front of a judge who will make that determination. If anyone from the Public Defender's Office abuses a statute like this, I would welcome the judge to sanction that person for going above and beyond what is necessary. In reality, defense attorneys have 150 cases each at one time and are only going to be in a position to ask for what is critical in the most important cases. This bill is a significant tool for defense attorneys to obtain needed information.

Senator Jones:
What do other states allow for similar provisions regarding subpoenas for preliminary hearing?

Mr. Yeager:
I do not know that answer, but I would be happy to get back to you with that information. I do know that not every state has a preliminary hearing procedure process.

Mr. Frey:
Empowering the defense to issue subpoenas and have them honored at the preliminary stage is important for all the reasons described; plus, it encourages intelligent pleas. The preliminary hearing stage is critical; it is the point of no return for many defendants because an offer is extended. If an offer is rejected, the rejection is based upon the information available at the time. Without the subpoena power, an independent set of information cannot be developed to foster an intelligent plea. Oftentimes, absent the subpoena power, a defendant may take a plea unintelligently or a defendant proceeding unintelligently, which is an unfair position for a criminal defendant to be in. Our position is that not only does this bill do everything that Mr. Yeager described, but it also is a required component to the guarantee of effective assistance in the plea bargaining process. This issue has recently been addressed by the U.S. Supreme Court in the *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) case and in the *Missouri v. Frye*, 132 S.Ct. 1399 (2012) case.

John T. Jones, Jr. (Nevada District Attorneys Association):
We are in opposition to S.B. 420 because preliminary hearings are not the place to contest evidence.

Chair Segerblom:
Do you object to both parts of the bill?

Mr. Jones:
We do not object to the contempt provision at the trial phase of the criminal process, but we do object to making preliminary hearings mini trials. Under caselaw, the Nevada Supreme Court clearly has said that preliminary hearings are not "mini trials." I direct you to the Nevada Supreme Court case of *Marcum v. Sheriff, Clark County,* 85 Nev. 175, 451 P.2d 845 (1969). The court said the issue of innocence or guilt is not before the magistrate; that function is constitutionally placed elsewhere, which in this case means the district court.

Senator Ford:
What about the circumstances described earlier where a defense attorney can subpoena a videotape that is going to undercut for probable cause? Why should that not be dealt with at the preliminary hearing phase?

Mr. Jones:
A preliminary hearing is not a place to contest evidence. If the State has evidence, even slight or marginal, that a crime was committed and the defendant was the person who committed the crime, the case is getting bound over for trial. This bill would make the preliminary hearing a mini trial by inviting fishing expeditions at the preliminary stage, which is not going to accomplish anything. That is what the district court and the trial are meant to do. A preliminary hearing is designed to have a prosecutor show that a crime was committed and that the defendant committed the crime.

Grand juries generally perform the same function as the preliminary hearing, although in a different manner. Grand juries are secret proceedings in which the grand jurors, the prosecutor, the witnesses, their potential attorneys and the transcriptionists are the only people allowed. Defendants can give testimony at grand jury proceedings, but they are not in attendance throughout the rest of the proceedings.

Senator Ford:
What is the problem with getting rid of a case at the preliminary hearing stage with minimal subpoena discovery?

Mr. Jones:
That is not the end result that the Nevada District Attorneys Association thinks the State will get with this bill. Senate Bill 420 will invite fishing expeditions and more contested preliminary hearings.

Senator Brower:
At what point does the State's *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) obligation kick in to produce exculpatory evidence?

Mr. Jones:
That happens generally at trial. Under Nevada law, prosecutors do have a duty to turn over any evidence in their possession at the preliminary hearing stage.

Senator Brower:
Does this include exculpatory evidence?

Mr. Jones:
Yes, any evidence.

Senator Brower:
If a videotape is considered exculpatory, would it have to be introduced before the preliminary hearing?

Mr. Jones:
Yes, if the tape is in the district attorney's possession.

Senator Hutchison:
Hypothetically, if a police report states a battery was committed at a casino and a videotape of the crime shows the defendant did not commit the crime, does the defendant still get bound over now that there is competing evidence?

Mr. Jones:
The job of the justice of the peace is to determine if there is evidence showing that a crime was committed and that the defendant is the person who committed the crime. As long as there is evidence to show those two things, contested or not, the case is getting bound over. It is not the job of the justice of the peace to weigh evidence one way or the other at the preliminary hearing stage; that is the job of the jury at the district court level.

Senator Hutchison:
This is an extreme example, but if you have a statement from a witness that says a defendant committed battery, but now a videotape shows it was someone entirely different who committed the crime, would the judge have the discretion to determine that the videotape is conclusive and the defendant will not be bound over—or would the judge leave it up to a jury to decide?

Mr. Jones:
Both arguments make sense in that example, but I am not certain what a justice of the peace would do. Generally, that scenario is not what we experience.

Senator Brower:
If it is up to the judge to decide if the videotape undercuts the probable cause, then the judge is not bound in any way to find probable cause.

Mr. Jones:
That is correct. It is the judge making the determination as to whether or not there is probable cause.

Chair Segerblom:
What about another scenario where, before the preliminary hearing a defendant can plead to the offense but, if the defendant goes forward with the hearing, then the plea bargain is gone. It seems unfair that the defendant has to make a life-changing decision without full access to all the evidence.

Mr. Jones:
Oftentimes, the State does not have all the facts at the preliminary hearing stage either; many times the unknowns are what drive negotiations.

Senator Ford:
In the example given, the presumption is that subpoena power exists for the defense attorney to obtain the videotape. A prosecutor might not request the videotape and therefore would not have a requirement to turn it over, whether it is *Brady* or otherwise. As a result, the judge will not have the opportunity to determine whether the videotape undercuts probable cause. Why would we not allow a defense attorney to subpoena information that could allow a judge to decide at the preliminary hearing stage that no probable cause exists when the videotape shows the crime was committed by someone other than the defendant?

Brett Kandt (Special Deputy Attorney General, Office of the Attorney General; Executive Director, Advisory Council for Prosecuting Attorneys):
On behalf of the Attorney General and the Advisory Council for Prosecuting Attorneys, we object to the bill for the same reasons detailed by Mr. Jones.

Chair Segerblom:
In your opinion, is it clear that the Nevada Supreme Court has said that preliminary hearings are not mini trials, that they are strictly for probable cause, and therefore there is no right?

Mr. Kandt:
Correct. To clarify, we do not object to part one of the bill that would allow contempt. We only object to part two of the bill which would create what we consider a mini trial. This is not the purpose of a preliminary hearing.

Lisa A. Rasmussen (Nevada Attorneys for Criminal Justice):
I want to clarify a few points. When Mr. Jones responded to Senator Brower's question regarding the *Brady* obligation, Mr. Jones testified that the State has a requirement to turn over all evidence in its possession. What often happens in State court, which is different than federal court, is that the police often do not give all the evidence to the district attorneys. Ultimately, before trial I may receive the evidence, but that does not do much good for the defendant when the evidence is exculpatory.

I want to share a case of mine, involving 18 counts of sexual assault, that was dismissed at the preliminary hearing. The mother of the girl was afraid to talk to me because she claimed Child Protective Services (CPS) told her she could lose her children. But she said if I subpoenaed her, she would testify truthfully. When I subpoenaed her, she testified that her daughter had lied. The mother also testified that she told CPS and the police that her daughter admitted to lying, and the only reason her daughter made the allegations was so she could move to Utah to live with her father.

When I subpoenaed the mother, I had no idea what she was going to say at the preliminary hearing. Ultimately, the case was dismissed, and a human being did not have to spend time in custody with no bail pending the disclosure of what was clearly exculpatory evidence that I should have had from the beginning and which the State did not give me. The prosecutor stated he did not know about

the evidence because it was not in his file. This underlines why, at this critical stage of the proceeding, defendants should have a right to due process.

To suggest that this bill will bring abuse or a fishing expedition is ridiculous. I cannot think of any reason why the State would be afraid of abuse. It is rare that defense attorneys subpoena witnesses to a preliminary hearing, but when we do, there is a good reason. I ask that you pass S.B. 420 (Exhibit K).

Chair Segerblom:
I will close the hearing on S.B. 420 and open the work session.

Mindy Martini (Policy Analyst):
Senate Bill 45 was heard on March 11, and it was submitted on behalf of the Records and Technology Division of the Department of Public Safety.

SENATE BILL 45: Revises provisions governing the sealing and removal of certain records of criminal history. (BDR 14-345)

This measure revises information that must be included in a petition to seal or remove all records relating to a conviction and revises the definition of an "agency of criminal justice" to include a subunit of any governmental agency. This measure was submitted according to the Division of Records and Technology to make a complete seal. Two amendments have been submitted for this measure. The first one is from the Department of Public Safety, which was discussed at the hearing. The amendment deletes section 11 of the bill that keeps the language of NRS 179A.160 which relates to the removal of records when the disposition of a case was favorable to the accused. The Department's testimony indicated it can make the needed changes without statutory changes.

The second amendment was submitted by Laurel Stadler, Rural Coordinator of the Northern Nevada DUI Task Force. Ms. Stadler has not been able to testify due to medical reasons. She has asked that amended language from section 1, subsection 5 of Assembly Bill 156 be added to this bill.

ASSEMBLY BILL 156: Revises provisions relating to the sealing of certain records. (BDR 14-590)

The amendment would add that a person cannot petition the courts to seal records for a violation relating to driving under the influence (DUI). In

Ms. Stadler's email, she indicated that the language in section 1, subsection 5 of A.B. 156 has been amended to clarify that felony DUI offenders may not petition to seal those records because of the "once a felon, always a felon" provision already in statute (Exhibit L).

The Assembly Committee on Judiciary heard A.B. 156 on February 28 but has not yet passed the bill. Assembly staff informed me that testimony from the meeting centered around the potential need to clarify that the bill is referring to "records of conviction." Line 17 on page 3 of A.B. 156 states, "A conviction of a crime against a child." The word "conviction" does not appear in the following lines. That was the main topic of discussion in the Assembly Committee on Judiciary meeting.

There are two amendments for this bill, and you can approve them both.

Chair Segerblom:
Ms. Butler, have you seen this amendment from Ms. Stadler?

Julie Butler (Records Bureau Chief, Records and Technology Division, Department of Public Safety):
I did see this amendment, and the Department does not have a position either way. The main focus of S.B. 45 is to improve the record seal process.

Senator Jones:
I do not feel comfortable tacking on an Assembly bill to S.B. 45 that we have not yet heard.

Sentor Hutchison:
Ms. Butler, did you approve the Department of Public Safety's amendment?

Ms. Butler:
Yes. The Department submitted that amendment because it believes it can administratively handle those things needed.

Senator Jones:
I move we amend the bill with only the amendment from the Department of Public Safety.

SENATOR JONES MOVED TO AMEND AND DO PASS AS AMENDED S.B. 45.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

Ms. Martini:
Senate Bill 118, heard on February 25, was sponsored by Senator Brower.

SENATE BILL 118: Revises provisions relating to forfeiture of property. (BDR 14-462)

Ms. Martini:
This bill reduces the standard of proof in proceedings for forfeiture to a preponderance of the evidence. The statutes state clear and convincing evidence (Exhibit M). No written amendments have been submitted, but one verbal amendment was submitted from the Chair based upon discussion at the hearing on the forfeiture account. Pursuant to NRS 179.1187, the forfeiture account is established; currently 70 percent of the amount of money in excess of $100,000 remaining in the account at the end of any fiscal year must be distributed to school districts for the purchase of books, software and hardware. The amendment would provide that 80 percent of the amount of money in excess of $50,000 would go to school districts. Currently, the money that does not go to the school districts is used by law enforcement to enforce the provisions under NRS 453, Controlled Substances. The proposed amendment would remove this duty of law enforcement. Law enforcement is also required to use the money to enforce the provisions of Title 45 of NRS, which relates to wildlife. This duty would remain.

Chair Segerblom:
Are there any comments on my proposed amendment to lower the threshold to $50,000 and to raise the percentage to 80 percent of the money above $50,000?

Thomas Moreo (Clark County District Attorney's Office):
I cannot comment on your proposed amendment. That is something that the Las Vegas Metropolitan Police Department would need to decide.

Senator Brower:
I am not sure this amendment is friendly. I would be interested in hearing the perspective of the district attorneys and the Attorney General.

Mr. Kandt:
On behalf of the Attorney General, the prosecutors bringing this proposal to Senator Brower were concerned that high dollar forfeiture cases currently proceed to the federal court system because of the lower standard in the federal court civil forfeiture proceedings. Federal courts have the preponderance standard that is proposed here. Because of that, the bulk of forfeiture proceeds goes to the federal level. By changing the State's burden of proof to that same standard, the State will now keep those cases that are currently going to the federal court system and thereby increase not only the State's share but also the portion going to our schools. Our proposal was not to change how the pie is divided but to grow the pie. There are a lot of stakeholders in the process of changing the way the pie is divided. I do not know if we have a position on that, as our focus was on growing the pie.

Chair Segerblom:
If we increase the pie, then we can increase the percentage that goes to the schools.

Senator Brower:
I understand and appreciate the amendment. Having the school districts benefit from the forfeitures is an important part of the statutory scheme. Changing the standard in such a way as to benefit the districts and the State is a much bigger issue, and I am not sure we can get the stakeholders to agree.

Chair Segerblom:
What do you think about removing the part relating to controlled substances?

Senator Brower:
I would defer to the witnesses since we have not had a chance to discuss that.

Mr. Jones:
Unfortunately, our law enforcement partners are not here to speak to these issues. In general conversations I have had with them, they have expressed opposition to changing the formula.

Senator Jones:
Where is the formula located in statute?

Ms. Martini:
Subsection 2, paragraph (d) of NRS 179.1187 states that 70 percent of the money in excess of $100,000 remaining in the account of any fiscal year must be distributed to the school district in the judicial district.

Senator Jones:
Is that a different section than what the bill is under?

Ms. Martini:
Subsection 2, paragraph (a) of NRS 179.1187 states, "the money must not be used to pay the ordinary operating expenses of the agency." This refers to the law enforcement agency. According to subsection 2, paragraph (b), the money derived from the forfeiture of any property described in NRS 453.301 must be used to enforce the provisions of chapter 453 of NRS, Controlled Substances. And subsection 2, paragraph (c) states that money derived from the forfeiture of any property described in NRS 501.3857 must be used to enforce the provisions of Title 45 of NRS, Wildlife.

Senator Brower:
The reason why the reference to NRS 453 is included is because the vast majority of the assets seized are from drug traffickers. The idea is to financially assist law enforcement agencies that are taking down these drug trafficking operations by replenishing the agencies' resources.

Chair Segerblom:
I understand the idea, but if there is no appetite to get rid of that section, then I will give up on that.

Mr. Kandt:
To clarify, is your amendment proposing to give law enforcement agencies greater discretion in how they utilize the funds?

Chair Segerblom:
Yes.

Mr. Kandt:
Unfortunately, we do not have a law enforcement agency representative here. I think they would welcome increasing their discretion in the use of those funds, but I cannot speak on their behalf.

Senator Brower:
I appreciate the amendment, but I do not think it is workable despite its best intentions.

Chair Segerblom:
Then we will go with the bill as written. I do not like the due process protections, but we did not have time to get the federal language.

SENATOR HUTCHISON MOVED TO DO PASS S.B. 118.

SENATOR HAMMOND SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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Chair Segerblom:
I will open the meeting up to public comment in the south.

Mercedes Maharis:
Thank you for not supporting permanent, psychological damage, and please look into the court system. The DOC court system is their own, Mr. McDaniel testified today. I think you will find out why we have almost 3,000 individuals as of March 7 in close and maximum custody.

Chair Segerblom:
The Senate Committee on Judiciary is adjourned at 11:01 a.m.

RESPECTFULLY SUBMITTED:

Lindsay Wheeler,
Committee Secretary

APPROVED BY:

Senator Tick Segerblom, Chair

DATE:

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	4		Attendance Roster
S.B. 107	C	26	James G. "Greg" Cox	Information regarding SB107
S.B. 107	D	2	E.K. McDaniel	Nevada DOC Statistics
S.B. 421	E	6	Peter C. Neumann	Letter of Support
S.B. 420	F	1	Steven Yeager	Highlights of SB 420
S.B. 420	G	2	Steven Yeager	Relevant Statutes
S.B. 420	H	5	Steven Yeager	Jansen Order
S.B. 420	I	12	Steven Yeager	Lippis Order
S.B. 420	J	9	Steven Yeager	Sample Guilty Plea Agreement
S.B. 420	K	1	Lisa A. Rasmussen	Letter of Support, Nevada Attorneys for Criminal Justice
S.B. 45	L	11	Mindy Martini	Work Session Document
S.B. 118	M	1	Mindy Martini	Work Session Document