MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
April 3, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Friday, April 3, 2015, 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 www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Glenn E. Trowbridge

COMMITTEE MEMBERS ABSENT:

Assemblyman Tyrone Thompson (excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Shelly M. Shelton, Assembly District No. 10

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Janet Jones, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Michael R. Brooks, Attorney, Las Vegas, Nevada
Mark E. Rowley, Private Citizen, Las Vegas, Nevada
George A. Ross, representing Nevada Bankers Association
Venicia Considine, Staff Attorney, Legal Aid Center of Southern Nevada
Tara D. Newberry, Private Citizen, Las Vegas, Nevada
Robert Kern, Private Citizen, Las Vegas, Nevada
Jon Sasser, representing Legal Aid Center of Southern Nevada
Steve Yeager, representing Clark County Public Defender's Office
Dominic Gentile, Attorney, Las Vegas, Nevada
Jeremy Bosler, Public Defender, Washoe County Public Defender's Office
Scott Coffee, representing Nevada Attorneys for Criminal Justice
William Terry, Attorney, Las Vegas, Nevada
Kriston N. Hill, Deputy Public Defender, Elko County Public Defender's Office
Wesley K. Duncan, Assistant Attorney General, Office of the Attorney General
Brigid J. Duffy, Chief Deputy District Attorney, Juvenile Division, Clark County District Attorney's Office
Jocelyn Murphy, Client Services Coordinator, The Rape Crisis Center, Las Vegas, Nevada
Daisy Hernandez, Director, Clark County Youth Advocate Program
Kristy Oriol, Policy Specialist, Nevada Network Against Domestic Violence
Tony Shelton, Policy Director for Assembly District No. 10
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
Stacey Shinn, representing Progressive Leadership Alliance of Nevada
Erik Schoen, Executive Director, Human Services Network
Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada
Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff's Office
Chuck Calloway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Mona Lisa Samuelson, Private Citizen, Las Vegas, Nevada

Chairman Hansen:
[Roll was taken. Committee protocol and rules were explained.] We have three bills to address today. We will end the meeting no later than 10:55 a.m. I have already spoken with two of the proponents of the bills regarding the time limitations. We will begin with Assembly Bill 282, which will be presented by Assemblywoman Seaman.

Assembly Bill 282: Revises provisions governing real property. (BDR 3-855)

Assemblywoman Victoria Seaman, Assembly District No. 34:
Assembly Bill 282 is a cleanup bill intended to further the process of the recovery in Nevada's housing market. It is understood that the housing market recovery is dependent upon borrowers making good decisions and lenders being willing to extend credit for residential home purchases. This bill modestly addresses some of the provisions in the Nevada law that have created disincentives to the extension of residential financing in Nevada.

Assembly Bill 282 is directed at two particular provisions which are problematic. Section 1 of the bill addresses some of the inefficiencies contained in the foreclosure mediation program (FMP) regarding judicial foreclosures, specifically, the wholesale adoption of mediation rules for judicial foreclosures based on the FMP nonjudicial program, which is ineffective, and separate rules should apply. The rules should reflect the ultimate authority of the presiding judge to regulate the behavior of the parties in a case that is presently before it.

The second part of A.B. 282 addresses the punitive aspects of the Nevada Homeowner's Bill of Rights (Senate Bill No. 321 of the 77th Session). The provisions will allow lenders additional time to work with homeowners to resolve their mortgage issues before the lender has to decide whether to foreclose.

Finally, the bill reduces the penalty amount for a statutory violation from $50,000 to $5,000 to ensure that lenders' compliance is encouraged and that lending is not deterred (Exhibit C).

I am now going to turn the testimony over to Michael Brooks, who has been working with me on this bill.

Michael R. Brooks, Attorney, Las Vegas, Nevada:
I am an attorney in southern Nevada. I represent a number of lenders and organizations in the lending industry. The lending industry, particularly the

default lending industry, is not my future because the number of defaults and foreclosures has dropped dramatically. My future is for my nine children and their opportunities, dreams, and abilities to obtain financing.

Historically in the state of Nevada, about 80 percent of home purchases are made with financed money. Currently, approximately 60 percent of homes are purchased with financed money. The number of loans that are made every month on new purchases is between 1,500 to 1,800. Currently the availability of funds has been stymied. I have been closely tracking this trend by looking at other states as to how they have responded to the housing market crisis and their loan activity. I have been reviewing what Nevada has done to cause some of the slowdown and what options are available to correct this issue. For example, in Arizona we are seeing a significant recovery in both home prices and in sales volume. There was a recent headline in an Arizona newspaper about millennials jumping back into the home purchase market. We are not seeing that in Nevada. Most millennials here are renters. It is a real problem.

A lender has to decide what the risks are, what the costs and exposures are, before they will enter the market. They have to consider if there is a default, will they be able to get out before losing their shirt. They may just simply choose to avoid the market altogether, which appears to be the case. If you talk to most loan brokers, they will tell you it is a real challenge to obtain a loan in the state of Nevada.

The proposed changes to this bill are very modest. The previous changes to the law in Nevada were significant. Those changes were unique, as not many other states have the provisions we added to our laws. They have some of them but not all of them. I am specifically referring to the foreclosure mediation bill, Assembly Bill No. 149 of the 75th Session, a 2011 bill, Assembly Bill No. 284 of the 76th Session that addressed mortgage fraud, and the Nevada Homeowner's Bill of Rights, S.B. No. 321 of the 77th Session, which addressed only the foreclosure mediation aspect and its application to judicial foreclosure provisions of the Nevada Homeowner's Bill of Rights. Essentially these three pieces of legislation created tools for homeowners to protect themselves against overreaching lenders and the harm that would be caused emotionally and financially with the foreclosure of real property. Unfortunately, the changes in the law have been almost too effective. It has been so successful in protecting homeowners from being foreclosed upon that it has created a situation which denies them the opportunity to get a loan in the first place. This bill sharpens these tools and will further the recovery so homeowners will have the opportunity to obtain the financing needed to purchase a home.

Again, I will point to Arizona. One of the statistics that I found very telling was that historically, Nevada's home price index has been higher than Arizona's. Arizona is currently at or slightly below its peak in 2006. It has almost made a full recovery. It is, in fact, now above Nevada's median home price. Nevada, by comparison, hit a peak of $300,000, and now is at approximately $200,000, which is 36 percent below the past peak. We are not even close to full recovery by that standard. And, of course, we have fallen behind the state of Arizona. The direction of the housing market is in a positive direction; however, the problem is we had fallen so far that the recovery has not been robust or vigorous enough to allow us to create opportunities for our citizens to improve their station in life.

Chairman Hansen:
When you reference the differences between Nevada and Arizona, are you talking about new construction homes, median price of homes, or total number of homes sold?

Michael Brooks:
I am referring to all indicators. It would include townhomes, resales, and new construction.

Chairman Hansen:
Arizona is actually at their 2006 peak?

Michael Brooks:
Arizona did not experience the heady times Nevada experienced. They peaked at about $205,000 to $210,000 and they are now in the low $200,000s.

Assemblyman Elliot T. Anderson:
You have lined out section 1, subsection 4, on page 3. I am wondering what purpose that served. I feel if you get rid of a person with authority to negotiate, what is the point of even having the program? If you were going to mediate with someone on a case, you would not meet with an attorney who is not representing the client on the case you are in. That is sort of akin to negotiating a case with someone who is not working on it, in the legal context.

Michael Brooks:
The question relates to the representative of the homeowner?

Assemblyman Elliot T. Anderson:
No, it says the person with authority to negotiate mediation. It is a requirement that the lender can actually modify the note at mediation and have that authority. I do not understand the point of negotiating with someone who cannot actually do a loan modification.

Michael Brooks:
There is a companion provision within the nonjudicial foreclosure statute that requires exactly what you are talking about. We are not touching that issue. This is only in the context of the judicial foreclosure. It is simply for the purposes of ensuring there is not some extraneous language in the bill. Our purpose is to remove it with respect to judicial foreclosures and let the courts control the negotiations between the borrower and the lender in a judicial foreclosure context.

Assemblyman Elliot T. Anderson:
Are you saying that the courts would actually have their own mediation program? Because the courts already administer the FMP, would they not send them to their mediation program?

Michael Brooks:
That is a rich question, as there are many variables there. Long before the creation of the Nevada FMP, courts mediated cases and they controlled it by ensuring that the parties participated in good faith. The question with the FMP is, is it the proper method for that to happen? I submit to you that it is not. In fact, the best method is for the court hearing the case to control that aspect of it. The FMP creates additional issues with regard to the relationship between the borrower and lender that are unnecessary; in particular, in situations involving a court proceeding where a judge has complete control over it.

Assemblyman Elliot T. Anderson:
The FMP had its bumps when it got started. I do not think anyone had a clue as to what was going on at first but now it is humming along nicely. It is working and has become relatively efficient. I worked as a foreclosure clerk at the Legal Aid Center of Southern Nevada, and I have seen it work well. I would be nervous to start tinkering with it.

Assemblyman Araujo:
My district has two major zip codes that are the most foreclosed upon areas in the state. I have several issues with this bill. The major issue is I do

not understand the logic behind section 3, subsection 2, lowering the amount of damages that a constituent of mine could potentially receive from $50,000 to $5,000. Why such a drastic change?

Michael Brooks:
My first question would be, why $50,000? It is extremely punitive. If you look at other consumer legislation, it is all within the range of $1,000 to $5,000. Therefore, $50,000 actually represents the outlier. This is simply the remedy to bring this statute in line with other legislation that currently exists. With regard to the foreclosures, I submit to you that the foreclosure numbers in your district have probably dropped. The heyday of foreclosures from 2007 and 2008 is well documented but the players who caused them are out of business. We are trying to now focus on the future for your constituents.

Assemblyman Araujo:
Thank you for that, but again I just have a lot of heartburn over this and hope you would review the language in this piece of legislation. When I vote, I consider the constituency that I represent. While you may not see it, I do when I go out and knock door to door. There are many people who are looking to be represented, who still need a voice, and this bill does not give them the voice they need.

Assemblyman Ohrenschall:
You mentioned that the storm has passed and the bad days of 2008 are gone. I am looking online at <www.bankrate.com> and it says for February that we were the top state in the nation for foreclosures. We were up almost 7 percent since January. One in every 569 housing units received a foreclosure filing. While we may not be in the same situation we were in 2008, I am still very troubled by that kind of data. I am not sure about changing horses midstream, especially when the Homeowner's Bill of Rights is still in its infancy. Hopefully, we will start getting good results from that. Why do you feel we do not need to see the results of that program first?

Michael Brooks:
You are right regarding your last point about recovery. We are in a modest recovery. What we are trying to do is remove the obstacles to real recovery. With regard to the foreclosure numbers you are talking about, we were filing 1 in 90 homeowners in foreclosure and now it is 1 in 500. We are doing much better in that regard, but we are still first in the nation for foreclosures. If you ask the industry professionals, they will say it is due to foreclosure mediation. There have also been overlays with the Consumer Financial Protection Bureau and some other federal legislation.

Assemblyman Ohrenschall:
I appreciate your perspective but that is not what I am hearing from the people working with the homeowners who are trying to stay in their homes.

Assemblyman Gardner:
In section 1, all you are doing is going to the system we used before? I am a civil attorney, and we often do mediations that are required by judges, and that is all we are doing. The bill says you do not have to go to a separate mediation plan where they just use a mediator. We can use the judges that we typically use and go through our regular process. Is that the point of section 1?

Michael Brooks:
Precisely.

Assemblywoman Fiore:
As I look at this bill, I see it helping grow our recovery and real estate market. Can you touch on that? I feel that once we pass this, it will help raise our property values.

Michael Brooks:
That is the hope. Obviously, there are larger market conditions that will also govern the recovery. Residential home markets in this country have been largely driven by the availability of financing. Eighty percent of the homes in this country have been purchased through financing to help us live out the American dream. The idea is to bring more money into this state by making it a little more enticing for the lenders, or at least not as punitive for them. It is part of an overall process of empowering lenders to make loans to those young new families to turn them from renters to homeowners. Those are the people that communities are built on. I do believe this is a step in that direction. It is not going to make us the most enticing state to lend in, but it certainly is going to be a step in that direction.

Assemblywoman Diaz:
You say that section 1 of the bill will help the real estate market, but are there that many judicial foreclosures currently happening in the state? You also say we need to rely on the judges to get this remediated. That causes me a lot of concern, as I know our judicial system is already backlogged. If something is already working well for our residents, I do not see how relying now on judges to do it is a more efficient way.

Michael Brooks:
For example, in Clark County there are plenty of judicial resources to address these issues. With regard to mediations, a lot of those are referred out to

a panel of mediators that actually can handle them very effectively. Those mediators report to the judges as to whether the parties have participated in good faith.

Then we address the question regarding the success or failure of the FMP. I am not sure that it is as great a success as everyone thinks it is. Their own statistics show they had 14,000 foreclosure filings last year and they accomplished 400 either permanent or long-term loan modifications. That equates to roughly $1,000 per successful loan modification. It is a very small percentage of those homeowners that actually get into a permanent or a temporary loan modification. Nationally, only 7 percent of loan modifications actually succeed. You have to ask yourself, is it really worth the expense to go through that process? Also, do we want to force that on the judicial foreclosure process? You want to make them permanent paying homeowners, not just keep them in their homes under whatever circumstances you can.

Assemblywoman Diaz:
Did you answer my question regarding how many judicial foreclosures are happening?

Michael Brooks:
I think you are right about that. I think the numbers are way down. This would be a cleanup bill to prevent the judicial foreclosures from becoming the way of the future.

Assemblyman Jones:
I know that the ability to changeover the market would help the market come back. That is basic economics. In this instance, the banks are not readily willing to come back to Nevada because there are so many problems. Thus, they do not want to loan. I personally experienced this recently. I make a decent amount of money, and I could not purchase even a very modest home due to overlays and extra conditions. How can our lower earning people purchase a home if the banks are not willing to come back? Does Arizona have a mediation requirement in their laws?

Michael Brooks:
No, Arizona had their own crisis, but they did very little to affect their foreclosure process, so they are doing well.

Assemblyman Jones:
So the banks are willing to go back to Arizona rather than come back here? If the banks are not willing to come back here and are not willing to loan, only the high-end people can get loans, then the market does not come back.

Michael Brooks:
I cannot state that as a fact. What I can say is the statistics bear that out. I have not had conversations with any bank authorities or officials who have said this. But if you look at the data, that is the narrative that really speaks out.

Assemblyman Jones:
I have talked with lenders, and they say with all the overlays and all the requirements that the banks just do not want to lend here. That is my anecdotal evidence. But I have also talked to Realtors and February had the lowest number of transactions since the crisis began. Banks and people are not able to create the liquidity in the market, and that prevents a comeback. Do you have the statistics showing that February had the lowest number of transactions in Clark County?

Michael Brooks:
You are referring to the Greater Las Vegas Association of Realtors (GLVR) report? Yes, I do have that. It was about 2,200 to 2,400; last month was only about 2,500. We have 1.1 million units on the market in this state and in our largest county, Clark County, we are selling 2,500 monthly. That is not a robust and vigorous housing market.

Assemblyman Nelson:
Just for the record, you iterated that this is just in judicial foreclosure proceedings and would have nothing to do with deed of trust foreclosures. It appears to me that in section 2, subsection 2, paragraphs (a) through (c), it goes through some situations where the calculations have been changed, which then affect the deadlines at the top of the bill. If you go down to section 2, subsection 2, paragraph (d), in those calculations you did not include any calendar days during which a complete or incomplete application for a foreclosure prevention alternative submitted by the borrower is pending without decision. That refers to loan modification requests, is that correct?

Michael Brooks:
The language for a foreclosure termination prevention alternative is actually the process that was adopted in the Homeowner's Bill of Rights. It is a reference to the period of time during which a homeowner has completed a foreclosure alternative package and submitted it to the lender and the lender is reviewing it for modification or whatever the alternative might be.

Assemblyman Nelson:
Did we not change the statute that the lenders have to give an answer within a certain period of time?

Michael Brooks:
Yes, they do; this does not affect that. This bill says that during the pendency of that, the times are stayed. Now, if they violated the time frames, then that is dealt with in another statutory section that we have not touched.

Chairman Hansen:
Thank you for your testimony, Mr. Brooks. Assemblywoman Seaman, do you have anyone else you would like me to call up at this time?

Assemblywoman Seaman:
Yes, Mr. Mark Rowley.

Chairman Hansen:
Does Mr. Rowley have something new to add?

Mark E. Rowley, Private Citizen, Las Vegas, Nevada:
I am a 36-year resident of our great state of Nevada. I have worked for myself in multiple aspects of the real estate business for over 25 years as an investor, developer, licensed general contractor, and licensed real estate agent.

The financial crisis and meltdown of the residential mortgage-backed security markets of 2008 was felt around the world. Many causes of the meltdown have been suggested with varying weights being placed on different factors by numerous experts. At the heart of many of these opinions are two core topics: an unregulated over-the-counter derivatives market, specifically credit default swaps, and the repeal in 1999 of the Glass-Steagall Act that removed the barrier between the commercial banks and depository banks—a system that was set in place in 1933 through the U.S. Banking Act. [Mr. Rowley continued to read from written testimony (Exhibit D).]

Chairman Hansen:
Mr. Rowley, thank you for being concise with your testimony. I would like you to submit your testimony to our Committee. That is the type of testimony I really like to receive with a lot of data, facts, and figures rather than just opinions. I will now open up the hearing for proponents of A.B. 282.

George A. Ross, representing Nevada Bankers Association:
Nevada Bankers Association supports A.B. 282. Although this is not a revolutionary bill, it is important to remember that we do not want to overstate its impact because the vast majority of foreclosures take place in a nonjudicial manner. This bill applies only to judicial. There are a few reasons for that: it is less expensive, takes less time, and is less complex. The way Mr. Brooks explained this is important because with a judicial foreclosure, you

end up getting many of the functions of mediation anyway. From the banker's perspective, it is an opportunity to have a fresh look at the mediation process. It was designed at a time when many homeowners did not answer their mail; they put their heads in the sand and prayed the world would go away, even when a bank was trying to negotiate with them. Bank of America had a very aggressive program trying to reach out to the mortgage owners, but homeowners would not respond. We had hoped the past legislation would have brought more people forward

Today the world is different. Any lender who services over 5,000 loans must follow the rules set by the Consumer Financial Protection Bureau that lays out an entire procedure, which includes a mandatory offer to negotiate a new loan at a certain time in the process. That is not part of the judicial process, and this bill does not affect that process. This is very important in context to all the questions that have been asked as well as some of the testimony heard during this hearing. This is a fairly narrow bill, but it does give an opportunity to take a new look at the program by those people who actually administer it and will make the process work better if it is going to continue.

Assemblyman Elliot T. Anderson:
You have said that judicial foreclosures are expensive. Mediation cuts down on the process. It brings people who have the authority to negotiate into a room with the homeowner and come to an agreement. I have been personally involved in some recent mediations and loan modification negotiations with Bank of America; the process did work well. However, that was in a nonjudicial context, but if you were to use the judicial foreclosure, the process would still have worked well. In 2009, the servicer in many cases would not even know who the owner was and that is why these requirements were created. We are really turning back the clock with this, are we not?

George Ross:
Not exactly. The banks' responsiveness on this is very different than it was then. At that time, the major banks were getting all the blame for loans and practices that were not theirs. They were basically told, or strongly asked, to take over certain lenders who had made many of these bad loans. They were trying to figure out how to absorb these bad loans. They frankly had no clue to the extent of the issues and problems of the bad loans they had gotten into. They were not prepared to do this. The implication of what you are saying, Assemblyman Anderson, is that things are working pretty well now and that is because banks know this. The federal Consumer Financial Protection Bureau rules lay out very clearly what you must do in terms of offering opportunities.

That and the mediation program are still there. These rules do not apply to the vast majority of mediation situations that are judicial and will not apply to nonjudicial cases.

Chairman Hansen:
Is there anyone else who would like to add to the testimony on A.B. 282? [There was no one.] We will now open the hearing up to opposition testimony on A.B. 282.

Venicia Considine, Staff Attorney, Legal Aid Center of Southern Nevada:
I am appearing today as a concerned citizen and as an attorney who represents clients in a variety of consumer defense-related issues, including foreclosure defense and underwater homes.

There has been a lot of discussion today about this bill making the process more efficient and quicker. This bill actually does the opposite. Section 1 concerns judicial foreclosures, which often take years, and if the foreclosure is completed, there is an additional title issue. In 2013, homeowners could elect to participate in the existing foreclosure mediation program to make the process more efficient and resolve the issues there instead of going through a long-term judicial foreclosure.

Section 2 concerns nonjudicial foreclosure timelines. This would be notices of default and notices of trustee sale. The timelines were added specifically to encourage banks to get homes through the foreclosure process, when possible, in order to put the home back on the market. Mr. Rowley pointed out that there are 40,000 homes that are not hooked up to water, which means there are 40,000 abandoned homes in the state of Nevada that are outside of any mediation process, and the only reason they have not been foreclosed on is because the banks have not done it. To extend the timelines as section 2 does would allow the banks more time to delay the process and create more abandoned homes.

There are tolling provisions already in this bill. For example, the timeline for notices of default is nine months. If a notice of trustee sale is not recorded within nine months, then they have to go back and record another one. It is an incentive to get that process completed. Under current law, if someone is in a bankruptcy and there is a motion to lift that stay, then that time for the notice of default goes back into counting. They want to extend that for the entire time someone is in a bankruptcy. A person can be in a bankruptcy up to five years. Instead of a three-month timeline, you are looking at extending that time frame to five years. This is just one of the examples of how this bill will have the opposite effect on streamlining the process.

Assembly Bill 282 will allow the Consumer Financial Protection Bureau rules to overlay or take precedence over our state laws. Those rules, as mentioned by Mr. Rowley, require the banks to reach out and offer modification options when possible prior to starting the foreclosure process. This bill extends that period after the foreclosure process has started. We oppose this bill for that reason. We would like to see our communities rebound and the homeowners who can afford their homes remain in them through a modification process that allows them to do that. If they cannot stay in their homes, these mediation programs and short timelines encourage the banks to put those houses back on the market. The bill as written would do the opposite. My testimony has been submitted to the Committee (Exhibit E).

Tara D. Newberry, Private Citizen, Las Vegas, Nevada:
I am an attorney and mediator. I have been a mediator since the initial appointment period for the program back in 2009. I would like to address some of the issues about efficiency and judicial economy, as I am intimately familiar with the process and the various changes to the program.

First, I would point out that taking the mediation program away from the judicial process is going to tax the courts. Right now, we have one judge in Clark County and I believe one in Washoe County that hear appeals from the FMP. It has taken years for that to evolve and years for the Nevada Supreme Court to make decisions to help guide everyone through this program. By taking the mediation program out of the factor for judicial foreclosures, you are asking the other judges on the bench to become familiar with a very sophisticated and complex area of the law. Real estate and foreclosure law is not something that every attorney takes in law school and understands. It is impractical to think that all the judges could address this issue. We already have a designated specialty court to handle the appeals process itself. I do not believe it creates judicial economy.

Secondly, the revisions to the rules in 2011 encouraged a huge spike in judicial foreclosures, which then brought the creation of Assembly Bill No. 300 of the 77th Session as a solution by making the judicial foreclosure the same as nonjudicial foreclosure. This was meant to stop the banks from hopping between the nonjudicial process to the judicial process if they thought it would expedite foreclosing on the home and getting past certain rules and restrictions. For the homeowners, it is much more expedient and cost-effective to be in a nonjudicial process. When the bank chooses a judicial foreclosure, most of the homeowners do not respond or cannot respond because they do not know how. They do not have the access to the courts. The enrollment form that has to accompany the complaint and summons is meant to encourage the homeowners to come forward even if they cannot afford counsel. They also

have the contact information for the Legal Aid Center of Southern Nevada and various other nonprofits that offer classes and representation for homeowners that are disadvantaged.

As a mediator, I have presided over hundreds of mediations, and loan modification is not always the outcome. However, we do consistently pursue mediation because the homeowner and the bank can have an honest conversation. They are talking to someone in a position of authority who then says, Look, no matter what we do, these numbers do not work for your situation, but what can we do as an alternative?

Short sales were a common outcome in mediation between 2010 and 2013 because the banks were willing to allow, and wanted, those homes to be returned to the market. I believe this was the cause for the increase of home values in 2013. Taking the mediation program away from that judicial context will create an increase in judicial foreclosures again. The banks will not be required to bring someone with authority in to sit down and have a meaningful conversation on either a retention strategy or exit strategy that does not involve an actual foreclosure. Foreclosures on the whole reduce our home values.

If the goal of the program and the bill is to strengthen our real estate market, it is important to keep in mind that less than 10 percent of the homes will go through a foreclosure. It is better to return a home to market with a short sale or a loan modification than it is to go to auction for 65 to 70 percent of the value of the property, which is a common occurrence.

The last thing I would like to comment on is the damages section. Consumer attorneys need to have some type of statutory fee-shifting provision in order to represent people who otherwise have no access to justice. By taking out the attorney fees provision, you are stripping the homeowners and citizens of Nevada from being able to find attorneys to represent them that are knowledgeable, competent, and able to navigate them through this complex area of law and foreclosure.

Regarding the bank's cost-benefit analysis, I do not see how damages for willful misconduct can be factored into a cost-benefit analysis unless the banks intend to violate the law. I do not see how a damages provision would discourage lending. Having an expedient and efficient manner in which to turn properties back to the market would be an encouraging factor for lending.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, which is national; the Consumer Financial Protection Bureau rules and regulations; and the Nevada laws have not tied the hands of lenders in the last two years when

it comes to the impact of all the requirements that Assemblyman Jones was referring to with regard to getting a loan now. No Nevada law is going to change the lending standards. You have to prove that you are qualified, and the biggest problem the lenders have is the capacity to repay.

I think we are using this bill to tackle problems that it simply is not going to tackle. The only outcome I see here is a spike in judicial foreclosures—a taxing of our judiciary with regard to having to preside over these matters. We already have a program that has been put into place that efficiently deals with foreclosures. The current program puts properties either back on the market or back into a paying status. It has assisted us over the past six years in stabilizing our market as best as possible.

Robert Kern, Private Citizen, Las Vegas, Nevada:
I am a real estate and contract attorney based in Las Vegas and have been representing Nevada homeowners in litigation and mediation since the financial crisis began. I am going to deviate from my prepared remarks just to respond to the testimony I have heard this morning, because I had no idea what the proposed purpose or alleged benefit this bill would have. Mr. Brooks testified that this is for the purpose of stimulating lending in Nevada. I have to tell you that this bill will not do that.

If you look at this bill and what it changes, the only effect it will have is on bad loans. The bad loans came in the boom. We all know what happened in Nevada: everyone was trying to sell real estate and many bad loans came through Nevada. This bill creates a loophole so that lenders with bad loans can skip all the document requirements if they go through judicial foreclosure. They will not have any risk of penalty for misconduct or for making false statements and things of that sort. As an attorney who does this every day, as much as you would believe that large lenders do not do things like that, they do. They will do it more if there is no penalty for this conduct. The new loans that are going out there right now are not the bad loans. There is simply no incentive for lenders to give bad loans anymore. New loans are not going to be bad loans.

As Ms. Newberry pointed out, if you are not engaging in willful misconduct, you have absolutely nothing to fear. I have rarely seen a penalty or sanction given at all. The only time I have seen a sanction above $5,000 is when the lender was actually caught and proven to have forged an endorsement on a note. They gave themselves probably a $200,000 to $300,000 mortgage through forgery. If we have no penalty for willful misconduct and they stand to make $200,000 to $300,000 by forging that endorsement, we are giving them financial incentive to break the law. When we have judicial sanctions, what we

are doing is saying it is up to the judge. It is a good idea to leave that decision in the hands of the judge, so that when there is egregious misconduct, there is actually something they can do. What I want you to think about is the balance of factors here. We are hurting Nevada homeowners, and we are doing it in a way that is not going to stimulate any new lending. This bill has zero risk of affecting anyone who is making a new loan in Nevada.

Chairman Hansen:
Mr. Kern, if you could wrap up your testimony, we have a very tight schedule for the next week, and I apologize for not being able to allow you more time.

Robert Kern:
What I want to make clear is this bill creates a loophole so you can bypass the most egregious rules by going through judicial foreclosure. Since the passage of the Nevada Homeowner's Bill of Rights in 2013, there have been only 22 cases that have gone through judicial foreclosure. We are not talking about a massive number of cases. You are not going to change lending by changing 22 cases. The purpose of this is to create a loophole so that if lenders all go through the judicial method, they are going to get through that loophole. What we are going to do is create a massive backlog in our courts, increase costs, and insure that no homeowner who cannot afford an attorney for full litigation to be represented in something like this. I do know that there was a homeowner who wished to testify on their help with this bill.

Chairman Hansen:
I try to give 30 minutes to both sides, so I apologize and will be going to Mr. Sasser now.

Jon Sasser, representing Legal Aid Center of Southern Nevada:
In our opinion, this is a bill that is stated to stimulate lending in Nevada. However, the changes in the bill seem to have no nexus with that very laudable goal we all support. Why does Nevada have a smaller percentage of loans going through lending institutions? I think we all know that many investors have come into our state, paid cash for properties, and did not go through the traditional loan process. That is why we are unique in having that different percentage.

As we have heard, almost no cases go through judicial foreclosure. The mediation requirement is certainly not causing a problem with our ability to get loans. Three years ago, banks had bad paper, and often they could not prove they owned the property. Due to the mediation requirement, the banks began to file judicial foreclosures to evade the need to prove ownership in the

foreclosure mediation process. It was added in to keep people from evading our current laws and it is going to affect that.

We feel the second part of the bill encourages what has been called zombie foreclosures, leading to more abandoned properties, and not turning the housing market over as was stated in testimony from Las Vegas.

Finally, the provision that says you cannot get attorney fees when you have been wrongfully foreclosed upon encourages breaking the law. Those are some of our oppositions to the bill.

Chairman Hansen:
At this time, I am going to close the opposition testimony. For those of you who wished to testify, I apologize. I would like you to submit your testimony in writing. We also have a sign-in sheet that we pay attention to that shows who was for or against a bill. We have two additional bills we need to hear today and will have to move forward. I am not going to hear neutral testimony as no one signed in with a neutral position. Assemblywoman Seaman, you can come up and talk for 30 seconds, if you would like.

Michael Brooks:
With regard to the increase in judicial foreclosures, there is no nexus between the judicial foreclosures and the mediation bill, which was adopted in 2009. The judicial foreclosures were a response to A.B. No. 284 of the 76th Session. We will not see a resurgence of judicial foreclosures as a result of this bill. Regarding the allegations that this is intended to delay and creating longer time frames, it actually allows the lenders more discretion to negotiate with homeowners, and not forcing them to sell because of these arbitrary timelines, allowing them time to work out payment arrangements and other things like that.

Chairman Hansen:
We are going to reopen the hearing on Assembly Bill 193. The opposition did not get to testify, so I will give them one full hour. At 10 a.m. we will then give a rebuttal opportunity to the proponents of the bill. The bill we are going to discuss is the amended version that both parties have been able to work on together.

Assembly Bill 193: Makes various changes relating to criminal procedure. (BDR 14-911)

Steve Yeager, representing Clark County Public Defender's Office:
I will try to be as brief as possible. I have a PowerPoint (Exhibit F) but I will speak quickly and possibly skip some slides in the presentation. We also submitted a letter in opposition to this bill (Exhibit G). I am not going to cover all the points, just the ones we object to the most.

Chairman Hansen:
Mr. Yeager, you do not have to rush your testimony. You are the lead man, and I do not want you to do a speed read and think we are not paying attention. We do want to hear your testimony. This is a very serious bill with a lot of correspondence and very high-ranking judicial people on both sides, and I want to hear your side of it.

Steve Yeager:
I appreciate that. The speed in which I am going to do this is more a reflection of those who would also like to speak on the bill. The only change I wanted to make to the order of things is to have Dominic Gentile in Las Vegas speak after I am done if you would allow it, Mr. Chairman, as he has a prior engagement.

The Clark County Public Defender's Office is opposed to Assembly Bill 193. You heard a number of claims on what this bill is about at the initial hearing. The first claim was that it would save money, that there was too much money being wasted through the district attorney's office on witness travel. They told you that $1.3 million, which included jury fees, is what they have paid. As a point of reference, our Clark County jail last year spent over $16 million just in overtime to house inmates and operated at a $17 million structural deficit. That gives you an indication of the kind of money we are talking about. In the grand scheme of things regarding the criminal justice system, $1.3 million is not very significant.

If A.B. 193 is about saving money, there are a few questions you may want to ask yourselves. If we are about saving money, why would we eliminate a screening process that promotes plea bargains? Currently at preliminary hearings, hearsay is not allowed so we have a chance to hear from witnesses with actual knowledge about the case. Both the district attorneys and public defenders get a chance to see what the case is really about and evaluate the strength of the case. That results in a screening process or a vetting process. Assembly Bill 193 eliminates that. Many of those cases that now are negotiated either during or following a preliminary hearing will no longer be negotiated and will go to district court to be set for trial.

If A.B. 193 is about saving money, why is the defense now only going to get a witness list five days before trial? Under current statute, we get it well before trial and have a chance to investigate. Getting a witness list five days before trial is going to cause a delay and a fiscal impact on the public defender's office to hire more investigators.

Why would we require the defendant to attend the preliminary hearing? Right now there is a mechanism in statute where the defendant's presence can be waived. The defense has to give notice to the prosecutor, but why would we make the defendant appear for a preliminary hearing, especially if hearsay is going to be allowed and the preliminary hearing only involves a police officer reading from a police report? Why would that be necessary? The district attorneys want to make that a requirement, and currently it is not required.

There is an easier fix to the money problem, it is in sections 3 and 7 of the Nevada District Attorneys Association amendment (Exhibit H). We agree with this amendment. Let us use audiovisual technology with any witness who lives more than 100 miles away. That is a commonsense approach, but it preserves the ability to see and talk to a witness who actually knows about the case. However, it also saves costs. You heard in the presentation about needing to fly witnesses in from abroad and out of state; sections 3 and 7 would solve this problem. We agree; if this bill moves, it should include those amendments.

What is A.B. 193 really about? It is about shifting more power to the district attorneys' office. It is about eliminating oversight of the district attorneys' office. Right now, the justices of the peace have that gatekeeping function. I will tell this Committee that very few cases are dismissed at the preliminary hearing stage. However, the ones that are deserve to be dismissed. Allowing hearsay at a preliminary hearing would put the justice of the peace in a position where they would virtually never be able to dismiss a case following a preliminary hearing.

Although A.B. 193 might save the district attorneys some money in their budget, there will be consequences to this bill, and there will probably be more costs at the back end. The public defender's office will have to hire more investigators. Right now, we have one investigator for every eight attorneys, which comes out to about one investigator for every 2,400 cases a year. That is not going to be adequate. We believe that the jail costs are going to increase. If we are not having cases dismissed or appropriately negotiated following a meaningful preliminary hearing, those individuals are going to proceed to district court and go to trial. Most of them will remain in jail the entire time.

Our clients are indigent; most of them, if not all of them, cannot afford bail to get out of custody.

We believe this bill is going to require additional judges and departments to hear more jury trials. In addition, the justice of the peace is going to have a lesser opportunity to really look meaningfully at a case when deciding on bail. What happens now is when a client first goes to court, bail has already been set based on the charges the individual was booked into the jail on. At that point, I might ask the justice of the peace to either release my client or reduce bail. It is very common for a justice of the peace to say, "I want to see what happens at the preliminary hearing before I make that decision." This is because the judge wants to see how strong the case is and what the case is really about. If we allow hearsay at preliminary hearings, the judge is going to know nothing more after the preliminary hearing. He would only know the information based on the police report that was initially submitted on the case. In addition, neither side is going to learn any more about the case.

Preliminary hearings are valuable for both sides of the equation, district attorneys and public defenders, as well as the accused in finding out what the case is really about. If we take away a meaningful preliminary hearing, there will be additional costs associated with not being able to negotiate cases that should be negotiated.

Let us address the plea negotiations. I would say 85 to 90 percent negotiate prior to the preliminary hearing. This means the parties communicate and the district attorney never has to subpoena or bring witnesses to court. Those are the cases that we can all agree on what the value of the case is. Some cases are negotiated during the preliminary hearings. It is not unusual to start a preliminary hearing and to see a witness or victim on the stand and then realize the case is not what it appeared to be initially. There are times during a preliminary hearing we will take a short recess and negotiate the case. Some negotiate right after the hearing. Sometimes there is a public defender or a defendant who says, "This is not any good; they will never convict me." Then upon seeing the testimony, they may say this is a very strong case and want to negotiate it. Those kinds of situations are not going to happen if a preliminary hearing becomes just an officer reading from a police report, because no additional information is going to be gathered from the preliminary hearing. Even for the cases that have a preliminary hearing, 99 percent negotiate before trial. We should want to resolve the cases as early in the process as possible. That saves time, money, and not to mention the human cost of having a defendant perhaps remain in custody for a significant period of time awaiting trial.

The Clark County District Attorney's Office files about 23,000 felony cases per year. Last year in the Eighth Judicial District in Las Vegas, there were 149 criminal jury trials. That includes public defender and private defense trials. If the math is correct, that is a little more than 0.5 of all cases on the felony level that are filed that actually go to trial. The truth is, defendants are more likely to stay in jail pending those trials if there is not a meaningful screening at the preliminary hearing.

You initially heard that the genesis of this bill was not to make witnesses and victims testify at multiple hearings. However, if a victim has to testify, which happens about 10 to 15 percent of the time, usually they will only have to testify once at the preliminary hearing. The only time an individual is going to have to come back twice to testify is if there is a preliminary hearing and then a trial. You can see we had 149 of those out of 23,000 last year. Therefore, we are not talking about a significant number of individuals who would have to come back to Las Vegas twice. I doubt anyone is proud of this, but it is the reality of the system. The system would break if we even increased the number of trials by 20 or 30 percent; we would need more judges.

You also heard testimony that the justices of the peace are exceeding their statutory authority. We did not hear any examples of when that happens. If that is happening, let us hear the examples and talk about them. Let us talk about whether those decisions were inappropriate. The justice of the peace takes an oath to defend the *Constitution*. An adverse decision by a justice of the peace does not mean they are acting outside of their authority. It just means the district attorneys do not like having the case screened, but that is the function of separate branches of government. That is why we have a judiciary as a check on the executive power of the district attorney's office. This is not a problem because of the right to appeal; the justice of the peace is already in statute. We did not hear in the proponent's testimony whether they appealed any of those adverse decisions and, if so, what the results were. There is simply no demonstrated need for a reduction in statutory authority for justices of the peace. This Committee heard earlier this week that the district attorneys themselves admit that the justices of the peace perform an important gatekeeping function.

You might remember Assembly Bill 296 about co-conspirator liability, when the district attorneys themselves said Look, the really weak cases will be screened out at the preliminary hearings. This will not happen if A.B. 193 passes. No cases will be screened out at the preliminary hearing.

The idea of taking away the power of the justice court for the motion to suppress is not new. The Legislature considered this issue in 2007 in the 74th Legislative Session. I think Assemblyman Ohrenschall was the only one of you who was on the Committee at that time and, if I recall, that was his first session. The Nevada Attorneys Association brought this bill and it said the justice of the peace cannot hear motions to suppress. I have uploaded the bill, Assembly Bill No. 65 of the 74th Legislative Session (Exhibit I) and the minutes from that session (Exhibit J). There was a full hearing on it and at least one justice of the peace testified. I recommend this Committee read that hearing because I think it is enlightening in terms of the value of motions to suppress. That bill never came up for a vote.

If we are talking about saving money, the justice of the peace should dismiss cases that are blatantly unjustified and unfounded. If the district attorneys disagree, they can appeal. This Committee may or may not know that if the justice of the peace dismisses a case at the preliminary hearing because the district attorney had not met the lowest standard burdens of proof, the district attorney still can, and usually does, go to the grand jury. They essentially get a second bite of the apple, which happens routinely. If a judge dismisses a case, I expect to hear from the district attorney saying they are going to the grand jury. That is also another avenue. Again, we are talking about very few cases. In six years of doing preliminary hearings, I can tell this Committee I have not had a justice of the peace dismiss one case. I have had them dismiss certain counts but not a case. It is so infrequent that when it happens, in our office of 125 attorneys, we know about it because it is the exception, not the rule. Of course, if the district attorneys do not like the rulings on motions to suppress, they can appeal. That is already in statute, and I think it has been in statute since 1969.

Let me give you one real world danger of A.B. 193. You might have remembered hearing about a case from 2013. There was a horrific automobile accident in Moapa, Nevada, where five individuals were killed. They arrested an individual named Jean Ervin Soriano saying he was the driver of the car and that he was intoxicated. The witness at the time told the Nevada Highway Patrol that she saw Soriano exit the driver's side of the car. At the preliminary hearing, that witness appeared in person and admitted that she had made a mistake, that the car Soriano had exited was actually turned over so she saw him exit the passenger seat. In addition, that was the first time she realized she had made this grave mistake. As a result, the case was dismissed and the actual driver was apprehended. Under A.B. 193, that would not happen. We would have a police officer telling the judge what the witness said at the time of the accident and that individual, Mr. Soriano, would have stayed in jail anywhere from a year to three years awaiting trial. His bail would have been

set astronomically high with the five deaths resulting from the accident. This is the kind of case that A.B. 193 is going to change. That is only one example of many. I am sure the Committee has gotten emails about others, and I will not go through all of those. That is the kind of case that concerns us when we talk about A.B. 193.

The claim is that this bill is about protecting five-year-old sexual assault victims. However, as written, it does not just apply to that; it applies to any age. The bill is not worded to protect that narrow class of people the district attorneys claim it is intended to protect. What no one mentioned in regard to this claim is that existing law already protects children. *Nevada Revised Statutes* (NRS) 51.385 allows for the admission of hearsay statements of children under the age of ten. In many circumstances that is routinely used both at the trial level and in justice court. In addition, there are a couple of other statutes referenced here that allow for alternative methods for children to testify. They can set up screens and have them testify from a different location. Therefore, the Legislature in the past has already seen fit to change the rules for children.

It is also claimed that Nevada was behind the times and it was time for Nevada to join the rest of the nation. You were told that 37 other states already do this and that hearsay will not violate the *U.S. Constitution*. The truth is that Nevada is far from the only state to provide protections at preliminary hearings. We have had preliminary hearings for over 100 years in this state. We have had the rules of evidence apply at those hearings, and it has worked well. Of the states cited by the district attorneys, less than half would allow what the district attorneys are seeking here, which is unqualified admission of all hearsay. In terms of population, only about 25 percent of the country allows what A.B. 193 would in terms of hearsay at a preliminary hearing. Currently 18 states, including Nevada either prohibit hearsay or have limited exceptions that appear in statute. These states have a total population of 136 million people, which represents about half of the country. Some of the other states that apply the rules of evidence at preliminary hearings are Texas, the second most populous state; New York, the third most populous state; and Florida, the fourth most populous state. Nine of the states cited only admit hearsay with significant restrictions. That is another 20 percent of the population. California is the most populated state in the country and they do this by a measure called Proposition 115, but it is very qualified. In California, you have to be a qualified law enforcement officer to be able to get this hearsay. Not just anyone can come in and testify to hearsay. In Colorado, the judge has to approve it before the hearsay comes in. In Oregon, you have to show that it would be an unreasonable hardship to bring the witnesses to court.

My legislative intern did extensive research on all 50 states, including making calls to figure out exactly what they do, and I would put his research up against anyone else.

The majority of states that are doing this have significant procedural safeguards that are not included in A.B. 193. Only 25 percent of the population allows unrestricted hearsay. The federal system does not even have preliminary hearings; they just have grand juries. I would submit to this Committee that the federal system is very different from our state system. They have nowhere near the volume of cases, they have a much higher conviction rate as well, and they have a meaningful system of pretrial release. You probably have seen from newspaper reports that when someone is convicted in the federal court usually they are being told to turn themselves in to serve their prison sentence. That is because the default is that you are going to be out of custody fighting the case. Unfortunately, that is not the case here in the state of Nevada.

We should not want to be California or any other state. This Legislature has heard repeatedly about how we are Nevada and are proud of it. We do not need imports from other states, and I would submit that California is probably the last state we should be looking at in terms of how to do things. They are potentially under federal court orders to release people from their jails and prisons. We do not need to play "follow the leader" here. We have had preliminary hearings since the late 1800s and they have worked. Why would we have this dramatic change now without any demonstrated need for it?

The truth is there is value to seeing live witnesses. There is value not just for the defense attorneys, but also for the prosecutors and the defendant. The Nevada Supreme Court stated that the purpose of a preliminary hearing is to weed out the weakest of the weak. Under this bill that will not happen because you are not going to have live witnesses appearing at preliminary hearings; you will just have police reports. Groundless or unsupported charges of grave offenses relieve the accused of the degradation and the expense of criminal trial. Many unjustifiable prosecutions are stopped at that point where lack of probable cause is clearly disclosed. The preliminary hearing is a critical stage of criminal proceedings.

If you are poor, you get a public attorney at a preliminary hearing. I am not sure, under this bill, what my role would be at a preliminary hearing because I cannot seem to do anything other than ask questions relating to probable cause. This would just make our role to be someone who just sits there and listens to the contents of a police report that we have had for 15 days. If you were going to do this to preliminary hearings, you would be better off to get rid of them entirely. It would be an utter waste of time for the defendant, the jail

transporting officer, the district attorney, the witness, and the defense attorney to show up in court for that. We can all read a police report; we do not need it to be read to us.

So what is A.B. 193 really about? It is about power. It would give the district attorneys the power to keep someone in jail for at least 90 days on a police report alone. I say at least 90 days because that is about as fast you are going to get to a jury trial in Clark County, and that number of days is probably a lot longer—closer to a year. It eliminates the oversight of the judicial department by neutral magistrate, which is the whole point of having a justice court. It is a dramatic, sweeping, unwarranted change to 100 years of procedure that has worked really well in this state. Assembly Bill 193 allows all hearsay, second-, third-, and fourth-hand. We could even have an officer saying another officer told me that a witness said that another witness said. There is no limit to the kind of hearsay that can be allowed under this bill. There is no oversight or exceptions.

Finally, A.B. 193 is not right for Nevada and its citizens. You told us that this is the most important bill for the criminal justice system in the last 20 years. It is the single most dangerous bill in the last 20 years. The potential that this bill has to clog our system, to keep people in custody pending trial, and the cost, both financial and human, are significant. It is not prudent to make such a sweeping change after a few hours of testimony. If we are going to go down this road, we need to take baby steps. If the Committee's wish were to proceed on something like this, my recommendation would be to refer this to the Advisory Commission on the Administration of Justice. Let us have a real conversation over the interim about the impact of this bill. Let us hear from the judges and from all parts of the state. Things do not operate everywhere like they do in Clark County. However, I think it would be imprudent for the Committee to pass a bill like this after only three hours of testimony. We could have 25 to 45 people show up to testify against this bill, but out of respect for your time and the realities of the situation, we tried to limit our testimony as much as possible. However, many stakeholders would need to be heard before we do something like this. Therefore, my request on behalf of the Clark County Public Defender's Office is a no vote on A.B. 193, at least the portions that would allow hearsay and that would take away the judges' ability to entertain motions to suppress. Those are dangerous changes that are not needed.

Chairman Hansen:
Thank you, Mr. Yeager. That was well put. What I want to do is listen to all six of you gentlemen before we go to questions. I want to be sure what you need on the record is on the record. What was the name of the gentleman in Las Vegas you wished to testify?

Steve Yeager:
That would be Dominic Gentile.

Dominic Gentile, Attorney, Las Vegas:
I should probably give a little background about myself. Next Saturday I will start my forty-fourth year in the practice of law. I have been teaching trial advocacy, evidence, and criminal evidence since 1977. I was the first adjunct professor hired by the William S. Boyd School of Law. I was the first adjunct to teach at a law school in Nevada.

I am here to deal with the question of hearsay at both a preliminary hearing and a grand jury. I have yet to hear anybody mention that the law we currently have in Nevada was passed in response to six years of work that was done by the American Bar Association (ABA) Criminal Justice Section's Committee on the Grand Jury, between 1977 and 1982. I tried to get copies for everyone, but it is copyrighted with the American Bar Association. I will try to make it available to all of you. It was in the 1980s that Nevada came into the modern world, and I have no idea why no one has suggested this to you. I also want to comment on the fact that Mr. Yeager talked about how he has never seen in his years as a public defender a case dismissed at the preliminary hearing stage. There is a good reason for that.

The bottom line is the definition of probable cause in terms of how much evidence it takes to establish, whether it is at a preliminary hearing or a grand jury, and I quote "slight or marginal evidence," which is the definition of the Nevada Supreme Court. The Nevada Supreme Court has recognized that one witness is enough to establish probable cause. It is critically important that there be at least a witness and a percipient witness. Hearsay evidence is loosely defined as something someone in court says that repeats what they heard someone out of court say. It puts the trier of fact in a situation where they have no ability to assess the credibility of that person upon whose statement the finding of probable cause by slight or marginal evidence is made. This applies whether it be a justice of the peace at a preliminary hearing, a judge at a bench trial, or a jury, and it applies in both civil and criminal cases. We currently use hearsay evidence in preliminary hearings in Nevada. There are 44 exceptions that come to mind to the hearsay rule, and if it fits an exception, it is admissible. The only hearsay that is not admissible in Nevada is rank hearsay: hearsay that is not trustworthy at all based on hundreds of years of experience with it.

With a criminal prosecution, you have, in addition to the simple hearsay rule, the question of confrontation. The defendant has a constitutional right to confront witnesses against him. Now that might not apply at a preliminary hearing, and

I grant you that. But one of the things that I have heard no one say is, what are you going to do in a situation where the district attorneys prove the slight or marginal evidence by way of a hearsay statement that came in without the opportunity to cross-examine or confront that out-of-court statement that was otherwise inadmissible. I suggest to you that after a hearing such as that, it would be incumbent upon a defense lawyer to say to his client, Well, unless they provide that witness live at your trial, they will not be able to convict you on that. I further suggest to you that there are some defendants, none that I represent, that might find a way of doing away with that hearsay declarant before the trial. You will be inviting that if you allow inadmissible hearsay to come in at a preliminary hearing. I have not heard anyone speak to that, and certainly not the district attorneys.

The federal system has a provision for preliminary hearings; the last one I saw was in 1973. It did away with them because the federal system in our district indicts fewer than 300 cases a year. Of those 300, at least 200 of them are what we call proactive cases where some federal agency targets an individual and decides they want to indict that person and then they go out and look for evidence to do so. About one third of them are such things as bank robberies or drug deals. Almost all of the cases that come through state court are reactive cases. It has been a long time since there has been a proactive investigation in state court. The weeding-out process that is performed by good lawyers who choose to spend their life as justices of the peace and contribute to society in that fashion, who have the same education and the same credentials as the district court judges but are just in a court that has less jurisdiction—to squander and waste their ability to make judgments with respect to the existence of slight or marginal evidence by making it easier to put this evidence through as hearsay, is simply not a good idea.

I also want to address the question of the grand jury process. The proposal by the district attorneys is that a grand jury will be able to return an indictment on pure hearsay 100 percent. A preliminary hearing can then result in a finding of slight or marginal evidence existing on pure hearsay. I again direct you to the study that was done by judges, prosecutors, defense attorneys, and law professors who were members of the ABA's Grand Jury Committee. If you look into the legislative history, you are going to find a prosecutor by the name of Ray Jeffers, who has passed on from us. I had the good fortune of working with him the last couple years of his life. There was no one that was more vocal about installing the protections that the ABA's Grand Jury Policy and Model Act came up with than Ray Jeffers. In addition, there was also no one that was more fierce and believable a prosecutor. I think this Committee would make a mistake if it acted upon this bill without looking into the work that was done by the ABA.

As far as I know, the only two states that adopted the grand jury proposals, wholesale, and banned hearsay because of that study are Nevada and New York. To the extent that there are any weaknesses, those can be corrected by our Supreme Court on a case-by-case basis. However, to do away entirely with the ban on rank hearsay being used and to eviscerate the properly exercised judicial power by our justices of the peace simply does not serve the people of Nevada.

Chairman Hansen:
Mr. Yeager, who is the next person you would like to call?

Steve Yeager:
Jeremy Bosler, Washoe County Public Defender.

Jeremy Bosler, Public Defender, Washoe County Public Defender's Office:
I sat through the previous proceeding where the district attorneys made their presentation and heard the same comments about the cost savings and efficiency. I will submit to the Committee there is a greater goal in the criminal justice system than efficiency, and that is accuracy. This bill undoes many of the provisions that have been in Nevada for 150 years.

We have a strong libertarian tradition in Nevada and part of that tradition is to have a preliminary hearing. That tradition has been that when the state exercises its power and has you arrested for a criminal offense you have a right to have that matter heard in front of a neutral magistrate very quickly. In fact, you can examine witnesses to make sure there is some accuracy and legitimacy to that prosecution. This bill undermines the whole tradition of Nevada and would put us on a less firm footing and lead to less accurate results and ultimately more spending by the public defender's offices.

I monitor the bills for the Public Defender's Office and our trial rate is similar to Clark County's which is less than 1 percent. If you have a preliminary hearing by hearsay—and this could be second-, third-, or fourth-level hearsay—those cases will not be screened. They will be sent to district court and every public defender and private attorney will have to act upon the assumption that the case will go to trial. They will not have the opportunity to have bystanders, the complaining witness, or the officer under oath. By taking the posture that the case will go to trial, you will be lining up extra witnesses and buying plane tickets for witnesses for your case. What has been to this point the ability to do these things in justice court very quickly and with less expense now will be shifted into district court so that every case will be a trial case. You will see cases resolving the day or week before, but only after everybody has spent the time and expense to work up the case as if they were going to trial.

Clark County District Attorney Steven Wolfson made a comment at the last hearing that he did not see this bill as increasing the number of trials because there are only a limited number of judges. I do not agree with that sentiment. It would be akin to this Committee or the Legislature passing ten new criminal offenses. There would be more trials regardless of how many trial judges we had on the district court bench. I do not share his confidence that this will not impact the district court. I would hope that it does not pass but if it did, I think you should expect the district court, probation, prosecutors, and the jails to come to you in two years saying, Well, we did not weigh in heavily on this but now we see the unintended consequences of this attempt to make our system more efficient.

I share the concerns expressed by other members of the Committee about the idea of having hearsay being admitted at any level, either grand jury or preliminary hearing. I am concerned about the idea that we want magistrates to consider evidence that we know is unlawfully obtained. We do not want the magistrate to even deal with that; we would just rather pass that case off to district court. I do not see how that is efficient for the taxpayers, for the people who are involved in the system, the judges, the bailiffs, the prosecutors, or defense attorneys. I do not see how that is good for our community or even law enforcement, because the quicker we can show an officer what he has done is not going to withstand constitutional muster, the quicker that officer can change his behavior and tell his supervisors, Hey, this is going on and I do not think this should be part of our practice. Why would we want to delay that process? Why would we not want magistrates to do the job that they take an oath to perform, and that they are elected and paid to do?

Again, there has been a lot of talk about efficiency and cost savings. I would submit that it is a completely inefficient way to go about it. The cost savings will be shifted and increased in other areas.

Unique to Washoe County is that with the current system, we have the ability to bring witnesses to preliminary hearings, which I think is an important responsibility the state knows it has. We have built a system called a mandatory status conference system which has reduced the district attorneys' need to bring witnesses to court. We have reduced their subpoena fees by 70 to 80 percent. We have been able to resolve cases still in the preliminary hearing with the law as it exists, preserving the idea that if a preliminary hearing has to be conducted that the state will have to bring witnesses which will be their responsibility. If they cannot do that, or if they do that and the case does not turn out the way they thought it would, those things can be resolved.

[Assemblyman Nelson assumed the Chair.]

I see very little good coming from this bill. Not to repeat the testimony of previous witnesses, but there are a constellation of small procedural problems that occur with this bill. Whether it is dealing with *Cripps v. State of Nevada* [122 Nev. 764, 137 P.3d 1187 (2006)] issues and other Supreme Court precedents, this is not something I would encourage this Committee to pass. This is something that should not be taken lightly or quickly. If this were a bill presented by the defense bar, I would venture to say that the prosecutors and other members of the bar would be saying that the Advisory Commission needs to look at it and bring experts from other jurisdictions. Also, review the ABA report that Mr. Gentile referenced. The only thing that is constant in criminal justice is the law of unintended consequences. I think you are putting yourself in a position where all the unintended consequences will overcome any benefit, if there is one, from this bill that has been submitted by the District Attorneys. [A copy of Mr. Bosler's testimony is submitted as (Exhibit K).]

Vice Chairman Nelson:
Mr. Yeager, who would you like to testify next?

Steve Yeager:
Could we go back down to Las Vegas to Scott Coffee and Bill Terry?

Scott Coffee, representing Nevada Attorneys for Criminal Justice:
Chairman Hansen made a comment earlier concerning opinion. These concerns have been written about in law review articles by Professor David Brennan from San Diego, California. These articles talk about preliminary hearings and what has happened in light of Proposition 115 in California. Most of the concerns that have been expressed today have been documented there, including less accuracy in the plea bargaining agreement.

I listened to the testimony last week and the sponsors of the bill said that the system is broken. I respectfully disagree; I think what they were saying is the system, on occasion, is inconvenient for them. Sometimes the system should be inconvenient. It is the reason we got away from Star Chambers, which were a much easier way to prosecute people but were not very accurate. There has to be a cost to justice and having people show up and give testimony. If they are going to accuse someone, it makes perfect sense.

We were told last week that the prosecutors are concerned about justice and that they can take care of the problem. In addition, they would never prosecute a case they did not think was righteous. With all due respect, allowing prosecutors to simply admit whatever hearsay they would like and not having

a neutral magistrate involved is like letting the catcher and pitcher call their balls and strikes in a major league baseball game. It is a nice idea, but it does not work very well in practice.

I have been inundated over the past several weeks since A.B. 193 has come before this Committee with cases that have been dismissed at preliminary hearings. Cases were dismissed for witnesses changing stories and even well-meaning prosecutors get cases wrong. It happens many times because they get bad information in the field. Where that becomes known is in a preliminary hearing when the actual witnesses show up.

There has been some discussion about hearsay and Mr. Lalli said we could bring in an officer to testify for several witnesses and make things easier. With all due respect, what has been proposed does not require an officer. The district attorney's office could go down to the street corner and get a volunteer to read a police report into the record. You cannot ask any meaningful questions in that situation.

I would like to give an example that I think everyone can relate to. Suppose you are in college and you are a fan of Shakespeare. You hear about a wonderful new version of *Hamlet* that is about to come out and you go to the movie but you have not seen the trailer. The first actor on the screen is Fozzie Bear, the second is Big Bird, and the third and fourth are Ernie and Bert. You are very disappointed at what has just happened. The trailer, if you had seen it, would have let you know who the players were. Seeing the trailer would have let you make the evaluation if it was a worthwhile use of your time to go sit through that particular version of *Hamlet*. Preliminary hearings are the same thing. They are not a mini trial but they do allow us to look at credibility and figure out which witnesses may or may not be credible. They do allow for correction of problems that happen in the field.

No one has talked specifically about human costs, but there is tremendous human cost here. There have been lists of cases I have been given that were actually dismissed at the preliminary hearing. It is a major inconvenience, rightfully or wrongfully, to have the accused sitting in custody for a couple of weeks. However, it is nothing compared to the life-changing difference of putting the wrongly accused in custody for 90 days. We are talking about an inconvenience and the difference between losing their home, losing their family, or their job. When Mr. Lalli was presenting last week, he admitted under questioning from Assemblyman Ohrenschall that he has seen charges dismissed, and it will affect the judicial economy when those cases are no longer dismissed. It is a problem; a financial cost to Clark County. It costs about $130 a day to keep someone incarcerated. An additional 60 days in custody is

going to add $6,000 to $8,000 to the bill for incarceration for every one of those cases that are wrongfully bound over. A savings could be had by simply allowing audiovisual testimony. I urge this Committee to vote no on A.B. 193. [Mr. Coffee also submitted a letter in opposition (Exhibit L).]

[Assemblyman Hansen reassumed the Chair.]

Chairman Hansen:
Thank you, Mr. Coffee. Mr. Terry, go ahead with your testimony.

William Terry, Attorney, Las Vegas, Nevada:
I have been practicing law in excess of 40 years. I would like to bring two cases to your attention; one when I was a federal prosecutor and another as a criminal defense attorney. When I was a federal criminal defense attorney, as Mr. Gentile indicated, a preliminary hearing was a rarity. We had a case where an individual was charged with bank robbery, and for some reason I did not believe the reports and the witness identification. I decided to do the preliminary hearing in the federal system and sure enough, when the witnesses testified live, they indicated that was not the defendant. I represented another young man when I became a defense attorney in the criminal system in Nevada. He was charged with multiple counts of sexual assault. He remained in custody for a period of time until we had the preliminary hearing. The reports clearly indicated that at least three witnesses identified him as the individual who had done the sexual assault on this woman. At the time of the preliminary hearing, each one of the witnesses testified that he was not the young man. If this bill passes, both of those cases would have had different results, whether they were in the state system or the federal system. Nevada has always been in the forefront of recognizing defendant rights and not in the forefront of how we achieve potential misjustice in the quickest way possible.

The Legislature passed enactments years ago that recognized that there were racially biased reasons why police officers were arresting people on traffic violations. That is no longer permitted. These legislative sessions have recognized the importance of keeping these safeguards in place. Whether Nevada is a minority state because we do not allow hearsay or because we are simply at the forefront, we have continued to do that by such things as the requirement for a prosecutor to present exculpatory evidence if he is aware of it. Why do we want to back down from that type of approach? This type of legislation sends a message to the justices of the peace that they do not have the ability to weed out those cases that should be weeded out. The reality of life is that the majority of the justices of the peace we have that consider motions to suppress and motions to dismiss and the exceptions to the hearsay rule that have to be testified to do an exceedingly good job. Why do we want

to eliminate those rights at the time of the preliminary hearing? Our court has said that the preliminary hearing is a critical stage of the procedure, and our Nevada Supreme Court has said it recognizes that the justice court proceedings eliminate cases that should never be in the district court system. Currently, if an individual is arrested and, if they do not have sufficient funds to meet the standard bail, they are going to remain incarcerated. If you allow hearsay to be utilized at a preliminary hearing, those individuals will typically remain incarcerated through the district court level. That is not a recognition of an individual's rights nor is it a fiscal savings on the part of the state of Nevada. I urge you not to allow this legislation to pass.

Chairman Hansen:
Thank you, Mr. Terry. We have about five minutes for one more person to testify, and then we will have a few brief questions.

Steve Yeager:
We have Kriston Hill from the Elko Public Defender's Office who traveled a great way to testify.

Kriston N. Hill, Deputy Public Defender, Elko County Public Defender's Office:
This bill proposes two things unique to the rural areas. The first is that there will be a due process violation. The *Constitution* of the State of Nevada and the *U.S. Constitution* require that life, liberty, or property cannot be denied without due process of the law. It is dangerous and sets a bad precedent that due process for criminal defendants is now going to be different. If a criminal defendant commits a crime in Clark County, the process due to him is going to be different than if he commits a crime in Elko County or Washoe County. For that reason alone, we would suggest that you do not allow this bill to proceed. Additionally, this bill does away with criminal information. Criminal information is extremely important to us because they provide a list of witnesses the state intends to call. We use this list to do our conflict checks. Elko County is a very small area; most of our clients communicate with other criminal defendants. They are always mixing and mingling, and it is often that we represent multiple witnesses in a case. If this were to proceed, there is a potential that we would not find out those conflicts until five days before trial. It is going to be extremely costly to our office. Our resources are limited, and we could be wasting those resources preparing a case for trial that may never proceed to trial. Additionally, it is going to be costly for our county. Unlike Washoe and Clark Counties, our county does not have an alternative public defender's office where the case is handed off if a conflict arises. Our county pays private attorneys $100 an hour to represent indigent defendants that our office has a conflict with.

As I indicated, this is going to be a huge cost to our county, because we have wasted so many resources preparing this for trial and now another attorney is going to be charging our county $100 an hour to basically redo the work we have already done to prepare this for trial. This would also require that defendants appear at the preliminary hearing. There are two reasons this is a bad idea. The first is a practical reason; sometimes our clients cannot afford to come. I have represented a college student from New Jersey and truck drivers from Delaware, and they simply cannot afford to come to a preliminary hearing. The second reason is a strategic reason. Sometimes there are problems with the identification of the witness and we do not want our client there until we can resolve those identification issues. This is even more problematic because now we would not be allowed to make a motion to prohibit an in-court identification. This is a bad idea for the citizens of Nevada. It can have a huge detrimental impact on the rural areas, and for these reasons we would urge you not to pass Assembly Bill 193. [Ms. Hill also presented a letter in opposition (Exhibit M).]

Chairman Hansen:
Mr. Yeager, we are out of time. I would like to allow some Committee members a few very brief questions.

Assemblyman Gardner:
We have received many letters from victims groups talking about how traumatic it is for them to come to preliminary hearings. These are victims of sexual assault, child abuse, and rape, to name a few. What would your response be to those people saying this would be a good thing for these victims, as they would not have to come to a hearing and face the people who harmed them?

Jeremy Bosler:
The District Attorney at the last hearing told you that they have a way to resolve that. They can bring people to the grand jury at any time and have them testify outside the presence of defense counsel or the accused. There are processes already in place to prevent that. Can we eliminate the trauma that goes with testifying as a complaining witness? I do not think there is actually any way we could get to that point. I would also submit that there is significant trauma for the defendant who may be wrongfully accused. They are being held in jail, away from their family, possibly losing their job and home. We want to get them to court as quickly as possible and have a magistrate or some other process involved. Is there a magic answer? Will this bill help certain people? Perhaps, but the other repercussions of the bill are so harmful to the criminal justice system. I do not think it should be lightly undertaken.

Assemblyman O'Neill:
Mr. Yeager, throughout this testimony I heard you do not allow bail in Clark County? I thought that was a right; you keep saying people are being kept in jail? Are there no bail proceedings in Clark County?

Steve Yeager:
If I said that, I misspoke. Typically, criminal defendants do have bail, but my point is that it is set at the time of booking, so it is based on whatever the person is booked into the jail on. In my opinion, the bails in Clark County are high. My point was that my clients, by definition, are indigent. They are most likely not going to make any standard bail. When they have their first appearance in court, I might ask the judge to adjust the bail, but typically the judge says he wants to see what is going to happen at the preliminary hearing. My point being, if we get to a preliminary hearing and the judge does not learn anything more than they had initially, which was the police report, there would not be movement on the bail. I think the likely scenario is going to be that these people will stay in custody pending the resolution of their case.

Assemblyman Jones:
First, I appreciate your passion for wanting to stand up for people's rights, and you gave a very good presentation. However, I was a little confused because early on you said you were okay with the amendments but then it seemed the entire presentation was that we were throwing the preliminary hearing out the door. If you are good with the amendments, and the district attorney's office are good with them also, was most of what you said not applicable?

Steve Yeager:
We are okay with most of the amendments, but there are still some that are huge sticking points. For instance, we are not okay with allowing in unfettered hearsay; that is in the amendment and we do not want it there. We are not okay with saying that a justice of the peace should not be able to entertain a motion to suppress. Those are the two largest issues but there are some minor issues that I wrote about in my letter to the Committee. The justice court taking the pleas—in Clark County we are okay with that. The witness being 100 miles away—we are okay with that. There are some things in the bill we could live with, but the two main ones being hearsay and eliminating the motion to suppress, we object to wholeheartedly.

Assemblyman Ohrenschall:
I am concerned with section 8 of the bill regarding doing away with the defendant's right to let the grand jurors know if charges were dismissed at the preliminary hearing because the justice of the peace found there was not any slight or marginal evidence to bind the defendant over for a district court trial.

I was here in 2011 along with Chairman Hansen, Assemblywoman Diaz, and Assemblyman Anderson and at that time, Assembly Bill No. 269 of the 76th Session was met as I recall with no opposition from the prosecutors association, and that was the bill that allowed a defendant to have the grand jurors know that the charges had been dismissed at the preliminary hearing. I wondered what would be the public policy goal of keeping the grand jurors in the dark and not letting them know that the prosecutors have already had one bite of the apple, the charges were dismissed, and now they are going back for a second?

Steve Yeager:
I cannot speak to what the intent is behind the change. I do agree that this particular provision was vetted and supported even by the Nevada District Attorneys Association and was voted 39 to 3 in the Assembly that session. If we are not going to tell the grand jury that there was a prior proceeding where the case was dismissed, the reason would be that it is more likely that the grand jury would indict on a case. It is likely that the grand jury would make a decision contrary to the justice of the peace. Maybe we could have the district attorneys explain what their intent was, but for the defense attorneys it was a recognition that someone who had already looked at the case decided there was not enough evidence there and the grand jury should know that.

Assemblyman Ohrenschall:
I agree; I cannot countenance keeping the grand jurors in the dark about that.

Steve Yeager:
Mr. Chairman, if I might very briefly let you know a number of other people are here who wanted to testify. I understand that we have a limited amount of time, but did want to acknowledge those that came here. I did not realize during the hearing that this bill was scheduled for work session next Thursday. Between now and then, if anyone has additional questions, I will be here, probably close to 24/7 as will most of you, so feel free to reach out, and I will be available to answer any questions.

Chairman Hansen:
On this particular bill and Assembly Bill 49, I suspect we could take a week for each side. In all seriousness, we have had a lot of excellent testimony, extremely capable people saying many very valuable things. I apologize to all the people in Las Vegas for not being able to give you the full opportunity to vet your concerns. If you would please submit them in writing to us. Trust me, I am working overtime to get an understanding of both sides of this issue so we can make a wise decision. We will now bring up Mr. Duncan for rebuttal.

Wesley K. Duncan, Assistant Attorney General, Office of the Attorney General:
I do appreciate this Committee's indulgence in hearing these bills and vetting these important issues. There are people down south who wish to address this issue first, and then I will give my closing statements.

Brigid J. Duffy, Chief Deputy District Attorney, Juvenile Division, Clark County District Attorney's Office:
I am here today on behalf of Clark County Department of Family Services. The 16 attorneys in my office represent that department. What I would like to talk about today is that many of the victims in our criminal cases are children in the foster care system as a result of abuse or neglect by a perpetrator responsible for that child's welfare.

As you deliberate over this very important piece of legislation, I am confident this Committee will consider the trauma our child victims will continue to endure when they are subjected to multiple hearings. On behalf of the foster children that I serve, I want to ensure this Committee knows that in addition to those criminal trials you have been talking about over the last few hearings, these children are also put through at least one other trial in family court. If we were to go to termination of parental rights, they would then have to go through two trials. We need to find a way to reduce the continued trauma to our vulnerable children. Just imagine being a 6-, 10-, or 15-year-old and having to tell a story about how you were sexually assaulted, not just to the person you report it to but repeatedly and potentially four times to criminal and family court, who are basically strangers. Passage of A.B. 193 takes a positive step for our child victims, especially those I serve in foster care, to reduce their trauma.

Jocelyn Murphy, Client Services Coordinator, The Rape Crisis Center, Las Vegas, Nevada:
I am here on behalf of the Rape Crisis Center of Las Vegas to express our support of A.B. 193. We feel this bill is beneficial to all victims because of the emotional difficulties brought on by having to face a perpetrator multiple times in the courtroom, and relive and discuss the details of a sexual assault multiple times in front of spectators in the courtroom. [Ms. Murphy continued reading from testimony (Exhibit N).]

Daisy Hernandez, Director, Clark County Youth Advocate Program:
We are a national nonprofit and here in Clark County we work as a mentorship and advocacy group. We work specifically with victims of human trafficking aged 12 to 17. I am here to support this bill. As my colleagues have said, this will help reduce the retraumatization of our victims and children who go through the court process.

Kristy Oriol, Policy Specialist, Nevada Network Against Domestic Violence:
I want to echo what has already been said about victims, but there are a couple more points I think this Committee needs to take into consideration. First, for domestic violence to be considered a felony, which is where this bill would apply, a person would have to be convicted three times within seven years or would have had to commit the violence by strangulation. These particularly egregious crimes would elevate this to a felony level where a victim would have to come testify against his or her abuser at the preliminary hearing. We think this is very scary and dangerous for victims. I do not want the Committee to underestimate the impact fear can have on a witness. We have heard many stories today about how witnesses can change their story and potentially how this can impact a defendant. Estimates show that 80 to 90 percent of victims recant their statements. Does that mean that 80 to 90 percent of victims are lying? No it does not; it means these victims are very fearful when they are in the courtroom staring at their abuser and having to tell their story. These victims are facing fears from not only the abuser but also the abuser's families and friends in the community. Please take that into consideration when you consider this bill.

We are in support of the sections that allow hearsay to be used at preliminary hearings and grand juries, as well as the use of audiovisual technology. There are quite a number of elder abuse victims of domestic violence that are not able to attend the hearings, and we think this audiovisual access is very important (Exhibit O).

Wesley Duncan:
I want to address some of the points that were raised in Mr. Yeager's presentation. I know Mr. Yeager certainly meant no slight in his presentation. I have practiced on the other side of the table with Mr. Yeager. I take umbrage to the characterization of this bill as a power grab and that the district attorneys or Attorney General want to ram cases down people's throats, because this is not what this bill is about.

We talk about human cost to defendants. There are human costs to victims as well. Assemblyman O'Neill asked about the bail schedule. The bail schedule is set for every type of felony. When they go before the justice of the peace, the counsel will present arguments as to where to set bail. The justices of the peace are aware of the overcrowding in the jails. The people who are dangerous to the community, a flight risk, or have multiple convictions are the people who are staying in custody until their preliminary hearing.

The assertion was made here that this is going to overload the district court system with cases. I would like to give you a practical look at how this works. Prior to a preliminary hearing, an attorney general or district attorney is given a list about a week out of the cases they will hear. You have all your case files; you know which cases are going to be heard in front of the justice of the peace. You contact the defense attorney and make offers on those cases. As they said, 99 percent of the cases are plea-bargained. Even before you go to a preliminary hearing, a deal has already been worked out. Before you even step into a preliminary hearing, you have already negotiated these cases. District attorneys or attorneys general do not want to put on 15 extra cases now that hearsay evidence is allowed in. The system is still going to be leveraged. It was said more cases are not going to be negotiated. The other side of that is that more cases will likely be negotiated. Defense attorneys do a great job throughout our state; they represent their clients to the best of their ability. However, they understand that currently the way the preliminary hearing system works, many of those hearings have become mini trials. You can say, Let us see if the victim shows up or Maybe the child victim will do terrible on the stand. This is a probable cause hearing we are talking about, not their actual constitutional right to a trial. We are talking only about a probable cause determination. A probable cause hearing is not the place where you entertain your constitutional motions like suppressing evidence.

Mr. Gentile made a statement that our justices of the peace are just as equipped as district court judges. That is not true. In 15 out of our 17 counties, lay people are allowed to be justices of the peace. I do not have an opinion on whether this Legislature should change that or not, but how can a person who has not gone to law school have the same ability as someone who has a law degree and understands the legal process? This body has decided that justices of the peace do three things: hear misdemeanor trials, arraign felonies, and hear probable cause determinations for preliminary hearings. If they want to become district court judges, they need to run for the district court. The other assertion that the justices of the peace are now completely handcuffed, and that they are never going to be railroaded again, is flat-out erroneous. They can still say that evidence is not relevant, they can entertain argument from counsel about it, and they can say that double or triple hearsay is not reliable and they will not consider it for probable cause determination.

Another important point is that the defendant can cross-examine whoever is admitting a hearsay statement. Defendants can now admit hearsay evidence on their own behalf. Therefore, it cuts both ways. Having hearsay evidence is going to invite witnesses to be killed, was an assertion that was made. I will not even touch that. It is absurd.

Finally, I want to close with there is no constitutional right to an adversarial hearing for a probable cause determination. I would ask the Elko public defender to read *Gerstein v. Pugh* [420 U.S. 103 (1975)], that says there is no constitutional right to an adversarial hearing. The Nevada Supreme Court said that preliminary hearings are not mini trials. A complete exploration of the facts is to happen at the trial stage. This bill does nothing to affect the trial rights of a defendant. Does it create efficiencies at the probable cause determination stage? Perhaps, but there are times when a district attorney or attorney general is still going to want to put someone on the stand to see how strong their case is. This idea that we want to have all the cases flood the district courts is completely absurd.

We have heard that 36 other states allow hearsay evidence, and the defendants can enter hearsay evidence. While we certainly want to protect the rights of defendants, and again, we are completely protecting their rights at the trial stage, they should be able to cross-examine their accusers. Their accusers should have to face them at the trial stage. However, the *Constitution* does not provide that this has to happen at a preliminary hearing stage.

This bill is a victim-centered bill. If you had a young daughter or son who was sexually assaulted, putting them through the trauma of the incident, then the police talk to them, and then they have to go to a preliminary hearing or to a grand jury where they are going to face cross-examination and explain their story to a prosecutor. Then they go through the actual hearing, and if there is a probable cause determination, the district attorney will have to prepare for trial and will have to talk to the child again. They have to go through a trial where they are sitting in front of 12 people and will also be subject to cross-examination. Why are we doing that? You have the opportunity to put your stamp of approval on whether or not this is good policy.

I submit to you that it is not necessary. The due process rights that we are referring to apply at the trial stage; the assertion that they are being violated at the preliminary hearing stage is again not true. There has been a lot of passion on both sides of the issue. I have appreciated the dialogue and the discussion. I will remain open to any questions here or offline.

Chairman Hansen:
I have to say for our Committee, whether we realize it or not, we have, at this hearing and the last one, gotten an opportunity to hear some of the best legal minds and the most skilled lawyers in the state of Nevada. What you do not know is that behind the scenes I have had constant contact with people from

the Supreme Court down to the justice of the peace level on this particular bill. It is a unique thing that we are actually participating in this and having the caliber of people testifying in favor and against. Now it will be up to us to determine what we are going to do with A.B. 193.

Assemblyman Ohrenschall:
Mr. Duncan, you mentioned that the hearsay exception in section 1 would benefit not only the prosecution but also the defense. However, in section 1, subsection 6, lines 17 and 18 on page 4, it says, "only evidence that is relevant to the existence of probable cause may be admitted." I am not seeing exculpatory evidence which would be beneficial to the defendant being admitted even through hearsay. You also mentioned that the defense would still be able to cross-examine the officer who is not the witness, and I really question the value of being able to cross-examine a nonwitness who simply is just a second or third relayer of hearsay. My question is related to the evidence regarding crimes against our children. The hearsay exemption proposed in section 1, of course, is not limited to crimes against children; it would apply to a victim from 5 years old to 105 years old. Current law, NRS 51.385, already provides an exception for any child under 10 where there has been an accusation of sexual or physical abuse, and I wonder why the current statutory provisions that would protect a child from having to be present at that hearing are not adequate?

Wesley Duncan:
To answer your last question, I think the point is that they still have to participate in an adversarial-type hearing. The constitutional right to a defendant does not provide that you have a constitutional right to an adversarial hearing. The first part of your question, the reason why a defendant can enter on their own behalf, they can rebut whether there is actual probable cause that exists and that a crime was committed. They could not put in a statement from their grandmother saying he is a great guy. An example that I use in some of our more difficult and low-income areas of Las Vegas is if you have a defendant that is accused of robbing a store or beating someone up and there were three witnesses that said no, it was the other guy that started it. In addition, those witnesses are in the wind and you cannot find them for a preliminary hearing. The police took statements from those three witnesses and the defendant could enter those statements on his behalf because it relates and correlates to whether or not there is a probable cause determination. It is a hearsay statement but it relates to the probable cause. That is why I say it cuts both ways. The prosecutor is not going to be able to bring in hearsay evidence about things that are not relevant and neither is the defendant going to be able to do so.

Assemblyman Ohrenschall:
I appreciate the answer but I have to respectfully disagree about NRS 51.385. I do not believe it would require the child victim under 10 years old to appear in a proceeding.

Chairman Hansen:
That is going to be the end of the questioning. We are out of time and have another bill to get to. Mr. Duncan, thank you for your testimony. No one has signed up in the neutral position. I am now going to close the hearing on A.B. 193. I thank everyone who participated for keeping it well above board and tempers cooled.

We will now open the hearing on Assembly Bill 407.

Assembly Bill 407: Revises provisions governing crimes and punishments. (BDR 14-814)

Assemblywoman Shelly M. Shelton, Assembly District No. 10:
I am here today to introduce Assembly Bill 407. (Exhibit R) I have a PowerPoint presentation (Exhibit P) to go along with my testimony (Exhibit Q). There is an amendment on the Nevada Electronic Legislative Information System (NELIS) that basically guts the whole bill.

According to 2014 Department of Corrections statistics, there were approximately 13,000 people incarcerated with 348 convicted of category D felonies and 105 convicted of category E felonies. Currently, if you are convicted of a category D or E felony, the court must impose a prison term of 1 to 4 years. In the case of a crime that has no victim, should a person be convicted of a felony and imprisoned? In the proposed amendment, if a person is found guilty of a qualifying nonviolent felony, the court must sentence the person for a gross misdemeanor or misdemeanor as determined by the court. A qualifying nonviolent felony is defined as a first violation; punishable as a category D or E felony; and does not result in physical, psychological, or financial harm to the victim. [Assemblywoman Shelton continued reading from testimony (Exhibit Q).]

Here are some incarceration numbers (Exhibit P). The United States has one of the highest incarceration rates in the world; we even beat Singapore. How, in the land of the free and the home of the brave, does this happen? As you see here (page 3, Exhibit P), there is a baseline that hovers around the 0.2 percent range. The minimal variation over 60 years reflects a longstanding criminal justice system that was based on prosecuting crimes that harmed others.

In 1971, the "war on drugs" was declared. In 1984, we got "tough on crime" and this is what happened. You can see the spike on the chart. Since then, the size of our prison and jail populations has exploded. [Assemblywoman Shelton continued to read from PowerPoint presentation (Exhibit P).]

Chairman Hansen:
Do you have anyone else you wish to testify prior to questioning?

Assemblywoman Shelton:
We have no more testifiers.

Assemblyman Elliot T. Anderson:
I just wanted to thank you for bringing forth a very interesting and, I think, a needed discussion. My question is about specific lines in the amendment. Section 1.5, subsection 2, paragraph (a) says, "is a first violation of the statute under which the person is found guilty." Does that mean it is just not a prior offender of the specific statute or just not prior offenders period? In addition, do you have a list of what crimes you would anticipate falling under this? I would like to understand which felonies would be included in this.

Assemblywoman Shelton:
I agree with you; this is a chance to have this discussion. We have also been talking with the Clark County District Attorney's Office for help with the language on this bill. The intent is not to let criminals run free in our society, but what we are talking about are people for whom it is their first offense. They have made a mistake and the most common examples would be drugs and marijuana. There are some others but that would be the best example to use.

You are asking if you get arrested for one incident and it has to do with marijuana and then you are arrested three years later for speeding?

Assemblyman Elliot T. Anderson:
Yes, something becomes a felony. Therefore, it would be just for the specific statute and not the offender's prior offense, correct?

Assemblywoman Shelton:
Tony Shelton is my policy director and he will address that part of your question.

Tony Shelton, Policy Director for Assembly District No. 10:
When this bill was being drafted, it was addressing each individual offense. We are talking about offenses that have no victim. You bring up a very good point, because there could be somebody who has been convicted for numerous

other violations and how would this affect those kinds of people. That is something no one has spoken to us about. That might be something we need to discuss with the District Attorney's Office.

Assemblyman Elliot T. Anderson:
Thank you for the interesting discussion.

Assemblyman Jones:
You mentioned that there are 453 people, is that how many people this would affect? Would they be released from jail right away, or do you have an estimate?

Tony Shelton:
No, we do not have an estimate on that. As it stands, the way it is written, I do not believe it will do anything for the people already incarcerated. That was the intention of the bill in the beginning, but it was so complicated and difficult that we had to amend it to apply from this day forward.

Assemblyman Ohrenschall:
I want to thank you for bringing this bill. You cannot imagine how many people I have met who have something happen like these felonies earlier in their lives. They have gone on to be productive citizens and good parents, but this has been dogging them and having a lot of collateral consequences in terms of future possibilities. People talk about the State Board of Pardons Commissioners as a way for people to try and get pardoned from that felony, but it is very difficult. The Pardons Board is financially strapped, and usually only meets once or twice a year. I really appreciate this bill and I think it is about time.

Assemblywoman Fiore:
I really like this bill and I do not know if I am a sponsor, but I believe I am. However, if not, I would like to see if we could amend it to be retroactive. If I am not a sponsor, I would like to be added to the bill. I know we are in a crunch time but if we could amend that quickly, I think Mr. Wilkinson could help us with that.

Chairman Hansen:
We will work on that. Let us open it up now for proponents of A.B. 407. I will give you five minutes.

Steve Yeager, representing Clark County Public Defender's Office:
I support this bill. It is a fantastic idea. At the Public Defender's Office we are not saying open the jails and prisons; what we are saying is let us get the right

people there for the right amount of time. This is recognition that there are some felonies on our books, such as simple drug possession or forgery, that maybe do not have a victim. If there is any interest in moving forward with the bill, I would certainly be willing to work with the sponsor and anyone else on tightening up this language.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
We support this bill wholeheartedly. I appreciate Assemblyman Ohrenschall's comments about the young people that I and Mr. Yeager represent. It does have many collateral consequences for that first category D or E felony offense. There are immigration, housing, and gainful employment issues that will collaterally affect them, and I would be happy to render my services to the sponsor and do anything I can to get this bill passed.

Stacey Shinn, representing Progressive Leadership Alliance of Nevada:
This policy proposal is a win-win from several different perspectives. From a humanist perspective and as a licensed social worker in Nevada, I believe in second chances, rehabilitation, and the disease model of addiction. From a fiscal perspective, this will save taxpayer dollars by reducing incarceration rates. From a racial justice perspective, we know that communities of color are incarcerated at a much higher rate than their white counterparts, especially for drug convictions despite use rates.

Erik Schoen, Executive Director, Human Services Network:
We are a dynamic collaborative of over 60 health and human service providers who are passionate about health and human services. We support this bill. We think it is an important protection for civil rights. At the same time, it would reduce the criminogenic exposure that prison tends to bring upon people who come into contact with that. There are numerous studies that detail any time spent in prison increases the likelihood of future crime, not decreases it. We think this protects civil rights, and will save tax dollars. We support this bill (Exhibit S).

Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada:
I am here in support of the bill. We believe this will still hold first-time offenders accountable. I wanted to note that the Legislative Counsel Bureau produces lists of what our category D and E felonies are and you can Google it to get the list.

There is also the important provision that says even if it is a category D or E, it also cannot cause anyone harm. I do believe there will be a limited scope of people who would actually be eligible for this. I have talked about this before in this Committee that once you raise a crime to a felony, there are a number of collateral consequences. One of the biggest is that there are a myriad of jobs in Nevada that you are not eligible for once you get a felony conviction. Right now, people lose jobs once they are convicted of a felony. Once again, keeping people employed keeps them from recidivating, and so we are in support of the bill.

Chairman Hansen:
We will now open it up to opposition testimony.

Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff's Office:
I am here to testify in opposition of A.B. 407 as it was originally written. I have not had a chance to read the amendment. I think it still covers one particular point that was concerning to us. I want to draw your attention to the original language that still might be covered in the amended version of the bill. Section 2, subsection 3, says that unless a greater penalty is provided in *Nevada Revised Statutes* (NRS) 212.160, NRS 453.337 or NRS 453.3385, a person who is convicted of possession of flunitrazepam (roofies) or gamma hydroxybutyrate (GHB), or any substance that those are in are guilty of a misdemeanor in that original language. We do not want to reduce the penalties of possession for those substances. Roofies, GHB, the devil's breath, the devil's drink, or the date rape drugs, these are not drugs that the users utilize on themselves for getting high.

Chairman Hansen:
Mr. Spratley, I do not mean to interrupt, but she deleted that from the bill entirely.

Eric Spratley:
I believe these are still the provisions in the amendment regarding that nonoffensive felony. Those drugs I stated are not offensive until they are used. These are offensive drugs to be used on others to take advantage of them and possibly rape them. It is appalling to law enforcement that this legislation is being proposed to minimize those drugs, considering that this body heard Assembly Bill 212 and the many rapes alleged to be committed by a celebrity who is possibly using these or similar drugs to prey on female victims. Now you are asked to consider maybe reducing the penalty for those drugs. We would ask you to consider that when you are weighing this bill. We would like to review the amendment and see how it works in reducing the inmate population or if it would increase it at the Washoe County detention facility.

Chairman Hansen:
I want to see the statistics. I am always hearing that we have all of these nonviolent offenders in our prisons, but no one produces any numbers for Nevada. I want to see those. If you are looking into that, I would like to see those statistics.

Chuck Calloway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
I am here to testify in opposition to the bill as written. I have not had the chance to think of all the potential consequences of the amendment. I certainly support the idea of reducing the population of not only our jails but our state prisons. I am always supportive of alternatives to incarceration. In fact, we have seen in the Las Vegas Metropolitan Police Department over the last several years a decrease in the number of arrests but an increase for a variety of reasons in the length of stay for people who are at the detention center. I think the amendment is a step in the right direction, and I look forward to working with the bill sponsor on this.

Chairman Hansen:
One thing no one brings up in these hearings is one way you can substantially reduce the jail population is to obey the law.

Assemblyman Elliot T. Anderson:
I am happy to know that the amendment only applies to category D and E felonies. Roofie possession is a category B, so I feel a lot better about section 2. Do you have a list of what felonies are actually being addressed in this bill in regard to the category D and E felonies?

Assemblyman Ohrenschall:
I was just going to point out that this would not be applicable to the date rape drugs because they are a category B, not a D or E felony.

Chairman Hansen:
I see there is someone in Las Vegas waiting to testify. Are you here to testify in opposition to the bill? You are the only person in the neutral position.

Mona Lisa Samuelson, Private Citizen, Las Vegas, Nevada:
I am a 25-year resident of Nevada, and I am a medical marijuana patient. I am trying to come down to these hearings and understand what is going on in our community in regard to these regulations. I have been living under the stress and duress of the legislation as it has been enacted these last 15 years. Because I am a layman, I was not quite sure how to take some of this language. I do not want to be paranoid and think that my legislators are trying to come

down hard on me. It looked like you were taking away a lot of the discretionary privileges of our police officers. I did not want that to happen because, believe it or not, a lot of the people who are going to get hit by this are the medical marijuana users who cannot afford to get on the program. There are a lot of costs with the dispensaries up and very flashy, but they are cost-prohibitive. We are not the criminal element, we are the sick, injured, and dying. So please keep this in mind as you go about doing things for medical marijuana. I think there is another bill that addresses the civil penalty and it has a $100 fine for one ounce or less. I think these are the things that we need to look at to be more community-minded as you talk about the felony charges and how that can affect a young life. Medical marijuana is going to be proven to be a more intelligent choice than pharmaceuticals. You do not want to ding a whole new generation because of what we did not know. We are good people; these laws are hurting good people. It hurts to sit through this legislation; I know 10,000 people and I am here to speak for these people. We feel stupid, we have to come down here. We hurt. We cannot make sense by the time we get up here. We just want you to remember that we are here.

Chairman Hansen:
Thank you for your testimony this morning, Ms. Samuelson. With that, is there anyone in Carson City here to testify in the neutral position? [There was no one.] Assemblywoman Shelton, do you have a final statement?

Assemblywoman Shelton:
I said if Ms. Samuelson makes me cry, I do not want to go up there. But I just wanted to let her know that this bill is intended to help her. With that said, I am glad we have been able to have this discussion and I want to thank you for your time.

Chairman Hansen:
I will now close this hearing on A.B. 407. I will open the hearing up for public comment. [There was none.] The Committee on Judiciary is adjourned [at 10:54 a.m.].

[Also submitted for the record were the following exhibits: (Exhibit T), (Exhibit U), (Exhibit V), (Exhibit W), (Exhibit X), (Exhibit Y), (Exhibit Z), (Exhibit AA), (Exhibit BB), (Exhibit CC), (Exhibit DD), (Exhibit EE), (Exhibit FF), (Exhibit GG), (Exhibit HH), and (Exhibit II).]

RESPECTFULLY SUBMITTED:

_____
Janet Jones
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 3, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 282	C	Assemblywoman Victoria Seaman	Testimony
A.B. 282	D	Mark Rowley, Private Citizen, Las Vegas, Nevada	Testimony
A.B. 282	E	Venicia Considine, Staff Attorney, Legal Aid Center of Southern Nevada	Testimony
A.B. 193	F	Steve Yeager, Deputy Public Defender, Clark County Public Defender's Office	PowerPoint Presentation
A.B. 193	G	Steve Yeager, representing Clark County Public Defender's Office	Testimony
A.B. 193	H	John T. Jones, Jr., representing Nevada District Attorneys Association	Proposed Amendment
A.B. 193	I	Steve Yeager, representing Clark County Public Defender's Office	Assembly Bill No. 65 of the 74th Legislative Session (2007)
A.B. 193	J	Steve Yeager representing Clark County Public Defender's Office	Assembly Bill No. 65 of the 74th Legislative Session (2007) Minutes
A.B. 193	K	Jeremy Bosler, Public Defender, Washoe County Public Defender's Office	Testimony
A.B. 193	L	Scott Coffee, representing Nevada Attorneys for Criminal Justice	Letter in Opposition
A.B. 193	M	Kriston N.. Hill, Deputy Public Defender, Elko County Public Defender's Office	Letter in Opposition

A.B. 193	N	Jocelyn Murphy, Client Services Coordinator, The Rape Crisis Center, Las Vegas, Nevada	Testimony
A.B. 193	O	Kristy Oriol, Policy Specialist, Nevada Network Against Domestic Violence	Letter of Support
A.B. 407	P	Assemblywoman Shelly M. Shelton	PowerPoint Presentation
A.B. 407	Q	Assemblywoman Shelly M. Shelton	Testimony
A.B. 407	R	Assemblywoman Shelly M. Shelton	Proposed Amendment
A.B. 407	S	Erik Schoen, Executive Director, Human Services Network	Testimony
A.B. 282	T	Stacey Shinn, representing Progressive Leadership Alliance of Nevada	Testimony
A.B. 282	U	Barry Gold, Director of Government Relations, AARP Nevada	Letter of Opposition
A.B. 282	V	Janice Treichel-Mascolino, Private Citizen, Las Vegas	Letter of Opposition
A.B. 193	W	Melissa Saragosa, Justice of the Peace, Chair of the Legislative Committee for the Las Vegas Justice Court	Position Paper
A.B. 193	X	Brian Vasek, Private Citizen, Las Vegas, Nevada	Letter of Opposition
A.B. 193	Y	Joel Mann, Attorney, Las Vegas, Nevada	Letter of Opposition
A.B. 193	Z	Sandy Heverly, Executive Director/Victim Advocate, STOP DUI, Inc., Las Vegas, Nevada	Letter of Support
A.B. 193	AA	Jonathan MacArthur, Attorney, Las Vegas, Nevada	Letter in Opposition
A.B. 193	BB	Steven Wolfson, District Attorney, Office of the District Attorney, Clark	PowerPoint Presentation

		County	
A.B. 193	CC	Steven Wolfson, District Attorney, Office of the District Attorney, Clark County	Letter of Support
A.B. 193	DD	Christopher Hicks, District Attorney, Washoe County District Attorney's Office	Letter of Support
A.B. 193	EE	Konrad Moore, Public Defender, Law Office of the Public Defender, County of Kern, Bakersfield, California	Letter in Opposition
A.B. 193	FF	Brendon Woods, Public Defender, Alameda County Public Defender, Oakland, California	Letter in Opposition
A.B. 193	GG	Adrina Ramos-King, Government Affairs Officer, City of Las Vegas	Proposed Amendment
A.B. 193	HH	Adrina Ramos-King, Government Affairs Officer, City of Las Vegas	Testimony
A.B. 193	II	Frederick Lee, Jr., Public Defender, Elko County Public Defender	Letter in Opposition