MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
May 6, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:19 p.m. on Wednesday, May 6, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Tick Segerblom
Senator Aaron D. Ford

GUEST LEGISLATORS PRESENT:

Assemblywoman Irene Bustamante Adams, Assembly District No. 42

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Chandni Patel, Intern to Assemblywoman Irene Bustamante Adams
Connie Westadt, Committee Secretary

OTHERS PRESENT:

Benjamin Lublin
Lise-Lotte Lublin
Daniele Dreitzer, Executive Director, The Rape Crisis Center, Las Vegas
Kristy Oriol, Nevada Network Against Domestic Violence
Brett Kandt, Special Assistant Attorney General, Office of the Attorney General

Stacey Shinn, Progressive Leadership Alliance of Nevada; National Association of Social Workers, Nevada Chapter
John T. Jones, Jr., Nevada District Attorneys Association
Bob Roshak, Nevada Sheriffs' and Chiefs' Association
Sherry Powell, Ladies of Liberty
Elisa Cafferata, Nevada Advocates for Planned Parenthood Affiliates
Jocelyn Murphy, The Rape Crisis Center, Las Vegas
Vanessa Spinazola, American Civil Liberties Union of Nevada
Wes Duncan, Assistant Attorney General, Office of the Attorney General
Steve Wolfson, District Attorney, Clark County
Mark Jackson, District Attorney, Douglas County; President, Nevada District Attorneys Association
Philip Kohn, Public Defender, Clark County
Jeremy Bosler, Public Defender, Washoe County
Steve Yeager, Office of the Public Defender, Clark County
Sean B. Sullivan, Office of the Public Defender, Washoe County
Sonia Lucero, Executive Director, Nevada Child Seekers
Tonja Brown, Advocate for the Innocent

Chair Brower:
We will open the hearing on Assembly Bill (A.B.) 212.

ASSEMBLY BILL 212 (1st Reprint): Increases the statute of limitations for sexual assault. (BDR 14-1062)

Assemblywoman Irene Bustamante Adams (Assembly District No. 42):
The statute of limitations for reporting a sexual assault is 4 years. For one of my constituents, that 4-year window did not work. People traumatized by a sexual assault have no recourse if the assault is reported outside the 4-year window. Assembly Bill 212 changes the statute of limitations to 20 years. I proposed to remove the statute of limitations altogether, but a consensus was reached on a 20-year statute of limitations.

Chandni Patel (Intern to Assemblywoman Irene Bustamante Adams):
I am an intern for Assemblywoman Irene Bustamante Adams and a junior at the University of Nevada, Las Vegas, studying political science. I have provided written testimony (Exhibit C).

Chair Brower:
Do I understand correctly that 26 states have done away with the statute of limitations altogether?

Ms. Patel:
That is correct.

Benjamin Lublin:
I am a native Nevadan. Sexual assault and rape are matters I hold close to my heart as a subject that needs to be addressed. I urge this Committee to extend the statute of limitation for sexual assault from 4 years to 20 years. It is a small change to make but a great achievement for victims.

The statute of limitation allows a victim only 4 years to report a sexual assault. The most common misconception is that a victim is prepared to call the police and file a police report within minutes after the rape. Most victims are in disbelief, feel ashamed, scared, paranoid and, at times, suicidal. A woman is 3 times more likely to suffer from depression after an assault than a man, 6 times more likely to suffer from posttraumatic stress disorder, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs and 4 times more likely to contemplate suicide according to the U.S. Department of Justice. Numbers and words cannot give personal insight into what a rape victim has to deal with when the time has come to finally speak out.

I watched my wife, who was under the impression she had experienced a bad reaction to alcohol, fall apart when she found out that she had been the victim of a methodical and devious plan to assault her. I watched her cry in disbelief, and I watched her slide into depression and anxiety. She was a calm, cool person who became distant to me. Things she had found funny did not make her laugh anymore. She changed. With my help and the support of friends and family, she became strong again, not only as my wife but also as the mother of our children.

I honestly believed that we would have a day in court when she could look her assailant in the eyes and let him know that he had not gotten away with it. He would be held accountable. That was not the case because of a statute of limitations. This confused me. I have always had a strong belief in the justice system, and I believed that if someone raped you or a family member, that monster would be held accountable. Instead, the law gives the predator a

get-out-of-jail-free card and the freedom to victimize others. The law should empower victims. Instead, it deters victims from coming forward. When my wife decided to come forward and tell her truth, she was called a whore, a slut and a tramp. People said, "She got what she deserved. I bet he raped her good." The culture we live in not only makes fun of sexual assault victims but also tells them to be silent. When I told my mother that Lise-Lott, my wife, was going to come forward and tell the world she was assaulted, my mother told me to keep it in the family. "Don't let everyone know what happened," she said. She was worried about exposing our children to what society would say about it. I wondered why my mother would think this way. She is a strong woman. Then it hit me. She comes from the old school. The school where we are programed by society to stay silent and keep quiet about rape.

Rape is neither glamorous nor subtle. Rape is a brutal act that invades the victim. It is an act that psychologically alters a victim's mind and permanently changes that life. Part of the reason why I hold this matter so close to my heart is because I was sexually assaulted at the age of 13. Through therapy and the devotion of my wife, I was able to change a horrible experience into a positive one by working with Assemblywoman Irene Bustamante Adams to introduce a bill to change the statute of limitations. I am here to show you what sexual assault looks like. It has taken me 25 years to come forward publicly and talk openly about myself. I told no one other than my wife and therapist. I decided to share this with you because I have never felt more strongly about supporting an issue before.

The impact of rape on families, siblings, neighborhoods and communities is far more severe than you would expect. The statute of limitations does not take into account the time necessary for a victim to come forward. It took me 25 years to speak out. How many other victims will come forward only to be silenced or discouraged by the statute of limitations?

Lise-Lotte Lublin:
I am a native Nevadan and graduate of the University of Nevada, Las Vegas. My story began in 1989 when a man I trusted put a drug in my drink without my knowledge and took advantage of me. He invited me to his suite to discuss career opportunities and he insisted I have two drinks. Within a few minutes, I became dizzy and disoriented. He asked me to sit with him. As I sat, he began stroking my hair and talking to me. That was my last moment of consciousness. My next memory was waking up at home. In November 2014, my husband

informed me several women had accused my assailant of drugging and sexually assaulting them. When I heard this, I reported the facts to the police.

A detective with the Las Vegas Metropolitan Police Department Sexual Assault Unit evaluated my report. I was informed the statute of limitations prevented any investigation of my report. I sat in the detective's office and cried as I realized no one would be able to help me. I will never see justice, and I did not do anything wrong. If I had had any memory of what had happened, I would have filed a report 25 years ago. I now know that the 4-year limit on sexual assault cases prevents a victim in my circumstance from seeking justice. Why would the law want to prevent me from seeking justice? I do not understand what purpose it serves to have a 4-year period within which a victim has to report a sexual assault. I see no purpose other than to protect an assailant. Who is protecting the victim? When the nature of a sexual crime is to dominate and overpower a victim, it is difficult for a victim to feel safe exposing details of the assault.

My assailant has assaulted over 30 women, and he continues to walk free. He has methodically planned and refined his routine for drugging and assaulting women. The law is on his side. The drugs he uses prevent his victims from remembering the assault. Because shame and humiliation can prevent the victim from reporting the crime within 4 years, he is free and clear. Sexual assault is a crime that causes long-term damage. Reporting the violation is extremely difficult to do and cannot be tethered to a 4-year time limit. This law needs to change to allow victims the opportunity for healing and justice.

Every day I have spent working on A.B. 212 has given me strength to rebuild my life. I started this journey looking for a way to cope with the damage I experienced. In turn, I found a way to calm my heart. Changing this law will give new victims the much-needed time to deal with the pain of a sexual assault and the opportunity to expose a perpetrator. You have the power to help all of us. I urge you to use that power for the greater good and to empower victims so they can become survivors.

Senator Ford:
Mr. and Mrs. Lublin, you are my constituents. I appreciate your courageousness and the compelling testimony you have just given on this issue. It places a much-needed face on this issue. Thank you for stepping forward and sharing your stories.

Daniele Dreitzer (Executive Director, The Rape Crisis Center, Las Vegas):
Assembly Bill 212 does not change the burden of proof or the amount of evidence required to prosecute a sexual assault. We know that over time, evidence degrades; witnesses are lost; memories fade. However, the opportunity to report these crimes is essential to the healing process for many victims. Victims should be allowed to pursue justice. Whether the case can be prosecuted is up to law enforcement and the district attorney. Victims need the opportunity to say this happened to me and to name the perpetrator. This act in and of itself can be a powerful piece of the healing process.

Kristy Oriol (Nevada Network Against Domestic Violence):
We support A.B. 212. I have provided written testimony (Exhibit D).

Brett Kandt (Special Assistant Attorney General, Office of the Attorney General):
We support A.B. 212. We supported the original bill with no statute of limitations.

Stacey Shinn (Progressive Leadership Alliance of Nevada; National Association of Social Workers, Nevada Chapter):
We support A.B. 212. I also personally support A.B. 212 as a woman who sits here today single because of sexual assault.

John T. Jones, Jr. (Nevada District Attorneys Association):
We support A.B. 212.

Bob Roshak (Nevada Sheriffs' and Chiefs' Association):
We support A.B. 212. Lieutenant Eric Spratley, Washoe County Sheriff's Office, and Chuck Callaway, Las Vegas Metropolitan Police Department, are unable to be here but wish to register their support for A.B. 212.

Sherry Powell (Ladies of Liberty):
This is my mission in life. In 2005, my daughter was sexually assaulted in Carson City on her sixteenth birthday. It took me 2 years to forcibly draw the attention of the District Attorney to her case. I thought my daughter was the only victim. There were three victims. The other victims were 10-year-olds. I watched them testify. They cried. They were intimidated. They were afraid. They could not speak. It was tragic because it played right into the predator's

hands. My 16-year-old daughter held it together. As a part of the plea bargain, my daughter's case was dismissed.

My daughter's case cannot be prosecuted because she is now 25 years old. If the statute of limitations is changed, she can testify and her perpetrator will be brought to justice. He spent 90 days in jail for a gross misdemeanor because my daughter's case was not prosecuted. She was the only one strong enough to stand up, point at the accused and say this guy did it. I know millions of victims on the Internet feel great relief and empowerment when they are able to testify. It is a celebration when the perpetrators are convicted.

Elisa Cafferata (Nevada Advocates for Planned Parenthood Affiliates):
We support A.B. 212.

Jocelyn Murphy (The Rape Crisis Center, Las Vegas):
I am the client services coordinator at the The Rape Crisis Center. We support A.B. 212. I see multiple clients on a daily basis; I hear daily from men and women who want to report sexual assaults, but the statute of limitations has run. Assembly Bill 212 would provide them justice.

Vanessa Spinazola (American Civil Liberties Union of Nevada):
We are neutral on A.B. 212. We were opposed to no statute of limitations. We are concerned about the rights of the accused and the degradation of evidence and witnesses. We do understand the complicated healing process.

Senator Harris:
I want to put on the record that I absolutely support A.B. 212. The testimony was compelling. I am open to making the window larger, but I do not want to put the bill in peril. Please help us understand the nature of the amendment to A.B. 212, and whether our desire to give you more help and give these victims a larger window for justice would be appropriate.

Assemblywoman Bustamante Adams:
I welcome that discussion. I will also speak with my Assembly Committee members to see if they are open to having the time extended. I know the 20-year statute of limitations was the product of a compromise. There was opposition to removing the time frame completely.

Chair Brower:
We will close the hearing on A.B. 212 and open the hearing on A.B. 193.

ASSEMBLY BILL 193 (1st Reprint): Makes various changes relating to criminal procedure. (BDR 14-911)

Wes Duncan (Assistant Attorney General, Office of the Attorney General):
Assembly Bill 193 allows hearsay evidence for certain offenses at preliminary hearings and grand jury proceedings. This bill is important for a number of reasons. This is a victim-centered bill. It is focused on enumerated offenses. Certain victims will only have to face the accused when the constitutional Confrontation Clause is applicable to the proceeding. Assembly Bill 193 is important because it puts Nevada in line with the majority of states. Thirty-six states allow hearsay evidence at preliminary hearings. Hearsay evidence is allowed at federal grand jury and preliminary hearings. The military also allows hearsay evidence at preliminary hearings. Assembly Bill 193 touches on the efficiency of the system and results in cost savings. *Gerstein v. Pugh*, 420 U.S. 103 (1975), says there is no constitutional right to an adversarial hearing at the preliminary hearing stage. Assembly Bill 193 does not take away or erode trial rights at a district court level. The bill only addresses evidence at a preliminary hearing at the justice court level and grand jury proceedings.

In Nevada, justice courts are courts of limited jurisdiction. Justice courts have three functions: misdemeanor trials, felony arraignments and preliminary hearings. The preliminary hearing is for the determination of whether there is probable cause for a case to move to the district court level. If a person is arrested via either probable cause or an arrest warrant, there is a 48-hour hearing. The justice of the peace (JP) will review the evidence and determine whether there is probable cause to hold the person. Within 72 hours, the person is arraigned in front of the JP. At that point, the case may be negotiated. If not negotiated, there must be a preliminary hearing within 15 days.

In Nevada, a preliminary hearing is an adversarial proceeding. Assembly Bill 193 would allow hearsay evidence at the probable cause level. Once a JP finds probable cause, the case is bound over to the district court. At the district court level, there is a jury trial, dispositive motions, suppression motions, *Jackson v. Denno*, 378 U.S. 368 (1964), hearings, etc. We are not talking about that. We are talking about justice court.

Chair Brower:
What is hearsay?

Mr. Duncan:
Hearsay is an out-of-court statement used to prove the truth of the matter asserted therein. For example, a stranger sexually assaults a 12-year-old girl. The police officer interviews the victim and a recorded or written statement is taken. Assembly Bill 193 will allow that statement to be entered into evidence at the justice court level—the probable cause level.

Chair Brower:
How does that statement come in at the preliminary hearing?

Mr. Duncan:
The district attorney calls the officer as a witness. Foundation is laid for the statement: how the officer knew about the crime; whether the officer met the victim; and whether a statement was taken—if so, was the statement taken in front of the officer and was it a sworn statement. The district attorney offers that statement into evidence through the police officer. The JP considers that evidence in determining whether there was probable cause.

Chair Brower:
In that scenario, the police officer would testify as to what the victim told him or her. The police officer would be subject to cross-examination by defense counsel. Perhaps most importantly, the police officer would be subject to the JP's independent evaluation of whether the police officer was credible and whether the hearsay was reliable.

Mr. Duncan:
That is correct. Assembly Bill 193 does not eliminate the gatekeeping function of the JP. The JP can find the hearsay not credible or not relevant and, thus, inadmissible.

Chair Brower:
The JP can also admit the hearsay into evidence but find it to be unreliable and, as a result, find no probable cause.

Mr. Duncan:
That is correct. Assembly Bill 193 does not undercut a JP's power to ferret out whether the evidence is reliable.

Senator Ford:
I have misgivings about this bill. I am in a quandary. I understand what you are trying to do with the three different categories. This bill is much better than the original bill. I have received numerous letters, not just from citizens and laypersons but also from judges who disagree with the premise in general and this bill in particular. These are the people required to interpret and enforce the law. They oppose A.B. 193. How do you rebut their arguments?

Steve Wolfson (District Attorney, Clark County):
You have received two, three or four letters; but in Las Vegas alone, we have 14 JPs. If you had received 14 letters or 10 or 12 letters from the JPs who only do criminal cases, I would think maybe we have a problem. I have spoken to some of the JPs, and they are in favor of A.B. 193. I cannot speak to why certain JPs have decided to go on record as individual judges. They are not speaking for the entire court. They are speaking as individuals.

Senator Ford:
I agree with that, and they have made that clear in their letters. We seldom receive letters from judges on anything. This is an important issue. My issues with this bill relate to the use of hearsay. We know that hearsay is typically unreliable. There are exceptions to the hearsay rule. You say that preliminary hearings are adversarial. There is no constitutional right to confront a witness at a preliminary hearing. If it is adversarial, why would we not include hearsay protections?

Mr. Duncan:
It might be that we disagree about the role of the preliminary hearing. All constitutional rights are available at the trial stage. This bill targets the most vulnerable victims of crime. The policy question is whether we want to subject 12-year-old victims to the gauntlet of an adversarial hearing at the preliminary hearing stage. They absolutely have to do that at the district court trial where there are constitutional protections. The policy question is whether we should do that to our most vulnerable victims of these certain enumerated offenses at the preliminary hearing.

The crime occurs. You talk to the police. You talk to a prosecutor. You go through an adversarial preliminary hearing. If probable cause is found, you talk to a prosecutor. You talk to a defense investigator. You go through a psychological examination. You go to trial. You face 12 people you do not know. You face the accused. Should we do that?

Senator Ford:
The saving grace of A.B. 193 is that it is not the original version. I understand you intend to protect vulnerable victims. That is what has me reserving judgment.

Mr. Duncan:
Assembly Bill 193 applies to both preliminary hearings and grand jury proceedings. Sections 1 and 5 allow hearsay for the following offenses: child abuse of children under the age of 16; sex offenses of children under the age of 16; and felony domestic violence that results in substantial bodily harm. Sex offense has the meaning ascribed to it in NRS 179D.097. Some examples are child sexual assault, lewdness with a child, battery with intent to commit sexual assault, sex trafficking, etc. Sections 3 and 7 of A.B. 193 update the use of audiovisual teleconferencing at the preliminary hearing and the grand jury proceeding. It allows witnesses who live 100 miles or more from the place of the hearing, if they have a medical condition or other good cause exists, to testify through the use of audiovisual technology. The JP determines whether good cause exists.

Section 10 provides a remedy for failure to provide "Marcum Notice." Marcum Notice is the notice that you have to give to a defendant and a defense attorney prior to taking a case to a grand jury. If a district court judge found the Marcum Notice deficient, the judge would dismiss the case. Section 10 cures that deficiency by opening up the grand jury proceeding, providing the person the opportunity to testify and instructing the grand jury to deliberate again on all the charges contained in the indictment following such testimony.

Senator Segerblom:
What kind of penalties do the crimes listed in A.B. 193 carry? If convicted, is the defendant a registered sex offender for life?

Mr. Wolfson:
The crimes range from a low-grade Category C or Category B felony offense all the way up to Category A. The statute defines which cases fall under "sex offense." A conviction of sexual assault on a minor carries a potential life sentence. They are all felony offenses.

Senator Segerblom:
If convicted, would the defendant be on the Nevada Sex Offender Registry?

Mr. Wolfson:
I believe most would be required to register.

Senator Segerblom:
My concern is that I have seen cases bound over for trial during which defendants are forced to plead to something they did not do because the reality is life in prison or being a registered sex offender for life absent a plea deal. If there is a way to test the veracity of the accuser earlier, the situation of having someone plead guilty to a crime he or she did not commit might be avoided. The sentences are so tough for these crimes, it seems as though you would want to give defendants as much opportunity as possible to avoid that situation.

Mr. Wolfson:
You are right. Most of these offenses carry stiff punishments because most of the crimes we are talking about deserve such. At the end of the day, we still have the various layers within the criminal justice system. This preliminary hearing and grand jury hearing stage is just the first stage. This does not relieve the victim from ever having to testify. These victims have to come in at trial and be subject to cross-examination. I do not believe that if we merely allow hearsay in certain situations that the dynamic will change of how many people plead guilty or not guilty. It is just a more efficient way of moving some cases up to the district court stage while protecting the rights of defendants and saving a lot of kids from a lot of trauma.

Chair Brower:
I agree with everything you said except the part about the preliminary hearing or grand jury hearing being the first screening process. The first screening process is the district attorney's discretion on which cases to bring to a preliminary hearing or grand jury hearing. I am as critical of prosecutors as anyone when I think prosecutors deserve it, but I understand the system relies on those we

elect to fulfill these responsibilities to do screening at the front end. How important is that to you and your respective offices?

Mr. Wolfson:
You are right and you are wrong. I agree that we have discretion and we exercise that discretion on a regular basis. Before that, we have police officers and detectives who screen cases. Often, they will not send a case to the district attorney if they do not believe the victim is credible. When it comes to our office, we do not file on every charge. We exercise discretion. We only file charges if we believe, one, that the crime was genuinely committed and, two, that we can prove it beyond a reasonable doubt. These are the toughest of cases because often we do not have a lot of corroboration, but we do have those various screening processes.

Mark Jackson (District Attorney, Douglas County; President, Nevada District Attorneys Association):
I drafted a 70-page charging manual that addresses the importance of the charging function in our office. I train my prosecuting attorney that whatever decision is made later on—whether the District Attorney's Office decides to dismiss, whether a magistrate dismisses the charges after a preliminary hearing determining no probable cause, whether a jury finds the defendant not guilty because the State has failed to meet its burden of proof—the bell cannot be unrung with respect to the initial decision to charge a person with a crime. That will stay there. There are procedures for sealing a particular record, but charging is arguably the biggest power given to a prosecuting attorney. It is one that should never be taken lightly.

In many of these cases, a probable cause determination has already been made because a magistrate has issued an arrest warrant. The arrest warrant is based upon hearsay. A single affiant drafts an affidavit regarding the course and scope of the investigation. Who was talked to. Who was interviewed. This will include the victim of the sexual assault. The affidavit will include the child's statement to the law enforcement officer. If the judge makes a probable cause determination, an arrest warrant is issued and the person is arrested. Probable cause is the same whether it is determined at the time of the issuance of a warrant or at the time of a probable cause hearing.

The Legislature enacts the laws. The prosecutors enforce the laws. The judges interpret the laws. With all due respect to the judges who oppose A.B. 193, the

law is clear. There is no constitutional right to confrontation at a preliminary hearing. For over 50 years, the Nevada Supreme Court has decided issues related to preliminary examinations and the functions of JPs. A preliminary hearing is not a substitute for a trial. All facets of the case are reserved for trial and not the preliminary hearing. I am not sure why any judge would object to A.B. 193 because it is fully in compliance with the law and within the discretion of the Legislature to pass. The judges' letters offer personal not professional opinions.

Chair Brower:
Why would a JP be afraid of a change in the law which in no way changes his or her discretionary responsibility to make the probable cause decision? Why would a JP be afraid to be allowed to hear hearsay if he or she wants to? The JP can reject the hearsay if he or she determines it unreliable.

Mr. Wolfson:
You hit the nail on the head. We are not asking the JP to give up his or her role in determining the strength of the evidence, the weight of the evidence or whether the evidence establishes probable cause. Statements have been made that A.B. 193 will do away with preliminary hearings and that we might as well get rid of all JPs because they will not be needed. That is wrong. The JP will still have the discretion to weigh the evidence and dismiss the case if the State has not met its burden.

Senator Ford:
I am not persuaded by the notion that we will not need JPs. My focus is on the policy issue. I understand that, constitutionally, confrontation is not required, but we do not have to base this on constitutional requirements. This is a fairness issue. It is a policy issue for the Legislature. There are several layers of consideration here. The Confrontation Clause is one. You have satisfied me that we do not need to be concerned about that. Hearsay is inherently unreliable. In the instances addressed in A.B. 193, it is clear why you would want hearsay to be admissible. What is the countervailing protection at the preliminary hearing stage for the accused?

Mr. Wolfson:
If A.B. 193 passes, we are not going to introduce hearsay in every case. There are many cases in which prosecutors have doubts or need to see how a young

witness will do under cross-examination. If this bill passes, some children will still testify. It is not a blanket ticket to introduce hearsay in every case.

Senator Ford:
When hearsay is introduced, what countervailing protections does the accused have? Is the accused able to use this hearsay exception as well?

Mr. Wolfson:
The accused's lawyer gets full discovery days or weeks before the preliminary hearing. The hearsay declaration is available. The defense lawyer can cross-examine the in-court witness about the hearsay statement and bring out inconsistencies or statements that are not believable. It is not a one-way street. The defense can also introduce the hearsay statement.

Mr. Duncan:
The JP has the ability to ferret out the case. Writs can still be filed to have the district court revisit the issue of probable cause. The district court judge can find the JP's determination wrong, grant the writ and dismiss the case. This is a policy decision for the Legislature. For these limited crimes and victims, there should not be an adversarial confrontation at the preliminary hearing.

Philip Kohn (Public Defender, Clark County):
Assembly Bill 193 is a significant change in the criminal justice system. I have had the opportunity over the course of the last 8 years to be a member of the Advisory Commission on the Administration of Justice. This is exactly the type of bill that should be vetted by the Advisory Commission. The Advisory Commission should look at it and make a decision based not on emotion but on best practices. I have heard for the last 3 months that 36 states have adopted this change in one way or another. I have not heard how they have adopted it. I have not heard how other states ensure due process and fairness.

I agree with the definition of hearsay provided by the witness. Assembly Bill 193 allows hearsay testimony to be admitted without providing for how that hearsay should be offered. That is what scares me. The example given over and over again is if a victim does not testify, a police officer who heard the victim's statement can present the statement at the preliminary hearing. Hearsay can be hearsay on hearsay on hearsay. If the detective who took the statement is not available, nothing in A.B. 193 prevents another police

officer, a district attorney investigator or anyone sitting in the courtroom from reading the police report into the record. That is hearsay.

The Legislature has dealt with this issue before. *Nevada Revised Statute* 51.385 addresses the admissibility of statements of children under the age of 10 describing sexual acts or physical abuse. This is a trial right. *Nevada Revised Statute* 51.385 provides that the court shall find, at a hearing outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness. That is my problem with A.B. 193. There is no guarantee of trustworthiness. That is critical to all hearsay. This would be an easy fix to make. In lieu of a victim testifying, the proponents of this bill could have recommended a videotape of the entire interview offered by the police officer who took the video, testifying to the manner in which the video was taken and the relevant circumstances. Then I would have a different view of A.B. 193.

I concede that there is no right to confrontation at a preliminary hearing. However, if we are going to do this, let us do it right and let us be fair. If we do not have the victim testify, we should certainly have the best evidence of what the victim said. There is no police department in this State that does not or cannot videotape an interview if they so choose. Few of us do not have cell phones with video equipment. This would not be a big burden. If we allow hearsay to be admitted as evidence, at least let us be able to test it and cross-examine the people who took the video as opposed to simply saying hearsay is admissible. I am concerned about this. Since there is no trustworthiness put into A.B. 193, I think we should send this bill to the Advisory Commission to decide how we can do this and to understand how other states have guaranteed fairness.

I am also concerned about the discussion we had about these cases in general. Most of the sexual assault cases we talk about in A.B. 193 are either 10 years to life, 25 years to life or 30 years to life. They have significant penalties. I have been a lawyer for almost 40 years. I have been both a prosecutor and a defense attorney. I am not objecting to these cases going to the grand jury. If the prosecution is concerned about the rigors of cross-examination at an early stage, take the case to the grand jury. In my experience, these cases are well-served by a preliminary hearing. It gives the prosecutor a chance to preview the testimony of the witness. It gives the prosecutor a chance to observe the perceptions, the memory and the recall of the victim. It gives the

defense attorney the same opportunity. Most importantly, when faced with 35 years to life, it is important for the defendant to see that, one, the victim exists and, two, the victim is going to testify. I think in the long run, the system is better off having preliminary hearings. If we decide to get rid of preliminary hearings completely, that is a different discussion.

There has been a discussion about the prosecution's duty to use discretion before cases are filed. The last four Clark County District Attorneys have filed over 80 percent of the felony cases given to them by the police agencies. We do not have the narrowing that I was used to as prosecutor. However, we do have a significant narrowing at the preliminary hearing stage. Historically, the District Attorney's Office files between 23,000 and 24,000 felony cases a year. About 40 percent of the cases move from justice court to district court. Most of the narrowing happens in justice court. Out of the approximately 23,000 cases filed by the Clark County District Attorney last year, 8,444 made their way to district court. Of the 8,444 cases, 149 cases resulted in a jury trial. We plea-bargain 99.5 percent of our cases. The preliminary hearing is a crucial part of the system. I implore you not to change the system until we have a chance to vet what is best for victims, for the system and for due process.

Senator Ford:
We allow a child's hearsay testimony at trial, and it is evaluated in accordance with NRS 51.385. Why is it not appropriate to allow a child's hearsay testimony at the preliminary hearing absent these strictures since confrontation is not a constitutional requirement at the preliminary hearing?

Mr. Kohn:
Nevada Revised Statute 51.385 only applies to children under the age of 10. The court must find a specific set of facts. It is incredibly rare for this to happen. To me, the difference in a 10-year-old versus a 15- or 16-year-old is huge. In determining trustworthiness under NRS 51.385, the court must consider whether: the statement was spontaneous, the child was subject to repetitive questions, the child had a motive to fabricate, the child used terminology unexpected of a child of similar age and the child was in a stable mental state. None of these requirements are in A.B. 193.

Senator Ford:
I do not like the arbitrary lines of a 10-year-old versus a 13-year-old versus an 18-year-old. A kid is a kid as far as I am concerned. If the language of

NRS 51.385 were included in A.B. 193, would the use of hearsay at the preliminary hearing stage be acceptable to you?

Mr. Kohn:
I would still be concerned about the defense judging the case, the court judging the case and the district attorney judging the case. Would I be more comfortable if A.B. 193 had these provisions and safeguards? I would. I still think it is something that should be discussed. I would rather see the district attorney's office use the grand jury process more often in cases like this where the victim is not subject to cross-examination. I would be more comfortable about A.B. 193 if there were a hearing like the one prescribed by NRS 51.385 to ensure trustworthiness.

Chair Brower:
If this were a more complicated or unprecedented issue, I might agree with having it vetted by the Advisory Commission. A majority of the states, the federal system and the military system allow hearsay. The military system is generally considered to have stronger procedural safeguards for the accused than the state or federal systems. I do not think this is all that groundbreaking, novel or complicated. I am not persuaded it merits more study. With respect to your point that the preliminary hearing is a tool for making a determination of trustworthiness, simply allowing hearsay does not change that. Is it still not up to the JP to evaluate the evidence and to make the determination with respect to trustworthiness and whether the case should go forward?

Mr. Kohn:
No. The word hearsay is used in A.B. 193 without any qualification. Since nothing qualifies it, the district attorney will argue abuse of discretion whenever the JP dismisses a case in which hearsay is offered, even if the hearsay is offered by someone other than the police officer who took the statement. That is my professional opinion.

Chair Brower:
The more likely result is that the district attorney would not dare try to get triple hearsay in through a nonpolice officer witness for fear of raising the ire of the JP. The district attorney would get a call from the chief JP asking, "What are you guys doing bringing in someone who has nothing to do with the investigation and trying to offer triple hearsay? You need to bring in a police officer." That is the JP's role. Why cannot the JP exercise that discretion?

Mr. Kohn:
Assembly Bill 193 does not give the JP that discretion. Mr. Duncan pointed out that JPs have limited jurisdiction. This would be more palatable if the Legislature were to require that if the victim is not called, then the person who took the statement must be called and the statement must include an audio or video recording. Under A. B. 193, anyone can read the police report because it is "hearsay evidence."

Chair Brower:
I understand. Can the JP simply find no probable cause?

Mr. Kohn:
I do not believe so. Assembly Bill 193 allows hearsay and does not give the JPs any more discretion than they have now.

Chair Brower:
It does not take any discretion away. This bill would not force a JP to accept hearsay and find probable cause when the JP would not otherwise want to do so.

Mr. Kohn:
I cannot answer yes or no. I know that these cases, especially the ones involving child victims, are highly emotional. They are very difficult. They are difficult for the victim, obviously. They are difficult for the defense attorneys, believe it or not. They are difficult for the prosecutors. They are difficult for the court. Under A.B. 193, I do not think judges are going to find hearsay given by a third party is irrelevant, immaterial or in any way untrustworthy. There is no reason to do so under A.B. 193.

Chair Brower:
The JP would not do so unless the hearsay was untrustworthy or unreliable. That is a call we expect the JP to make every day in issuing arrest warrants, search warrants and in binding defendants over for trial. You talked about the narrowing or the filtering process. I understand that is a reality of the system. It is a reality that makes the system work and without which the system would not work. I do not think it is possible for the system, in Clark County in particular, to go exclusively to a grand jury process. There is not enough time. There are not enough grand jurors. It would not work. If A.B. 193 were passed,

is it not impossible to know whether the narrowing or filtering would continue? We cannot know that.

Mr. Kohn:
That is true. That is why I would like to send this bill to the Advisory Commission to study. Since I have been the Clark County Public Defender, we have had two cases pleaded or tried, and all the discovery did not come out until after the plea was entered or the verdict rendered—which was problematic. Some of the best lawyers in our office recommended a plea because the downside of 50 years to life was so grave. Unfortunately, we did not have all of the discovery. When Mr. Wolfson says that we have all of the discovery for a preliminary hearing, all I can say is I now have this video. We do not even have subpoena power before a preliminary hearing. We have limited evidence before a preliminary hearing. That is a real problem in Clark County. The police do not have all the evidence before the preliminary hearing. The hearing happens or can happen within 3 weeks of the crime. There will be a lot of problems.

Chair Brower:
In the federal system, hearsay is allowed in both the grand jury and preliminary hearings. The reality is there are not many preliminary hearings, there is no adversarial process and all hearsay comes in. Defense counsel is not in the room. It is the grand jury, the prosecutor and the court reporter. That is it. That is how we indict people. I am not aware of a groundswell of objection by the defense bar to that system. I do not know if anyone who has opposed this bill has ever written to his or her United States Representative or Senator asking that the federal system be changed because it is fundamentally unfair. How does the system work in other states, the federal system and the military system if it is so unfair?

Mr. Kohn:
There is a reason why I have only practiced in federal court once. The federal system is different. I would not want to be part of the federal system. The biggest difference is the law of great numbers. I know you were the U.S. Attorney. I do not know how many cases your office filed in any given year. I assume it was between 400 and 500 cases. The law of large numbers in the State system is a problem.

I am a refugee from California. I moved here right after Proposition 115 passed that allowed for hearsay. I grew up in California. I love California. California is a disaster. Its prison system is under a federal mandate. I do not know how much the hearsay rule added to the problems in California, or why its prisons are so overcrowded. I do know the process is different. When I left California, there were municipal courts and superior courts. Now it has a unitary system. California does not have municipal courts and superior courts. California has completely changed its system. Proposition 115 was the result of the initiative process. I do not believe in governing that way. I believe in the way we do things in Nevada. I believe in the Advisory Commission. I would like to see A.B. 193 sent to the Advisory Commission to find out how the 36 states admit hearsay. What safeguards do those states have? I know that in California, one safeguard is that a district court can reduce the charge on its own motion. It is called a Rule 17(b) motion in California. We do not have that in Nevada. If we add all the best safeguards from the other 36 states, I will vote it out of the Advisory Commission with you.

Senator Ford:
Allowing hearsay at the preliminary hearing stage makes it easier to establish probable cause and easier to bind someone over for trial. It makes plea negotiations and taking a plea all that much more urgent because the defendant does not want to be on the Sex Offender Registry for life. Is that right, or is this too attenuated? Does it have this level of connection?

Mr. Kohn:
That is exactly my concern. As the Clark County Public Defender, a high percentage of our clients are in custody and are poor. Sexual assault on a minor is a felony. The District Attorney has an incredible advantage when our clients are in custody. Our clients cannot help us prepare our case. They cannot help us prepare witnesses. It is incredibly coercive. Yes, it makes our case more difficult to defend.

Jeremy Bosler (Public Defender, Washoe County):
We have 34 attorneys in our office. We take about 8,000 cases each year. We are opposed to A.B. 193. It is not good public policy. There is no constitutional right to a preliminary hearing; however, there has been a rich long-standing statutory right to a preliminary examination in Nevada since the 1800s. I do not think that right should be set aside quickly for even a small number of enumerated cases.

Chair Brower:
We are not talking about getting rid of the preliminary hearing. We are talking about allowing hearsay in limited circumstances. There is no statutory prohibition on hearsay at the preliminary hearing. There is a statutory prohibition on hearsay at the grand jury. I assume that over time, caselaw has taken the one and transferred it over to the other.

Mr. Bosler:
There is no right to admit hearsay at a preliminary hearing absent an exemption otherwise by statute.

Chair Brower:
Is there is a prohibition in statute on hearsay at the preliminary hearing?

Mr. Bosler:
The normal rules of evidence prohibit the use of hearsay as applied through caselaw.

Chair Brower:
We have a statute that prohibits hearsay in the grand jury.

Mr. Bosler:
Yes. The prohibition at the grand jury was developed as part of an American Bar Association study on best practices for grand juries. We have not had the same study for preliminary hearings, but the prohibition has developed as the practice.

Chair Brower:
Assembly Bill 193 does not preclude a defendant from having a preliminary hearing. It just allows hearsay in certain limited cases.

Mr. Bosler:
Agreed. The enumerated cases in A.B. 193 are the toughest of cases and the cases with little corroborative evidence. That makes it that much more important to challenge the veracity of the evidence. There should be a way for the magistrate or the attorneys to evaluate the quality and quantity of the evidence at preliminary hearings. These are high-stake cases. The prosecutors have said that the intent of the bill is not to prevent complaining witnesses from ever testifying but to not have them testify at the preliminary hearing. There is a greater policy question we all have to answer: Is it better to have the

complaining witness testify in front of a magistrate and be cross-examined early in the process or to wait until the jury trial to testify before 12 strangers under more emotionally charged and difficult circumstances.

The evaluation of a child witness in a case like this in front of a magistrate is sometimes the thing that resolves the case. We have provisions in law to make victim advocates and things like that available to the victim. At some point, a judge will have to decide whether the witness is competent to testify. It is better to have the judge decide earlier rather than later that the witness is not credible or is a bad historian. Much was made of the cost savings to be achieved by allowing hearsay. The testimony in the Assembly was for the original bill. Those cost-saving estimates have been substantially reduced because we have significantly limited the types of cases at which that hearsay may be allowed.

In Washoe County, we are able to accommodate the concerns for these victims and still provide due process for the accused by allowing witnesses to testify in front of a magistrate and have the testimony evaluated by a magistrate before going to district court. We have something called a Mandatory Status Conference (MSC) system. We have used the MSC system to limit the number of subpoenas and witnesses. In fiscal year 2008, the Washoe County District Attorney's Office spent $189,000 on subpoenas. With the MSC system, in fiscal year 2013, it spent $40,000. There are ways to protect the interests of the accused and the sometimes innocent accused while allowing a safeguard that requires a witness to actually testify at hearing if defense counsel believes it to be necessary.

These three enumerated offenses are a small body of cases. The hearsay limitations in NRS 51.385 are not in A.B. 193. Maybe that would make it more palatable. If we allow hearsay for these enumerated cases, what makes the victim of a robbery less traumatized? There are greater policy questions. If you undertake this step toward allowing hearsay in enumerated cases, are these the right enumerated cases? Should it be a bigger body? Should it be a smaller body? What is the experience of other states that have done this? This is not a simple fix. I disagree with the Chair. I think this is a significant departure from what is a rich history in Nevada to make sure that the preliminary examination actually operates as a screening mechanism and the veracity of the witnesses is measured. This step should not be lightly taken. It probably would be best to have experts come to the law school and tell us what the experience is in

California. I am concerned about Mr. Kohn's statement about cases backing up in district court. It is a savings question. Cases in which hearsay is allowed and the credibility and veracity of the witnesses are not measured will go to district court. The JP will not have the authority under A.B. 193 to determine this is hearsay within hearsay. Assembly Bill 193 says hearsay shall be allowed. It does not limit its introduction to the person who interviewed the declarant.

Chair Brower:
If this bill passes, why would the JP not be able to simply say, "I have heard all the testimony at the preliminary hearing. I do not find probable cause to bind this defendant over for trial. Case dismissed"?

Mr. Bosler:
Assembly Bill 193 does not change that authority, but the issue would be the hearsay. Could the JP find the hearsay testimony unbelievable? Could the JP find the hearsay insufficient because it was offered by someone other than the person who took the child's statement?

Chair Brower:
Can the JP find no probable cause because the evidence is insufficient?

Mr. Bosler:
I agree. The JP can.

Chair Brower:
That would not change under A.B. 193.

Mr. Bosler:
The JP would not be able to say the hearsay is not true hearsay; the hearsay is not first level but rather second level, third level, double hearsay or triple hearsay. Someone from the well of the courtroom could read the statement.

Chair Brower:
If that happened after passage of A.B. 193, the JP could say, I do not find that credible. The JP does not have to say, I do not find that credible because it was triple hearsay. The JP could simply say, I do not find—given the totality of the evidence presented at this preliminary hearing—probable cause to believe that this defendant committed that crime. Case dismissed.

Mr. Bosler:
In my opinion, if the JP did that based on the quality of the hearsay or the level of the hearsay, a writ would be filed challenging the dismissal and the JP would be reversed. The statute does not place any limitation on what type of hearsay is admissible. I do not think this is a step to be taken lightly. I share Mr. Kohn's view that this is something we should do in a more robust environment.

I read one of the letters from the judges. The judge expressed a concern that sometimes as a result of the testimony of the complaining witness presented at the preliminary hearing, the charge is changed from sexual assault to lewdness or from one count of lewdness to three counts of lewdness. Assembly Bill 193 deprives the magistrate and the complaining witness of that opportunity. It may inure to the detriment of the defendant, but we use the magistrate in the preliminary hearing to screen cases and make sure the right charges and the right cases make it to district court. This bill does not accomplish that.

Steve Yeager (Office of the Public Defender, Clark County):
I have provided a letter from the Clark County Public Defender's Office (Exhibit E). I also provided a presentation (Exhibit F). Admittedly, this presentation was prepared for the Assembly. Not all of it is applicable. The import of it is a review of the 36 states that admit hearsay. There is conclusory language about the fact that less than half of those states have no safeguards. The preliminary hearing is a pressure point in the case. Most cases are negotiated before the preliminary hearing. Sometimes we have to get to the preliminary hearing and we—the defense attorney and the district attorney—have to see the evidence. One of us might be mistaken about the strength of our case. Sometimes my client needs to see the evidence up close before the negotiation happens. Often for defense attorneys, the preliminary hearing is the only opportunity to see a victim or see a witness testify.

If the victims' bill of rights—Joint Resolution (S.J.R.) 17—is approved, the preliminary hearing may be the only chance defense counsel has to see and talk to a victim. Under S.J.R. 17, the victim would not have to talk to us. The preliminary hearing is a vetting that often results in negotiation, which happens in 99.6 percent of cases. As a policy matter, if we know these cases are going to negotiate, do we want that to happen earlier in the process or later? Having the victim at the preliminary hearing helps negotiations. One, more cases will go to district court. It is not a huge number, but there will be some. Two, more cases will go to jury trial that would otherwise negotiate. It is a whole different

animal to testify in front of a jury. Most victims will testify one time at the preliminary hearing. That is a better place for that to happen than at a trial.

Senate Joint Resolution No. 17 (1st Reprint): Proposes to amend the Nevada Constitution to expand the rights guaranteed to victims of crime. (BDR C-952)

Senator Ford:
Exhibit F on page 18 says that 18 of the 36 states would not allow what the district attorneys seek here. Page 19 says that nine of the cited states only admit hearsay with significant restrictions. What are those restrictions?

Mr. Yeager:
In California, the hearsay must come through a qualified law enforcement office. That is someone with 5 years of experience. In Colorado, the judge has to approve the hearsay before it comes in. In Oregon, the magistrate has to be shown that it would be an unreasonable hardship to bring the witness in. We highlighted those three states. I have more information that I could provide to you. It is not an open-up-the-gates scenario. It is tempering in some of the other states. *Nevada Revised Statute* 51.385 applies at trial; but Clark County uses it at preliminary hearings quite often. The JPs will allow child hearsay at preliminary hearings with those procedural safeguards. It is not codified but used by practice. It is not used at grand jury proceedings.

Senator Ford:
Why can we not put the strictures of NRS 51.385 into A.B. 193?

Mr. Yeager:
Those requirements could be put into A.B. 193. If A.B. 193 passes as written, what impact would that have on NRS 51.385 and its use in Clark County by practice in preliminary hearings? The result would probably be that NRS 51.385 would only be used at trial and would not be used at preliminary hearings.

Sean B. Sullivan (Office of the Public Defender, Washoe County):
I have provided written testimony (Exhibit G). We all agree that the JP is the final arbiter of a witness's credibility or demeanor at the preliminary hearing. Assembly Bill 193 will make it difficult for the JP to determine the credibility or veracity of a witness if the witness is not at the preliminary hearing. The lead detective or the lead officer may be there, both of whom have the color of

authority, but the JP cannot test or be the final arbiter of the victim's credibility or demeanor under these circumstances. Often, cases do resolve at the preliminary hearing when the victim is placed on the witness stand and the victim's credibility and veracity is tested. A client will ask to get the deal back that had been offered or decide not to go through with the hearing. The preliminary hearing resolves a lot of cases because of the vetting process. We oppose A.B. 193.

Chair Brower:
You hit upon the most salient point: the absence of the actual complainant in front of the JP who is tasked with making the probable cause determination. We have established that the defendant does not have a constitutional right to confront the witness at the preliminary hearing. We need to ferret that out and decide whether that makes sense as a matter of policy. Let the record reflect that I did let the defense go beyond the 30-minute allotted time because of Committee questions.

Mr. Jackson:
Mr. Kohn stressed to the Committee that this could be done through the grand jury process. There are 17 counties in Nevada. We only have two counties that use the grand jury process. It is expensive to have grand jurors meet on a regular basis over the course of up to a 2-year appointment. In Douglas County, we have special grand juries on average every 7 years. We are allowed to take limited cases to the grand jury. Grand jury proceedings do not take care of the issue. A child sexual assault victim or a child abused at a felony level in Pioche or Ely deserves the same consideration as victims in Clark County.

The evidence that the prosecution is required to present at a preliminary hearing in minimal. The Nevada Supreme Court has repeatedly stated that it is "slight, even marginal" evidence. That is it. That is all we need to establish probable cause. This is a policy decision. Some of the most underreported crimes are sexual assaults and abuse of children. These are our most vulnerable victims. Two of the three exceptions in A.B. 193 relate to children under the age of 16. One of the reasons sexual assault is underreported is because of the criminal justice system as discussed by Mr. Bosler and Mr. Sullivan citing to *State v. Davis*, 14 Nev. 407 (1879), in Exhibit G. We have had other statutes enacted in the 1800s that were later determined to be unconstitutional or bad policy for the State. Laws can change.

Child victims describe testifying as the worst experience of their lives. A child is subjected to the ridicule and humiliation of having to testify at the preliminary hearing. The child testifies just once. The court binds over following the preliminary hearing. That child tells my deputies and me that he or she will never go through it again. The majority of the cases are not resolved because of the innocence of the accused. This is about our inability to protect a victim from being abused again at a court proceeding when there is no constitutional requirement to put that victim on the stand. The policy decision to be made should be about the victims, our most vulnerable victims.

Senator Ford:
I am entirely sympathetic to the three classes of individuals you are trying to protect, but you have made a couple of presumptions. One of the important reasons for a preliminary hearing to is determine whether probable cause exists. You are calling these individuals victims. To the extent an individual is proven a victim because the accused has sexually assaulted him or her, so be it. Assuming that an individual is a victim puts a spin on this issue that makes it less tenable for me. What is the appropriate balance between protecting someone who may be a victim and the rights of the accused? We are talking about hearsay. If we are to allow hearsay at preliminary hearings, why would we not include the language from NRS 51.385 or some of the protections adopted by other states?

Mr. Jackson:
One state does not allow preliminary examinations at all but bases the determination on an affidavit much as we do for a warrant. There is a broad spectrum of approaches. Assembly Bill 193 is significantly different from the initial bill. It comes down to these particular types of victims. In addition to NRS 51.385, there is NRS 51.315. The first exception to the hearsay rule is a guarantee of trustworthiness. The Nevada Supreme Court has said that the victim's testimony is in and of itself sufficient to find the defendant guilty at trial.

Not every witness is going to have videotaped or recorded testimony. It does not always happen that way. *Nevada Revised Statute* 51.385 is a trial right. It addresses having a hearing outside the presence of the jury. That would not apply at a grand jury proceeding or at a preliminary hearing because at a preliminary hearing …

Senator Ford:
I am talking about the relevant provisions. For example, having the judge look at whether the statement was spontaneous or whether the child was subjected to repetitive questioning. The type of strictures would be applicable at the preliminary hearing stage. What is wrong with including those provisions in A.B. 193?

Mr. Jackson:
Those are typically questions the defense attorney asks on cross-examination of the victim or the law enforcement officer. The JP can take that into consideration.

Senator Ford:
Do you have a problem putting those provisions into A.B. 193?

Mr. Jackson:
I do have a problem putting them into A.B. 193.

Mr. Wolfson:
Nevada Revised Statute 51.385 applies to only children under the age of 10. That is a limited class, narrowed further by a determination that the child is unavailable or unable to testify. That has not been talked about today. There are reasons why we have that limited admissibility vehicle. The reasons for allowing hearsay under NRS 51.385 should not apply generally to the three classes of victims in A.B. 193.

Assembly Bill 193 does not say that a JP cannot dismiss a case. Other rules allow a JP to dismiss a case if he or she does not find probable cause. California is a disaster. I, too, am from California. It is not a disaster because of hearsay at preliminary hearings. I reached out to 15 of the 36 states that allow hearsay. We received positive responses as to its benefits. We received measured responses. We did not just hear from district attorneys' offices that gave us one-sided versions.

Right or wrong, my face is on this bill. I am the district attorney from the largest county in Nevada. If this bill passes, more cases in my jurisdiction than anywhere else will be affected. I was a prosecutor in the beginning of my career, and I was a defense lawyer for 25 years. I bring an appropriate balance and objectivity to this discussion. This is a significant departure. We do not

allow hearsay at preliminary hearings or grand jury proceedings. Just because we have been doing it a certain way for a long time does not mean it is the right way. Thirty-six states and the federal system allow hearsay in one way or another. There must be something to it if the majority of states allow what we want to do.

Mr. Duncan:
The JP is the gatekeeper. Assembly Bill 193 does not change that fact. It would be laughable if a district attorney had someone off the street come in and read a police report. The JP would find no foundation for the hearsay and deem it not reliable. The JP would dismiss the case. The most robust system for protecting the rights of the accused is the military justice system. I was a prosecutor and a defense attorney in that system. The military system allows hearsay for all crimes. No one would say it is a kangaroo court or that rights are being run over. Assembly Bill 193 is limited to specific victims of specific crimes. There are human costs to victims in these cases.

Senator Ford:
Thirty-six states do this in some form or another. I am trying to find what form we want to have in Nevada, if we allow this to happen. I am interested in hearing what limitations, safeguards or protections you would support if not NRS 51.385. My open mind will close quickly if we cannot come to some resolution on safeguards to be included in this bill.

Ms. Oriol:
I have provided a letter (Exhibit H) expressing the support of the Nevada Network Against Domestic Violence for A.B. 193. While the provisions in this bill only apply to felony domestic violence and most domestic violence charges are misdemeanors, this is an important addition to Nevada law. To reach the felony level for domestic violence, an abuser would have three or more domestic violence convictions within 7 years or would have committed domestic violence by strangulation. These are particularly violent and egregious crimes.

In opposition testimony presented to the Assembly Committee on Judiciary on A.B. 193, many examples were offered of victims changing their statements when present at the preliminary or grand jury hearings. These examples were used to substantiate the claim that victims can be mistaken about their perpetrator or lying in their accusations. These assumptions are quite problematic. Beyond the fear of facing one's abuser in court, a victim may also

be pressured by the abuser's family and friends to recant. A large number of victims recant. This is not an indicator that victims lie or are mistaken, but a symptom of the level of fear, danger and complexity victims must confront when facing their perpetrators in court. It is also important to remember that a common manipulation tactic of abusers against victims is to instill repeatedly that a victim is the one to blame and will not be believed when testifying. Understanding these circumstances helps you understand why a victim might change his or her story, especially when the violence is severe enough to be classified a felony with substantial bodily harm. We support the audiovisual portions of the bill. I urge the Committee to pass A.B. 193. It has been narrowed to a specific group of people who are vulnerable and can benefit from this law.

Ms. Dreitzer:
Ninety-eight percent of perpetrators of sexual assault never spend a day in detention. Over one-half of all sexual assaults are never reported. It is so difficult for these victims, particularly child victims, to come forward. The issue of losing the narrowing effect from preliminary hearings is a travesty of justice.

The Rape Crisis Center in Las Vegas saw 12 victims between the ages of 13 and 17 in April. Ninety-three percent of abused children are abused by someone they or their family knows, trusts or loves. The same is true of domestic violence victims. These defendants are known and loved by these victims. It is incredibly difficult for a victim to face his or her abuser at any time but particularly so close to the time of reporting the abuse. Giving victims time to get some counseling and support prior to the trial would be a great service. We know that many cases are pleaded or do not go forward because prosecutors know these victims cannot testify. They are too traumatized and not strong enough to be put on the stand at any time. That in and of itself is a travesty of justice. The rights of defendants over and over and over again are placed above the trauma and devastation perpetrated on women and children every day. Perpetrators are allowed to hide behind these issues and go free, while children deal with a lifetime of pain and difficulty. Assembly Bill 193 puts a small modicum of justice in their corner. I beg the Committee, please offer these victims this small option of help and support.

Senator Harris:
Does having the ability to use hearsay evidence make victims of these horrible crimes more likely or perhaps less reluctant to come forward and be involved in

the criminal justice system? We hear that it takes years before women and children who are affected can come forward and face their abusers.

Ms. Dreitzer:
Any limitation on the number of times these victims have to be face to face with their perpetrators is a benefit to the victims. Assembly Bill 193 gives them an option, and if they are strong enough to come forward and appear at the preliminary hearing, that is wonderful. Particularly for children, getting time to have counseling, support and distance can only be of benefit to them.

Sonia Lucero (Executive Director, Nevada Child Seekers):
We support A.B. 193. We deal with victims of human trafficking and sex trafficking. We mainly deal with children. When they come back, they are afraid to talk. It takes a long time for them to heal, and it takes a long time for their family to heal, too. These children do not sleep. They are afraid because of what they have been told. They are afraid to come forward.

Tonja Brown (Advocate for the Innocent):
I oppose A.B. 193, particularly section 1, subsection 6, paragraphs (a) through (c). I am concerned about cases, like divorce cases, in which the mother will use the children and say they are being abused by the father. There are cases in Nevada in which fathers have gone to prison. When these children become adults, they tell the truth about fearing their mothers and being forced to testify. This law will lead to more wrongful convictions.

We have heard about the discovery issue during the preliminary hearing. If you go to the minutes of the Advisory Commission on the Administration of Justice, June 23, 2010, you will see documentation from the district attorneys addressing discovery issues up to the day of trial. My concern is that if the victim is not at the preliminary hearing and the determination of probable cause is based on hearsay, the accused will feel obligated to take a deal because he or she does not want to spend 10 years or 20 years to life in prison. The accused will plead guilty to something he or she did not do.

I have personally witnessed a woman fill out a statement on domestic violence. None of it was true. If A.B. 193 passes, women like her will make false accusations and use hearsay to get a guilty verdict. Fortunately, this woman did not show up for court. The JP threw the case out and advised the defendant to stay away from her because she was dangerous. She can go on and do this to

other people based on hearsay. My proposed amendment (Exhibit I) contains a remedy to the situations like the one I have described.

Ms. Powell:
I oppose A.B. 193. A tape recording will not make it easier for a victim. It is never easy for a victim. Requiring the victim to testify at the preliminary hearing establishes a full case so that the case can be plea-bargained. Most victims never see a courtroom. Victims go to a preliminary hearing and are once again betrayed by the system. I have been involved with four male youths who were wrongfully charged and found not guilty. The evidence alone can destroy lives. Once the tag is there, it is there forever. I have a concern especially for young men aged 14 to 21 who are accused, not maliciously but in a juvenile way. Their lives are ruined forever. Allowing hearsay evidence just adds one more straw. As a paralegal, I know hearsay is not good. It is not good in terms of making a solid case that will not be overturned and revictimize the victim. The best case for Jaycee Lee Dugard was DNA evidence. All that would have been needed was a scientist, but instead, the prosecutor chose to plea-bargain the case. Now we will be supporting Phillip Garrido for the rest of his life.

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Chair Brower:
The hearing is adjourned at 3:31 p.m.

RESPECTFULLY SUBMITTED:

_____
Connie Westadt,
Committee Secretary

APPROVED BY:

_____
Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
A.B. 212	C	3	Chandni Patel	Written Testimony
A.B. 212	D	2	Kristy Oriol / Nevada Network Against Domestic Violence	Letter of Support
A.B. 193	E	2	Steve Yeager / Clark County Public Defender's Office	Letter of Opposition
A.B. 193	F	26	Steve Yeager / Clark County Public Defender's Office	Presentation
A.B. 193	G	2	Sean B. Sullivan / Washoe County Public Defender's Office	Written Testimony
A.B. 193	H	3	Kristy Oriol / Nevada Network Against Domestic Violence	Letter of Support
A.B. 193	I	4	Tonja Brown	Proposed Amendment