

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Eighth Session
March 12, 2015**

The Senate Committee on Judiciary was called to order by Vice Chair Becky Harris at 1:04 p.m. on Thursday, March 12, 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

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Connie Westadt, Committee Secretary

OTHERS PRESENT:

Lisa Rasmussen, Nevada Attorneys for Criminal Justice
Sean B. Sullivan, Office of the Public Defender, Washoe County
Steve Yeager, Office of the Public Defender, Clark County
John T. Jones, Jr., Nevada District Attorneys Association

Senator Harris:

We will begin our hearing on [Senate Bill \(S.B.\) 186](#) with its introduction by Senator Brower.

[SENATE BILL 186:](#) Provides for the recovery of attorney's fees and litigation expenses by certain prevailing parties in criminal actions. (BDR 3-205)

Senator Greg Brower, Senatorial District No. 15:

Both Senator Ford and I appreciate the opportunity to introduce S.B. 186, a bill aimed at filling a gap in Nevada's criminal justice system.

Senate Bill 186 would allow a person, whether an individual or a corporation, to be reimbursed for the costs of defending against a criminal case if a judge determines that the government's case was vexatious, frivolous or brought in bad faith. In 1940, former U.S. Supreme Court Justice Robert H. Jackson made the following observation about the power of the prosecutor in our system:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.

The point of Justice Jackson's now famous admonition is that a prosecutor's abuse of power can have a devastating effect on those on the wrong end of such abuses and on a free society. We acknowledge that most prosecutors, indeed the overwhelming majority of prosecutors, are honest, hardworking public servants with all the necessary qualities we expect of a person in whom we entrust enormous discretion and power over the lives and liberties of our citizens. However, prosecutors are human beings and are susceptible to misconduct beyond a good faith mistake or error in judgment. Indeed, we occasionally see examples of this and when we do, it shakes our collective confidence in the system—a system that, if it is to work, must have the utmost confidence of the citizenry.

Consider the recent case from Phoenix, Arizona, in which the former district attorney of Maricopa County and two of his deputies were disbarred and disgraced when they, in the words of the judge who presided over the matter, "defiled the public trust." It was an ethical mess beyond belief. When a prosecutor steps over the line for whatever reason—laziness, political ambition, personal animus, desire to avoid embarrassment—and initiates or continues a case vexatiously, frivolously or in bad faith, the wrongdoing should be punished. Beyond that, the target of such misconduct should be made whole at least monetarily. The dismissal of such a case by a judge or acquittal by a jury is obviously a good result. However, for the unfairly targeted defendant to simply

win is not enough, particularly when the defendant has spent thousands or even millions of dollars defending against charges that arguably should never have been brought.

Unfortunately, Nevada law has no remedy for the aggrieved party, even when the prosecution is vexatious, frivolous or brought in bad faith. Some might suggest that the wronged defendant in such a situation can file a lawsuit alleging malicious prosecution or a civil rights violation. Such remedies require a completely new and potentially very expensive lawsuit. Moreover, the case will be impossible to win because of the absolute immunity that prosecutors enjoy under Nevada law. Nevada law is not unique in that regard. Prosecutors generally enjoy absolute immunity from such claims.

Senate Bill 186 proposes a simple, straightforward approach. If an individual or a corporation is prosecuted, prevails and can convince the same judge who presided over the case that the case was prosecuted vexatiously, frivolously or in bad faith, the judge can order the government to reimburse the defendant or defendants for all costs and attorney's fees expended in defending against the case. Procedurally, a simple motion is filed within 30 days of the dismissal or acquittal. No new case or new judge is required. The judge reviews the motion and makes an independent decision as to whether the government's conduct was in fact vexatious, frivolous or in bad faith. Losing a case at trial because a jury was not persuaded of guilt beyond a reasonable doubt or suffering a dismissal of the case by the judge who was not persuaded that the case should go to trial would not be sufficient to make a claim for costs and fees under S.B. 186. Mistake, good faith error in judgment, bad luck or any of the other things that can cause a good faith prosecution to fail will not support a successful claim. The judge must be convinced that the government acted vexatiously, frivolously or in bad faith—a very difficult thing for a claimant to prove.

This concept is not new. The federal justice system has had such a remedy since 1997. In the federal system, the law is known as the Hyde Amendment, named for the late Congressman Henry Hyde. Despite understandable consternation by the United States Department of Justice (DOJ) at the time the Hyde Amendment was proposed, it has worked well. We will view a brief video, <http://archive.tennessean.com/VideoNetwork/619559923001/Hyde-Amendment> ([Exhibit C](#)), which describes a relatively recent federal case that concluded with a successful claim by the target of the prosecution.

The story depicted in the video is a classic example of why S.B. 186 is needed. A small businessman is unfairly targeted. He spends nearly \$1 million defending himself. The government's case falls apart. The small businessman believes that the government acted in bad faith. The judge agrees and orders the government to reimburse the defendant for his costs and fees. It seems only fair. In Nevada, that small businessman would have no remedy.

Prosecutors do not like to think that they could act vexatiously, frivolously or in bad faith in carrying out their duties. Honorable public servants have nothing to worry about. Will the competent, diligent, honest prosecutor potentially be the unfair target of an unfounded claim under S.B. 186? Yes, that is possible, just as public officials are subject to lawsuits based on their official duties. No public official likes to be second-guessed, sued or otherwise accused of wrongdoing. I am confident that our judges will recognize meritless claims when they see them and deny them accordingly. Indeed, in the federal system, despite the literally hundreds of thousands of cases prosecuted by the DOJ since 1997, at last count less than 100 such claims have been made. As far as I can tell, there have been only nine successful claims. However, should not someone with a righteous claim be able to make the claim and let an independent judge decide?

Senator Ford and I did not introduce S.B. 186 expecting it to be universally praised by all interested parties, but we did so because we believe it is the right thing to do. Just as happened when the federal law was introduced in 1997 and the DOJ objected strenuously, we expect to hear some objections or at least some questions. Senate Bill 186 provides an extraordinary remedy for extreme cases, but it is an important deterrent and a necessary check on the prosecutors in our system. Just as the proverbial sky did not fall on the federal system when the Hyde Amendment became law in 1997, our system will survive and become even stronger with the passage of S.B. 186.

Senator Aaron D. Ford (Senatorial District No. 11):

I was pleased when Senator Brower approached me about the idea of a State law providing a remedy for vexatious, frivolous or bad faith prosecutions. He is exactly right. It makes perfect sense that an aggrieved person should be made whole, not just with an acquittal but also monetarily. I wholeheartedly support S.B. 186.

Senator Hammond:

You mentioned an Arizona case, nine federal cases and we have seen the video. Has anything occurred in Nevada that would precipitate the need for S.B. 186?

Senator Brower:

That is a difficult question to answer. Because a remedy does not exist in Nevada, it is hard to find a case with a developed record on which to opine. I have observed a couple cases for which claims may have been justified. A few years ago, the Office of the Attorney General brought a case that included more than 600 felony counts against two individuals who worked for a mortgage servicing company. All counts were dismissed by the judge before trial in response to the defense's argument that the Attorney General's Office had abused the grand jury process; the Office had not disclosed a significant conflict on the part of the deputy attorney general prosecuting the case. Unfortunately, that case involved a witness who the defense believed had been bullied by the Attorney General's Office into cooperating. The witness did not think her bosses had done anything wrong. She committed suicide. We will never know how a claim would have turned out because no remedy was available and the record was not fully developed.

Another case is the State's prosecution of former Lieutenant Governor Brian Krolicki. Before trial, the judge found that the indictment did not state probable cause sufficiently and dismissed the case. No record was developed and a claim could not have been made. If you polled criminal defense lawyers in our State, you might find 50 examples of righteous claims. If there were only two valid claims, S.B. 186 would be worth passing so that those two wronged defendants could seek justice.

Senator Harris:

I understand that the intent of this bill is to make defendants whole for attorney's fees and litigation expenses resulting from vexatious, frivolous and bad faith prosecutions. My concern is for those who are not able to afford their own independent, private legal counsel. I understand that these defendants are not paying attorney's fees or costs; however, taxpayers are. Reimbursing the public defender's office might send a message to the prosecutorial branch of our judicial system on behalf of defendants who rely on public defenders that they too might prevail if prosecuted vexatiously, frivolously or in bad faith. That would allow defendants of all income levels the ability to take advantage of the

remedy provided by this law. I am curious why S.B. 186 reimbursement would not be available to the public defender's office and other agencies that appoint counsel, thereby assisting them in providing defense for others.

Senator Brower:

The bill is modeled on the federal law and the federal law does not allow that. We would be moving money from one government pot to another government pot. On the other hand, some have advocated for a reform of the federal law to allow exactly what you are talking about. There is something to having your day in court and an opportunity to prove that you were prosecuted unfairly. The vast majority of such claims will not be successful. Nevertheless, you make a good point. It is something for the Committee to consider.

Senator Segerblom:

I understand that a prosecutor has absolute immunity under Nevada law.

Senator Brower:

Yes. There is a Nevada Supreme Court case on point. A well-developed body of caselaw provides absolute immunity to prosecutors, qualified immunity to investigators and qualified immunity to prosecutors when they are acting in a quasi-investigatory capacity. It is very difficult, if not impossible, to prevail on a malicious prosecution claim against a prosecutor under Nevada law or that of virtually every state.

Lisa Rasmussen (Nevada Attorneys for Criminal Justice):

We support S.B. 186. Chair Brower's testimony explains why this legislation is needed. Use of the law would be extremely rare. It would not open a floodgate. I was an attorney on one of the cases Chair Brower referenced, the one with the 600 counts filed by the Attorney General's Office. That is the kind of case in which a motion would have been filed. On the other hand, I have won cases with a jury acquittal or a judge dismissal that did not rise to the level of vexatious, frivolous or bad faith. Unfortunately, that is not true in every case, and S.B. 186 provides a necessary remedy. I know people who have spent hundreds of thousands of dollars defending themselves. This is one way to make them whole. Of course, it does not restore health or compensate for the damage caused by the stress of undergoing a prosecution brought in bad faith.

I have won one malicious prosecution case. We settled with Nye County for a substantial amount of money. The case was clearly brought in bad faith. That is

so rare and it is so hard to prevail in that type of case. The defense bar agrees with Senator Harris that S.B. 186 should extend to public defenders and appointed counsel. Those budgets are completely separate from the prosecutor's budget. If nothing else, it would provide parity. We would not want prosecutors going forward in a bad faith because a defendant was represented by a public defender. We support S.B. 186 as written or amended. It is long overdue and needed.

Sean B. Sullivan (Office of the Public Defender, Washoe County):

We agree with the comments of Ms. Rasmussen. We support the concept of S.B. 186. We appreciate the dialogue opened up by Senator Harris regarding public defenders and indigent defenders. We support that as well.

Steve Yeager (Office of the Public Defender, Clark County):

We support S.B. 186 as written. We think it is good for the justice system. We would support adding public defenders.

John T. Jones, Jr. (Nevada District Attorneys Association):

We are neutral on S.B. 186. While it is hard for me to believe that a prosecutor would act vexatiously, frivolously or in bad faith, it is also hard for me to say that someone is not entitled to recover costs when a prosecutor does so. The point of S.B. 186 is to make a defendant whole. A defendant who is represented by a public defender does not expend any money. To the extent a defendant does expend money, then that money should be reimbursed. That would treat defendants with private or public counsel the same way.

Senator Brower:

Senate Bill 186 contemplates an extraordinary remedy that we hope will be rarely, if ever, used in Nevada. I have prosecuted dozens of cases on behalf of the United States. No one knows the power that a prosecutor has better than a former prosecutor. I have never met a finer group of public servants in my professional career than prosecuting attorneys and law enforcement agents. Occasionally, someone or some group steps over the line. Often a prosecution starts in good faith and later falls apart; rather than doing the right thing, the prosecution is pursued beyond the point of good faith. When that happens, there should be a remedy. If it is never used, great; but if it is needed just one time, it should be there and that is the point of S.B. 186.

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Senator Ford:

My colleague said it best and he is exactly right. I am delighted to be a cosponsor on S.B. 186, and I am looking forward to its passage.

Senator Harris:

We will close the hearing on S.B. 186. We are adjourned at 1:37 p.m.

RESPECTFULLY SUBMITTED:

Connie Westadt,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit		Witness or Agency	Description
	A	1		Agenda
	B	3		Attendance Roster
S.B. 186	C	NA	Senator Greg Brower	Video Link