MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Ninth Session
March 17, 2017

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:07 a.m. on Friday, March 17, 2017, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 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/79th2017.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Ozzie Fumo
Assemblyman Ira Hansen
Assemblywoman Sandra Jauregui
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblyman Keith Pickard
Assemblyman Tyrone Thompson
Assemblywoman Jill Tolles
Assemblyman Justin Watkins
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblywoman Lesley E. Cohen (excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Dina Neal, Assembly District No. 7
Assemblyman Edgar Flores, Assembly District No. 28

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Janet Jones, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

James W. Hardesty, Justice, Supreme Court of Nevada
Thomas F. Pitaro, Private Citizen, Las Vegas, Nevada
Jeff Clayton, Executive Director, American Bail Coalition, Lakewood, Colorado
Richard J. Justin, Owner, Justin Brothers Bail Bonds, Carson City, Nevada
Kristin L. Erickson, Chief Deputy District Attorney, Washoe County District Attorney's Office; and representing Nevada District Attorneys Association
Christopher J. Hicks, District Attorney, Washoe County District Attorney's Office; and President, Nevada District Attorneys Association
John J. Piro, Deputy Public Defender, Clark County Public Defender's Office
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office
Erick A. Stovall, Private Citizen, Reno, Nevada
Kimberly Mull, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence

Chairman Yeager:
[Roll was called. Committee protocol and rules were explained.] We are going to begin with one Committee bill draft request (BDR) introduction, which is BDR 2-738.

BDR 2-738—Revises various provisions relating to estates. (Later introduced as Assembly Bill 314.)

This BDR 2-738 comes from the State Bar of Nevada; it is a bill we typically get and is very thick. I will entertain a motion to introduce BDR 2-738.

ASSEMBLYMAN OHRENSCHALL MOVED FOR COMMITTEE INTRODUCTION OF BILL DRAFT REQUEST 2-738.

ASSEMBLYMAN THOMPSON SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYWOMAN COHEN WAS ABSENT.)

Chairman Yeager:
Today we have a presentation and two bills. At this time, I would invite to the table Justice Hardesty, Supreme Court of Nevada, who is going to provide an overview on the Committee to Study Evidence-Based Pretrial Release. We have the PowerPoint here and on the Nevada Electronic Legislative Information System (NELIS).

James W. Hardesty, Justice, Supreme Court of Nevada:
I know you are very busy, and I do not want to consume a lot of time about the subject of pretrial release. Perhaps you will recall hearing the Chief Justice reference this during his remarks during the State of the Judiciary address. The presentation that I want to provide you is not in support of or in opposition to any particular bill. I would like to provide you with some background information on this topic. I know there is a bill that has been suggested to you, which is Assembly Bill 136. I have recently received a set of amendments to this bill.

I am here today to give the Committee an overview of what the Nevada Supreme Court is doing on this topic. I would like to emphasize, as you will see in my presentation, that to the extent that judges are called upon to make decisions about pretrial release of those charged with a crime, the Supreme Court is in a position to adopt rules to regulate how judges approach this topic. While I certainly appreciate the suggestion written in the bill that the Supreme Court may adopt rules to effectuate pretrial release decisions by judges, in my view and in the court's view, we already have the authority to do that.

The importance of this presentation is to bring you up-to-date on the efforts that have been made by the committee to study this topic, provide information about why we are doing this study, and let you know that it is an evolving process. On Monday, March 20, 2017, our committee will be meeting to ascertain the status of what is taking place at the pilot sites throughout the state. We will then make determinations on how to proceed from there. I expect the pilot programs to continue through June 30, 2017, after which, the committee will assess whether to make recommendations to the Supreme Court on how to proceed with respect to this topic. It is important for the Committee to know [slide 2, (Exhibit C)] that "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law" [*Coffin v. United States,* 156 U.S. 432, 453 (1895)]. A person who is arrested is not yet guilty; they enjoy that presumption of innocence, and the point of this topic is that one must be respectful of that. What happens when someone is charged with a crime?

The Conference of State Court Administrators in 2012-2013 published a policy paper in evidence-based pretrial release [slide 3, (Exhibit C)]. As noted in that paper from a U.S. Supreme Court case [*United States v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 2105, 95 L. Ed. 2d 697 (1987)], "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." If any of you or your loved ones were charged with a crime, I am certain you would want to have the ability to seek a pretrial release prior to your trial being conducted. Slide 3 states, ". . . economic status [is] a significant factor in determining whether a defendant is released pending trial, instead of such factors as risk of flight and threat to public safety." Too often, we retain defendants in jail who cannot afford to make bail. As a consequence, ". . . for the poor, bail means jail."

At the Conference of Chief Justices, all 50 justices supported Resolution 3, "Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release," (slide 4). In making pretrial-release decisions, courts should be using evidence-based practices. In June 2015, in response to the Conference of State Court Administrators (COSCA) Policy Paper, and the Judicial Council of the State of Nevada unanimously approved a resolution creating the committee to Study Evidence-Based Pretrial Release in Nevada. The Judicial Council was created by the Supreme Court and made up of all of the judges throughout Nevada.

When one is making a pretrial release decision, the judge should focus on two things. Bail should be based on standards relevant to assure appearances in court, and the determination should be individualized to each defendant, [*Stack v. Boyle,* 342 U.S. 1 (1951)] [slide 5, (Exhibit C)].

A federal court case, *Jones v. City of Clanton* [2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 15, 2015)], stated,

> Criminal defendants, presumed innocent, must not be confined in jail merely because they are poor. Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all.
>
> Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment.

My concern as Chief Justice of the Nevada Supreme Court in 2015 was that Nevada should study this question on how it is influencing our position in this state, so we can get in front of any federal case that would charge us with violating the Equal Protection Clause of the Fourteenth Amendment.

Many studies have looked at this question on impoverished people being retained in jail because they could not make bail. A study of all nonfelony cases in New York City in 2008 found that for cases in which bail was set at less than $1,000 (19,617 cases), in 87 percent of those cases defendants were unable to post bail at arraignment and spent an average of 15.7 days in pretrial detention, even though 71.1 percent of these defendants were charged with nonviolent, non-weapons-related crimes [slide 6, (Exhibit C)].

Twelve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bonds unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention.

Six other states have adopted this presumption by court rule (slide 7). That is the approach we are looking at in Nevada, which is consistent with what has been done in Arizona, our sister state, as well as in Virginia. Rather than undertaking this process through legislation, the Supreme Courts in those states have effectuated a process or system for individualized review of pretrial release through the adoption of court rules.

The purposes of the committee are to study the current pretrial release system and to examine alternatives and improvements to that system through evidence-based practices and current risk assessment tools. The committee will ultimately make recommendations to the Judicial Council of the State of Nevada and the Nevada Supreme Court regarding possible strategies for reforming and improving Nevada's pretrial release system (slide 8).

Committee membership consists of members of the Nevada judiciary, lawyers practicing criminal law, and court services officers and management staff from counties throughout Nevada. The committee consists of 23 judges, (18 limited jurisdiction judges and 5 district court judges), the Clark County Public Defender, Clark County District Attorney, Washoe County Public Defender, Washoe County District Attorney, Nevada Association of Counties (NACO) representatives, and leadership from pretrial services departments in both Washoe and Clark counties and county managers [slide 9, (Exhibit C)].

I want you to know this is a topic that has received considerable study by the committee. At the first meeting on September 30, 2015, the committee received presentations from Tim Murray, Executive Director of the Pretrial Justice Institute; Laurie Dudgeon, Director, Kentucky Administrative Office of the Courts; and Tara Boh Blair, Executive Officer, Kentucky Department of Pretrial Services. Kentucky has been operating on this system since 1978; their history and background is critical to our understanding of this process. At the committee's November 5, 2015, meeting, Kathy Waters, Director of Adult Services, Arizona Supreme Court, gave a presentation on Arizona's experience and their approach to this issue [slide 10, (Exhibit C)].

In December 2015, we received presentations regarding the approach taken by the U.S. District Court (slide 11). In January 2016, Spurgeon Kennedy from the National Institute of Corrections provided a key presentation on his papers dealing with the subject "Building a Pretrial Justice System: Elements of Effective Pretrial Programming" and "Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field." The committee unanimously adopted the performance and outcome measures as presented in "Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field." (slide 12). If we do not know what we are going to measure, then how do we know where we are headed?

As a consequence, we adopted this series of outcome measurements and definitions, appearance rates, safety rates, concurrence rates, success rates, pretrial detainee length of stay, universal screening, recommendation rates, response to defendant conduct, and pretrial intervention rates [slides 13 and 14, (Exhibit C)]. These are areas that the committee needs to study and evaluate in order to arrive at decisions about the best approach.

In February 2016, the committee was provided access to the Department of Justice, Office of Justice Programs (OJP) Diagnostic Center (slide 15). With the assistance of that organization and their consultant, Dr. James Austin, Ph.D., President, JFA Institute, and based on those presentations, the committee voted to move forward with the process of validating a Nevada-specific risk assessment tool. The purpose of the tool is to give judges additional information about a defendant who appears in front of them as to whether they are a flight risk or a public safety risk. The committee was presented with the results of a validation study conducted by Dr. Austin and at that time the committee unanimously voted to implement the tool in pilot sites.

I asked judges from around the state to consider being a pilot site for this program. In Clark County, the Las Vegas Municipal Court, departments of the Las Vegas Justice Court, and all of the Washoe County courts agreed to be a pilot site. In addition, I wanted to get the rurals involved because this is a tricky issue for them because of resources, and Steve Bishop, the Justice of the Peace in Ely, agreed to be a pilot site as well. We finalized plans for the pilot site programs in July and August 2016 [slide 16, (Exhibit C)]. On August 18 and 19, 2016, the committee conducted a Nevada pretrial risk assessment (NPRA) tool training session. It is not very often you see 400 public defenders and district attorneys in the same room participating in a training session about how this evidence-based practice tool would be used. Those training sessions were held in both Washoe and Clark Counties. We also had judges of all levels and pretrial service officers participating in the training.

The pilot program commenced on September 1, 2016, and since that time, the pretrial service officers have been completing the risk assessment tool. That tool has been used by judges to assist them in making decisions in those pilot sites concerning pretrial release. As with any new program, it has had its starts, fits, and problems. As usual in Nevada, it is a resource issue. The pretrial services organizations struggle to fill out the risk assessment tools in a consistent manner with the staffing that is necessary to accomplish these objectives.

I want to express my sincere appreciation to the Pretrial Services Division in Washoe County; Anna Vasquez, Manager, Pretrial Services and her team in Clark County; and law enforcement in Ely. They have worked tirelessly to effectuate the goals and objectives of the pilot program. It is a challenging and big task for them to undertake.

There are a couple of things I mentioned in my previous presentation on the Advisory Commission on the Administration of Justice that affect this issue. The pretrial risk-assessment tool is intended to measure the outcomes we identified, but it is also intended to set forth a series of factors that are scored by the pretrial service team. Those factors place a defendant as low, moderate, or high risk category [slide 18, (Exhibit C)] with respect to the two questions that constitutionally are asked, which are, will the defendant fail to appear, and, will the defendant be a public risk to society? Our Nevada Records of Criminal History has worked hard to get up-to-speed with the backlog of unfiled information. The status of that is a little uncertain, but it is clear that there is still a backlog of unrecorded information.

This caused the committee in the summer of 2016 to develop a risk assessment tool, which would focus on arrests history rather than convictions of the defendant—what was the defendant's criminal history? Since that time there has been progress made, but probably not the kind of progress we would like to have in the Nevada Criminal History Repository's recording of that information. As a consequence, the district attorney's office in Washoe County has expressed concerns about the changes recommended by the Justice Department in its review of arrests versus convictions.

Nevertheless, the judges who are operating the pilot program elected to use convictions rather than arrests as a factor that would be scored in making release decisions. The committee will discuss that issue further on March 20, 2017. It is a reasonable difference of opinion about whether you should be scoring arrests or convictions when making pretrial release decisions. Certainly, good arguments can be made in respect to both. It underscores what I mentioned to you earlier about the Advisory Commission on the Administration of Justice's recommendations. We in Nevada need to get our criminal history information up-to-speed, so it is reliable and can be used to help guide criminal justice stakeholders in making decisions on a variety of topics, not just pretrial release scoring decisions. The public safety issue, which is important to address, is that a judge is provided with more information today because of the risk assessment tool.

Nevada's system for releasing defendants has been on bail. I am not here today to criticize the bail industry—that is not the point—it has nothing to do with the bail industry. How we release people from jail should be guided by our constitutional principles. A question that the committee has studied is whether money has anything to do with guiding the decision about whether a defendant will fail to appear or if they are a public safety risk. What does $3,000, $5,000, or $100,000 have to do with those two questions? Almost nothing.

What we have found is that the bail schedules in Nevada are inconsistent in nearly every township in the state, and they are inconsistent with respect to crime types. Therefore, someone charged with a crime in Lyon County may be facing a different bail than someone charged with the same crime in Clark County. A subcommittee of the Advisory Commission has studied bail and has come forward; in fact, we will hear their report on Monday. They will present a study of a recommended bail schedule for Nevada to make it uniform. Why should a person arrested in one part of our state face a bail that is vastly different from the bail in another part of the state?

Another concern is that bail itself creates the problem that erases the equal protection questions being considered in federal courts throughout the United States. A single mom who runs a bad check is arrested, cannot get bail, and as a consequence she sits in jail. All kinds of societal problems flow from that scenario; first among them is Child Protective Services picks up her kids; next, she loses her job; and then she is out of work and loses her apartment or housing. There are many examples like that throughout this state taking place and have been for a number of years because we have been a money, bond, or bail default system. We do not make individualized decisions as *The Constitution of the State of Nevada* expects us to do, and that is what we need to do. Therefore, the committee's effort in

developing an evidence-based risk assessment tool has been focused on developing a fairer system [slide 19, (Exhibit C)]. This is not something particularly new; tools like these are being used in at least 12 states and the District of Columbia. Nevada has a lot of work to do.

Our effort through this committee is to continue studying this process, see how we can make it work, and how counties can collaborate. One of the areas that was a challenge for the rural counties is getting access to criminal history information. Washoe County's pretrial service office is providing that information for Stephen Bishop, Justice of the Peace in Ely. We think we can develop other systems that will help provide access and support services for rural counties that do not have pretrial service officers in place. This process requires continued evaluation. There has been some progress made; as I said, we do not have all the statistics on hand because the pilot programs are still studying this subject. The committee needs to continue its work before specific recommendations are made to the Supreme Court.

I do believe we have made a lot of progress in this area. I want to cite two examples that bring this issue home. We are able to supervise defendants more effectively on pretrial releases. It is a simple call-in system. Many of us get phone calls from our doctors reminding us of an appointment. A system has been developed in Clark County for an automatic call system to call the defendant and remind them of a court appearance. That has improved court appearances and reduced failures-to-appear dramatically. In Clark County, when they made that call to a defendant who had a scheduled hearing, she responded by saying that she was in an emergency room having a caesarean section. Her court appearance was scheduled for the next day. Now under most circumstances that mother would have had a bench warrant issued for her arrest because she failed to appear, and Child Protective Services would have picked up her child because of the existence of the bench warrant. Instead, because of a phone call, they were able to reschedule her court appearance. In Washoe County, we have had a number of other examples where we have been able to follow defendants more closely with a supervised release.

Here is the important point: many people are arrested and do not need to pay money to get out. They do not pose a public safety risk or a risk for failure to appear. Why should they be expected to pay money to get out? Why not book them, schedule their court appearances, and release them? That process is evolving, especially at the pilot site in Washoe County as the judges have modified their decisions about who should be released. Now you see court services making a number of release decisions that they have previously been restricted from doing because those people being released simply do not present a risk of failure-to-appear or to public safety.

We do not have all the answers yet as the study is in progress. I appreciate the advocacy of the sponsor of this bill, her interest in this subject, and her study of this issue. The court should continue its work in studying these tools. I do feel strongly that Nevada has made a lot of progress in advising how we approach pretrial release decisions.

Sorry for taking so much of your time, Mr. Chairman and Committee members, but I am open to any questions. You have the balance of the PowerPoint presentation, and if any of you have any questions about this topic, or have additional information you would like to inquire about, please feel free to call or email me, and I will provide you with additional background.

Chairman Yeager:
Thank you for your presentation, Justice Hardesty, and for providing the PowerPoint slides. I did have a chance to look at those, and they are very thorough, so I would encourage the Committee members, if you need more information, to start there. The Vice Chairman and I did attend the training that you spoke of down in Las Vegas. It was very valuable in terms of understanding this issue.

Assemblyman Fumo:
I want to commend you for your work in this area because it is an area that needs reform. On slide 9 (Exhibit C) you said lawyers and practitioners in criminal law were part of the committee. I was wondering if you had any private practitioners, people who have been in the trenches for 30 to 40 years who have done this over a span of time, rather than just figureheads on the committee.

Justice Hardesty:
Yes.

Assemblyman Fumo:
How many of those do you have?

Justice Hardesty:
Maybe two.

Assemblyman Fumo:
I would encourage you to include a few more. Do you have any bail agents on the committee?

Justice Hardesty:
No, sir, but we have had extensive presentations by the bail industry. They have made a number of suggestions and the committee studied and evaluated those suggestions at length. All of the minutes and all of the materials the committee studied are on the Supreme Court's website, including the materials presented to us by representatives of the bail industry. We have appreciated their input.

Assemblyman Fumo:
I noticed that you had United States Magistrate Judge Peggy A. Leen testify before the committee. I looked at slide 42 (Exhibit C), and you had the actual sheet that the judges use. The 18 U.S. Code § 3142 directs those judges to look at the least-restrictive means to assure a defendant's appearance. They look at about eight factors: ties to the community, the

person's employment, their education, if they can abide by the restrictions, can they avoid contact with the victim in the case, will they report when required, a promise to appear, can they comply with curfew, and lastly, their criminal history. I noticed on your slide presentation it looks like the first seven categories you address are criminal history. That is the first seven in the states when it has the least importance in the federal system. You get to employment history as number seven, and then they talk about residential status rather than ties to the community. I would just recommend leaning towards that, as you seem to be weighted very heavily on a prior criminal history rather than the two other factors which are: will they appear and are they a danger to the community? You focus heavily on danger to the community and less on the appearance.

Justice Hardesty:
Thank you, Mr. Fumo, for the suggestion. The factors listed in the Nevada risk assessment tool are factors that have been predictive of the question of whether or not someone will fail to appear, and whether they will be a public safety risk. More than one million cases have been scientifically evaluated to determine what factors predict what a defendant will do in respect to those two issues. Certainly, the weighing of criminal history is a reflection on the condition of our criminal history database in Nevada. I would also note that the federal system is different from Nevada's. Nevada does not base its decision on least restrictive means; it bases its decision on the factors that are enumerated.

If you have Assembly Bill 136 in front of you, you will notice that at the end of the bill in section 3 there is a statute in which all of the factors that are currently considered in *Nevada Revised Statutes* (NRS) 178.4853 are listed. Many of those factors are not considered to be predictive by most people doing the validating studies. Therefore, Nevada has a statute that outlines a series of factors that a judge is supposed to consider, and several of those are not considered predictive by the scientists who are studying the reasons why someone would fail to appear or would be a public safety risk.

This bill would repeal those sections, which is probably not a good idea, as you need to decide whether the court is going to advance rules that will address this question before one abandons the factors that are contained in the statute for making pretrial release decisions. Aside from that point, we are trying to focus on what the predictive factors are. The information we got for our tool came from the study of 1,051 cases in Nevada in 2014. Those various cases were studied by Dr. Austin to identify the circumstances surrounding those individual's arrests; what happened to them after their arrest; and whether their particular situation was predictive consistent with the tool. We are using the tool that produced those predictive factors with the exception of a dispute that exists within the committee about whether to use arrests or convictions.

Assemblyman Fumo:
I can appreciate that, but rather than try to guess the predictive factors, if you look at basic ties to the community and the promise to appear, I think you will have a much greater success rate. If you look at those eight factors, it might give you a better indication because the federal government has been studying it a lot longer than Nevada. Just a suggestion for you.

Justice Hardesty:
Of course, as you know, Mr. Fumo, the federal government's system is quite a bit different from the state's system, mainly in terms of the caseload, which is vastly smaller in the federal system than in the state's systems. In addition, their pretrial service teams are vastly larger. As you know, in the federal system, a magistrate judge has a detailed report about the defendant the day they are arrested. In the state system, we have 26 or 27 court services officers in Clark County trying to provide support for one justice court, the Las Vegas Justice Court. We are so understaffed in this area that we cannot compare to what the federal system does.

Assemblyman Wheeler:
I have to admit it has been many years since I have been in a courtroom as an arresting officer. One of the things I always saw that worked well, that appears by this evidence-based checklist that we are removing, you alluded to when you said an amount of bail in one county might be different in another; that is judicial discretion. By doing this, do we not remove that gut feeling of the judge or justice has saying, this person is not coming back. In my opinion, many times someone who has spent 20 to 30 years on the bench has a good feeling about that.

Justice Hardesty:
Thank you for the question, Assemblyman Wheeler, and I am glad you asked it. This risk assessment tool is a guide; it in no way replaces the gut feeling of the judge. In fact, it does not replace the decisions by pretrial service officers to override the guide because of circumstances that are individualized to that defendant. We see that every day. This is not a mechanical process as you point out, but when bail is the basis for the decision, it is a mechanical process. Judges can say, the bail schedule for this crime is $5,000 and thus set it at $5,000. The judge is then off the hook if something goes bad—that is crazy. You should be making decisions about whether this individual is going to fail to appear or is a public safety risk. That decision should be made by a judge who is informed.

At the committee's first meeting, Justice of the Peace Bishop stated that under the current system he usually had no information about the defendant who was in front of him. This risk assessment tool tells the judge more than he has ever known about that defendant today. Judge Perkins initiated this process in Douglas County, even though Douglas County did not officially become a pilot site. He finds this extremely helpful in informing him about a defendant he has never heard about or met before. Therefore, when he makes that gut decision—at least now—he is making it with some information that he never had before, and that is the point of the tool.

Assemblyman Elliot T. Anderson:
I am glad that question was brought up because the way that we have done it by looking just at the offense is not very instructive or probative. You could have someone picked up on a misdemeanor or a gross misdemeanor who is exceptionally dangerous and is a risk. That has nothing to do with whether someone is a risk to the community because they are picked up on a certain gross misdemeanor; it does not dive deep enough. I think it is good to get that extra information to the judge.

You touched on the question that I have regarding NRS 178.4853 factors, which is how we have traditionally done bail based on length of residence and the list you articulated. My question is about how it has been interacting with the objective-based evidence instrument in the trial so far. Has there been a split consideration? The statute requires the judges consider all of those factors, but it does not instruct as to weight of those factors. I am wondering if in practice that section has interjected any problems into using the new objective-based instruments. I was confused about how those factors would interact in process once the pilot program started.

Justice Hardesty:
The point of the pilot is to identify what we can do to improve the system and how we can improve our decision-making process. We are talking about changing an approach to criminal justice decision-making that has been going on in this state since statehood. That is not an easy thing to do; reforming the criminal justice system is like moving the Titanic with a paddle—it is very difficult. When one makes decisions about the criminal justice system, you have to be aware of the fact that a decision in one area affects other areas and usually has unintended consequences that may not be very good.

To your point, what the pilot program is showing in Clark County is that judges are still defaulting to a lower bail if the defendant is a moderate defender. However, they are still using bail with respect to those release decisions. In Washoe County, it is a mixed bag. You have instances in municipal court cases where the defendant should be released sooner than they are being released because the risk assessment tool was still being prepared. In the last two months, they have stopped preparing the risk assessment tool on defendants whom the judges agree should simply be released and are not a failure-to-appear or a safety risk. Some judges on the justice court bench in Washoe County are still defaulting to some bail, and some are defaulting to an "own recognizance" release. It is an evolving process, and we need to study why judges are making those decisions.

Be mindful of this in fairness to the judges if a defendant is released and a bad thing happens. By the way, I was a district court judge faced with making these decisions, and one of the most challenging decisions a judge is faced with is exercising their gut feeling to make the decision about whether to release someone from jail, especially someone who may have committed a heinous offense. Being mindful of their constitutional rights, you have to make

that decision. What are the circumstances that allow you to make the release? In Nevada, the default position has usually been to set the bail higher. If they eventually make bail, I am off the hook. That is a terrible way to approach the decision, and in the meantime, we continue to incarcerate people who cannot afford to make bail.

We should be making these individualized decisions by providing the judges with the most information possible. Do not force the judges to make these decisions by flying on the seat of their pants without information. You want to give them as much information as you can, and this is what these tools do. It is a guide, and it helps score the defendant into low or moderate risk, and then the counsel can come in and make their arguments about what other reasons there are to keep someone in jail. In cases where someone is a public safety risk, judges are setting bail higher than they did on the previous bail schedule because it is one way to assure they do not create a risk to society.

If you were in the federal system, as Assemblyman Fumo referred to earlier, you could have a case like the federal judge in the opioid pill case. In that case, two of the defendants continued to stay in jail. In our system, you are entitled to bail—period. The question then is what is the amount of bail that would keep a public risk defendant in jail? I hope we get to a point where the decision can be made that the judge can say, you remain in jail because you are a public safety or flight risk, as they can in the federal system. That is what the judge has been saying in that federal case. Our state and federal systems are different in making those decisions.

Assemblyman Elliot T. Anderson:
You mentioned that some of those factors are not good indicators. Are those factors getting in the way of making objective determinations? I am not clear on that and wanted to delve into that comment you made a bit more.

Justice Hardesty:
The court is expected to consider the factors listed in NRS 178.4853, but in the pilot sites, they are using the factors that are enumerated in the risk assessment tool.

Chairman Yeager:
Thank you for being here this morning, for your presentation, and for the hard work on this issue as well as many others. I know we will hear from you a couple of more times, as the session moves along, on commissions that you have been involved in.

At this time, we will formally open the hearing on Assembly Bill 136.

Assembly Bill 136: Revises provisions governing bail in certain criminal cases. (BDR 14-708)

Assemblywoman Dina Neal, Assembly District No. 7:
I am here to present Assembly Bill 136. We already know what a pretrial risk assessment tool is, and I think everyone is clear on that definition. One thing I learned while moving forward on this bill is that people either love or hate pretrial risk assessment tools. There is a level of fear related to bias, and they think the local court culture, specifically in Clark County versus Washoe County, is a potential barrier. This is based on conversations with people who have come into my office saying they either like or dislike what you are presenting. In my research, I went looking for whether these were valid concerns.

The Pretrial Justice Institute (PJI) stated in their research in the *State of the Science of Pretrial Risk Assessment* in 2011 that the factors played out in A.B. 136 and in current statute actually came from a 1961 study by the Vera Institute of Justice. What I found interesting was that the factors people often studied were included in that 1961 study. This is what PJI said, "These have included items related to community and family ties, employment, prior criminal record, educational level, specific crimes for which a person is charged, and substance abuse."

If these are factors that have been played on in one way or another since 1961, and here we are in 2017, what is the commonality with those factors and is there a legitimate concern on whether those factors are good, valid, or create bias? That is probably the conversation we are going to have today because people are concerned that I took out the prior statutory "own recognizance" language. When I realized the lineage of the language, I realized that I might have been playing the game 40 years ago.

The second thing I researched was people had concerns around the court culture. I heard a lot about the argument of judicial behavior. I found research dating back to the 1970s that stated that the coined term "local legal culture" plays a role in pretrial tools because the expectations and beliefs of the police, judges, and court administrators affect how a defendant is released and how detention decisions are made. The research also stated that we need to be mindful of the many agendas under which officers of the court operate. To counter that agenda, we need to make sure that the courts and individuals understand, are skilled, and are able to operate the program effectively.

I am stating this because in my love/hate conversations around A.B. 136, I tried to get to the heart of the historical knowledge about their arguments, where they were coming from, and whether they were real or valid. I found that some of them were. Part of the discussion around law is that you attempt to bring a bill you think will serve a particular purpose, and then you try to figure out if those in opposition have legitimate concerns for why something should or should not exist in law. I do not know how to solve some of the concerns about whether a court or judge refuses to use a pretrial assessment tool, but instead goes ahead and does his or her own thing. We had a series of conversations around that kind of behavior.

The third piece of information people approached me about was data quality and its limitations. When I started researching this, I found a few research people, such as National Legal Aid & Defender Association, who put a report out in July 2015 called

Risk & Needs Assessments: What Defenders and Chief Defenders Need to Know. That research concluded that we need to constantly reassess; there are various modeling strategies that should be encouraged; and sometimes those various modeling strategies are not commonly used. In order to deal with the data quality, limitations, and bias, we need to make sure that the risk assessment tool considers the social factors, such as racial discrimination, and administers safeguards against implicit bias, thus potentially, decreasing disproportionate minority confinement.

Those are the things that people brought to me on why they were not sure if they liked this bill. I decided to present it anyway and let the chips fall where they may; we will figure it out as we go.

Because Assemblyman Flores has to leave and chair the Assembly Committee on Government Affairs, he will now present the provision that is causing the most problems, which is section 5.

Chairman Yeager:
Assemblyman Flores, thank you for your patience this morning. I want to let the members know that there is an amendment (Exhibit D) on the Nevada Electronic Legislative Information System (NELIS) that is substantially different from the original bill, so as we go through the bill make sure you are following that amendment.

Assemblyman Edgar Flores, Assembly District No. 28:
This is Assemblywoman Neal's bill, but with her indulgence, we talked about some issues I have seen through my lens in practicing immigration law. She was more than willing to adopt some of that language, and I will be talking about that now. We did not think the timing of this presentation through, as Assemblywoman Neal is the Vice Chairman of Government Affairs, and I am the Chairman, and that committee is waiting for us. I am going to try to be as thorough as possible, and hopefully she can address any other questions pertaining to the bill.

Specifically, I am looking at section 5, on page 2 of the mock-up (Exhibit D). I have to throw the caveat out there that this is a mock-up; the language will be amended; and I will explain why. Let me explain the issue: an individual right now can get picked up for any specific charge, whatever that may be, and find himself in city jail. The regular booking process in Las Vegas dictates that we run him through what is called the "287(g)" program. This is a system where you answer a set of questions, and if you say, you were not born in the United States—even if you are a legal permanent resident, even if you are a United States citizen—they still run you through that program. If you are undocumented or they are trying to get you for whatever reason, it will trigger a hold. Right now in Nevada, they will send a probable cause request for a hold for immigration purposes for 72 hours. That allows

Immigration and Customs Enforcement (ICE) 72 hours to come in and take that individual to the Henderson Detention Center. Typically, that is the process in Las Vegas. I am not here to argue about the 287(g) program or whether that hold is proper; I do not want to go into that discussion, as I know it is a very loaded issue. I want to focus specifically on the language in this bill.

Here is the issue: say I am the family member of the individual who has been detained. I go to a bail bond company and say, my brother was detained yesterday and I want to pay the 15 percent bond. The bail bond company will then call the jail and ask, what is the bond; what is going on, and how can we make this work? They will pay it for me after I have paid the 15 percent—or whatever percentage they have asked for. They find that there is an ICE hold for 72 hours. Immigration and Customs Enforcement comes in, picks up my brother, and puts him on an immigration hold.

In that scenario, I then go back to the bail bond company and say, "Wait a minute, I paid you 15 percent so he could be released on bail and they have not released him. Why? I want my money back." They will tell me no. I am not saying all of them are doing this; I do not think they are advertising to the immigrant community to try to get their business—I am not saying that. I am saying that they are taking advantage of the fact that the defendant's families are oblivious to what is an ICE hold.

When we talk about undocumented individuals or the word immigration, it is such a loaded term. Let us take that word out; let us just call it a hold. A bail bond company knows there is a hold on an individual, and knowing they are not going to be released, they still take money from a family who is desperate and doing everything they can to get that money. The bail bond company then tells them they are not giving them anything back. It is disingenuous and a huge problem. It is just a hold; the bail bond company knows ahead of time that it is there, and they are still taking people's money. Even if the individual is not released, the bail bond company does not return the money to the family. What the intent of this language is meant to say is if you knew there was an ICE hold or any type of hold, and you still accept someone's money, even though they are not released, you should probably give that money back, within reason. They did provide some type of work; someone in that office picked up the phone and spent time on this. I agree that we should pay them for whatever that is worth. However, if they knew they should not have posted the bail to begin with, then the question is, how much of that money should be returned?

In this language, we placed it at 10 percent. We put that in there without knowing if this is the proper way to go about it. We analyzed it and asked a bail bond company how much time is invested per phone call, how much paper do you spend, and let us compensate you for that. Whatever that dollar amount is, they should be paid for that. However, everything else should go back to the family.

I will entertain any questions you may have at this time.

Assemblyman Pickard:
I appreciate what you are saying; if someone takes something from someone knowing that they do not need to pay it, it is probably wrong. I am wondering if there is a situation where the bail bond company would not know before taking the money and subsequently find out?

Assemblyman Flores:
I do not believe so. I have had an opportunity to speak with a few individuals—law enforcement and attorneys—and it is my understanding that the process is typically replicated throughout the state. They will pick up the phone and call the facility that is detaining the individual. At that point, the process is they let them know if there is any type of hold. By the way, I am using the lens of immigration holds, but there are many types of holds. Traditionally, with other holds, the bail bond companies have been good about saying there is a hold, and we will not be able to get him out.

However, in this arena, maybe because it is so new or because no one has said anything, they are disingenuously taking the money knowing that the individual is not going to be released. In my opinion, they do know. If there is a scenario where they do not know and they take the money, I do not want to punish them for taking the money. I still think we should pay them for wasting their time and putting a staff member to work on it. Even if it is a mistake and the bail bond company took the money thinking it would work out, 72 hours later someone is picked up, and we realize the bail is not going to work, let us pay you for that time; it is fair. However, let us give them the rest of the money back.

Assemblyman Pickard:
I appreciate that and think it is appropriate. I guess the thing that spurred my question was we are refunding 90 percent, and I am wondering if that is an arbitrary number, or if we should say, they are able to withhold their costs prior to refunding the balance. I do not know; I am just thinking out loud.

Assemblyman Flores:
I agree. That is a random number I threw in there, and it is not backed up adequately. I think the language you suggested is appropriate and would satisfy the spirit of my intent in this section of the bill.

Assemblyman Watkins:
I am focused on the part of the language about knowing. This Committee has heard testimony previously that there are bail bond companies that do not use computers. My concern is that there is this plausible deniability in the language, and there is an incentive not to know. I would be curious how you feel about "notice" language; notice being whether or not that information is available to them. If they are on notice, they cannot charge the families this amount of money for someone on hold rather than actual knowledge. Actual knowledge is nearly impossible to prove but notice is not.

Assemblyman Flores:
I agree. This is what I am thinking the amendment will look like; this is for the Committee to decide and come back to me regarding this specific section. I will go along with whatever the Committee thinks is best. It would be appropriate to take "knowledge" out of the equation and make it a "may/but/shall." A bail bond company "may" accept 15 percent, or whatever percent they charge, "but" if we find out that there was an ICE hold and 72 hours later they are still in the Henderson Detention Center, they "shall" issue a refund and keep whatever charges they are entitled to for the work that they did. That is a way I would like to approach it and take knowledge out, so we can avoid the conversation of, did he know, could he have known, and did he do adequate work of reaching out by phone or email? Assemblyman Watkins and other members of the Committee, could we speak offline about this; I am open to doing this whatever way you want. I agree with you that we should take that "knowledge" out of the language.

Chairman Yeager:
Assemblyman Flores, you are being paged to chair your committee. We will not take any more questions for him at this time, but I would invite members to connect with him offline. Assemblywoman Neal, you may proceed with the remainder of the presentation.

Assemblywoman Neal:
Section 2, subsection 1 (Exhibit D) says, "The Supreme Court may adopt standards . . . ." They are going through the process of looking at a tool, so this language was put in there to make sure it was a reflection of what was already taking place. Whether the court has the authority or not, the idea was given to me to insert that particular sentence just to make sure that I was acknowledging that this was happening and to make sure that was an activity that could occur.

In section 2, subsection 2, it adds in the factors of:

> (a) The character of the person who is being considered for release from custody pending trial;
> (b) The person's ties to family and the community;
> (c) The person's status and history of employment;
> (d) The person's record of criminal history, including, without limitation, the abuse of drugs;
> (e) Any facts which warrant concern that the person will break the law if released without restrictions;

and it continues on. They look like the existing factors in law. In the American Bar Association's national pretrial justice research, these were the factors that they had stated were being commonly used in pretrial tools, and more important, it was also the language being used in Texas. If there are issues or concerns with that language, or if it is a failure in some way, the conversation that I wanted to have around those factors is as I stated earlier.

When I realized that those factors had roots in 1961, I felt that they were not necessarily off the mark or biased, but if we want to have the conversation in 2017 as to whether these factors are indicators or are adequate questions that should be part of the tool, that is an appropriate question to discuss as to whether 1961 measures and conversations are still relevant today. I do not know where people's opinions fall on that, but I thought they were legitimate questions. What I understood in the assessment tool is that it is important to make sure you are asking the right questions to the right population; that is one of the clear benchmarks. If the definitions are not clear, or if there is not an agreement upon those definitions, then you are going to have an issue in regard to how that tool will be used and how effective it is going to be. Right now people are not agreeing on those definitions. I am open for discussion and let us have that conversation.

In section 3 (Exhibit D) it says, "In determining whether to release a person from custody pending trial, the magistrate shall use an evidence-based risk assessment tool relating to pretrial release. The tool used by the magistrate must: (1) Have been proven to statistically reduce bias; and (2) Meet the standards for inclusion in an evidence-based risk assessment tool, if adopted by the Supreme Court . . . ." The reason the language ". . . .have been proven to statistically reduce bias, . . ." is incorporated is because the research has shown that it is important to make sure that the tool you are using considers social factors, such as racial discrimination. Some of the people who came to my office were saying, "Well, the tools out there actually create bias, and there is an opportunity to incarcerate more people of color versus not."

The reason I added that language was to offset and deal with the fact that, in the statute, we needed to address a statutory tool that would reduce bias. I am certainly not an advocate of trying to make sure there is a tool that is ineffective and has a potential of promoting more racial discrimination, but there is no perfect tool. In finding out that there is no perfect tool, I said, Okay, let us figure out where I should go with this. What is interesting is that the research states that you just have to try to make sure that you pick factors that you know are agreed upon, common, and have been consistent questions that are going to affect and deal with the population particular to your state. If we look at every state, we are going to find that pre-assessment tools are different, and they use certain modeling. I felt this was the best language I could come up with, and I would come into this Committee and have the debate on the love/hate around pretrial tools.

Chairman Yeager:
Thank you for your presentation, Assemblywoman Neal. I certainly want to thank you for being flexible on this. Ideally, we would be in a more secure place, but with the number of bills we have coming out, it was important to start this discussion and be able to hear the bill.

Assemblyman Pickard:
I particularly appreciate this bill because of the presentation by Justice Hardesty. The amendment was very helpful and cleared up most of my questions. It is exactly the point that you raised at the very end, regarding a tool that has been proven to statistically reduce bias. I am certainly sympathetic to the point; I am just wondering are there any tools we can use that have been statistically proven?

Assemblywoman Neal:
I found some tools being used in Oregon and Kentucky, and I found some unique discussions happening around release and bail decisions in New York City. I did not bring them all to this meeting, but those were some of the places I looked at, and I can supply that information to the Committee. I read documents that were listing several places—I will add Virginia and Ohio as well—that created some pretrial risk assessments. In Virginia, their tool is called the Virginia Pretrial Risk Assessment Instrument (VPRAI). They revalidated the tool in 2009, and it is currently used by all Virginia pretrial service agencies. The Commonwealth of Kentucky uses a statewide pretrial, and they validated their instrument in 2010. The Pretrial Texas Institute said that even though a risk assessment tool may be validated and is being used, there is a need to do a constant reassessment. They should never let it become stagnant and say, "Oh, we have been using this tool for 10 years, and never go back and have a conversation about whether or not it is still accurate and working appropriately." That is the only take-away that I can offer from my research.

Assemblyman Pickard:
Were those all statistically proven the ones that you quoted? If they are, it sounds like the Supreme Court would have a lot of guidance in coming up with their rules.

Assemblywoman Neal:
Yes, what I have learned so far is that the Supreme Court is going to keep traveling on the path that they are traveling on. It is important that whatever tool is created is specific to Nevada and the Nevada population. We are unique, as we know, and each county is unique; Clark County is not like Washoe County. Therefore, whatever tool the counties decide to use, we need to make sure that it is based on the population that is entering the courts in Nevada.

Assemblyman Elliot T. Anderson:
In section 3, it is talking about the requirement that the magistrate shall use the tool. I was hoping you could explain exactly what that means. I take it to mean that they have to look at the tool. They have to take in the information, but they do not have to necessarily go with what the tool says. Is that your intent?

Assemblywoman Neal:
I do want them to use the tool. In regard to them not using it, that has been some of the complaints that I have heard. It is important for it to be a guide. With regard to the methods to use when they are trying to figure out how to release low offenders, you want them to consider the factors of the person who is in front of them. We know that judges are very

particular about their discretion, and they do not want it taken away, but the intent of that language is that they would use the tool to guide their decision. If a person were a low risk, they would actually release them.

Assemblyman Elliot T. Anderson:
Just to clarify what I mean, it is the difference between autopilot versus just looking at your instruments when you are flying. I would want to avoid a requirement that it is on autopilot, and they have to do what the tool says; that would be my concern. Are you looking for it to just be used in guiding their decision or do they have to go with the conclusion of the instrument?

Assemblywoman Neal:
That is a good question; I struggled with that yesterday because of the conversations I was having. The question I asked those who were in opposition was, why is it not working in Clark County, although it is working in Washoe County? They said the judges may be in the pilot program, but they are not necessarily using or doing any of the prescribed activities that people want them to do. I was trying to figure out what my leeway is there. What should I be doing; what can I actually enforce or make them do? My goal is that they use it, but also try to figure out the fine line between not being on autopilot, not kicking any of the criteria or tools to the side, but actually using it in their decision-making process. If you have an idea on how I can better phrase that language, I would definitely like to sit and talk with you. It is my understanding that there are judges who actually do not use the tool now.

Assemblyman Elliot T. Anderson:
I think the phrase "shall consider" gets you there; that would be good wordsmithing. I also want to ask about the "statistically reduce bias" language. In general, I support an objective evidence-based bill. It is a great concept, and the reason it is good is because it does reduce bias inherently. If you are looking at objective factors, you are getting information that is hopefully objective; how can it be anything but unbiased? You always have to take into account criminal history, right? You could also say that there is no way you can make that completely unbiased considering systemic bias issues in the justice system that this Committee talks about a lot. What did you mean by ". . . proven to statistically reduce bias, . . ." because I could make a point that some of those factors are inherently biased, but there is really nothing you can do about that as you have to take into account criminal history. You have to consider that factor, but in general, you can make the argument that every objective-based instrument is going to reduce bias in decision making because it is inherently objective.

Assemblywoman Neal:
Criminal history should be a factor, but what we are trying to figure out is how to reduce the social factors of the racial element and how the racial status of the individual will be affected by the tool. What I learned was that it is difficult to guard against implicit bias. When I started researching the work that was out there, I found there has been a conversation, not only in policing, but also at the Department of Justice, on what you can actually do in order to safeguard against implicit bias. There is no foolproof method, but there is a way to try to

make sure that it is minimized. This can be done by looking at the factors, such as those stated in the bill: the person's family and community ties, their status and history of employment, and their record of criminal history.

I have encountered a constituent in my district who committed one crime, which was stealing socks, and spent three months in jail as restitution. The question was, should that person have actually been in jail for sock stealing? I would argue no—they should have been released, and there should have been restitution, but that was not the case. I am trying to figure out, in that particular sentence in the bill, how I could make sure the tool was going to reduce any kind of racial bias but still look at the criminal history of the person because I think that is important. Does that answer your question? I know it is a sticky sentence, so if you have ideas or other research that will help me strengthen that, I am willing to discuss it with you.

Assemblyman Elliot T. Anderson:
I do not have any ideas in mind. I just think it might become superfluous because every objective instrument has at some level reduced bias, and that is the point I am trying to make. I am not sure conceptually if this is right until we see the full results of the pilot study. I volunteered to go on the Committee to Study Evidence-Based Pretrial Release because I like the idea. Until we get the results from the pilot program, I am wondering if we might be putting the cart before the horse. You do not need to comment; I was just thinking out loud and wanted to let you know what is going through my mind.

Assemblyman Fumo:
I want to compliment you for bringing this bill forward. I actually like your first version better than the amended version. I would like to work with you on this bill. I want to tell you that the factors you have in your amended version are light years ahead of what the study produced from the Supreme Court. He had none of those factors in there, and yours somewhat mirrors what the federal court is doing. You on your own have done more than that committee has done, and I wanted to compliment you on that. We could discuss this offline, as I know you have other speakers here.

Assemblywoman Neal:
I appreciate that. I am open at this point to all conversations. This was a movement away from my original bill, and I am at the point where if it goes back to my original bill, or what is now the Equal Justice Initiative Act as a matter of right giving people bail release, then I am open to that as well. This has been a new experience for me and an interesting one—I will tell you that.

Assemblyman Thompson:
Is there any alignment with the risk assessment tool? I know the juvenile justice system is working on risk assessment tools as well. Are we working together on the assessment tools, or would they need to be separate because of the graduated approach, so to speak, if you are looking at juveniles and now you are looking at adults. I guess that is the first part of my question, and I may have a follow-up.

Assemblywoman Neal:
I honestly did not look at that; I was thinking more about the work already in Clark County. Clark County has a project called the Harbor program, and if I had thought I would go in that direction, I would have started to align myself around that because there is a lot of work happening and success around juveniles and the assessment. They are doing a serious level of wrap-around services for those juveniles to make sure that they do not reoffend, and they have family and community support. I think that is a valid consideration because we could learn many lessons from their programs.

Assemblyman Thompson:
It would be interesting to see if the cognitive and developmental issues are different because you are going from juvenile offenders to adult offenders. This is just food for thought in continuing the conversation around the tool because in the conversations we have been having, the tool is very instrumental in this legislation.

Assemblywoman Tolles:
I appreciate these discussions about data-driven approaches and addressing the conversation of bias because I think it does one of two things; it either helps identify if and where bias exists or how to address it. I commend the court and law enforcement that have come to the table and joined this discussion. It also helps to remove doubt where it does not exist. It is important to have those data-driven discussions, and I want to thank you for bringing the discussion of this particular aspect of the law to the Committee. As I said, all the different groups are coming to the table with this discussion; it is just a matter of aligning timelines. I did not see any timelines in your bill and perhaps having some sort of timeline for implementation might give everyone time to come into alignment on the best approach moving forward and implementing these tools.

Assemblywoman Neal:
I appreciate that suggestion. There is no timeline, as I believe this is the fourth amendment. That is something to consider. I know this bill is not perfect. It has some technical flaws, so I would definitely be willing to work on that and try to make sure that there is some alignment around this bill if it moves forward and if the Committee decides it is something that they want to do.

Chairman Yeager:
We are going to move on because we have another bill to hear later this morning. Thank you, Assemblywoman Neal. At this time, we will open the meeting for testimony in support of A.B. 136. Mr. Pitaro, did you want to testify in support or in one of the other categories—opposition or neutral?

Thomas F. Pitaro, Private Citizen, Las Vegas, Nevada:
My comments are in favor of certain things and strongly in disfavor of others, as well as the approach that is being taken. It may be worth having the other two individuals out here, and we can hash it out and try not to have a demarcation of for-or-against the bill. On the other hand, I can continue the way I am now.

Chairman Yeager:
Mr. Pitaro, if you are okay with it, let us take you in the neutral position. That sounds like that would be best. Does anyone want to testify in support of A.B. 136? [There was no one.] Let us open it up for opposition testimony. Obviously, I know we have heard some testimony, and this is going to be a work in progress. We certainly appreciate your time, but if you could keep your comments as concise as you can, it would be much appreciated by the Committee and the sponsor of the next bill.

Jeff Clayton, Executive Director, the American Bail Coalition, Lakewood, Colorado:
I want to begin by commending Assemblywoman Neal for bringing this bill to the Committee. These are all hot national issues and important to consider. As Justice Hardesty said, the Nevada Supreme Court already has the power to implement court rules, but these are questions of substantive law that the Legislature should continue to interject itself into. Certainly, the standards in this bill include demographic factors, which former U.S. Attorney General Eric Holder criticized as part of the risk assessments. The trend is to move away from demographic factors because they correlate with lack of race and gender neutrality. The other thing to keep in mind is the cost of implementing a risk assessment process and how it will be funded; typically, it is local governments who have to shoulder the burden.

To address what Justice Hardesty said about having to do this because of the equal protection clause violations: with all due respect to Justice Hardesty, frankly, that is just false. The Eleventh Circuit Court vacated an order just last week on this very point. Justice Troy Nunley of the U.S. District Court for the Eastern District of California is the only substantive ruling on this that found there was no right to affordable bail under the equal protection clause, and there is no such thing as wealth-based discrimination in this country that rises to the level of scrutiny. So with all due respect, you do this because it is the best practice; you do not do it because you are forced to do it.

The idea that there is a lack of individualized consideration is also something I want to correct. What I told Justice Hardesty's committee was that individual consideration should occur immediately, and there should be no bail schedules in Nevada, period. You cannot afford that, so then what? Can we shorten the time to have individual consideration? The reality is most people get in front of a judge in a matter of days. The use of financial conditions of bail has been proven by peer-reviewed literature to be effective. Frankly, as Dr. James Austin said in the committee, we do our best work in high-risk felonies. We allow people who are not going to get out on these high-risk cases to get out. We do not do our best work in these low-level misdemeanor cases.

A couple of comments on section 3: this is well-intentioned and necessary to move forward on this. Again, someone has to pay for the tool and conduct the assessments. The idea that the tool has been proven to reduce bias is not strong enough. You should say no tool should be used in Nevada unless it has been shown to be race- and gender-neutral. Are there tools that are race- and gender-neutral? The answer is we do not know. If you perform a web search with "ProPublica risk assessments," or the Electronic Privacy Information Center (EPIC) criminal algorithmic transparency, this has all popped up in the last six months.

There is a book called *Weapons of Math Destruction*, which is a good read and has a section on criminal algorithms.

The main point I would make, and partly why I am slightly upset with the committee, is this is all happening behind a curtain. We requested the data that underlies the Nevada risk assessment, and we were rejected. We were rejected because it was a handoff, and the data is now in the possession of the federal government under a proprietary contract, thus we cannot get it. For my part, in representing my client, I want to know when does commercial bail work and when does it not, and how can we advocate for it in appropriate circumstances? We cannot get any of this information. I would argue that this should be open to a defendant whose custody and future is dependent on the results of this test, and the public should have confidence that it is predictive, that it works, and that it serves to increase race and gender neutrality.

The gender neutrality piece is an interesting one as well because men are never considered low risk. My wife says that is because you go drink beer with your friends. There is an issue in terms of discrimination on these tools that is worth looking at. The Wisconsin Supreme Court held that one was unconstitutional without safeguards in the sentencing context unless certain safeguards were met. I think this is a ripe issue, and I commend the Assemblywoman for bringing this forward, but I would say it needs more work.

In regard to section 5, I respect this issue; I understand it. You do not want to create disincentives to have people bailed out who are not going to be deported. That is a national movement on this bill, which is, do not hold these people in jail and create disincentives for bail bond companies to bail them out when the hold is going to come off and they are not going to be deported. The question is, how many times do the holds come off? I would say if I was going to rewrite this section, what I would say is have the jails reject the bails, do not let the bail bond companies post the bonds if there is an ICE hold. That is a clean way to simply get rid of this. You could do the same thing with other holds. If they are not bailable, they cannot post. Certainly, they could advise the client that they could post the bond, but if the hold does not come off, you are out of luck. Another standard that I have seen in other states that makes sense is rather than defining how much premium goes back, just say a judge may make an order to avoid unjust enrichment of the bail bond company in a situation like this.

Finally, well-settled standards for setting of bail in Nevada should not be repealed; I would stick with what you have. I think the risk assessment is just one more tool in the toolbox, and as Nevada goes through this process, we can develop best practices on this issue. In concept we agree with what Assemblywoman Neal is trying to do, and I would certainly like to continue to work with her and the Committee as we move forward on this issue.

Chairman Yeager:
Thank you for your testimony, Mr. Clayton. Assemblyman Hansen has a question.

Assemblyman Hansen:
One thing that did strike a strong cord with me was the idea of bail bond companies taking advantage of people who do not realize they are going to have an ICE hold. In the computer era, it is very difficult for me to believe that the bail bond companies are not aware of the ICE holds. If that is, in fact, the case, it is a real strike against the bail industry if you represent them. Another solution might be to have a method that will hold them accountable for deliberately taking advantage of people who are ignorant of the process.

Jeff Clayton:
I agree, and this is the first time this solution has been mentioned to me. I will do my own investigation on this. If they do not post the bond, it is a regulatory violation right now. If they take the money and do not post, that would be a violation. I have real problems with this, and if there is deception, we cannot have that. I am going to get to the bottom of this.

Assemblyman Hansen:
Excellent. In the computer era, it is hard for me to believe that the bail bond companies are ignorant of the whole situation. That would be a good issue to take care of.

Chairman Yeager:
I will note that we have discussed many times in this Committee that sometimes the frustration is that our justice partners do not necessarily communicate with one another. In my experience, sometimes it is hard to know because the information has not been uploaded where it needs to go. That is a broader discussion that we will touch on as we go forward. Thank you again for your testimony, Mr. Clayton.

Richard J. Justin, Owner, Justin Brothers Bail Bonds, Carson City, Nevada:
I have been a bondsman for 33 years. Did you hear what Jeff said? Ditto. As far as the immigration bonds are concerned, in 33 years that I have been in business, I have never taken a bond with an ICE hold. Do we know all the time? No, the jail does not let us know. I put in bonds all the time where there is a requirement for an ankle monitor, and then I find out after 5 o'clock I cannot get it done until the next day. That is where the problem lies.

What Jeff said about the surety bondsman taking money on immigration: it should be disallowed and that is the answer. Am I approached by legal counsel to post a bond in a state case, so they can be removed and fight the federal case? Yes, that happens. Most of the time the jails here—not so much in Washoe County or Clark County—will tell us if there is an ICE hold when we call. I just tell the client I will not deal with it. However, attorneys have requested that I post bail, so they can get their client to federal court.

As far as what we can charge and what we cannot charge, if we do not post a bond, we cannot charge. There would not be anyone saying, we will give you $10 or $20, and we will pay you this much. You cannot do that under the current regulations of the Division of Insurance, Department of Business and Industry. We cannot make money unless we post the bail. Therefore, you cannot have an expense incurred unless it is a physical act like driving to Elko; something you can document what you had to charge. Other than that, we do not

charge at all. If someone is currently held in Minden but has a case in Lyon County with a cash-only warrant for $5,000, that person will post $1,000 bail, so they can get out of Minden and be moved to Lyon County to take care of that. That person will have a new court date for the Minden case. We do this all the time. It is for expediency and the administration of justice; it just happens. You cannot outlaw it completely.

When they are being released on an immigration bond from the state to the federal jail, the premium is earned. There is a statute in the *Nevada Revised Statutes* that covers the bail bond companies if they are deported, so we can be released from the liability. This has happened to me once in 33 years where I had to ask the court for a relief from a forfeiture of a bail because the defendant was deported. I did not know and was not told that he had a hold. It turned out that the people did that so they could get the kid out of the country. I was not informed by the jail or the family, and the whole thing was a ruse. I do not agree with your solutions on what you can charge and what you cannot charge on the immigration issue. What I have heard is that 98 percent of these problems are stemming from another part of the state, not here in Carson City.

I had many questions for Justice Hardesty, and I want to thank him for his hard work on this. However, the risk assessment issue is creating problems for local sureties. The first evidence of a surety bond dates back to 2750 B.C., so bail bond companies have been around for 5,000 years. In the 33 years I have been in business, my efficiency rate is about 99.5 percent. In other words, if I lose 2 percent, I am out of business. This I do at no expense to the taxpayer, and I do it with heart. What I see in the paper, that says bail bond companies post bail and they are gone, is just not true.

I am in contact with all the drug programs. There was a governor here 40 to 50 years ago who said 90 percent of the problems with the people in jail in Nevada are from alcohol and drugs. The money that is being spent on what is going on right now should be spent on the drug courts. You are wasting your money.

Chairman Yeager:
As you know, the point of this Committee is to decide what is good policy for the state. We certainly respect your input, but know that this is everyone's goal on the Committee. This is why we have public hearings, so we get various comments, and we appreciate you being here to share your comments.

Assemblyman Watkins:
We have heard before in this Committee, in regard to providing notice to bail bond companies via electronic means, that there are a number of bail bond companies who do not operate on computers. Is that your experience?

Richard Justin:
It is for me because I am a dinosaur. My daughter, who expects to inherit the business, is up to speed with computers. We could do it electronically. We do some things with certain jails by fax and mail. We could go fully electronic. One of the local agents is working on that committee.

Assemblyman Watkins:
So then, you are the perfect person to ask this question. How do you go about finding out about holds? Just through the phone and calling the jail, or is there any other way you go about verifying whether there is a hold on someone before you accept money on behalf of the family?

Richard Justin:
That is done by phone and computer. Some of the jails have websites; there are a couple of statewide websites where you could locate someone, but you do not get the bail information. Primarily we contact the jails by telephone. You call the jail and they say, yes, he has a warrant out of Reno, and he has an ICE hold, and a local charge with $5,000 bail discharge. This is the first time I have been before the Legislature; I apologize.

Chairman Yeager:
No need to apologize, Mr. Justin, you did just fine. I just wanted to let you know that no final action is going to be taken on this bill today. What we are trying to do is get everyone's input, and then we decide if and how to move forward. Again, I want to thank you for being here this morning and providing your testimony, and we welcome you back to the Committee anytime.

Richard Justin:
This is one of several areas we are monitoring. We also have a deal with the actual courts within the inner workings of the business, the forfeitures, the defendants, and we keep up with them, and they have the Division of Insurance and this conclusion-based search for evidence.

Kristin Erickson, representing the Nevada District Attorneys Association:
I am here today in opposition of A.B. 136. With me today to express our concerns is the President of the Nevada District Attorneys Association, Christopher Hicks. Mr. Hicks is the District Attorney of Washoe County.

Christopher J. Hicks, District Attorney, Washoe County District Attorney's Office; and President, Nevada District Attorneys Association:
I want to thank the Committee for allowing me to testify today. It is an honor to speak here. In addition to my role as the Washoe County District Attorney and the President of the Nevada District Attorneys Association, I also serve on the Committee to Study Evidence-Based Pretrial Release that Justice Hardesty so aptly spoke of this morning. I have been an active participant in the committee, and I can tell you as I sit here today I am neither a lover nor a hater of the pretrial risk assessment tool process. All along, I have been fully

open to examining its flaws and looking into its benefits. The reason I feel I need to speak to you today is because section 3 requires the use of a pretrial risk assessment tool, so naturally that intersects with the work that the committee is doing and the pilot program that is going on in Washoe County.

Initially, I would like to commend Justice Hardesty for his hard work and his leadership in the committee and bringing these stakeholders together. As you heard earlier today, the usage of evidence-based risk assessment tools is compelling. The idea of using evidence-based factors to help ensure those arrestees who represent a low risk to reoffend and a low risk to not appear in court is appealing. Those people should be considered for an "own recognizance" release or for an appropriate bail by the court. Additionally, the idea of using those same factors to ensure arrestees who present a high risk to reoffend or not appear in court is equally compelling as to why use one of these tools.

The problem I am here to talk about is one of the most critical factors considered in a risk assessment tool, and that is criminal history. That is not just me here as a prosecutor and the Washoe County elected District Attorney; that is what the experts say. Using evidence-based factors, criminal history is a necessary consideration in whether or not someone will reoffend or fail to reappear.

I would like to give you a quick background on the Nevada criminal history system. The Nevada Criminal Justice Information System (NCJIS) is what reports an arrestee's Nevada criminal history. For lack of a better term, it is an arrestee's "rap sheet." It identifies a suspect's arrest dates, the charges booked upon, and if available, the record of convictions or other dispositions such as deferral or dismissal. An evidence-based pretrial risk assessment tool like the one being used in our pilot programs, which would naturally be the one used if this bill passed, is what is used in scoring that sheet.

Several questions ask about an arrestee's criminal history. The only mechanism by which the court services has to score that is by using that individual's criminal history from NCJIS. While the NCJIS criminal history records regularly show arrests, very often they show no disposition data. An arrestee's criminal history often shows all that he has ever been arrested for, but it often does not give a result. This creates an overwhelming problem if an evidence-based assessment tool relies on dispositions. The tool being used in our pilot programs relies on this disposition data. If the criminal history conviction data is incomplete then so is the final score on the tool, and in turn, the release decision made by the court is poorly informed—if not misled—and potentially unwarranted. It results in making a decision in the dark.

I would like to give you a prime example that is reflective of this, and it will show simply why Nevada is not ready right now for this kind of mandate of a risk assessment tool. John Doe is the name I will assign to this arrestee to keep his identity confidential, but he is an individual currently being prosecuted by my office for trafficking a controlled substance—methamphetamine. He has a Nevada criminal history dating back to 2004; his criminal history in California goes back to 1984 when he was initially charged with rape.

In the last ten years in Nevada, his exiguous record reflects the following arrests: November 2015, DUI second offense; September 2013, domestic battery, first offense; March 2010, felony conspiracy to commit robbery; September 2009, trafficking, possession of a controlled substance for sale, and possession of a controlled substance; April 2009, DUI first offense; January 2009, DUI, first offense; September 2008, DUI, first offense; December 2007, DUI, first offense, and drugs. Of all eight of those arrests listed in the last ten years, there is only one disposition in that criminal history. That is it—one. That sole disposition is the November 2015 DUI conviction; the remaining seven are only memorialized as arrests.

Prior to being elected as Washoe County District Attorney, I personally prosecuted John Doe from charging decision to sentencing, so I am well aware of who this individual is and his criminal history. His DUI arrests that I mentioned all resulted in convictions, one of which was a felony third offense enhanced by the others that put him in prison in 2010. The September 2009 drug arrest resulted in a conviction for possession of a controlled substance for the purpose to sell methamphetamine for which he was also sent to prison. The September 2013 domestic battery charge resulted in a plea of disorderly conduct. The conspiracy to commit robbery arrest stemmed from a 2004 cold case murder where John Doe assisted two individuals in the robbery of a local man who was shot during the robbery. Both the robbers were convicted of murder. John Doe received a plea deal in exchange for his testimony against the others. Unfortunately, he fled the state before the trial of one of the murderers, resulting in the court issuing a material witness warrant for his arrest. He was sent to prison on that felony as well.

John Doe's NCJIS criminal history record shows one misdemeanor conviction over the last ten years. His true Nevada criminal history over the last ten years is five misdemeanor convictions and three felony convictions. In his entire 30-year criminal history, he has seven felony convictions. John Doe recently pled guilty to his pending trafficking charge; he is stipulating to a 20-year habitual criminal sentence. The John Doe case is merely one example; I could personally provide many more.

Given the systematic problems with the timely entry of data into the criminal databases, I estimate there are hundreds or thousands of John Doe cases for which the current pretrial risk assessment tool will produce wildly misleading scores. If you score John Doe through the tool being used in our pilot programs, using the woefully deficient NCJIS conviction data, he scores in the low/moderate risk, meaning he is a low/moderate risk to reoffend and fail to appear. Upon judicial review, he would likely be given an "own recognizance" release with limited supervision conditions. This is a man with seven felony convictions, three in the last ten years. They include violence resulting in a murder, drug dealing, and habitually driving under the influence. However, the evidence-based assessment tool would not show any of that; it would reflect one misdemeanor conviction.

As I stated before, using an evidence-based risk assessment tool is compelling and appealing. That is only true if it is reliable. Nevada's criminal history records are not reliable. Putting unreliable or insufficient data into a predictive tool will produce faulty results, compromise

public safety and the fairness of our criminal justice system. As we stand now, if a tool like the one being used in the pilot programs were adopted by statute, individuals like John Doe would be released back into our communities making them less safe. Simply, Nevada does not have the infrastructure in place to support this bill; we are not ready for it. I strongly urge you to consider the impacts of this proposal as legislation. I oppose it on behalf of my individual capacity as the Washoe County District Attorney, and on behalf of Nevada District Attorneys Association.

Chairman Yeager:
Thank you, Mr. Hicks. It certainly is concerning to this Committee, as it should be, that our criminal history records are in such disarray, and that is hopefully something we will be able to work on going forward.

Assemblyman Thompson:
I just want to be clear: you are saying that in the risk assessment you do want to see the laundry list of criminal history, correct?

Christopher Hicks:
That is correct.

Assemblyman Thompson:
At what point is that even a standpoint or idea of your district attorney's office to alleviate implicit bias, or is that just not a concern? When you have a laundry list of criminal history and offenses, would you not say that leads to implicit bias? I will even use myself as an example. As an African American with a dark complexion named Tyrone, how does that allow me—if we are trying to look at how do we make this fair—to ever get a fair chance?

Christopher Hicks:
My first response is this is not my conclusion that criminal history is important to consider. The scientists who study this and presented over the year and a half that I was on the committee, provided evidence to us recurrently stating that it is important to consider this.

You have to remember the risk assessment tools are being used to predict risk. It is not being used to predict guilt or to predict a sentence. All it is being used for is to predict risk of reoffending or failing to appear. As far as leading to bias, the only bias using criminal history might lead to is a bias toward people who have a criminal history. It is very difficult for me to answer beyond that, sir, because I do not see it in any different way. I do not see it and never have, as a prosecutor, in my whole life seen it as someone's name, their ethnicity, their race; that is simply not something I consider. I do recognize that these systematic concerns are often discussed in this Committee. I am no expert on it and in no position to say, yes, that is so, or no, it is not. I just worry about public safety in this regard. I want to make sure those who represent a likelihood to reoffend or a likelihood to not appear are being assessed the appropriate bail and those who are not, are not.

Chairman Yeager:
Is there anyone else in opposition to this bill? Is anyone in the neutral position?

Thomas F. Pitaro, Private Citizen, Las Vegas, Nevada:
I have been practicing criminal defense in Nevada since 1974. After listening to the previous comments and statements as well as reading the original bill and the mock-ups, the first thing we should do is go back to the beginning. It appears everyone is asking the wrong question. Everyone is asking the wrong question because at no time have I heard an explanation of what the function of bail is in Nevada and the federal system.

The history of bail predates the *U.S. Constitution.* It predates the revolution, and there are two different themes that have been played out in the United States. The Eighth Amendment, the excessive bail clause of the *U.S. Constitution*, comes out of a 1689 English Bill of Rights. The *Nevada Constitution* bail provision, although it has the Eighth Amendment component to it, has a different stream of history that comes out of the colonies. That is, all people are bailable by sufficient sureties, except for certain offenses such as capital offenses or cases without parole. That actually predates the English Bill of Rights by going back to 1641 in Massachusetts and William Penn in 1682 in Pennsylvania.

There are two systems in America, and they are not the same although they have components that are similar. First, in Nevada, everyone has a constitutional right to bail; in the federal system you do not have a constitutional right to bail. In the federal system, you have a right not to have an excessive bail set but not that you have the right to bail. In Nevada, you have a right to bail as a matter of constitutional mandate, and that bail cannot be excessive. Most states follow the Nevada rule that goes back to the Pennsylvania Declaration of Rights and the Massachusetts Declaration of Rights from the 17th century. It was only that we had major changes in this with our so-called "war on drugs" starting in the 1970s and 1980s, when you had the federal government having the Bail Reform Act (1984) which did many things. It did not reform bail in a positive way; it actually made it worse.

In Nevada, the area we are looking at must start from the proposition that the default position is release. The comments I have heard by some of the people, including Justice Hardesty, were shocking in a way. He said Nevada should not look at the least-restrictive method. How can you not look at the least-restrictive condition of bail if the default position is that people are to be released? It is only the exception that a person should have a monetary bail set. It appears, in some of these comments, we think we can just not release people on bail. When I look at the bill, it uses phraseology such as, if we are going to release a person from custody. It is not "if," but we "must" release a person from custody. That is the way the *Constitution* is. Unless you are prepared to now change the *Nevada Constitution*, with its almost 400 years of history, we ought to start looking at this process to see how we are going to get more people out of custody, not put more people in.

The problem I am having is with the risk assessments as I have seen them. I have read the Pretrial Justice Institute's study; I have read many law review articles on this; I have looked at the Kentucky method, the New Jersey method, and the Washington, D.C., method. I have

looked at those sorts of things. The fundamental basis is to let people out, and the risk assessment is how we can find a way to keep people in. That is the fundamental problem that is facing you, not this esoteric, "Do we consider this or do we consider that?"

The function of bail is, quite truthfully, to make sure a person is going to show up. There is the added element—I might point out that it is not, historically, that old and comes out of the federal Bail Reform Act (1984)—that we are going to start predicting "future dangerousness." Anytime we start predicting "future dangerousness," bias then comes into it. There was a statement to the effect, "I have never prosecuted anyone with any bias, so I want to look at a person's arrests." As a practitioner of law for over 40 years in Clark County, I can tell you that a person from one area of Clark County would have many more arrests, not necessarily convictions, but arrests than a person from another area of the county. To deny that is to deny the obvious, put our head in the sand, and say that these things do not exist in our community. They must exist some place else that we only read about, but they do not exist in our community.

Chairman Yeager:
Mr. Pitaro, I am going to have to ask you to wrap up, please.

Tom Pitaro:
The wrap-up is: the original bill was very positive and that should come back and the rest of the bill probably should be deleted. The problem is not a risk assessment analysis or whatever the judges do; our crisis with bail in Clark County is the fact that the judges do not follow the law as it exists. Look at the *Nevada Revised Statutes* (NRS) 178.4853, which is going to be eliminated. If you look at those factors and then look at the risk assessment factors, they are almost the same sort of thing, just said in different words. The default position in the Clark County courts is bail and high bail. The problem you have to address is to make the judges accountable to the standards that are there. I would suggest an easy way to do that is in a bail decision under NRS 178.4853 that those judges have to articulate their reasons for the failure to deny bail or placing bail so high. When you are talking about discrimination, you start having bails of around $200,000 to $300,000—where the average family in Las Vegas or Nevada makes $50,000. What you are using is a phony bail system to keep people incarcerated.

I would make the point that Justice Hardesty mentioned; we have to have individual determination; that is correct. Then he says we have to have a bail schedule, which is the antithesis of an individual thing. Bail schedules are fundamentally unconstitutional under the *Nevada Constitution*. Other states have ruled that way under their constitutions that are similar. I think the issue is to look at how we can get more people out, not set up a system that is really functioned to let us figure a way to keep more people in.

John J. Piro, Deputy Public Defender, Clark County Public Defender's Office:
I just wanted to clarify for the record: I believe you said that we were coming up in the neutral position but pursuant to the Committee's rules where, if you oppose a part of a bill as written, you have to come in opposition. Right now, we are in opposition, but I wanted the

Committee to know that we have talked to the sponsor of the bill, Assemblywoman Neal, and she is amenable to working on the language of this bill. Therefore, I think in the future that we will be able to support this bill moving forward.

We can all agree that there are problems with the bail system, but there are problems with the risk assessment tool as well. We do not have the data from the pilot program to be able to know if it has been working in Clark County yet. After watching the Clark County Commissioners' meeting that just happened on March 15, 2017, I can tell you that the jail is still overcrowded, and the stays are actually getting longer. You would think with the risk assessment tool in place that would perhaps be getting shorter, but the stays in jail are longer. We need more work on this before we go about codifying a risk assessment tool.

We are in opposition, but I want to make it clear that we are in opposition for a different reason than the Nevada District Attorneys Association is in opposition. There is room to work; we could take it to the woodshed, if you will, Mr. Chairman, and figure something out on this bill that we can move forward with.

Lastly, in rebuttal to the Nevada District Attorneys Association's point: when you are going with the arrest data on pretrial assessment—to argue Mr. Pitaro's point—people can attest. Even Assemblyman Hansen, who has spoken about his own experience and he beat his case, would be judged negatively for an arrest that did not result in a conviction. That is not a proper way to look at it. A more proper way would be to collect better data and get the Nevada Criminal History Repository up-to-date rather than judge people on arrests instead of convictions.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
We are neutral with concerns, and I apologize if I should have come up in opposition. I simply could not come up in opposition in light of the fact that the Washoe County Public Defender's Office first and foremost does support the spirit and intent of what this bill is attempting to accomplish by way of bail reform in Nevada. To be clear, we support the concept of the evidence-based risk assessment tool for determining the release of a person pretrial, as it provides a magistrate with an objective, evidence-based criteria for making such important decisions at such a critical stage of the criminal proceedings. In other words, key decisions are often made in courts on a subjective manner, based upon experience or instinct rather than objective, data-driven assessments of a person's risk level and the most effective approach for protecting public safety in each case.

In addition, people who may be charged with low-level non-violent offenses who are not given a fair chance of court release pretrial will suffer a host of collateral consequences, such as losing jobs, being away from family members, and an interruption in important state and federal benefits, despite the fact that they are still cloaked in the presumption of innocence. More important, studies using data from state courts found that people who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than persons who were released at some point pending trial. Their sentences were significantly longer, almost three times as long as

persons sentenced to jail and more than twice as long for those sentenced to prison. This is from the criminal justice study from the Laura and John Arnold Foundation.

Although we greatly respect the intent of this bill, we do have some concerns with some of the language. Notwithstanding this fact, we also pledge, at the Washoe County Public Defender's Office, that we are committed to bail reformation in Nevada, and this bill is definitely a step in the right direction. We certainly appreciate Assemblywoman Neal for bringing this bill and meeting with us beforehand to address our concerns. We pledge to continue working with her and all the stakeholders on this very important measure.

Assemblywoman Neal:
I appreciate you hearing this bill. We will continue to work through it.

[All items submitted but not discussed will become part of the record: (Exhibit E) and (Exhibit F).]

Chairman Yeager:
We will now close the hearing on A.B 136. Members of the Committee, I know we are pressed for time, but we will go ahead and open the hearing for Assembly Bill 228.

Assembly Bill 228: Revises provisions relating to the termination of parental rights. (BDR 11-590)

Assemblyman Keith Pickard, Assembly District No. 22:
Assembly Bill 228 revises provisions regarding personal service for the termination of parental rights and addresses the termination of parental rights when conception is the result of sexual assault. There are two principal goals that we are trying to achieve. First, to improve notice to parents subject to termination, and second, to protect the interests of victims of sexual assault where a child is conceived. At least eight other states have found that it is in the best interest of the child to terminate parental rights of the father if the child is conceived as the result of sexual assault. Those states are Arkansas, Connecticut, Georgia, Louisiana, Maryland, Tennessee, Wisconsin, and Wyoming.

I was going to give a brief summary of the various sections, but instead I have with me Eric Stovall, an attorney who practices extensively in this area and a fellow of the American Academy of Adoption Attorneys, who will go over the sections of the bill. There is an amendment to be provided to simply add on Senator David Parks, Senator Moises Denis, Senator Becky Harris, Senator Pete Goicoechea, Senator Scott Hammond, Senator Joseph Hardy, and Senator Michael Roberson.

Eric A. Stovall, Private Citizen, Reno, Nevada:
As Assemblyman Pickard said, this is a large part of my practice; I deal with adoption issues almost every day of the week.

There are four principal parts of this proposed legislation. The first is found in section 3, subsection 3, which changes a minor's name to initials when publication is made in a newspaper. We usually use a newspaper publication to alert putative fathers that there is an action pending to terminate their rights. Currently, there is nothing that would keep the minor's full name from being published in the paper. It is not appropriate; we should change that to the minor's initials, and that is what this does in section 3.

Section 5 changes the time of holding a hearing after the birth of the child and after service to the putative or birth father. As it stands now in statute, a hearing could be set six months out after birth. Generally, what that means is that you could have a baby placed with an adoptive family for six months before we know whether the child is actually free for adoption. By this change, we are able to speed up that process. It still allows and requires the putative father to be notified of the hearing but would allow us to move forward with that hearing after service has been perfected.

Section 6, subsection 6 and subsection 7: Again, you would think this would be something you would just normally do, but in these terminations of parental rights cases, the court proceedings are not closed, and these records are not sealed. This is particularly troubling to adoptive parents who will find that the petition for termination of parental rights often includes their names and addresses along with a lot of other information pertaining to the child. Not all courts will seal these files because there is no statute allowing these files to be sealed. Section 6 will allow for a closed proceeding and for the files to be sealed.

Finally in section 7, subsection 1, paragraph (b), subparagraph (8), along with a litany of other items that would be grounds to terminate parental rights, we would include the conviction of a sexual assault of the birth mother as grounds for termination. That would seem to be common sense; if you are going to have a woman actually be assaulted and her assailant be convicted of sexual assault, we would want to be able to use that sexual assault conviction as grounds to terminate that father's parental rights.

Assemblyman Pickard:
In my desire for brevity, I failed to mention the goal of trying to protect the interest of the child and adoptive parents.

Chairman Yeager:
Thank you for that very concise presentation of the bill. We do have a couple of questions from the Committee.

Assemblywoman Jauregui:
I have a question regarding section 7, subsection 1, paragraph (b), subparagraph (8): "The child was conceived as a result of sexual assault for which the natural father was convicted." Should this not be more gender-neutral stating, ". . . for which the natural parent was convicted?" Can it not be the case that a woman sexually assaulted a male minor?

Eric Stovall:
I agree, and frankly after rereading this bill in preparation for this presentation, we should set up the bill to say the process for the mother or the putative mother would be the same as for the father or putative father because there are times when we are trying to terminate the rights of a birth mother or putative mother. Usually, we know because she was in the hospital and gave birth to the child, but sometimes she bolts, she leaves the hospital and flees, and then we need to terminate her rights. I would recommend that we make that gender-neutral or add a section saying that the process for a birth mother or putative mother is the same as a father or putative father.

Assemblyman Thompson:
I think what I heard you say is when a woman is impregnated and has a baby due to sexual assault, we automatically take them through the termination of parental rights? Or is there a choice she has to make? Many times, unfortunately, in sexual assault there is a relationship there.

Eric Stovall:
This is not an automatic process; this would only occur if the birth mother had proposed an adoption placement. In that situation, let us say the birth mom gives birth to the child and says she wants to adopt the child out. Then and only then, you would have to free the child from the parental rights of both parents. The mother is going to sign consent of relinquishment. What then do you do with the birth father's rights? The process we use in this field is to do a termination of parental rights. If the birth mother has initiated an adoption proceeding, you would have to go forward with the termination. In practice, what we do is contact the putative father and ask if he wants to consent. He can say yes and sign a relinquishment, or he can say no that he does not want to consent. If he wants to keep his parental rights, we would then go through a hearing, which is basically a full trial; we would be able to present evidence of the sexual assault through this amendment. The judge in deciding to terminate his rights could use that. It is not automatic.

Assemblyman Thompson:
I have been blessed to serve as a court-appointed special advocate. I think we need to be careful when we use the term that adoptive parents have rights prior to the termination of parental rights because, from my experience, that is not the case. That is what complicates it many times because the adoptive parents, and we appreciate that they love the kids and they are going to give them a loving, nurturing environment, but they really do not have rights until they have officially adopted the children.

Assemblyman Pickard:
Assemblyman Thompson, you are right; certainly until an adoption has taken place they have no legal rights. I think it is important to note that all of these things are predicated on the principle of the best interest of the child. When we are talking about an adoption placement having been made, it is certainly in the best interest of the child to have stability in their living situation with who is caring for them. To the extent that the adoptive parents have an interest in seeing through with the adoption procedure, I think it is an important distinction, but they still have an interest in making sure they are doing what is best for the children.

Assemblywoman Krasner:
My question comes in section 3, subsection 3, where you are talking about using the initials of a minor in publication. My understanding is the reason we publish the name is that the interested parties will receive notice. Maybe we tried to mail to them and there was no forwarding address, so they did not receive the mail or letter. Publication in the newspaper would put interested parties on notice. If we are only using the initials of the child, they are not getting any notice.

Eric Stovall:
You are exactly right; that needs to be corrected. I would recommend, though, that you still keep the initials of the child, but what should be added is the birth mother's name. Many times the child is given a name that the birth father or putative father is not going to recognize. In fact, sometimes a birth mother will say to the adopted family, tell me what name you are going to give the child, and I am going to put that on my birth certificate for this child. There is no way that a putative father would know the child advertised would be his. I think we should probably take a good look at amending this and add to the notice of hearing the name of the birth mother. I want to respect the birth mother's privacy, I appreciate that, but I think we need to give putative father's fair notice.

Assemblyman Elliot T. Anderson:
It has already been addressed, but I wanted to talk about it as well. My colleague, Assemblywoman Jauregui, spoke about the issue of gender neutrality. I do think if we did put it in the amendment it would be subject to immediate scrutiny. It could perhaps be struck down because of relying on gender stereotypes. I think it needs to be changed. I do not think we should make it as complicated as in your response. Simply changing it from natural father to natural parent would suffice and not create a completely unnecessary bit of language.

Assemblyman Pickard:
We agree, and simplicity is usually the best approach. We are certainly open to that amendment.

Chairman Yeager:
Are there any further questions from the Committee? I do not see any at this time, so we will go ahead and open A.B. 228 to testimony in support.

Kimberly Mull, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence:
Unfortunately, only one in three rapes is actually reported to law enforcement in the United States. According to the FBI's Uniform Crime Report, in 2015, there were 1,688 rapes reported in Nevada alone. Over 70 percent of the victims actually knew their attacker, and 93 percent under the age of 18 knew their attacker. For example, in the first half of 2016, there were 757 cases of sexual assault reported to Las Vegas Metropolitan Police Department, but only 51 were committed by a stranger, which is about 6 percent. The national rape-related pregnancy rate is 5 percent per rape among victims of reproductive age; however, only about 2 percent of rapists will ever receive a felony conviction, and fewer than that will ever see jail time. Five percent of those who are raped will get pregnant, but only 2 percent of rapists will actually be convicted of rape. You are three times more likely to get pregnant than you are to see your rapist receive jail time. When you get into the areas of sex trafficking and domestic minor sex trafficking, you actually see pimps who are often impregnating their girls on purpose; it is a way to control their victims. Once the girl gets out, if she is under age and is put in detention or is rescued, then he has a way to keep communicating with her.

Again, in both these cases, it is unlikely that there is actually going to be a felony conviction. We would hope that the legislative intent would be that the act of sexual assault and not the crime of those would be included so that if someone admits the guilt but pleads down to a lesser crime that it would also be included as a way for the judge to say, Okay, this is something we need to take into consideration as in the best interest of the child. The lifelong trauma associated with rape is already a life sentence for victims. Those who go through pregnancy that results from the rape and are strong enough to carry that baby and love the baby enough to decide to give it another home or keep it, should have every possible protection for themselves and the child that is available. Because of that, we strongly urge you to support A.B. 228.

Chairman Yeager:
Is there anyone else in support of A.B. 228? [There was no one.] How about opposition testimony? [There was none.] How about neutral? [There was none.] I would now invite our presenters back up to the table for closing comments. I do have one question: in situations where someone is a victim of sexual assault and becomes pregnant, but it was an anonymous sexual assault, is there currently a procedure to try to notify the putative father? Does it go through the normal process or does it not happen as a practical matter?

Assemblyman Pickard:
The process right now is that the mother can pursue a termination of parental rights. In fact, that remains the case. The only thing we are doing here with respect to that type of case is we remove the six-month waiting period that is currently in the law. They would still have to go through that same process.

To address Ms. Mull's concern about arrest versus conviction, we already have a presumption under NRS 125C.0035, subsection 5, which requires that a court consider the act, not the conviction. Evidence can be taken at that time under that provision of the statute to review whether there is sufficient evidence. It is a clear and convincing evidence standard, if I recall correctly, to make sure that the act of sexual violence actually occurred when considering custody in the first place. Therefore, that would still be open to the petitioner in a termination of rights. The only thing that would change in that context would be the elimination of the six-month waiting period. I appreciate the Committee's consideration of this bill and urge the passage of the bill.

Eric Stovall:
Thank you and the Committee; it is always enjoyable to come to the Assembly Judiciary Committee.

Chairman Yeager:
We will now close the hearing on A.B. 228. We will now open the meeting for public comment. [There was no public comment.] This meeting is adjourned [at 10:51 a.m.].

RESPECTFULLY SUBMITTED:

_____
Erin McHam
Recording Secretary

_____
Janet Jones
Transcribing Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a copy of a PowerPoint presentation titled "Committee to Study Evidence-Based Pretrial Release," dated March 17, 2017, presented by James W. Hardesty, Justice, Supreme Court of Nevada.

Exhibit D is a proposed amendment to Assembly Bill 136, presented by Assemblywoman Dina Neal, Assembly District No. 7.

Exhibit E is a letter in support of Assembly Bill 136 to Assemblyman Yeager and members of the Assembly Committee on Judiciary, authored by Mike Dyer, Director, Nevada Catholic Conference, Carson City, Nevada.

Exhibit F is a letter dated March 22, 2017, regarding Assembly Bill 136 to Chair Yeager and members of the Assembly Committee on Judiciary, authored by James W. Hardesty, Justice, Supreme Court of Nevada.