

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Seventy-Ninth Session  
April 5, 2017**

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:05 a.m. on Wednesday, April 5, 2017, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to 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](http://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  
Assemblywoman Lesley E. Cohen  
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:**

None

**GUEST LEGISLATORS PRESENT:**

None



**STAFF MEMBERS PRESENT:**

Diane C. Thornton, Committee Policy Analyst  
Brad Wilkinson, Committee Counsel  
Erin McHam, Committee Secretary  
Melissa Loomis, Committee Assistant

**OTHERS PRESENT:**

Christy Craig, Chief Deputy Public Defender, Clark County Public Defender's Office  
John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association  
Mandy Shavinsky, representing MGM Resorts International  
Richard P. McCann, Executive Director, Nevada Association of Public Safety Officers  
John "Jack" Martin, Director, Department of Juvenile Justice Services, Clark County  
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office  
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office  
Michael J. Oh, Senior Assistant City Attorney, Civil Division, City Attorney's Office, City of Henderson  
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department

**Chairman Yeager:**

[Roll was called and Committee protocol was explained.] Before we begin, I want to let everyone know that we are going to pull Assembly Bill 453 from the agenda.

**Assembly Bill 453: Establishes conditional plea agreements in criminal cases. (BDR 14-1065)**

If you are here for that bill only, I apologize. We may reschedule that for a later date, or we may not; it depends on how the time goes. With the removal of that bill, we have four bills on the agenda today. We intend to take them in order. At this time, we will open the hearing on Assembly Bill 377.

**Assembly Bill 377: Revises provisions relating to the competency of a defendant in a criminal case. (BDR 14-1074)**

**Assemblyman James Ohrenschall, Assembly District No. 12:**

With me, I have Christy Craig who is a Chief Deputy Public Defender at the Office of the Clark County Public Defender and an attorney with vast experience in this area. She is here to help me present Assembly Bill 377. I would like to briefly explain what this measure accomplishes. Existing law provides that a person may not be tried or sentenced for an

offense while they are incompetent. If at any time after arrest doubt arises as to the competency of a defendant, the trial or sentencing must be suspended until the question of competency is determined ([Exhibit C](#)). That is current law. Section 1 of [A.B. 377](#) adds a provision that a prosecuting attorney may not seek an indictment of a defendant for any offense during the period in which the court is considering whether that defendant is competent.

Secondly, existing law provides that whenever a defendant has been found incompetent and has subsequently been released from custody or outpatient services, the proceedings against the defendant that were suspended must be dismissed. In addition, no new charges arising out of the same facts and circumstances may be brought after a certain period of time has lapsed that is equal to the maximum time allowed by law for the crime of which the defendant was charged. Section 2 of this measure adds a provision that no new charges may be brought unless the prosecuting attorney has a good faith belief, based on articulable facts, that the defendant has obtained competency.

For those of us from southern Nevada, we have recently heard the sheriff make statements that Clark County Detention Center is the largest mental health facility in the state. Because someone suffers from mental illness does not mean that he is not competent. However, many of us have had loved ones, friends, and family who have had mental health issues where their competency was compromised. While we would not want that friend, family member, or loved one to enter into a contract to buy a car or make out a will while their competency is in question, similarly, case law from the Supreme Court says that we do not want that person to face charges. [Assembly Bill 377](#) tries to harmonize existing law to make sure that does not happen.

**Christy Craig, Chief Deputy Public Defender, Clark County Public Defender's Office:**

For the last 15 years, I have been working with our mentally ill defendants. The most important thing to understand is that once competency is in the process of being assessed, *Nevada Revised Statutes* (NRS) 178.405 ([Exhibit C](#)) requires that all proceedings stop. That is so important because under *Dusky v. United States* [362 U.S. 402 (1960)], to proceed when someone is unable to understand and cannot adequately aid and advise their attorney is a violation of due process. Anything that happens during that time frame, when someone could potentially be incompetent, leads to redoing the criminal task at hand. Typically, competency evaluations take about three weeks. There is a decision at the end of the competency evaluation whether the defendant is competent to go forward or is not. If they are not, other things happen. To allow the district attorney (DA) to go to the grand jury during that process violates the defendant's due process rights. A defendant has important decisions to make about the grand jury proceeding. Is he going to testify or not? Are we going to present evidence or not? A defendant who is unable to adequately aid and assist his lawyer does not have the capacity to make those decisions.

Section 1, subsection 4 simply codifies that idea. Even during the competency process, while that decision is being made, the state should not be able to go to the grand jury. They are going to have to wait until an evaluation is completed. That is consistent with NRS 178.400

and NRS 178.405. I point you to NRS 178.405 ([Exhibit C](#)) which says, "Any time after the arrest of a defendant, including, without limitation, proceedings before trial . . . ." If competency issues are raised, "the court shall suspend"—not "maybe" suspend; not think about it; they have to suspend those proceedings. A defendant has constitutional due process rights that would be violated if a court continued.

With regard to that section, the language we have provides that due process protection. The amendment ([Exhibit D](#)) that sought to have the court override NRS 178.405 is inappropriate and does not fit the way case law, United States Supreme Court law, or Nevada Supreme Court law allows with regard to competency. As a practical matter, I am not sure how or what they would present to a judge to show adequate cause that they should be able to go to the grand jury while someone is in the process of a competency evaluation. I do not know how they would get that done in three weeks.

**Chairman Yeager:**

I am sorry to interrupt, but I want to let the Committee know that the amendment Ms. Craig is referencing was provided by the Nevada District Attorneys Association, which can be found on the Nevada Electronic Legislative Information System.

**Christy Craig:**

I appreciate that. I do not think that amendment is appropriate nor should it be considered. The language that is provided adequately protects a person's due process rights during that three- to four-week period where they are contemplating whether they are competent. It fits with NRS 178.405 ([Exhibit C](#)) which requires that everything "shall" stop.

With regard to section 2, subsection 5, paragraph (a), what happens when a person is found incompetent is that they are sent to a forensic mental facility, either up north or down south. There is Lake's Crossing Center in the north and Stein Hospital in the south. In the event that a person cannot be made competent—they cannot become competent enough to stand trial—the charges are ultimately dismissed. For certain felons, category A felonies and some B felonies, the prosecutor has the capacity to have them held for another ten years, but the criminal charges are dismissed. At any time after the charges are dismissed, if a person would become competent, the State of Nevada can then refile the charges. We have no objection to that. What we are asking, and what this bill provides for, is that they have to have some reasonable belief, based upon articulable facts, that the person has become competent.

Rearresting and recharging someone just to send them back through the process—back to jail, back to court, being sent to competency court, being evaluated for competency again, sent to the forensic mental hospitals again just to end up in the same place—is a foolish way of going forward. It is not cost-effective; it is expensive to send people to a forensic mental facility, and it is inappropriate if the State does not have some reasonable belief that the person has attained competency at any time after that period.

This is particularly important for category A and B felons. There could be people who are charged with murder who are incompetent to proceed. When the charges are dismissed, they may be held at Lake's Crossing for up to ten years. If that individual became competent during that time, the State can refile because they would be able to make this burden. It is a necessary burden. They should not be able to refile and restart the process over and over again.

Recently in Clark County, we had charges dismissed against a person who was deaf and mute, and was incompetent as a result. Twenty-five days after the finding and the charges being dismissed, the State refiled charges. There is no belief that this deaf man had suddenly attained competency in those 25 days. He will restart the entire process over again when he is rearrested. He will go back to jail. He spent almost three and a half years in the process, including at Lake's Crossing, which costs \$477 a day for somebody to stay there. We are simply asking the State make a proffer in front of a court that they have some reasonable belief based on articulable facts that the person has attained competency. If the judge agrees with that finding, then the charges can be refiled.

**Assemblyman Pickard:**

I do not practice in this area, so I am looking for education here. Indictments are separate entirely. As I recall, NRS 178.405 deals with trials, not grand jury proceedings. I do not understand why we would hold up an indictment, because that is a separate process that does not involve the defendant and I imagine it could occur prior to the prosecutor having an opportunity to evaluate the defendant. The idea that the prosecuting attorney must have a good faith belief that the defendant has attained competence—I thought that was the current state of the law. Can you tell me what the difference is there? If we are automatically dismissing and refile cases, I am wondering why we would require the prosecutor to go through the same hoops multiple times. That would delay justice and ultimately increase the cost of the process.

**Christy Craig:**

Can I ask you to explain what you meant about the "hoops" because I am not sure I can answer that.

**Assemblyman Pickard:**

There is a difference between suspending a case. In the civil context, we can suspend a case for however long that justice requires. We do not have to dismiss and refile, which would cause us to make new pleadings, address those things, and ultimately drive up costs. On the civil side, our clients are paying us by the hour, and in your case, the State pays you whether or not you have work to do—not that you are ever without it. Ultimately, it drives up the costs because we are spreading out the cases across these employees' time. I am wondering if causing the cases to be refiled simply because we want to end the first process will drive up the costs of the process.

**Christy Craig:**

I will address that last part first. Perhaps I was not clear. For people who are incompetent, the United States Supreme Court has indicated that trials cannot proceed for a person who is incompetent, so everything has to stop. The process for the State of Nevada is then to send the person to a forensic hospital for treatment to competency. They can either be treated to competency and then returned to face their charges, or they are ultimately found incompetent without probability of ever attaining competency and the charges are dismissed—they cease to exist. The person can either be released from custody and go back to whatever county he is from or, for some category A felonies—murder, sexual assault—and a couple of B felonies, the State can ask the judge to hold that person for ten years at Lake's Crossing and not release them to the street. The charges are dismissed—the case no longer exists. It is not stopping and starting, it is simply no longer available unless the person becomes competent at some time. The State could then refile charges.

**Assemblyman Ohrenschall:**

I am not sure how often a scenario like this happens, but let us say a defendant's competency is questioned and they have to take a trip up to Lake's Crossing. Then a prosecutor seeks an indictment from a grand jury. We have often heard that old saying that a grand jury will indict a ham sandwich. The indictment comes down and the defendant is still incompetent, but now competency proceedings have to be renewed. There is another trip up to Lake's Crossing at \$475 a day. If anything, requiring a good faith belief of articulable facts that the defendant is now competent and ready to stand trial should actually save our constituents money.

**Assemblyman Pickard:**

I do not disagree. What I was getting at was, is the dismissal an automatic thing by operation of law? Once it is determined that the person is incompetent, he is dismissed summarily, and the prosecutor is forced by law to refile. Is this a situation where the decision is made by the prosecutor to dismiss the charges and then refile?

**Christy Craig:**

The forensic mental facility, either Lake's Crossing or Stein Hospital, does the treatment. They make reports that are presented to a court. The court holds a hearing with both the defense and prosecution there, the court makes findings that he is incompetent without probability, and the court dismisses the charges. The State always has the capacity to refile if they choose to; we are simply adding the standard by which it may refile charges. The law does not yet give the State any standards by which it must refile. What we are trying to avoid is what happened in Clark County where the charges were refiled 25 days later, even though the defendant had never shown any capacity and was not likely to get capacity.

If I could address your earlier question about the grand jury proceedings, it is significantly different. There are grand jury proceedings where the person is not in custody—he is just wandering around, doing his criminal acts or whatever he is doing. That is not the process we are talking about. The district attorney (DA) would not have any knowledge of competency. Typically, in the criminal process, a person will be arrested, charged with

a crime, and the defense attorney will notice that there is something not quite right about that person. Within the justice court setting where the original charges are being filed and the preliminary hearing is set, all that will stop and the person will move to competency court for assessment. For those grand jury proceedings, when the district attorney decides to go to the grand jury while that person has already been charged, the district attorney will issue a *Marcum* notice saying they are going to a grand jury on the case. At that point, the DA has knowledge that they are in front of competency and may choose to go forward anyway. In that position, when you have a person who is potentially incompetent, you cannot ask them any questions.

It is our position that the statement within NRS 178.405 ([Exhibit C](#)) establishing that at "Any time after the arrest of a defendant, including, without limitation . . .," followed by a list of conditions necessarily includes a grand jury proceeding on a case where the district attorney has knowledge of possible incompetency. It would not impact a case where the district attorney brings a grand jury proceeding and they do not have competency knowledge.

**Assemblyman Pickard:**

Addressing the Nevada District Attorneys Association's amendment ([Exhibit D](#)), is it your position that you can see no circumstance where a court might deem that it is in the interest of justice or public safety that something move forward despite the fact that competency is in question at that time?

**Christy Craig:**

In light of what the United States Supreme Court said in *Dusky* and what the Nevada Supreme Court has said in *Calvin v. State* [210 P.3d 712 (2007)], a person must be competent in order for the State to proceed against them, or it is a due process violation. I do not see what arguments the State could make. Somebody could maybe find some outliers, but by-and-large I am not sure how allowing the State to make some sort of adequate cause would be legal. I am not sure that is actually a legal standard.

On a practical basis, I do not know how they would do that in three weeks. Typically in Clark County, from the time a person is sent to competency court to the time we get a decision, there is about three weeks. That is a very short window in which to put a motion on and get a judge to hold hearings. I do not know how the defendant would even participate. If I am given notice as the defense attorney for someone who is incompetent and I need to explain to him that I need to hold hearings, I do not know how I would do that with someone who is potentially incompetent. That gives rise to the whole notion of due process and why it is important.

**Assemblyman Pickard:**

We will let the DA respond, but that helps.

**Chairman Yeager:**

When someone is in competency proceedings, is that defendant in custody in the jail? Are there people who are out of custody and going through competency?

**Christy Craig:**

In Clark County, the vast majority of defendants who are in competency court and having their competency evaluated are in custody. I would say probably 90 percent are in custody. There are some who are out of custody, but that is unusual.

**Assemblyman Elliot T. Anderson:**

Do either of you know how frequently defendants testify in front of a grand jury? This is sort of an academic discussion because I cannot recall any time when defense attorneys have their clients testify in front of a grand jury. One of the few instances I can remember is when there is a use of force review. Those are the only examples I can think of. I would appreciate some clarity on how often section 1 would be applicable.

**Christy Craig:**

I do not think applicability is based on how often it is used by a defendant. It is based on the defendant's right to participate if they choose to and their inability to actually make that decision. Whether I recommend somebody testify in front of a grand jury is a different question than whether he has the capacity and ability to consider that and make that decision himself. I will say that the grand jury is not an awesome place for a criminal defendant to be. I am not rushing to get somebody in front of a grand jury. That is not really the question. The question is if they have the capacity to make that decision. As a defense attorney, I can tell people all day long not to do things; it does not mean that they will listen to me. They have the right to make those decisions, whether it is good or bad for them. Someone who is in the process of having competency determined does not have the capacity to consider that and make a reasonable choice, no matter what my advice is. However, most of the time we do not go in front of a grand jury.

**Assemblyman Elliot T. Anderson:**

I understand that it is two different questions. I was trying to envision where this is ever going to be in function. I appreciate that conversation and information.

**Chairman Yeager:**

In my experience in that realm, I can remember two cases I have been involved in where defendants did testify in front of a grand jury, contrary to my advice. They made the decision to testify. It would be helpful for the legislative record to talk a little about the grand jury versus criminal complaint in justice court. Maybe you could take the Committee through how that works procedurally—how it is that an indictment can be sought while there is already a criminal case pending; and once an indictment is obtained, what happens with the case in justice court.



**Christy Craig:**

The district attorney has two pathways by which they can begin criminal charges. The majority of times they file a criminal complaint and the defendant is brought in to answer that criminal complaint in the justice court. The DA's office also has the capacity, if it so chooses, to go in front of a grand jury instead. Often it will start with a criminal complaint, the defendant will be in justice court, and at some point during that process the district attorney makes a decision to instead—while the criminal complaint is pending, while there is a preliminary hearing set, or whatever the reason—proceed in front of a grand jury.

There will be cases where there are many witnesses or it is a difficult scenario to present to a justice court. There are many reasons why the district attorney would choose to go in front of a grand jury rather than to proceed in front of the magistrate. They have the choice to do that. They can do that while the person is waiting with the criminal complaint pending on that same charge. They will hand the defendant a *Marcum* notice, and the *Marcum* notice says, "We are putting you on notice that we are going in front of a grand jury. If you want to know more, here are the things you need to do. If you want to testify, you have to let us know. Send us a letter; here is the address. If you want to know the date and time of the grand jury, let us know."

The defendant is typically in custody awaiting some sort of judicial process on the criminal complaint while the State is seeking an indictment by way of the grand jury. If the grand jury does indict, the defendant is then brought in, handed the indictment, and a new case based on that indictment is started and the old criminal complaint is dismissed. By and large, the person is in custody awaiting process on that original complaint.

**Assemblyman Wheeler:**

I am looking at this from a nonprofessional's point of view. I remember a case in the early '80s where we arrested a man for possession of a stolen firearm. We knew that he had committed a murder but we did not have the evidence. He was charged and arraigned on possession of a stolen firearm. While he was being held, the evidence was collected, a grand jury proceeding was held, and he was indicted on murder in the first degree. Would this preclude something like that from happening?

**Christy Craig:**

That is a complicated scenario. Let us assume that the person who had the firearm was mentally ill. You can be mentally ill and still be competent to stand trial. Being mentally ill does not bar trial. It requires being able to aid and assist your lawyer and being able to rationally and factually understand the process—what a judge is or what a jury does. If a person was arrested on possession of a firearm, given a criminal complaint, and there was some concern about his competency, for that three-week period when competency is being determined, the State could not go to the grand jury. They would have to wait until that assessment was completed. If that person was found to be incompetent, everything has to stop. They are sent to the forensic mental facility and treated to competency.

However, if after that three-week assessment they are found to be mentally ill but competent, should the grand jury go forward, they would have problems when the indictment comes back that they would have to deal with. Competency does require that it be assessed so the defendant can make decisions about his legal case. That is the bottom line—the most important part—as the defendant moves through the criminal process, that they are able to adequately assess the choices that they have to make to aid and assist their lawyer. If they cannot do that, the courts cannot proceed.

**Assemblywoman Cohen:**

Expounding on Assemblyman Wheeler's question, going to section 2, subsection 5, I know that I am getting into the black letter of law, but "no new charge" would be the murder charge as opposed to the refiling charges that you discussed earlier, correct?

**Christy Craig:**

No, that is a weird term of art that is used. When they say "new charges," they mean a new filing but on the original crime, whatever that was. If a person was found to be incompetent without probability on a murder charge, if they became competent, they could refile those murder charges, but it would be a new criminal complaint with a new number. It is not really a new charge, it is the original crime with a new complaint number.

**Assemblywoman Krasner:**

I see there is an amendment ([Exhibit D](#)) by the Nevada District Attorneys Association. Are you okay with that amendment?

**Assemblyman Ohrenschall:**

While I have great respect for the attorneys at the Association, I feel the bill accomplishes what is needed pursuant to Nevada and United States Supreme Court case law as is, and the amendment is not needed.

**Assemblywoman Krasner:**

The other thing I think some of the other members might have been confused on is, there is no right to assistance of counsel during a grand jury proceeding. Is that correct?

**Christy Craig:**

Not exactly. In our cases, they already have a lawyer; there is a criminal charge pending, and a lawyer is assigned for that particular crime. When they are being indicted, they typically hand the *Marcum* notice to the assigned attorney. That attorney is able to assist, discuss, and help the defendant. The defendant still has to make those decisions himself.

**Assemblywoman Krasner:**

During the indictment—during the grand jury hearing—does the defendant not have a right to have an attorney present with him?

**Christy Craig:**

Do you mean if they are testifying?

**Assemblywoman Krasner:**

In the grand jury proceedings.

**Christy Craig:**

That is correct. Sometimes we can sit in as long as we do not say anything, but we have to get permission.

**Chairman Yeager:**

Are there any other questions from the Committee? Seeing none, we will open up for testimony in support. [There was none.] Is there anyone who would like to testify in opposition?

**John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:**

I want to start by thanking Assemblyman Ohrenschall and Ms. Craig for listening to our concerns. We have had some discussions and we have agreed to continue those with respect to finding resolution acceptable to both of us. When you read this bill in total, that is where our Association begins to have some problems.

I want to use Assemblyman Wheeler's example where a defendant is brought in on a possession of firearm charge. Immediately the appointed public defender requests that that defendant go to competency. While the defendant is in competency we test the firearm, connect it to a murder, and work backward to connect that defendant to the murder. If the defendant goes to competency court, is found incompetent, and goes to Lake's Crossing, that entire time we are not going to be able to proceed on that murder charge. If the defendant goes to Lake's Crossing and is ultimately found to be nonrestorable, unless something changes with that defendant and the DAs are aware of it, we are not going to be able to proceed on that murder charge.

All we are asking for is the ability to go to a judge and plead our case. "Judge, in this instance we think we should be able to at least file a criminal complaint, or at least go to the grand jury on these charges and here are our reasons why." The language we are proposing is very similar to NRS 172.241. It is the grand jury statute. In Nevada, we are unique in that you, as a defendant, are required to have notice whenever a DA plans to take a case involving you as a defendant to the grand jury. In the federal system and most other states, that is not required. There is an out for a district attorney. If there is an adequate cause, we can go to the judge and say, "Hey judge, we do not want to notify this defendant and here is why." If the judge finds that there is adequate cause, we can proceed to grand jury without providing that defendant notice. What we are proposing to do is take that "adequate cause" language from the grand jury statute and add it into A.B. 377. It just gives us the ability to go to a judge and plead our case in circumstances where a defendant might be incompetent, yet we feel like we need to proceed with charges.

There are areas in law where the type of crime charged does make a difference in terms of what we can ultimately do with the defendant. I want to direct you to NRS 178.461. For certain category A and B felonies, if defendants are found to be incompetent but are still a danger to the community, we can place them in a forensic facility. That gives us options with respect to defendants who are charged with certain crimes that we would not have if they were charged with others. That is a situation where the charge matters with respect to somebody who is incompetent. All we are asking is for the ability to go to a judge and plead our case if somebody is in competency proceedings and we would like to file charges. I am willing to work with Assemblyman Ohrenschall and Ms. Craig, and I hope we can come to some resolution, but as of now, we are in opposition.

**Assemblyman Wheeler:**

I am trying to get my head wrapped around this. It seems to me that once a new charge has been brought, there has to be an arraignment quickly—I believe it is 72 hours. During that time, could a judge order a competency hearing so it would happen anyway? On the first charge, they have already ordered a competency hearing. They go back on the second charge and a judge could delay it while that competency hearing is going on and order a new competency hearing. Is that correct?

**John Jones:**

Generally, they will hold the new case until we get the results of the competency proceeding that has already been commenced. What I am saying is that we do not have two competency proceedings going on at the same time.

**Assemblyman Wheeler:**

What this does is remove the judicial discretion on whether he holds that case or not? Is that what this bill does?

**John Jones:**

We would not be allowed to file the new criminal complaint or new indictment in the first place, so we would never get to the phase where the judge would stay the proceedings.

**Assemblyman Fumo:**

Lake's Crossing is a lockdown facility, is it not?

**John Jones:**

Yes, it is a lockdown facility.

**Assemblyman Fumo:**

No defendant or person would be released from Lake's Crossing without the district attorney's office being notified. You would be given a report saying the person has been redeemed back to competency.

**John Jones:**

That is correct. Once they are discharged from Lake's Crossing, we do get notice and they are referred back to the district court that referred them to Lake's Crossing. That is when we get a report either saying they are restored to competency or they are not competent, and we get a prognosis on their chances of obtaining competency.

**Assemblyman Fumo:**

When you say discharged, they are not actually released; they go back to court, and you have an opportunity to argue that, correct?

**John Jones:**

That is correct. I do not know how many are actually contested, but we do have the ability to argue whether the decision or determination made by Lake's Crossing is the correct one.

**Assemblyman Fumo:**

So it is not as if somebody would be released and you would have to go find them again to reindict them; you would know before and could start the proceedings at that point.

**John Jones:**

Yes, we would know when they return from Lake's Crossing.

**Chairman Yeager:**

We talked about NRS 178.405 ([Exhibit C](#)), which indicates that if competency is in doubt, the court "shall" suspend the proceedings. I am curious to get your take on why that language would not preclude the seeking of an indictment by a grand jury.

**John Jones:**

That is a great point and it is something we can flesh out as we proceed. The indictment or criminal complaint is what triggers the criminal proceedings to begin with. We have used this in the Clark County District Attorney's Office; we have filed new charges on defendants who are either found to be incompetent or in competency proceedings. I can tell you that it is not something that we do regularly. It is infrequent and when we do it, we have good reasons why. All we are doing now by presenting our amendment ([Exhibit D](#)), is asking that we state those reasons to a judge and a judge can do one of two things: tell us "Yes, State. Yes, DA's office, you can file it. Here are my reasons why I think you provided adequate cause," or "No, I am sorry, you have not met the threshold; you cannot file this criminal complaint or go back to the grand jury."

**Chairman Yeager:**

Let us imagine a scenario where someone is found incompetent and is being treated at Lake's Crossing which, as Assemblyman Fumo said, is a lockdown facility. If at that point the district attorney decides he wants to seek a grand jury indictment and starts to go through that process, and the defendant at Lake's Crossing is incompetent but expresses a desire to participate in the grand jury proceeding and offer testimony, how do you anticipate that would work? Would the defendant need to be transported to testify at the grand jury

proceeding, or would your belief be that because the defendant is incompetent, the expression of a desire to participate in the grand jury is somehow invalid?

**John Jones:**

I think that is a good question. I do not know the answer to it and I do not want to speculate on the record. I would liken it to a situation where we have asked a judge to forgo *Marcum*. In other words, the grand jury proceedings occur when we have not let the defendant know that they have a right to testify. I think it would work the same way that works by operation of law, but I do not want to speculate on the record.

**Chairman Yeager:**

I appreciate that. Maybe it is something we can continue to discuss. Although it is probably a rare circumstance, it is a potential concern that the bill may be trying to address. What do we do in a situation where someone is in a lockdown facility and cannot physically be at the grand jury?

**John Jones:**

We do have, in statute now, a situation where if for some reason the State's *Marcum* notice is found to be defective, the case is re-referred to the grand jury to give the defendant the ability to testify. That could be something we would discuss. The only issue is if somebody is in Lake's Crossing for longer than a year and we get a new grand jury. That could potentially pose some problems; it is something that we could work out.

**Assemblyman Pickard:**

As I am going through this I feel like I am watching a ping-pong game, where about the time I see something about to happen, things change. Ms. Craig suggested that the frequency does not matter. How often this may occur, it does not matter; we are trying to put protections in place. Chairman Yeager asked a question that I had when I first went through this bill. I looked up NRS 178.405 ([Exhibit C](#)). The way I read this statute, it would have already precluded this. It made me wonder why we have this. From the DA's perspective, is it your position that we should retain a general blanket prohibition or stay the proceedings so long as someone is incompetent, unless there is some exigent circumstance that should allow a prosecutor to continue a case even when that defendant has no opportunity and insufficient competence to participate?

**John Jones:**

What I am saying is, the criminal complaint or indictment just starts the proceedings. That is all we are asking for the ability to do with our amendment ([Exhibit D](#)). Once a defendant is in competency, everything stops. At least to have the ability to start the proceedings, to get the baseline of what we are dealing with, is really what we want. I think Ms. Craig would agree that generally, the instances in which we have filed something while a defendant is in competency is when we are dealing with people who are extremely violent. Incompetence is a term of legal art and criminal law that deals with assisting your counsel. When we have violence and incompetence coupled, we have concerns with respect to the defendant and public safety.

All our amendment does is allow us to go to a judge and plead our case. In terms of due process, I think that alleviates the due process concerns because there is judicial oversight. There will not be a preliminary hearing until the defendant is found to be competent. There will not be a trial, but we can at least get the baseline on what we are dealing with. When we are talking about competency, there are provisions in statute that say what the defendant is charged with matters. When they are charged with more serious crimes, we have more resources and legal remedies available to us in how to deal with that client. Consider the situation where somebody comes in on a theft charge—which is not as serious compared to somebody who comes in on a violent charge—and while they are in competency proceedings, we discover they have committed a violent offense. We would not have the ability to file those new charges under A.B. 377 as currently written.

**Chairman Yeager:**

Does the amendment ([Exhibit D](#)) contemplate that before taking a case to the grand jury or refiling, the prosecutor would have to first go in front of a judge and get permission to do that? Would it be that the proceeding happens first, and afterward the district attorney seeks approval from the judge?

**John Jones:**

That is not specifically spelled out. If that is something the Committee wants, that we have to seek permission from the judge before we commence the proceedings, we can begin those discussions. What happens sometimes is that we will start a grand jury proceeding and in the middle of that, we will serve *Marcum* notice, but the grand jury will not deliberate until a certain period has passed after the *Marcum* has been served on the defendant. That is to give the defendant time to exercise their right to testify if they so choose. We have some flexibility in how we word it, but we are willing to work with you on that.

**Chairman Yeager:**

Are there any more questions for Mr. Jones? I do not see any. Is there anyone else who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in the neutral position? [There was no one.] I would invite Ms. Craig and Assemblyman Ohrenschall back to the table for any concluding remarks.

**Christy Craig:**

I would like to say I am grateful to the Nevada District Attorneys Association for supporting the actual language that we both seem to agree on for both parts of the requested changes. I would like to address Assemblyman Wheeler's question about what judges can and cannot do. I would point out that NRS 178.400 and NRS 178.405 ([Exhibit C](#)) place an independent duty on every actor in the court system—the judge, the DA, and the defense attorney. If they notice someone is incompetent, any one of those persons can raise that issue. A judge is never precluded from raising that issue.

In Clark County, we instituted a funnel system so that all the competency cases go to one judge for efficiency and cost-effectiveness. Back in the day, it used to be that all the different courts were doing competency evaluations on the same person and it cost

a lot of money. When competency starts, section 2 of NRS 178.405 notes that all other departments of the court are notified, and if the defendant has other charges pending they all go to one place. Nothing about this prevents a judge from saying, "I think something is wrong and it needs to go to competency." Everybody has a duty under the law.

I would also point out that the second part of the request we are making, which is post the case being dismissed, refers to section 2, subsection 5, paragraph (a). When reinstating the charges, they have to make a request in front of the court that is very simple: they have to say the reasons why they believe the person has attained competency, and then the judge would allow them to file charges if they could make that standard. I do not see it as necessary to have the second part from the amendment ([Exhibit D](#)) in the bill, that a court find adequate cause for such new charges, when the above language is, "Unless the prosecuting attorney has a good faith belief, based on articulable facts, that the defendant has attained competency." A judge would be making that finding upon that basis.

**Assemblyman Ohrenschall:**

To the concern about public safety: we heard that while someone's competency is in question, Stein Hospital and Lake's Crossing are both lockdown facilities that would be used until they would be transferred back to Clark County Detention Center or the city jail. If competency were restored, at that point all the actors involved would have that competency report. Nothing in this bill prevents charges from being filed if and when competency of the defendant is restored.

I ask the Committee to remember how you would feel if it was your loved one, your family member, who was going through some kind of mental health crisis. As Mr. Jones said, competency under the *Dusky* standard is a term of art, not exactly competency to execute a will or contract, but we still would be concerned and would not want them to make these kinds of life changing decisions until they were competent again. I hope the Committee will consider processing this bill.

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

**Chairman Yeager:**

We will close the hearing on Assembly Bill 377. At this time, we will open the hearing on Assembly Bill 380. I would invite Assemblyman Anderson to the table.

**Assembly Bill 380: Revises provisions relating to real property. (BDR 10-340)**

**Assemblyman Elliot T. Anderson, Assembly District No. 15:**

I have brought forward this legislation for several reasons: to prevent back-door eminent domain; to reduce uncertainty for businesses; to encourage development; and for the best reason of all—to make all the attorneys on the Committee relive their property law classes.



Some major employers in our state have concerns about losing rights over their private property. These companies have opened up their private property and developed their private property into a replication of the pedestrian experience, which often looks similar to a public thoroughfare. It has become a common trend in Nevada, both on the Las Vegas Strip and in outdoor malls, with which I am sure many of you are familiar. I am bringing Assembly Bill 380 to reduce risk to these companies, provide legal certainty, and stop an implied eminent domain theory that could punish development of private property by people losing rights to their property. I believe strongly, after thorough research, that we should encourage more legal certainty for these companies, to protect these property rights, to encourage development, and to reduce risk.

For those of you who have not had the pleasure of a first year (1L) property law class, allow me to explain in general how property rights work. Think of property law as a bundle of sticks. When you have full ownership over your land you have the whole bundle—say your average home. Take my condo in Las Vegas as an example. I am the record owner on that property. Right now, I have all the sticks. To purchase the land, I contemporaneously granted a deed of trust to my credit union. I lost one of the sticks and now the credit union has it. Furthermore, my condo belongs to a condo association that operates through covenants that run with the land, meaning that they stick with the property no matter who owns the property. Long before I owned it, another stick was taken away and given to the condo association. No one ever gets that one back. As many of us understand, as property owners we want to have full control and dominion over our property. Sometimes not having control over your property can be unsettling when you start losing some of these sticks. Especially when you are fined for not mowing your grass because you lost that stick to the homeowners' associations well before you even owned the property.

Allow me to move on to easements, because that is what A.B. 380 deals with. Easements are simply another form of stick that can be given away by a property owner. We have two species of easements, generally: express and implied. Express easements are always rights related to land. Oftentimes they are right-of-way or utility easements that allow a person or utility to cross land, in the case of express easements. Additionally, Nevada law expressly provides for conservation easements and solar easements. Expressed easements generally require some sort of written instrument, which would provide certainty because people would be signing and negotiating that out. However, we also have what are called "implied easements" that arise as a matter of law. These types of implied easements include easements by necessity, easements by implication, and easements by prescription. Implied easements arise under law when certain facts exist.

In general, A.B. 380 seeks to shut off a new implied easement theory in Nevada, which does exist—specifically in California. Many of you may know, as attorneys, that Nevada courts, in the absence of controlling law in Nevada, often look to California law for guidance. I modeled the legislation before you off of California code sections that deal with implied public easements. You can see a memorandum that briefly gets into the issue of implied public easements ([Exhibit G](#)). Similar to a prescriptive easement, California has these implied public easements. In general, it operates similarly but not exactly like a prescriptive

easement, which you may otherwise know as "adverse possession," except it is not the whole bundle of sticks. Adverse possession gets you the whole bundle. For a prescriptive easement, you would just lose one of the sticks, part of your rights to the land. I did my best to explain property law in less than 15 minutes. It is the best that I could do. If you are still confused, I apologize.

With that background, I would like to go through the bill. In general, it seeks to prevent owners of real property from losing parts of the bundle of sticks and reduce the unsettled concerns about this implied easement theory. I would note for the record that I am going off of a mock-up that was provided to the Committee ([Exhibit H](#)). I am not sure if it is available in Las Vegas. In general, the mock-up just seeks to tighten up the language a bit to make it specific as to the theory that I am trying to get at. If you look at section 1, subsection 1, this subsection allows any owner of real property to record a notice that expressly grants people the right to use the land by permission. Just so people understand what that is getting at, when you give somebody permission to use your land, you can no longer get the adverse or hostile element for a prescriptive easement. In the case of an implied public easement, you are granting permission. By recording that notice, you are explicitly providing that permission which, as a matter of law in these theories, stops that easement from becoming implied and to vest on behalf of the person it is in favor of.

If you look at section 1, subsection 2, that deals with the effect of evidence that notice has in a judicial proceeding. The mock-up strikes out subsection 3, which deals with notice by registered mail. It is unnecessary because, in the theory I am trying to cut off—you are not going to have someone to serve, you are not going to have an idea of who to serve with registered mail—so that is lined out. However, we do adjust the numbering and a new subsection 3 takes effect, which ensures that rights that are already established—there is already some sort of property right that has taken effect—that notice does not affect a vested right. That is important because we do not want to upset the existing property rights that have already vested at this time. It is not seeking to take away anyone's property rights, which I believe is important.

Furthermore, with subsection 4, it makes it clear that it is not an "all or none" proposition. The permission can be conditional. Oftentimes, if you open your property you do not want to give people carte blanche access; you want to say "only under these conditions." Subsection 4 specifically provides that the permission in section 1 can be conditioned.

Section 2 ([Exhibit H](#)) is simply a conforming section. It requires certain recording principles to be followed in recording of a notice under section 1. It ensures we have some certainty as to what is actually recorded in the notice. It makes sure that it is clear. A clear title and clear records are always a good thing in real estate.

Moving on to section 3, I did change this section to be clear that it is to specifically apply only to instances where you have a person, like a mall or a casino on the Strip, that opens up their property to the public. This is not a problem with individual prescriptive easements that exist outside of this context. I am not trying to alter all prescriptive easements in Nevada,

only as it relates to these situations where people have developed their private property and have invited the public on, at large. That allows notice to be put on the person's property and provide permission explicitly, which defeats any adverse or hostile claim as to a prescriptive easement. To get a prescriptive easement in Nevada, you need to have five years of open and peaceable use, it needs to be adverse, and there is one other element, on which I am drawing a blank. At any rate, this gets into the adverse element. Use cannot be adverse if you are there with permission. Section 3, subsection 1 ([Exhibit H](#)) explicitly provides for that notice to be granted via posts that must be posted every 200 feet.

Moving on to section 3, subsection 2, this explicitly gets into having the same protections against a government entity. It is a bit duplicative, but I think it is important to make it very clear. This is all about increasing certainty and we need to ensure that is clear as to the public, any person, and a governmental entity. It also uses the term "implied dedication" because that is a related theory. Rather than just an easement to the public, an implied dedication could go to a municipality. That explicitly shuts that off.

Section 3, subsection 3 discusses any improvements that cities, municipalities, or any other governmental entities have created on the property. It makes it clear that visible improvements that a local government or other governmental entity makes will be allowed to vest. There will still be an easement in that instance. If there have been visible improvements and there has been no action by the property owner to fight those easements or improvements, that is important as well because municipalities and other governments are in the business of providing services to the public at large. If they have created some improvements in order to deliver services, it is important that we provide for that because we do not want to accidentally get in the way of local governments or other governmental entities providing services.

To sum up, I know there is going to be some confusion over this one. It is a theory that is new to Nevada. Many attorneys on the Committee have heard of prescriptive easements. I would like you to think of this in a similar vein, as to not just a single person, but as to the public at large. With these pedestrian experiences, you have the public at large that makes use of this land and often it is open 24 hours a day. This is simply an effort to add a few more rubber bands to the bundle of sticks so they do not start falling out, to keep the analogy going. All of us would understand how we would feel if we developed our private property and suddenly there is a backdoor claim to our land. This seeks to tie that up, to ensure we have certainty, and that we have more investment. Business is about reducing risk, and that is what I am trying to do. I think this is good public policy that we should move forward.

**Chairman Yeager:**

Well done on the property presentation. I had flashbacks to law school and the Bar exam. Thank you for that jolt on this Wednesday morning. We have a few questions from Committee members. We will start with Assemblyman Watkins.

**Assemblyman Watkins:**

I was paying attention this time. I want to go to section 1, subsection 1. Recording that document does not actually mandate that the property owner must provide access to the public, correct?

**Assemblyman Elliot T. Anderson:**

That is correct. It does not mandate the notice, but it does provide a way similar to recording a deed. It provides constructive notice, which is how we operate in this state. In the case of a deed, you can record it and that is deemed to put everyone on notice. It is definitely permissive. They "may" record if you look at line 4.

**Assemblyman Watkins:**

My concern is that the result of that will be that in your 450-page document you get at every closing of every real property transaction, everybody will just post this notice. I do not see why you would not. It does not mean that the public has to come onto your property and now you have effectually eliminated any possibility of easements onto your property by doing so. While I understand that prescriptive easements, or any other easements, are not what private property owners want, it is in law for a reason. There is good public policy why courts have found that to exist. Now, by posting a single-page document in your recording history, we will have eliminated that.

**Assemblyman Elliot T. Anderson:**

I take your point. I would have to think about this a bit more, and we can talk about it offline. If you look at the language that we have in section 3, I am trying to nail down a very specific theory of implied public easements. I do not think it would take too much away from what I am trying to do to add that same language in section 1, subsection 1. I am trying to make it clear that this is to encourage wide-scale development from businesses that open up their property to the public at large. This is a wild theory from California that has sufficiently spooked major companies in our state. It is important to tie that down. That is something we can discuss; I just have to work through it a bit. At first blush, I think we could tighten that language down to ensure it is not every homeowner in Nevada. I suppose as a homeowner that would not be a bad thing.

**Assemblyman Pickard:**

I really like this bill. Having handled quiet title actions myself, I understand how this can help. One point that I struggled with as I was reviewing the mock-up amendment ([Exhibit H](#)) was in section 3, subsection 2. It says, "Regardless of whether an owner of land has recorded a notice . . . no use of such land . . . shall ever ripen to confer upon the public or any governmental entity a vested right to continue to make such use . . . ." Then, in subsection 3, we grant them that exact right. If a governmental agency is using private land where they are contributing either maintenance or substance to it, after five years we give them that right. I read that a couple of times, and I see a potential conflict there. I was wondering if you were aware of that or maybe I am misreading it.

**Assemblyman Elliot T. Anderson:**

Legal counsel can also comment on this. The way that I read those subsections together is that section 3, subsection 2 is the general rule, and subsection 3 is the exception to the general rule—ensuring we are not getting in the way of utility easements or any other improvements that have already been constructed and by which the property owner has taken no action to enjoin. Visible improvements could be a road or they could be power lines. There are a lot of different improvements that I can think of that would fit into this category. In that case, I think that they are very visible; it is not just the general public. If you do not know that power lines or other utilities are being constructed for the public benefit on your land over five years, people start to rely on those improvements that the local government has taken the expense to provide, then we have to say you slept, you lost. That is the way I read that. Legal counsel might be able to shed some light on that as well.

**Brad Wilkinson, Committee Counsel:**

I agree completely with that analysis. Subsection 2 is the general rule and subsection 3 is the exception to that, in circumstances where you have a governmental entity making visible improvements, spending money, and the owner of the land taking no action in five years, even though the owner is aware that the improvements have been made and the money has been spent.

**Assemblyman Pickard:**

I just noticed there is a provision that states, "except as otherwise provided in subsection 3." That was my concern. I must have glossed over that.

**Assemblyman Hansen:**

For those of us who do not have the benefit of a property law class at the William S. Boyd School of Law, University of Nevada, Las Vegas, we need some explanations. Our colleague, Assemblyman Watkins, has some bills on this of which I am highly supportive. I have seen cases in Nevada where you have a county road going through a ranch, and on the other side of the ranch is another county road, maintained by the county. The rancher blocks the access to that road because it crosses his private property. I know we have had a prescriptive easement law for at least 20 years. When this issue came up years ago, I did some research on it. We also have weird laws like if you are in a navigable body of water, such as the Carson or Walker Rivers, if you put your foot on the bottom and touch land you can be, in theory, prosecuted for trespass; but if you are floating on top of the water then you are legally allowed to cross. There is a lot of confusion on this for a person like me.

Your bill is dealing almost exclusively in situations on the Strip, but I want to make sure it does not become broader. What I see happening in Nevada is some individual buying a tiny section of land at the bottom of a mountain range and the rest of the mountain range and the canyons behind it are public domain. Because of the inability to access public land due to this individual's purchase of property, the entire side of the mountain range is blocked from public access. How far does this go on the prescriptive easements side? My understanding of prescriptive easements is that if you have allowed the public to drive on a road that crosses

a section of private property surrounded by public land for a certain number of years, it is considered a legal easement.

**Assemblyman Elliot T. Anderson:**

I would note that with the mock-up amendment ([Exhibit H](#)), I was specifically trying to avoid changing prescriptive easements in Nevada. To help you understand what a prescriptive easement is, you have to prove several elements in a court to acquire a prescriptive easement. Prescriptive easement requires five years of open and peaceable, adverse use. There may be an element I am missing. In this case, I am seeking wholly to avoid those issues. I do not want to get into them. I do not want to alter prescriptive easements as they relate to an individual person, except in the cases where you have a property owner who opens up their property to the public.

You can think of malls that create things that look like roads. They look like main streets except they are private property. There are several locations in southern Nevada that I can think of. On the Strip, there are areas around T-Mobile Arena and the LINQ Hotel and the casino at Caesars Palace.

The problem when you get into an implied public easement theory is that it is an implied dedication or an implied public easement that grants all kinds of rights over someone's private property. It goes beyond the right to use property. If something is an implied public land and there is an implied public right, you start talking about all kinds of other rights that the public has on public land. This is seeking to tie that up. It is not seeking to get into the issue in most cases of prescriptive easement. The language, especially in section 3, seeks to get us away from altering every type of prescriptive easement across Nevada. The theory of a prescriptive easement applies when a property owner is "sleeping" and not doing anything and meanwhile people use the land and rely on it; that is generally the idea. It is not exactly the idea, that is more of an easement by necessity, but it is a similar concept. It is to punish property owners to prevent waste of land. That is why we have all these weird rules that make these strange distinctions.

**Assemblyman Hansen:**

I just want to make sure we are not blocking public access. I apologize for perhaps expanding the discussion beyond the scope of the bill. My goal is to expand the opportunity of the public to access public lands. There are too many cases where the public is blocked from its own land. I want to make sure for the record that this bill is not trying to eliminate those types of opportunities.

**Chairman Yeager:**

I invite you to continue to talk offline. With an assist from legal counsel, I believe the element you were missing is "continuous use" over the period.

**Assemblyman Elliot T. Anderson:**

I did mention five years; that is in a way "continuous." Maybe I was just splitting it.

**Assemblywoman Jauregui:**

I appreciate that this bill is limiting the backdoor claim to land or property. This may be far-fetched, but can a bank record this on all prospective real-estate-owned property at the time of recording a notice of default or notice of sale to limit squatter claim to that property? Real-estate-owned property could sometimes be on a portfolio for four, five, or six years.

**Assemblyman Elliot T. Anderson:**

The way the bill is drafted, I could see that affecting adverse possession as well. As to the adverse element that would apply in that instance for a whole home, that would be the whole bundle. As for prescriptive easement, it would be one stick. It contains the same element, which is hostile or adverse. Think of it the same way. The bill operates by expressly granting permission. That defeats that element as to the adverse or hostile elements. I think the way it is written the bill would do that, although we would have to discuss tying that down per Assemblyman Watkins' concerns.

**Assemblywoman Jauregui:**

If a bank did record according to section 1, subsection 1, at the time they record a notice of default or notice of sale, then they are granting permission to a squatter; so at the point when they need to remove them, they would not have any tenant rights.

**Assemblyman Elliot T. Anderson:**

I want to be very clear legally about what this would do. It would specifically defeat the finding of hostile or adverse elements. Whether it gives tenant rights or not, I am not willing to get into that. I do not think that would qualify as a lease. Personally, I do not think that is what that contemplates. It is specific as to a hostile or adverse element, in either adverse possession theories or implied easement theories with an easement by prescription. I want to be very clear on the record.

**Assemblywoman Krasner:**

It does remind me of real property classes. Prescriptive easement: continuous for a period of years; open and notorious; adverse and hostile; and without permission of the owner. Those were the four requirements I remember from law school. What you are doing here by specifically granting an implied permission is in complete contradiction to the purpose of what an easement by prescription is. The typical example is that there is a fence and some property that is owned privately, and kids always cut through that area to go fishing in the creek. After five or ten years, you can see that the grass is beaten down by the kids' footsteps and there is a path there. The owner has a responsibility. If a child falls on that path, the owner then has a liability. Besides taking away an easement by prescription, it seems like it would take it away in all instances; it opens issues of liability for the property owner.

**Assemblyman Elliot T. Anderson:**

I would note that the bill as amended would only seek to apply that to situations where the owner clearly opens up their property to the public. I want to keep bringing you back to the malls that are designed like pedestrian experiences outdoors and the situations where you have major development on the Strip that creates a pedestrian-like experience. The bill



as amended would not apply in the sort of situation about which you are talking. It does not seek to alter the classic prescriptive easement that you are thinking of. As for liability, I am not sure that is contemplated here. It is just seeking to defeat one element of prescriptive easement when you have an owner who opens up the property to the public.

**Chairman Yeager:**

I would invite you to talk more offline to get a comfort level with the bill.

**Assemblyman Ohrenschall:**

I have to caution you that the only reason I passed the Nevada Bar exam was that there was no property law question that year. My property law skills are certainly not as strong as those of some other members of the Committee. My question has to do with section 3, subsection 3 on the mock-up ([Exhibit H](#)). From the bottom of page 3 to the top of page 4: "Where a governmental entity is using private land by an expenditure of public money on visible improvements on or across such lands or on the cleaning or maintenance . . . shall after 5 years ripen to confer upon the governmental entity a vested right to continue such use." It is dependent upon whether the property owner knew or should have known.

For a hypothetical, let us say I inherit a small tenth of an acre parcel on Las Vegas Boulevard. A relative gets sick and I have to move to Connecticut to care for the aging relative. I pay my property taxes, but I do not make it back to Nevada for five or six years. During that six years on this tiny parcel of land on Las Vegas Boulevard there have been sidewalks, palm trees, and misters put in by the city or county. Does your bill change existing law in terms of that right to use it, that easement, that the city or county would have based on all these improvements they have put in? What changes under your bill versus current law in terms? What rights do I gain or lose with your bill versus current law?

**Assemblyman Elliot T. Anderson:**

I can make a good argument under the implied easement theories we have now that the sort of improvement you are discussing, and what subsection 3 means to make clear is allowed, could already happen. The reason that subsection is in there is to not rule out those improvements as they could currently vest under implied theories. Since I am creating a strong prohibition against this back-door theory I have been discussing, I wanted to make clear that when the public, municipalities, and other governmental entities have spent the time to do these improvements—people are relying on them and, for whatever reason, the owner slept on his or her rights—we are not trying to abrogate those implied theories as to when there has been a serious investment in improvements and no one has said anything for five years. It is similar to a prescriptive easement.

**Assemblyman Ohrenschall:**

In your opinion, nothing under subsection 3 would change the existing state of the law?

**Assemblyman Elliot T. Anderson:**

I am not comfortable making that broad of a statement on the record. I would go back to my discussion with Assemblyman Pickard on that. Section 3, subsection 2 creates a strong



general rule that seeks to shut off the implied easement theory that I have been discussing. Subsection 3 ensures that when there has been an investment by a governmental entity that has created visible improvements for over five years and no one has said anything, in that case, the investment does not go to waste and the use would be allowed.

**Chairman Yeager:**

Is there anyone who would like to testify in support?

**Mandy Shavinsky, representing MGM Resorts International:**

I am also a member of the executive committee of the State Bar of Nevada Real Property Law Section. I have had the honor of testifying on behalf of bills drafted by members of the Real Property Law Section in many prior sessions, some of whose members have provided comments to this bill already. Those are already incorporated in the mock-up that you have received. As Assemblyman Anderson stated, A.B. 380 is patterned from statutes that presently exist in California: California Civil Code Sections 1008, 1009, and 813.

The purpose of A.B. 380 is twofold: to prevent public dedication of private property that has been opened up to the public for certain uses, subject to the exceptions to protect governmental agencies, about which we were just talking. In addition, it is to prevent the establishment of prescriptive easements in situations where private property owners have opened up their property to the public for certain uses. Assembly Bill 380 encourages owners of private property to continue to make their lands available for use to supplement opportunities that are available on tax-supported, publicly-owned facilities without being confronted with the possible loss of their property rights, by either public dedication or prescriptive easement. As Assemblyman Anderson stated, A.B. 380 is not intended to impair or restrict prescriptive easement rights set forth in *Nevada Revised Statutes* (NRS) Chapter 11.

Property owners in Nevada already borrow from California in some instances. You will see both up north and down south, in pedestrian areas that are privately owned, people will post signs that they think may help them in the event of a claim of public dedication or prescriptive easement. Presently in Nevada, there is no clear statutory authority or case law in a nonrecreational context that protects private property owners who open their property up for use by the public. I should note that NRS 41.510 does protect property owners for the establishment of prescriptive easement rights in a recreational context. That is camping, hunting, fishing, and things like that. It really does not address a situation like the one we are talking about here where a pedestrian mall or gathering place has been constructed. Those areas are frequented by members of the public and large groups of tourists and locals. I think it might help if I can answer some of the questions that many of you have had.

**Chairman Yeager:**

That would be okay, but I would just ask that you keep your answers brief. We do have a few more bills to get to this morning.

**Mandy Shavinsky:**

I am sure you have other things to do. I know the lawyers on the Committee are probably having flashbacks to 1L property law, which I was just having. I will combine Assemblymen Hansen's and Watkins' concerns into one. This bill is only intended in situations where the property owner wants to open their property to the public. They are telling people to treat this as a public area, but they want some protections in return. It is not intended to apply to situations where there is a traditional prescriptive easement being claimed. Perhaps where property owner B has a house, property owner A has property in front of it, and property owner B has used a road for a number of years—in excess of five years—and property owner A has not done anything about it. Those are not situations that Assemblyman Anderson is trying to address, nor does he want to address.

As for liability, I do not think the liability changes. This property owner has opened their property to the public for the public's use subject to reasonable limitations because it still is private property. The liability aspect is not any different than if it was private property. If somebody falls and breaks their leg on this property and they want to sue the property owner, they have every right to do so. If it is determined that the property owner has been negligent in some fashion, it is the same thing that it would be whether this legislation existed or not. It is not intended to address liability in any circumstance.

It really does require the property be opened up to the public. This is what the property owner wants to do; they just do not want an implied public dedication because they are opening their property up to the public for their use. If a private property owner was to record this language in every instance, they would essentially be saying that their property is open to the public to traverse or use, subject to reasonable restrictions. I do not know that anyone would have any incentive to do that because they would be giving away some of their private property rights. I do not know that a bank or other private property owner who does not want the public on their property would necessarily want to do that. I hope that helps and I am happy to answer any questions you may have, understanding that your time is valuable.

**Chairman Yeager:**

I do not think we have any questions, but feel free to submit anything you have in writing as well. I would invite Committee members to follow up with either Assemblyman Anderson or Ms. Shavinsky with additional questions. Is there anyone else who would like to testify in support? [There was no one.] Is there anyone who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in the neutral position? [There was no one.] I would invite Assemblyman Anderson back up for concluding remarks.

**Assemblyman Elliot T. Anderson:**

I want to mention one thing I forgot. The Real Property Law Section did look over this provision. It was in a formal review process. To be clear, that is not an endorsement. The members of the Section did look it over. This is trying to tie down a narrow theory that provides uncertainty to developers in this state. I would be happy to continue this conversation to tighten the language up to ensure we are targeting the specific intent and not

completely altering Nevada property law and making it even more difficult for first year law students.

**Chairman Yeager:**

We will close the hearing on Assembly Bill 380. We will move on to our third bill, Assembly Bill 411, and formally open the hearing on that bill.

**Assembly Bill 411: Revises provisions governing employment with a department of juvenile justice services. (BDR 5-1029)**

**Richard P. McCann, Executive Director, Nevada Association of Public Safety Officers:**

There is an amendment ([Exhibit I](#)) from Clark County on the Nevada Electronic Legislative Information System (NELIS). It is not going to get us where we need to go, but I am thankful for Mr. Jack Martin, Director of the Clark County Department of Juvenile Justice Services. We are trying to work this out and I am confident we will. Thank you for allowing us to have this hearing on record and maybe we can get this worked out shortly.

This bill is reflective of two statutes: *Nevada Revised Statutes* (NRS) 62G.223 and NRS 62G.225. The original bill [Assembly Bill 217 of the 77th Session] that was put into effect in 2013 has noble intentions with which we do not disagree. What *Nevada Revised Statutes* 62G.223 does is simply set forth a process by which people who work in the juvenile justice system are going to be investigated to make sure they are the kind of people you want working with your kids. I have no problems with that. The theory is that if a person who works in the juvenile justice environment is arrested or convicted of certain criminal actions—there is a litany of about 14—they should not be working with the kids. We do not have a quarrel with that overall process either.

The only thing we want to do is say that if we have someone who is arrested for a particular violation of criminal law, and they happen to work in the juvenile justice system and have charges pending against them, not a conviction, then we should make sure before they are disciplined, up to and including termination, that they are terminated for "just cause." All we want to do is add that their termination of an employee, if it is based upon an arrest, is in fact based upon a showing of just cause. Just cause is the foundation of what we negotiate our labor agreements with, it is part of Clark County policy, and it is part of NRS. Under all those instruments, it says you cannot be terminated unless there is just cause to do so. We spend a lot of time worrying about the rights of people who are charged with crimes. They do have rights, they should have rights, and so should people who, in the employment context, have the right to say, "If you are going to fire me, let us at least have a hearing. At least let us have just cause."

We then move from being charged with a criminal event to being convicted. There are some heinous things on that list under NRS 62G.223. There is murder, sexual assault, arson, embezzlement, abuse of elders, and others. You are not going to have any argument from us that if you are convicted of one of those crimes, you should be doing something else besides

being involved in working with kids. We are not here to say you should not be punished. There is a difference between a conviction and just being charged.

I give Clark County credit; they have offered us an amendment ([Exhibit I](#)). You have seen it on NELIS, and we are proceeding with additional language on that amendment that would take one element out and make it not necessarily one of the higher crimes—that would be misdemeanor driving under the influence (DUI). I am not, nor is the County, going to sit here and tell you that a misdemeanor DUI is not a bad thing; it is. By the same token, it is not something that without just cause should be the immediate death penalty of one's career. That is what we are asking. We are putting an exception to this whole process into NRS 62G.225. Our thanks to Clark County for working with us, and we will continue to work with them on the appropriate language.

The bottom line is we want to make sure that if somebody is going to be fired for something, there is just cause. How many statutes are there that say you can be fired for the following reasons? Is that not something we deal with within the departments themselves? We do not have too many statutes that say, Do this, get fired. We have a lot of statutes that say, Do this, and have consequences, but not to get fired. If we are going to have a statute that says if you do these things you will be fired, even if you are just alleged to have done them, you will be fired, let us make sure we have due process, which is just cause.

**Chairman Yeager:**

I appreciate, due to time constraints, your willingness to present this today. I know we are not quite there, but I wanted to make sure we had time to have a hearing.

**Assemblyman Pickard:**

Are we talking about jobs that are subject to a collective bargaining agreement (CBA) or are these at-will positions?

**Richard McCann:**

Because they are in public safety, they are all subject to CBA. All of the CBAs have a just cause provision, as does Clark County policy, as does Nevada state law.

**Assemblyman Thompson:**

I do not know if you want to answer or if Clark County does. Going off of what you said about using just cause as a person's due process, the way I am reading it, it creates a subdivision of a person who is, or may be hired, by prohibiting them from operating a vehicle. Can you explain that a little more?

**Richard McCann:**

I believe you are looking at section 1, subsection 5 of the amendment ([Exhibit I](#)). That is still undergoing some construction in our continued talks to try to get this amendment worked out. They refer to "subparagraph (12) of paragraph (a) of subsection 1 of NRS 62G.223." That is a misdemeanor DUI. In that area, Clark County is willing to work with us by saying if you happen to have a charge, or a conviction, of a misdemeanor DUI,

we are going to work with you by not terminating you, but by providing an alternative to driving around our kids.

**Assemblyman Thompson:**

My question is with it saying, "pending charges for or a conviction." I would think that the pending charge would be extracted from this. The conviction part I can understand. I guess it goes back to the just cause that you are putting in the pending charge. We are judging the person before they have been officially prosecuted.

**Richard McCann:**

You are reading our minds, Assemblyman Thompson. We have now taken subsection 5 and made it into subsection 5, paragraphs (a) and (b): one for the charges and one for the convictions.

**Assemblyman Wheeler:**

We are a right-to-work state. In private business, even in California, I was able to fire someone because I did not like the part of his or her hair. Obviously, you do not do dumb things like that because you want to keep good people; I am just carrying it to an extreme. I am wondering why Clark County would be any different. Why would they not be able to come in and say, "I am sorry, you should not be dealing with our kids. You are not right for this position, so we are going to let you go."

**Richard McCann:**

We have contracts. In at-will situations, you do not have a contract of employment. These collective bargaining agreements are contracts of employment. They provide the distinct basis upon which these people are employed, one of which was that you cannot become unemployed unless there is a due process and a just cause determination made.

**Assemblyman Wheeler:**

So this is contractual? We are putting contractual law into NRS?

**Richard McCann:**

What we are trying to do is say, if we are going to have a statute that says "thou shalt not do things or you get fired," we want to make sure that our contractual provision of just cause is also added. We do not want there to be a competition between the statute not saying that they need just cause when they have a contract that does. If we are going to have a statute that says I can be fired for something, then it should be a just cause determination, because that is what our contracts say; in fact, that is what state law says.

**Assemblywoman Cohen:**

Can you discuss the Federal Bureau of Investigation (FBI) reports? How difficult is it to get them fixed if there is a mistake in the reports?

**Richard McCann:**

It depends on the situation. We have had situations in which people have come back with "hits" indicating that they had a DUI or some form of domestic violence or otherwise. We came to find out that it was not the correct person. When the Department of Juvenile Justice or Family Services did the report, they were a witness and were reported as having been a subject. They go back and show that and they can correct the record. It depends on if you can correct it, what documents you will need, and how long ago it was, but it is certainly correctable. We have had several people correct those records because they had been in error—in good faith, but in error. They have corrected them and we are not sitting here talking about them today.

**Chairman Yeager:**

Is there anyone who would like to testify in support? [There was no one.] Is there anyone who would like to testify in opposition?

**John "Jack" Martin, Director, Department of Juvenile Justice Services, Clark County:**

We do oppose this bill. We helped write this bill in 2013 when it passed 61 to 0 because of the thought around protecting our children and developing a standard for peace officers in a law enforcement agency. I would seek one point of clarification on whether they are subject to CBAs. Assemblyman Pickard, I am also subject to this bill and I am an at-will employee. Several of our employees who are not covered by the CBA, or choose not to be covered by the CBA, are also covered under this bill. With that small point of clarification, I would say that Mr. McCann and I are working through some language and we hope to have that to you by the close of business today. We are waiting for some legal opinions on our side. I do oppose the bill, but I hope we can find a resolution very quickly.

**Chairman Yeager:**

Thank you for being willing to have the hearing today and work on the bill going forward. Is there anyone else who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in the neutral position? [There was no one.] I would invite the presenter back up for any concluding remarks.

**Richard McCann:**

One thing I did not say before, and it may not have relevance to your decision-making process, but there is a population cap on this. This bill only applies to Clark County if I did not make myself clear when referring to Clark County and Mr. Martin. It is, in fact, a county situation. The population cap put into this legislation four years ago indicated it only applies to Clark County. I wanted to clarify my presumption that you knew this was just a Clark County situation.

**Chairman Yeager:**

We will formally close the hearing on Assembly Bill 411. I am going to turn the meeting over to Vice Chairman Ohrenschall and make my way to the table for the next bill.

[Assemblyman Ohrenschall assumed the Chair.]

**Vice Chairman Ohrenschall:**

We will now open the hearing on Assembly Bill 412.

**Assembly Bill 412: Revises provisions relating to the jurisdiction of courts over certain criminal charges. (BDR 14-601)**

**Assemblyman Steve Yeager, Assembly District No. 9:**

Assembly Bill 412 seeks to make our criminal justice system fairer. It does so by trying to make sure our judicial system treats similarly situated defendants similarly, regardless of where they are arrested.

An example might help to illustrate what I perceive to be the inequities in the system. Let us say you are arrested in unincorporated Clark County on the Las Vegas Strip. You are charged with multiple crimes, some of them serious felonies, and others not so serious misdemeanors. In that circumstance, all of your charges are going to be filed in one court—Las Vegas Justice Court. You will have one defense attorney, one prosecutor, and one judge initially overseeing your case. In crafting a negotiation—and remember, 99.8 percent of these cases do negotiate—everyone involved has a complete picture of all of your charges. They have jurisdiction over all of those charges when crafting that negotiation. That is currently the situation in unincorporated Clark County and other parts of the state.

Let us move the events of this case to downtown Las Vegas, to Fremont Street, under the Fremont Street Experience. Now you are in the City of Las Vegas. Let us say you get arrested for the same exact thing—you have serious felony charges and not so serious misdemeanor charges. Now you are going to have two separate cases in the system. The serious charges, the felonies, are going to go to Las Vegas Justice Court. The misdemeanors will be filed in Las Vegas Municipal Court, a different court system. Now you have two prosecutors, two defense attorneys, and two judges. Neither prosecutor can bind the hands of the other prosecutor in negotiating your case. Neither judge can tie the hands of the other judge. You are going to have two separate proceedings. The outcome of these two scenarios can be very different due to having two different prosecutors and two different cases.

This is confusing for criminal defendants. If they are arrested and taken into custody, they may not even be aware of the case in the city. If they are arrested on a serious felony charge and they are in the county jail, they are not going to be transported to city court to take care of that case. That simply does not happen. While they are sitting in county jail fighting the more serious charge, the misdemeanors that are in city court are going to go into bench warrant status, meaning there will be a hold placed on them at the county jail.

The hold is a problem for the following reasons. In negotiating the more serious case, let us assume that everyone agrees the defendant should receive inpatient drug treatment. That person cannot be released to be transported to drug treatment if there is a hold on the person. That is going to delay entry into programming. Practically speaking, what would happen is the county jail would release the defendant; the defendant would then be transported to the city jail where they would wait, perhaps a few days, before going before

that judge and having to resolve a related misdemeanor case. If the district court gives a defendant probation and says, "We would like you to start probation. You are to report within 48 hours," and there is a hold from city court, they are not going to be released. They are going to be transported to city court and deal with that before they can start probation, regardless of whether the criminal conduct came from one event or not.

Let me give you a real world example that I dealt with not too long ago. I had a client who was arrested in the City of Las Vegas. This exact scenario happened where misdemeanor charges stayed in the city court and the felony charges came to justice court. I represented this individual in the justice court on felony charges. We went all the way up to district court. We went to a jury trial on that case and the jury found him not guilty on the charges. He had been in jail the whole time—about a year and a half in jail, marching our way toward trial. Once the jury found him not guilty, the judge ordered that he be released. However, he was not released, because he had a hold for a misdemeanor that was directly related to the conduct for which he was found not guilty. Instead of securing his freedom, he was then transported to the City of Las Vegas to have to deal with this misdemeanor offense. He was found not guilty in district court of the same facts that constituted the basis of the misdemeanor offense. You might think that we could solve that by me simply going to the City of Las Vegas attorney and saying, "Look, he was found not guilty. That should take care of this charge." I wish that were the case. It did not happen that way. We had to go through the entire process in municipal court and fight the municipal court case. Again, the judge there agreed that he was not guilty and released him.

Why do we do that to defendants? It seems very unfair to be able to split the cases like that. It is a problem for defense attorneys, too, at least for the public defenders in Clark County. We are county employees so we are not supposed to appear in city jurisdictions. We are only to handle matters in Las Vegas Justice Court, which is the county jurisdiction. I cannot tell you that we never go to municipal court to handle related misdemeanors, but we are not supposed to. Frankly, we do not have the time to do that and we do not have the time for the extra work. In addition, it can be very difficult for defense attorneys to get information about what is happening in the municipal court. We do not have any information-sharing in this state where we could look at a database to see what is the charge. We have to go through the public process in trying to figure out if there is a case. The truth is that most defendants understandably believe that when they are arrested, all of their charges are going to be in that one case. Even when you explain that there may be different jurisdictions that have different charges, it can be very frustrating and difficult to understand.

There is a mock-up of the bill ([Exhibit J](#)). The bill as it originally came out did not align exactly with what I was intending to do. First, if you look at the mock-up, I want to make clear that this only applies to cases going to justice court when there is a related misdemeanor. We heard a little today about a grand jury proceeding in which a district attorney can skip justice court and go directly into district court. That does happen. I do not intend for misdemeanor charges to be in district court. That is not the place for them. They need to stay in justice court because you do not have a jury trial for misdemeanors.



This bill, and the mock-up, would be limited to those situations where we have a justice court filing with a related misdemeanor that would otherwise go to city court. If the misdemeanor is based solely on the violation of a city ordinance, and not on *Nevada Revised Statutes*, it should stay in city court. The city ordinance violation should stay in city court. It just makes sense that they should be prosecuted by the city attorneys.

The third change is that I would like some language stricken on page 2, lines 10-12. That is just for ease of application. What I intend for this bill to do is if there is one arrest, from one event that includes felonies and misdemeanors, those should all go to justice court. If there are multiple arrests at different times, even if it is a course of conduct, I am not trying to capture all of that. It provides a procedural difficulty in figuring out how to file those cases. This bill is about fairness, it is about equal justice, and it is about streamlining our criminal justice system.

**Vice Chairman Ohrenschall:**

I personally have seen examples where someone faced charges in justice court and in municipal court out of the same set of circumstances. The district court was part of the negotiations that approved them for drug treatment, perhaps inpatient drug treatment, but they have this outstanding misdemeanor charge in municipal court that precluded them from entry into the drug treatment program. An example is a young adult goes for a joyride in the parent's car without permission. The parent reports the car stolen. The young adult is then charged with theft of a car, and also not having a valid license. The latter is a misdemeanor charge in municipal court. The current system impedes efforts at global negotiations of trying to resolve everything and to see if someone can get into a program that might help him or her.

**Assemblyman Hansen:**

Why do we need municipal courts? Why could we not convert municipal courts into justice courts? It is almost like a holdover from a past time. What do they do that is unique enough that you could not convert them?

**Assemblyman Yeager:**

That is a good question. We certainly could do that. Municipal courts are created by the *Constitution of the State of Nevada*. They have jurisdiction over the misdemeanors that occur within the city limits. I appreciate that suggestion. I am not trying to go that route.

**Assemblyman Hansen:**

I wanted to find out from you legal beagles if there is some reason we have municipal courts that makes them unique or necessary? If they perform some special function then it would make sense having this dual system where you run into this roadblock. Justice courts also handle misdemeanors, so why do we have to have this separate, confusing thing? For a nonprofessional, it is confusing. What does a municipal court do that you do not also do in justice court? It is just a thought. Your bill makes sense. I almost want to go further and say why do we not open the window and clean up some other stuff.

**Assemblyman Yeager:**

You make a good point. That is particularly true in Clark County with the City of Las Vegas. If you have ever seen a map of what constitutes city territory, not only is it confusing, but there are also little pockets that are city and not county. It makes little sense to me that I could cross the street, and if arrested for the same conduct, I have two cases in two jurisdictions, and they will be handled very differently. With respect to the municipal courts, they have a large volume of misdemeanors. If we were to transition those to justice court, there would be a resource need to expand justice courts. My vision with this bill is for those limited circumstances where we have more serious charges with an attached minor charge that can go to justice court. It is not going to increase anyone's workload because justice court is already getting that case; they are just getting another charge with the case. I am interested in talking about it. Perhaps the municipal courts might want to weigh in with something as well.

**Assemblyman Hansen:**

Having been where you are, I know you do not have much time on your hands to correct some of these things. It is a great bill, but I would be interested in seeing it done right.

**Assemblyman Pickard:**

As I understand it, right now the justice court has jurisdiction over all misdemeanors so they already have the jurisdictional question. I am wondering where that jurisdictional boundary is for municipal courts. Why are we not hearing all misdemeanors under the municipal court under that scenario?

**Assemblyman Yeager:**

We have a couple different situations here. For unincorporated Clark County, there is no municipal court because it is not a municipality. Misdemeanors that happen there are already coming to justice court. The way the system is set up now, municipal courts have exclusive jurisdiction over misdemeanors committed within the municipality boundaries. If I commit an offense within the City of Las Vegas or Henderson, it has to go to municipal court under the way it is currently written. What this bill seeks to do for those attached misdemeanors is to carve out jurisdiction from the municipal court and give it solely to the justice court. Under existing law, I do not think the justice court could grab all of the misdemeanors because they do not have jurisdiction over the misdemeanors that are occurring within city boundaries.

**Assemblyman Pickard:**

I recognize that. If this is occurring within the municipality, is there a jurisdictional limit for what the municipality can hear in terms of the misdemeanors? I thought they were coextensive in terms of what they could hear.

**Assemblyman Yeager:**

The municipalities have jurisdiction over all of the misdemeanors and that is it. They cannot hear anything else; no gross misdemeanors, no felonies. Right now, any misdemeanor has to go to municipal court. There is no ability for the justice court to reach in and grab a case out.

That is the same reason there is no ability for a judge or district attorney on the justice court level to tie the hands of a judge. This bill seeks to carve out that one circumstance, to say that, for the sake of fairness, we should keep the charges together.

**Assemblyman Pickard:**

I am not being clear. We know that neither the justice court nor municipal court has the ability to hear felonies. Those go to district court. I recognize trying to pull all of those together. That makes sense. I was wondering within the context of only being charged with a misdemeanor or gross misdemeanor, that will always go to the municipal court, correct?

**Assemblyman Yeager:**

Not quite correct. You are correct in the sense that felonies and gross misdemeanors, if they are going to go to trial, do so in the district court. Even the felonies and gross misdemeanors start in justice court. That is where the filing and the initial determination for probable cause is actually made. What this bill would do is say that in the instances where those serious cases are going to a justice court, we must attach onto them the related misdemeanors. As a procedural point, let us say that it does not get negotiated in a way where the misdemeanor gets dismissed; you are going to go to trial on it. What would happen procedurally is the misdemeanor would stay in justice court, sit there, and trail the district court proceeding to see what happens at the trial. It would probably get negotiated in some way or potentially would have the trial in justice court in front of the judge.

**Vice Chairman Ohrenschall:**

I was thinking what a savings this would be for judicial resources, prosecutorial resources, and defense resources. Take that example of the person who admits he stole his parent's car. He is in his early 20s, high on drugs, and needs drug treatment. He takes a negotiation and spends two or three months at county jail waiting for this to go through. Then he has to be transferred to city jail to deal with the misdemeanor charge of driving without a license for the same occurrence. That is a waste of all of our resources not to have that negotiated at once. Is there anyone who would like to testify in support?

**John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:**

This bill will greatly affect the way things are done, especially down south. Another scenario was briefly highlighted, but I just want to highlight it a bit more. When you have that situation where there are split charges for the same conduct and you have a municipal court misdemeanor, we try to get our clients into specialty court as the basis of the negotiation to wrap up all of the charges. What will happen is there is a bench warrant from the municipal court, because the justice court will not transfer the client from Clark County Detention Center (CCDC) to the municipal court, which is generally in the same courthouse. When our case gets negotiated, he or she has a bench warrant and they then have to go to the city jail. That is done at a cost of \$125 to \$150 a day to taxpayers. Moreover, if they are a person who requires medication because of a mental illness, they will not get that treatment while at the city jail. When they come back to CCDC, we have to spend extra time getting them on the medication again and restabilized before we can put them into the

specialty court. This process drags out cases unnecessarily long. It becomes problematic to get all the cases dealt with, get the client on the right track, and close things out. We are grateful that this bill has been brought forward and we are in full support.

**Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:**

I believe this bill streamlines the process of filings and helps with the resolution of cases through the plea bargaining process by giving everyone involved a clear picture of the charges at play. I especially agree with Chairman Yeager's point about holds being placed on our clients and how problematic that can be for us as practitioners despite the fact that I am in district court arguing my heart out at a bail hearing or to have my client released. Even if I am successful and the district court judge says, "Yes, Mr. Sullivan, you win. I am going to send your client to inpatient drug treatment in northern Nevada," I then realize that person has a hold at city court. It is extremely frustrating. It causes us as practitioners to get involved and start calling all of the other players in city court. It creates a new level that delays justice, in my opinion.

I recently learned about one of my colleagues at the Washoe County Public Defender's Office actually going into city court, appearing before the municipal court judge, and being chastised by that judge. I even think there is a statute that says Mr. Piro and I are not authorized to go into city court and litigate on behalf of our clients. This municipal court judge chastised one of my colleagues for appearing as a Washoe County public defender in municipal court. Once the judge realized that the public defender was attempting to act within the best interests of the client, being so frustrated with the system as-is, he allowed them to speak and present a case but asked them not to do it again.

This bill is a huge benefit to us in the defense bar and it will streamline the process. It will prevent these delays in justice. We are in full support of this measure.

**Vice Chairman Ohrenschall:**

Is there anyone else who would like to testify in support? [There was no one.] Is there anyone who would like to testify in opposition?

**Michael J. Oh, Senior Assistant City Attorney, Civil Division, City Attorney's Office, City of Henderson:**

We appreciate the intent of the bill to address the concerns presented for individuals who have been charged with both a misdemeanor and a felony arising from the same arrest and who are subject to the authority of two separate jurisdictions. We thank the sponsor for meeting with our lobbying staff and for submitting the amendment to clarify how this bill would be applied. However, the City of Henderson still has concerns about the impact the bill will have on the City of Henderson if passed.

Henderson Municipal Court has two specialty courts—Veteran's Court and an Assistance in Breaking the Cycle (ABC) Court. Both the Veteran's Court and the ABC Court combine alcohol and other drug treatment services and are intensive programs where the prosecutor, defense attorney, and the court work together to assist an individual in rehabilitation

to become a productive citizen. If misdemeanors that are connected to a felony or gross misdemeanor charge are filed in justice court, then the opportunity of persons who qualify for these specialty courts will not be available.

Additionally, this bill will take away some of the city's ability to enforce traffic violations that occur in the city when they are connected with the commission of a gross misdemeanor or felony.

Finally, the City of Henderson has a misdemeanor probation department pursuant to *Nevada Revised Statutes* (NRS) Chapter 211A, which allows municipalities and local governments to create a department of alternative sentencing. That department monitors people who have presentencing conditions or who have been sentenced to probation. The misdemeanor probation department monitors individuals who have conditions, and communicates with the court to advise of the progress and to assist in the successful compliance with conditions imposed on an individual. The misdemeanor offenses affected by this bill would not be eligible for monitoring by the misdemeanor probation department, resulting in a decline in the success rate of compliance with conditions and chances of rehabilitation for an individual charged with a misdemeanor crime.

We would like to work with the sponsor of the bill to find a solution where the goal of this bill can be accomplished while minimizing the impact to the municipalities.

**Assemblyman Pickard:**

Assuming that we are not talking about a simple traffic ticket but about a significant misdemeanor that was pulled up to the justice court level, is it your position that the recommendations of the justice court's probation department would be insufficient to meet your needs?

**Michael Oh:**

For the probation department at the misdemeanor level, they do not have the ability to work with the justice court systems. They are not giving any recommendations or communicating with justice courts for misdemeanors.

**Assemblyman Pickard:**

My understanding is the justice court has their own probation people. Are you suggesting that their probation requirements in working with these defendants would be insufficient under your standards?

**Michael Oh:**

If you are asking if the justice court's misdemeanor probation department would be sufficient to meet our requirements, I am not familiar with any of the probation departments available in the justice courts. I am most familiar, and work closely with, the probation departments in the City of Henderson.

**Vice Chairman Ohrenschall:**

Let us say someone has that situation we discussed earlier, where they are charged with the theft of a vehicle and a misdemeanor driving without a license offense within Henderson city limits. They take a negotiation that might lead to probation with inpatient drug treatment for the felony theft of a vehicle charge. Unfortunately, because the charge for driving without a license is in Henderson Municipal Court, that is not resolved as part of the global negotiations. Either drug treatment is delayed or the bed at the drug treatment center is given to someone else because this person has an outstanding bench warrant in Henderson Municipal Court. I just wondered what benefit the Henderson City Attorney sees in a process like that under the current state of the law.

**Michael Oh:**

I can speak as to Henderson's process. When someone is arrested and booked under a misdemeanor traffic violation and has an associated felony or gross misdemeanor, the misdemeanor offenses that would be heard in municipal court are placed on calendar within 24 hours, depending on what time they are booked in the Henderson Detention Center. They will then be heard by the Henderson Municipal Court the next judicial day, with the exception of weekends—in which case they are heard the following Monday after a Thursday night or Friday arrest. The misdemeanor traffic violation would be placed on calendar for them at least to have the arraignment to decide whether they will enter a plea as it relates to the traffic offense. If there is a case where the person is no longer in our custody, I know that our prosecution department does try to track the charges at the county and keep the court informed. The court does inquire if we have any further information as to where the charged individual is at, what the city's intentions are, and asks for our recommendations.

**Vice Chairman Ohrenschall:**

When that defendant is not in the custody of Henderson and a negotiation has been reached in justice court, does your office normally dismiss those charges, so that they will not have an outstanding bench warrant on that minor traffic charge that might prevent them getting into drug treatment or proceeding with whatever the sentence is in district court?

**Michael Oh:**

Oftentimes, if the individual is still in custody, they will submit paperwork to the municipal court referred to as a "kite." The city attorneys would then make a recommendation depending on the circumstances. If it is a traffic negotiation, they will offer some type of resolution, whether it is a fine or credit for time served. It has been a while since I have worked in the criminal division, but there is an opportunity there for individuals who have cases pending in municipal court who also have cases being resolved at the district court level.

**Assemblyman Elliot T. Anderson:**

I do not have a question, but I wanted to acknowledge Mr. Oh. I used to work with him at the City Attorney's Office in Henderson.

**Vice Chairman Ohrenschall:**

Is there anyone else who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in the neutral position?

**Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:**

I did not plan on testifying on this bill, but we are neutral because we believe it is more of a procedural issue. However, some thoughts came to mind that I thought I should clarify or put on the record. From a logistical standpoint, it makes perfect sense if someone is arrested in the city with a misdemeanor city offense and a felony, they go to the Clark County Detention Center to have both of those issues handled in the county. On one hand, there could potentially be a cost to CCDC. It would be hard to determine what that cost would be. For example, a person is charged with domestic violence and when they are placed into custody and searched, they have heroin on them. They get a felony heroin offense and a domestic violence offense. It occurs in the city and they are transferred to the county jail and booked. The heroin case, for whatever reason, is dismissed, but they still have the domestic violence charge. Under the current system, they would go to the city court for the domestic violence charge. They are found guilty under the domestic violence charge and the judge says, "I am giving you 30 days. You are going to do your 30 days in the city jail." Under this proposal, they would then serve those 30 days in the Clark County Detention Center. We would then bear the cost of that. It is hard to determine how often that scenario happens and what the potential impact would be. I do not believe we currently track the outcome of those cases that go to the city and what that cost might look like.

Section 1, subsection 2, paragraph (b) says: "A charge of a misdemeanor which meets the requirements of this subsection and which is erroneously included in a complaint that is filed in the municipal court shall be deemed to be void ab initio and must be stricken." In the case I described of a domestic violence complaint where the guy was found to have some heroin in his pocket, if that case was erroneously put into municipal court rather than the county, we would strike and void that domestic violence. This is a procedural issue, but from a public safety standpoint, it would be better if there were an effort to try to transfer that case to the county rather than just strike it.

**Vice Chairman Ohrenschall:**

While it might have a cost impact on CCDC, would you agree that the overall time in transferring somebody to the City of Henderson or the City of North Las Vegas would be less, in terms of all of the taxpayers in Clark County? If somebody can negotiate and not have someone spend three months at CCDC and then be transported to city jail for however long it will take to get that resolved, there would be less time in custody overall.

**Chuck Callaway:**

Yes, theoretically somebody has to bear the cost—either the city jail or the county jail. Under our current funding formula, the city pays for a portion of our funding and the county pays for a portion of our funding. In essence, it is six of one, half a dozen of the other. As for direct costs to the Clark County Detention Center under the sheriff's purview, there

could be additional costs if those individuals spend their sentence in CCDC rather than another facility. Yes, if someone is going to bear the costs, there could be savings as far as transporting from here to there, but my understanding is that we do transports to different jurisdictions on a daily basis anyway. It would be a potential bed cost for someone sentenced to the detention center, as opposed to having them sentenced to municipal jail.

**Vice Chairman Ohrenschall:**

I think there would be a cost savings, too, with not having someone spending extra time at a municipal jail after having spent time at a county jail.

**Chuck Callaway:**

In this scenario, it would be a cost savings for the city jail because they would be serving their time in the county.

**Vice Chairman Ohrenschall:**

I know we do not look at everyone as one big pie, but if we did, it would be an overall cost savings for our taxpayers. Is there anyone else who would like to testify in the neutral position? [There was no one.] I would invite Assemblyman Yeager back up for any concluding remarks.

**Assemblyman Yeager:**

I am certainly willing to work with anyone else in tightening up some of the language and some of the mechanisms in this bill. We wanted to have a hearing and went with what we thought was the best, but I am certainly open to discussions. What you sensed was some frustration. I would be lying if I said the justice court and the municipal court had a great working relationship. The communication is not always there. Some of the municipal courts, particularly in Clark County, are only open four days a week, and that makes it more difficult to get information.

I want to highlight a couple of things for the Committee. The stand-alone misdemeanors already in municipal court are going to stay there. They would have the option of going into any of these fine programs in the City of Henderson about which Mr. Oh talked. We are talking about a very small number of cases where there is something more serious going on. In those cases, the defendant is probably not going to qualify for a misdemeanor diversion court if they have felonies and gross misdemeanors pending elsewhere. I do not think this will have an impact there. I do want to acknowledge Mr. Oh. We have worked together on a couple of matters over the years.

I also wanted to address Mr. Callaway's concern over a complaint filed in the wrong jurisdiction being stricken or void. The way I envision that working is, we are already going to have a more serious case filed in justice court. If for some reason the misdemeanor was erroneously filed in municipal court, it would be stricken and refiled, or an amended charge could be filed in the justice court. I do not think we have a situation where no charge would be possible; it is just a question of the proper jurisdiction.



[All items submitted but not discussed will become part of the record: ([Exhibit K](#)).]

[Assemblyman Yeager reassumed the Chair.]

**Chairman Yeager:**

We will formally close the hearing on Assembly Bill 412. Would anyone like to give public comment? [There was no one.]

This meeting is adjourned [at 10:35 a.m.].

RESPECTFULLY SUBMITTED:

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Erin McHam  
Committee Secretary

APPROVED BY:

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Assemblyman Steve Yeager, Chairman

DATE: \_\_\_\_\_

## EXHIBITS

[Exhibit A](#) is the Agenda.

[Exhibit B](#) is the Attendance Roster.

[Exhibit C](#) is a copy of an excerpt from *Nevada Revised Statutes* 178.405 in regard to Assembly Bill 377, submitted by Assemblyman Steve Yeager, Assembly District No. 9.

[Exhibit D](#) is a proposed amendment to Assembly Bill 377 from the Nevada District Attorneys Association, submitted by John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association.

[Exhibit E](#) is a proposed amendment to Assembly Bill 377, submitted by Steven Cohen, Private Citizen, Las Vegas, Nevada.

[Exhibit F](#) is a letter dated April 4, 2017, in support of Assembly Bill 377 to the Assembly Committee on Judiciary, authored and submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice.

[Exhibit G](#) is a document titled "Prescriptive Easements in California," by Lou Segreti, Mike Whitton and Andy Puls, regarding Assembly Bill 380, submitted by Assemblyman Elliot T. Anderson, Assembly District No. 15.

[Exhibit H](#) is a mock-up of proposed amendment 3437 to Assembly Bill 380, dated April 4, 2017, submitted and presented by Assemblyman Elliot T. Anderson, Assembly District No. 15.

[Exhibit I](#) is a proposed amendment to Assembly Bill 411, from Clark County, dated March 31, 2017, submitted by Alex Ortiz, Assistant Director, Department of Administrative Services, Clark County, and presented by Richard P. McCann, Executive Director, Nevada Association of Public Safety Officers.

[Exhibit J](#) is a proposed amendment to Assembly Bill 412, submitted and presented by Assemblyman Steve Yeager, Assembly District No. 9.

[Exhibit K](#) is a letter dated April 4, 2017, in support of Assembly Bill 412 to the Assembly Committee on Judiciary, authored and submitted by Jim Hoffman, Legislative Committee, Nevada Attorneys for Criminal Justice.