MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-ninth Session
March 13, 2017

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 1:44 p.m. on Monday, March 13, 2017, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Nicole J. Cannizzaro, Vice Chair
Senator Moises Denis
Senator Aaron D. Ford
Senator Don Gustavson
Senator Becky Harris

COMMITTEE MEMBERS ABSENT:

Senator Michael Roberson (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman James Ohrenschall, Assembly District No. 12

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Kate Ely, Committee Secretary

OTHERS PRESENT:

Nova Murray, Deputy Administrator, Division of Welfare and Supportive Services, Department of Health and Human Services
Robert Langford
Damian Sheets

Lisa Rasmussen, Nevada Attorneys for Criminal Justice
Jennifer Noble, Nevada District Attorneys Association

CHAIR SEGERBLOM:
We will open the hearing on Assembly Bill (A.B.) 4.

ASSEMBLY BILL 4: Repeals provisions relating to reciprocal enforcement of support orders with foreign countries or political subdivisions. (BDR 11-175)

NOVA MURRAY (Deputy Administrator, Division of Welfare and Supportive Services, Department of Health and Human Services):

Assembly Bill (A.B.) 4 is a repeal of *Nevada Revised Statutes* (NRS) 130.035. There are letters (Exhibit C was Exhibit F in the meeting held February 10 in the Assembly Committee on Judiciary.) from various entities indicating the statute needs to be repealed because it interferes with the federal funding of the child support program. As a condition for federal funding, this section must be removed and a new definition included indicating a foreign country is now considered a foreign country and not a state as it had been previously noted.

CHAIR SEGERBLOM:
Is this a Uniform Law Commission bill?

MS. MURRAY:
Yes. It is the Uniform Interstate Family Support Act.

ASSEMBLYMAN JAMES OHRENSCHALL (Assembly District No. 12):
The National Conference of Commissioners on Uniform State Laws has no concerns with the changes proposed in this bill.

CHAIR SEGERBLOM:
We will close the hearing on A.B. 4 and open the hearing on A.B. 184.

ASSEMBLY BILL 184: Revises provisions concerning the withdrawal of certain pleas. (BDR 3-286)

ASSEMBLYMAN JAMES OHRENSCHALL (Assembly District No. 12):
Assembly Bill 184 seeks to provide a remedy for a small group of individuals who, due to a recent Nevada Supreme Court decision, were left without a remedy. When a criminal defendant is given bad advice, or when the defendant's attorney fails to meet constitutional standards for effectiveness and competency, he or she can suffer collateral consequences that can last throughout the client's lifetime. Collateral consequences can include losing the right to own a firearm or deportation.

There have been developments in caselaw that have attempted to provide a remedy but, unfortunately, there is a group of individuals who, unless A.B. 184 passes, really do not have a remedy.

Assembly Bill 184 represents a compromise bill worked out last Session with the prosecutorial bar and the postconviction relief bar to try to cure these collateral consequences. Unfortunately due to a last-minute mixup, it did not get adopted.

ROBERT LANGFORD:
In the early 1990s, the Legislature attempted to correct an issue with respect to postconviction writs of habeas corpus. There were two Nevada statutes allowing postconviction writs of habeas corpus. One statute applied to postconviction and the other related to trials. It became very cumbersome and confusing. The Legislature sought to correct it with a uniform postconviction habeas corpus bill. That was passed.

In *Hart v. State,* 116 Nev. 558, 1 P.3d 969 (2000), the Nevada Supreme Court reviewed the language of *Nevada Revised Statutes* (NRS) 34.724, subsection 2, and determined that petitions to withdraw guilty pleas did not come within the purview of the *Uniform Post-Conviction Procedure Act,* 69 Harv. L. Rev. 1289 (1956), and therefore they could proceed. That was good law for 14 years.

In *Harris v. State*, 130 Nev. Adv. Op. 47, 329 P.3d 619 (2014), the Nevada Supreme Court reviewed its decision on this issue and reasoned that it was unsound and unilaterally took away the right to have a motion to withdraw a guilty plea postconviction. This bill seeks to correct the view of the Nevada Supreme Court and, to a certain extent it is a separation of powers issue. Clearly, for many years, the Nevada Supreme Court thought there was in fact this remedy. Three years ago, the court decided it was not.

This extraordinary petition has been used several times but not always with success because the State is able to assert the doctrine of laches which means you have not acted on your remedy for too long and it is not fair to one party to have to litigate at this time. An example that resulted in a good outcome involves an active military medic who was required to carry a firearm. Having been convicted of a battery domestic violence, he was not allowed to carry a firearm and was vulnerable to an involuntary separation from the Air Force. A petition was filed and granted because a showing was made that his attorney had not conducted an investigation, did not review available discovery and was unprepared to advise the client to take a plea. The plea was overturned and he is still in the Air Force.

The only other case in which I was successful was for a well-to-do construction contractor who was a firearms collector. He owned dozens of firearms and had never been denied the ability to purchase a firearm. Somehow, his conviction did come up, even though it was almost 20 years old. Again, I was able to turn to this petition and was successful in overturning his plea by showing that he did not have an attorney, no discovery was completed and he had no idea that some time in the future he was going to lose his right to bear arms.

It is an extraordinary remedy, as Assemblyman Ohrenschall has pointed out. It has been narrowed down by the prosecutorial bar. They have looked at it, they agree with these modifications and that this bill should become law.

DAMIAN SHEETS:
I support A.B. 184 for many of the same reasons outlined by Assemblyman Ohrenschall and Mr. Langford.

This bill would help remedy situations for individuals who may be facing deportation. For example, an individual aged 38 years moved to the United States when he was 1 year old. His parents never informed him he was not actually a citizen of the United States. Approximately 25 years ago, he pleaded to two theft-related felony cases. He was not properly advised of potential collateral consequences which could include deportation. A proper inquiry regarding his citizenship status was not conducted and possible deportation was not discussed with him.

It was later determined he suffered from a variety of mental illnesses as a result of his upbringing that would have justified his conduct. He remained out of trouble for approximately 15 years. Pursuant to a misdemeanor arrest, he was informed he was going to be deported due to the prior felony convictions. The remedy available to him was to move to withdraw the guilty plea. Pursuant to *Harris v. State,* he would have been precluded from filing a motion to withdraw the guilty plea because the time period for postconviction relief would have lapsed approximately 14 years ago.

In this instance, the motions presented at the district court level were denied. If we would have had the ability to dig into prior counsel's failure to meet the standard of care towards his client, we may have been able to undo that plea negotiation, particularly since 15 years had lapsed. However, because we were unable to get to the merits, we were unable to address those issues. During our investigation, it was determined that the attorney had not given that advice or made the immigration status inquiry because at the time it was believed that he would not have to make that inquiry. The U.S. Supreme Court in *Padilla v. Kentucky,* 559 U.S. 356 (2010) clarified that inquiry must be made regarding immigration status.

There have been incidents where an individual goes to court with a misdemeanor charge of possession of marijuana. A court appoints attorneys for misdemeanor marijuana which is nonjailable pursuant to statute. These attorneys would plea defendants to a two-year "stay out of trouble" period and have them plead guilty to an amended charge of possession of a dangerous drug not to be introduced into interstate commerce. If defendants would fail to stay out of trouble, they would now be facing jail time. The defendant would not be aware that marijuana is nonjailable and because he was not properly advised by counsel, would take the deal on the spot. If the defendant failed to stay out of trouble, or picked up another possession of marijuana charge and a year has passed, he or she would be faced with jail time. When a motion to withdraw a guilty plea is made and over a year has passed since the date of conviction, an inmate would not be eligible for any kind of relief at that point.

But when a defendant has not yet been incarcerated and is assigned new counsel for another charge, new counsel can determine the offense is nonjailable by statute. This would allow that defendant the opportunity to correct the situation before he starts going down a path that could ruin his life. For most of these individuals, 30 days in custody will ruin their employment,

their marriages; or they lose income which could lead to losing their homes, all for an offense that is now legal.

There are a variety of circumstances where individuals are not advised that their right to possess firearms may be impaired. As time goes by, two or three years into postsentencing, defendants not knowing to reduce the pleas in the first charge now face charges of ex-felon in possession of a firearm because they never reduced their pleas. Most defendants are not advised properly that they need to return to court after the discharge of probation to remove the felonies from their records and reduce them to gross misdemeanors. There have been defendants who thought the charges would be reduced automatically to gross misdemeanors. They attempted to purchase firearms and were booked for ex-felon in possession of a firearm once they completed the purchase transaction and now own firearms. Currently, it would be too late to withdraw those pleas and now they face new felony convictions. This statute puts us in a position to be able to resolve those situations.

LISA RASMUSSEN (Nevada Attorneys for Criminal Justice):
We support this bill.

Another example involves an individual who was charged with murder and was sentenced to life without parole. Dedicated counsel for this individual successfully argued the defendant was not only innocent, but the defendant was not even in the State when the crime was committed. What was appalling was the prosecutors had knowledge of this.

The defendant spent 20 years in prison for a crime he could not have possibly committed. When the defendant realized the pitfalls of having pleaded to second degree murder plea in 2013, the Nevada Supreme Court denied his motion to withdraw the plea on the grounds his only available remedy was habeas. This particular individual did not have a habeas remedy because he had been completely released from his sentence, literally a 20-year unwarranted sentence. It left him without any remedy at all. This bill, in 2017, will not give relief because he has already filed a motion to withdraw and that is precluded.

Another disaster such as this case cannot occur again, and this bill provides an appropriate remedy.

SENATOR CANNIZZARO:
Section 1, subsection 3, lists four different provisions that must be satisfied to file this particular motion. One is that motions are filed within one year after the date of conviction. The other is at the time defendants file motions they cannot be incarcerated for the charges for which they have entered the pleas. Those two things seem to be in conflict. Does this create a bigger problem and laches would come into play?

ASSEMBLYMAN OHRENSCHALL:
There was a concern that this would cause a floodgate of cases of this type of motion filed by incarcerated individuals without any merit to the motions. In order to address those concerns, the understanding was habeas would be available within that first year for individuals who were in custody but would still be a remedy for someone who truly had an issue. But for those who had entered a plea years ago and were out of custody, there would still be no remedy. This was an attempt to narrowly tailor it to that group of individuals who were not in custody, had no attorney appointed to them, the attorney had been constitutionally deficient or did not advise them of consequences requiring an inquiry into their immigration status, as *Padilla* now commands every defense attorney to perform, and possible second amendment collateral consequences.

MR. SHEETS:
There are plenty of individuals who have gone through the process, and whether they were naïve or foreign just did not have a full understanding of the system, and they did not know the remedy existed because of bad advice.

SENATOR CANNIZZARO:
Section 1, subsection 3, paragraph (b) requires the motion be filed within one year. Section 1, subsection 3 refers to someone who has had a sentence imposed or an imposition of a sentence that has been suspended. How does this apply to someone who was convicted of a crime years ago, maybe has completed a sentence or is still incarcerated and would not meet these requirements? It appears these two sections are not reconciling.

ASSEMBLYMAN OHRENSCHALL:
To narrowly tailor it so that a year would be the time limit, but in the case where someone was not advised of the consequences, an example would be *Padilla*. Now you have someone who took a deal 20 years ago, has both a

business and family and is law-abiding citizen and is facing deportation. We are trying to allow for that person to have a remedy.

SENATOR CANNIZZARO:
If someone is sentenced for a term of imprisonment, then would habeas apply?

JENNIFER NOBLE (Nevada District Attorneys Association):
For individuals who are incarcerated, it is true that within one year they can file postconviction writs of habeas corpus. The same type of claims could be advanced in postconviction writs of habeas corpus. For incarcerated individuals, that would be their remedy.

SENATOR CANNIZZARO:
Does NRS 34, as a whole, not apply to misdemeanors?

MS. NOBLE:
That is true generally with respect to petitions for writ of habeas corpus. Our position has always been that it is not a remedy for misdemeanants. It would create a remedy for misdemeanants for a postsentence motion to withdraw a guilty plea.

ASSEMBLYMAN OHRENSCHALL:
Prior to *Harris v. State*, this is a remedy that did exist for misdemeanants. Oftentimes, someone who takes a deal on a misdemeanor, whether it is a charge of possession of marijuana or battery domestic violence, can have collateral consequences such as losing the right to bear arms, discharge from the military or possible deportation.

MS. RASMUSSEN:
The example I outlined previously is a situation in which the defendant fit squarely because he had no habeas remedy. If there is a preclusion, it is because there is a habeas remedy. He did not because he was completely discharged from his sentence.

CHAIR SEGERBLOM:
You mentioned a plea to a lesser offense, such as possession of a dangerous drug not to be introduced into interstate commerce, which is a misdemeanor drug possession punishable up to six months in jail. Can charges related to possession of marijuana be negotiated to that plea?

MR. SHEETS:
Yes. It puts a defendant in an interesting situation because he or she is now facing jail time when by statute the underlying offense would not subject the defendant to that jail time. If the "stay out of trouble" period extends beyond one year, and the defendant is denied that remedy, he or she ends up facing the music when it would be difficult to argue that counsel was effective when pleading someone from a nonjailable to a jailable offense. That would be an absolute miscarriage of justice.

CHAIR SEGERBLOM:
This is one of the issues we want to address this Session with marijuana convictions: provide an easy remedy to take convictions off. But it seems like we also want to take off the possession charge you just raised because even if it does not say marijuana, it actually arose from a marijuana issue.

MR. SHEETS:
I agree. Many of them have passed through the system and this has been going on for years.

SENATOR CANNIZZARO:
My understanding is misdemeanor marijuana offenses for possession of less than one ounce are also enhanceable. For individuals who have incurred several charges, certainly there is some benefit to pleading to nonenhanceable offenses. After so many offenses, you would then be facing a felony offense. Is this a different issue? The *Harris* decision comments on the legislative intent for one single postconviction remedy and an effort to streamline that. How does this play into the idea that we want to have a singular postconviction remedy? Would this mitigate the concerns raised regarding floodgates of litigation related to postconviction remedies?

ASSEMBLYMAN OHRENSCHALL:
Unfortunately, the *Harris* decision left a group of individuals with no remedy. We do not want to leave individuals who were represented by counsel who were not up to constitutional standards. The motion to withdraw a guilty plea was first put on the books in the late 1960s. It was affirmed in 2001 in the *Hart v. State* decision. I am not opposed to having one unified remedy, but the current law leaves a group of individuals who have been harmed with no remedy, and this bill will fix that.

MR. LANGFORD:
Prior to the *Harris* decision, there was the remedy recognized by the Nevada Supreme Court as being apart from the postconviction habeas corpus. Even they said yes, it is clear what the legislative intent is. The Nevada Supreme Court Justices literally changed their minds. If you look at the language of the opinion, they said we are going to revisit that and we are going to change our minds. There were no new facts in front of them about what the legislative intent was or why they should now believe that the legislative intent they found 14 years earlier should now be different. They just changed it. So this is a recognition that was not the legislative intent and as Mr. Ohrenschall pointed out, in the 2015 Legislative Session they said no the legislative intent is there. This is a separate remedy.

As to floodgates, that was a concern and may be the reason the Nevada Supreme Court changed their minds. They sought to narrow the number of petitions coming before them, or coming before the Attorney General most often out of the prison system, or to the district attorneys across the State. Working with the district attorneys, Assemblyman Ohrenschall crafted this very narrow bill that is designed to not allow the floodgates to open, but still give a remedy to those people who need to correct what this bill says is a manifest injustice.

SENATOR CANNIZZARO:
Let us say individuals are convicted and they do not file postconviction petitions within one year and they do not allege this. They come back and want to file motions to withdraw a plea. Would that be permitted under this statute? It seems as though we are allowing postconviction petitions for those people who might currently be incarcerated. This is seeking to provide a remedy for those who have previously been incarcerated. Would this allow for someone to basically forego making that allegation in a postconviction only to bring the motion later on, or would anything in this bill, because it specifically mentions a motion to withdraw a plea, allow individuals to bring that subsequent motion to withdraw a plea even if they were alleging some of the same things in a postconviction writ?

MS. NOBLE:
What is important to look at is section 1, subsection 3, paragraph (b) that refers to "specific facts demonstrating that some impediment external to the defense precluded bringing the motion earlier…" language has been lifted from

postconviction habeas corpus law. It is a difficult hurdle. Defendants would have to demonstrate there was something very special about why they did not bring those claims, not just that they did not know it, but that they could not have discovered it.

MR. SHEETS:
This has been narrowly crafted and is meant to protect it from being misused. If someone remains incarcerated after that one-year time period, an inmate will not be able to address it until after that incarceration. This will prevent it being misused. This would preclude that. An inmate has the time period to file that while being incarcerated, and if he or she does not, the inmate would have to wait until release. The language is crafted to address those issues and allow inmates the opportunity when they are to be released and realize there was something wrong, or for the individuals who never actually made it into incarceration and were unaware but then believed they could meet that burden and proceed forward. It protects from inmates using it to try to get out of a couple years into a sentence. The preclusions regarding incarceration are there to protect that.

CHAIR SEGERBLOM:
Ms. Noble, are you in support of the bill?

MS. NOBLE:
Yes. Additionally, this notion of floodgates opening certainly was always a concern, but the addition made to this bill was the one-year time line. On felonies, this procedural vehicle, the motion to withdraw a guilty plea, was used to circumvent the one-year postconviction petition for habeas corpus limitation. The same types of claims were coming forward ten years later with no time frame and the State was forced to respond to these very old claims with great prejudice to us at many times. This alleviates that concern.

ASSEMBLYMAN OHRENSCHALL:
It provides an extraordinary remedy for persons who really have suffered a manifest injustice. Unfortunately, they suffered that in most of these cases at hands of their defense attorney, or perhaps they were not appointed a defense attorney. While we strive for our legal community to do as well as we can, unfortunately we know it falls short due to illness and other substance abuse

problems and, unfortunately, a lack of preparation. This does provide a remedy to those people who have been injured in very, very serious collateral ways.

CHAIR SEGERBLOM:
We will close the hearing on A.B. 184. I am going to introduce Bill Draft Request (BDR) 7-479. I will take a motion.

SENATOR FORD MOVED TO INTRODUCE BDR 7-479.

SENATOR CANNIZZARO SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR SEGERBLOM:
The meeting is adjourned at 2:30 p.m.

RESPECTFULLY SUBMITTED:

_____
Kate Ely,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	4		Attendance Roster
A.B. 4	C	3	Nova Murray	Letter from Administration For Children & Families