

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-ninth Session
March 31, 2017**

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 1:06 p.m. on Friday, March 31, 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 Don Gustavson

COMMITTEE MEMBERS ABSENT:

Senator Aaron D. Ford (Excused)
Senator Michael Roberson (Excused)
Senator Becky Harris (Excused)

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Connie Westadt, Committee Secretary

OTHERS PRESENT:

Keith Kelly, Nevada Association of Realtors
Tiffany Banks, General Counsel, Nevada Association of Realtors
Garret Gordon, Community Association Institute
Lee McGrath, Senior Legislative Counsel, Institute for Justice
Jeanine Hansen, Nevada Families for Freedom
Todd Bailey, Nevada Accountability

Senate Committee on Judiciary
March 31, 2017
Page 2

Cole Azare, Omega Delta Sigma, National Veterans Fraternity, Inc.; Mainstream Partners
Holly Welborn, American Civil Liberties Union of Nevada
Wendy Stolyarov, Libertarian Party of Nevada
Sean Neahusan, Joey Gilbert Law
Lisa Rasmussen, Nevada Attorneys for Criminal Justice
Brett Kandt, Chief Deputy Attorney General, Office of the Attorney General
A.J. Delap, Las Vegas Metropolitan Police Department
Mathew Christian, Assistant General Counsel, Las Vegas Metropolitan Police Department
Corey Solferino, Washoe County Sheriff's Office
Kristin Erickson, Nevada District Attorneys Association
Todd Peters, Deputy Chief of Police, City of Henderson
Daniel Honchariw, Nevada Policy Research Institute

CHAIR SEGERBLOM:

I would like a motion to rerefer Senate Bill (S.B.) 515 to the Senate Committee on Finance.

SENATE BILL 515: Revises provisions relating to the financial administration of the Securities Division of the Office of the Secretary of State. (BDR 7-894)

SENATOR CANNIZZARO MOVED TO REREFER S.B. 515 TO THE SENATE COMMITTEE ON FINANCE.

SENATOR GUSTAVSON SECONDED THE MOTION.

THE MOTION CARRIED.

* * * * *

CHAIR SEGERBLOM:

I will open the hearing on S.B. 255.

SENATE BILL 255: Revises provisions relating to common-interest communities. (BDR 10-789)

SENATOR MOISES DENIS (Senatorial District No. 2):

When a person is purchasing a home in a common-interest community, the unit's owner is responsible for ordering a resale package from a homeowners' association (HOA). A resale package contains important documents including information on the community such as bylaws, fees, and covenants, conditions and restrictions. The law requires the owner or his or her agent to furnish a purchaser a resale package. Once received, the purchaser has five days to review the package and cancel the contract for purchase by hand-delivering or mailing the notice to the owner or his or her agent.

Section 1, subsection 2 of S.B. 255 proposes to allow delivery of the notice of cancellation by electronic transmission to the unit's owner or his or her authorized agent. Many owners and purchases use electronic means to communicate on various issues during a transaction. By only allowing the purchaser to cancel the contract in person or by U.S. prepaid mail seems archaic. Permitting the cancellation by email is a proper addition to keep up with the changing times. This change could assist the seller in obtaining notice sooner and being able to put the property back on the market quicker.

KEITH KELLY (Nevada Association of Realtors):

We support S.B. 255. The Nevada Association of Realtors approached Senator Denis and asked him to sponsor this bill because, as licensed realtors, we have seen many problems surrounding the issue of cancellation of an escrow after receipt of the resale package. The real estate industry commonly uses electronic means during the transaction to work with our clients. This proposed change would allow the cancellation of the contract to be consistent with the way that we do our business.

TIFFANY BANKS (General Counsel, Nevada Association of Realtors):

I have provided an amendment to S.B. 255 to remove section 1, subsection 9 ([Exhibit C](#)). The Nevada Association of Realtors met this week with representatives from Community Association Management Executive Officers, Inc. (CAMEO) and received input from Nevada Land Title Association on section 1, subsection 9. We discussed some concerns regarding this subsection but were not able to come to an immediate resolution. The Nevada Association of Realtors has committed to working in the interim with CAMEO, the Nevada Land Title Association and other interested industry stakeholders on any issues we have.

Senate Committee on Judiciary
March 31, 2017
Page 4

GARRET GORDON (Community Association Institute):

We have concerns regarding section 1, subsection 9 of S.B. 255, but we support the bill.

CHAIR SEGERBLOM:

I will close the hearing on S.B. 255 and open the hearing on S.B. 358.

SENATE BILL 358: Revises provisions governing the forfeiture of property.
(BDR 14-48)

SENATOR DON GUSTAVSON (Senatorial District No. 14):

Civil forfeiture laws represent one of the most serious assaults on the private property rights of innocent citizens in the Country today. I represent Humboldt County. A couple years ago, an incident happened in Nevada that gained national publicity. I decided we needed to do something about it. I will present a five-minute CNN video featuring Anderson Cooper and footage of a Humboldt County deputy sheriff seizing cash from a motorist.

Civil asset forfeiture abuse brought national attention to Nevada, which relies heavily on tourism. The manner in which civil asset forfeiture has been applied in Nevada has made us a national laughingstock. Here is a one-minute John Oliver video to drive home this point.

I am not here to disparage law enforcement. Our men and women in blue risk their lives to keep us safe. My daughter is a recently retired deputy sheriff from the Washoe County Sheriff's Office. I have the highest regard for our public servants. That being said, public trust in those who enforce the law is an important component of a civilized society. For many citizens, trust is being destroyed due to abusive practices allowed under civil asset forfeiture law. Law enforcement can seize your cash or other property, sell it and use most of the proceeds however they see fit, even though you were never arrested or even charged with a crime. Passage of S.B. 358 does not eliminate law enforcements' ability to combat drug cartels and other criminal activity. The intent of this bill is to protect the liberty and property rights of innocent individuals and keep law-abiding citizens from becoming entangled in a process that tramples their rights.

An innocent tourist driving back to Utah after winning a \$1,000 jackpot from a Nevada casino can have his or her money confiscated, even though not accused

of any crime. The burden then falls on the innocent victim to get his or her money back through a legal process that is time-consuming and often more costly than the asset taken. The driver stopped in the CNN video was never charged with any crime. He was told by the deputy who took his cash, "Good luck proving it. You will burn it up in attorney fees before we give it back to you." If that deputy had probable cause to believe that a crime had been committed, then the deputy had a duty to make an arrest, seize all assets and impound the vehicle. By the way, the deputy is no longer employed by the Humboldt County Sheriff's Office.

I have submitted a presentation provided to me by the Research Division of the Legislative Counsel Bureau ([Exhibit D](#)). The presentation describes each section of the bill. Passage of S.B. 358 will reform civil asset forfeiture laws to strengthen protections for innocent victims who are never charged with a crime. Senate Bill 358 will end civil forfeiture and replace it with criminal forfeiture.

It is not unusual or unlawful to travel with cash, and yet my money can be considered guilty until I prove it innocent, even though I have not been charged with a crime. The process required to have assets seized on a whim returned is nightmarish. It is time-consuming. The cost often exceeds the value of the confiscated asset. Nevada is not alone. Civil forfeiture laws have been enacted around the County since 9/11 and have resulted in widespread unintended consequences.

LEE MCGRATH (Senior Legislative Counsel, Institute for Justice):

My colleagues and I applaud Senator Gustavson and support S.B. 358. Forfeiture is a legitimate government function. No criminal has the right to the fruits of crime. It is perfectly appropriate for Nevada to confiscate that fruit from a criminal. In that respect, forfeiture is legitimate, and it is a lot like eminent domain, which is another legitimate government function. There is a difference between civil forfeiture and criminal forfeiture. Senate Bill 358 puts the appropriate guardrails around the right process.

Civil forfeiture made sense if you were the King of England in the seventeenth century and could not gain personal jurisdiction over Greek, Italian, or Spanish shippers or pirates when they violated your maritime and admiralty law. The King of England appropriately used in rem jurisdiction to confiscate property when he could not get his hands on the violator of English admiralty laws. That is not the case in Nevada today.

Law enforcement is doing the good job of stopping and arresting people who are suspected of violating State or federal laws. They do not need to use civil forfeiture because they have personal jurisdiction over the suspect. The appropriate process is criminal forfeiture. It makes sense to first charge, arrest and convict the suspect of a crime and then, in the same courtroom before the same judge, turn to the question of whether the seized assets are the proceeds and instruments of crime.

By ending civil forfeiture and enacting this bill, which creates a criminal forfeiture process, Nevada will continue to be tough on crime. It will continue to arrest drug mules. It will continue to have the deterrent of the loss of profit from crime. It will ensure that people are charged and convicted. It will ensure that someone who is acquitted of a crime does not lose his property.

CHAIR SEGERBLOM:
Have you seen S.B. 358?

MR. MCGRATH:
Yes.

CHAIR SEGERBLOM:
Is S.B. 358 a model bill or one similar to that adopted by other states?

MR. MCGRATH:
The bill uses wording that I contributed. It is a model that has been accepted by both a progressive organization as well as a conservative organization. It is a model that other states have used, including the platinum standard adopted by New Mexico.

CHAIR SEGERBLOM:
If we passed S.B. 358, would we be one of the leading states in getting rid of civil forfeiture?

MR. MCGRATH:
Yes. You would join New Mexico, Nebraska and North Carolina as a state that has eliminated the use of a seventeenth-century admiralty law and turned to the appropriate process of criminal forfeiture.

SENATOR DENIS:

Exactly how does this change what we currently do?

MR. MCGRATH:

Nevada, like many states, uses a two-track process. The person goes into the criminal justice system and his or her car and cash go into a civil system in which guilt is irrelevant. Senate Bill 358 creates a single sequential system. It is system in which the suspect is arrested, charged and convicted, and then the criminal court has the responsibility of determining whether the car and the cash are the instruments and proceeds of the crime. You leave a two-track system, and you replace it with a one-track system.

SENATOR DENIS:

We just watched a video that showed a police officer stopping a man and taking his cash. How does S.B. 358 change that process?

MR. MCGRATH:

The change would not directly affect sheriffs, police officers and highway patrol officers. That is because this bill does not change seizure laws. Law enforcements' work on the highways and streets of Nevada is unchanged. If law enforcement has probable cause that someone has committed a crime, it can stop and arrest. If there is probable cause to believe the cash and the vehicle are associated with the crime, the cash and the vehicle are subject to seizure. The car can be impounded. The cash can be put in a bank account or the evidence room. Law enforcement can seize contraband. That is not changed by this bill.

What S.B. 358 directly changes is the work of prosecutors. Prosecutors leave the two-track world of prosecuting the person in criminal court and the property in civil court. These functions are performed sequentially in criminal court. The first proceeding is the criminal prosecution. Then, in front of the same judge, the prosecutor litigates the transfer of title to the property to the State through the forfeiture. The indirect effect on law enforcement is that it will know that it has to have a charge that sticks. Law enforcement will know that there must be a connection between the crime and the seized assets.

SENATOR DENIS:

In the case of the young man driving from Michigan to California, the highway patrol officer would have charged and arrested him.

MR. MCGRATH:

Yes. It is not a high hurdle. The highway patrol officer needs to have probable cause that there is a crime. There cannot be an absence of a crime.

SENATOR DENIS:

In one instance on the video, the office had a drug-sniffing dog. If the dog sniffed drugs, there would be probable cause. Correct?

MR. MCGRATH:

Yes. The cash could be seized if the dog alerted, but there would have been an arrest, a charge and a conviction. This would be prerequisite to the transfer of title to the State through forfeiture litigation.

SENATOR CANNIZZARO:

In the video, the Humboldt County deputy sheriff appears to be acting outside the scope of his authority. What Nevada statute was he operating under when he conducted these particular seizures? If we have a deputy acting outside of his statutory authority as opposed to operating under valid civil asset forfeiture rules, he is a bad actor.

MR. MCGRATH:

I do not know the specific case of the young man driving from Michigan to California. It appeared that the officer believed there was a drug offense. If that is the case, it is appropriate to seize the cash. Senate Bill 358 does not affect that.

SENATOR CANNIZZARO:

The civil asset forfeiture statutes require there be a criminal charge. They require proof of the commission of a crime and proof that the assets were used in the commission of that crime. I am trying to find out if there is a statute I am missing that would allow the seizure of assets without issuing a ticket, arresting the suspect or bringing any criminal action whatsoever.

MR. MCGRATH:

I cannot tell you the statute number, but I can tell you that civil forfeiture does not require a ticket, an arrest, a charge or a conviction. The car and the cash are put on trial. The individual's guilt is irrelevant. That is how civil forfeiture works. That is what S.B. 358 would end.

SENATOR CANNIZZARO:

I am looking at *Nevada Revised Statutes* (NRS) 179.1173, subsection 2, which addresses civil forfeiture proceedings. It says that in a proceeding for forfeiture, the court shall issue an order staying the proceeding that remains in effect while the criminal action which is the basis for the proceeding is pending trial. Is there some other statute relating to forfeiture? The way I read this statute, there must be a separate civil proceeding relating to the forfeiture. The civil asset forfeiture proceeding is stayed while the criminal action is pending. I think this change to the law was made very recently. I do not see how this is different from what you are suggesting, except that it is not a part of the criminal case. *Nevada Revised Statutes* 179.1173 also includes a provision that if someone is acquitted, the property must be returned. It seems to me that the problem being addressed by S.B. 358 is a bad actor, not someone operating within the current confines of Nevada law.

MR. MCGRATH:

I regret that I do not have the statute in front of me. I must return to the general concept that in civil forfeiture process, the guilt of the individual is not an element of the loss of the property.

SENATOR CANNIZZARO:

The problem I have with that statement is that NRS 179.1173, subsection 2 says that if there is an acquittal, the property must be returned. The guilt of the individual does bear on the forfeiture.

I have a question about section 19 of S.B. 358. This section talks about a pretrial hearing to determine the validity of the seizure. If we move civil forfeiture into the criminal proceeding, is this the same as a motion to suppress based on a violation of the Fourth Amendment? The reason for my question is that section 22 delineates additional consideration such as whether a seizure is excessive. I wonder how section 19 plays into current motions to suppress filed during the course of litigation and whether section 22 has any impact on those pretrial motions. Are these two separate matters? It seems we are adding additional considerations to the validity of searches under the Fourth Amendment.

MR. MCGRATH:

Section 19 should not be thought of as analogous to a motion to suppress. It is more like a replevin motion. It is a motion that can be brought not by the suspect but an innocent third party.

SENATOR CANNIZZARO:

Section 19 says a defendant or third party has a right to a pretrial hearing. I can understand the third-party motion, but my question relates to the part of the section that mentions the defendant.

MR. MCGRATH:

That is correct. The most valuable part of this is the defendant's ability to access some amount of the seized cash to pay for his defense. What I foresee is a challenge brought by innocent third parties to the validity of the seizure. The validity of the seizure is low hurdle. It is probable cause, not preponderance of the evidence.

SENATOR CANNIZZARO:

I want to stop you right there. What you are doing with this bill is putting the civil asset forfeiture into a criminal proceeding. When you talk about the validity of the seizure, you are now touching on Fourth Amendment claims. Additionally, section 19, subsection 6 says that the court shall grant the motion if it finds it likely the final judgment will be that the State must return property to the claimant. You are asking a judge to make a determination about something more than having to return the property. You are asking the judge to make a decision about whether it is likely the final judgment of the criminal case will be an acquittal or whether there is some other constitutional violation that would render evidence inadmissible. That is a motion to suppress. This language is concerning to me because it seems to be asking a judge to make a determination reserved for a jury in a felony or gross misdemeanor trial.

MR. MCGRATH:

I think your analysis is mostly correct. I would offer that it is much more a question of replevin than suppression in the sense of providing an efficient way for people to go to court to challenge the seizure. I do not think you would object to that. If there is some sort of violation in the process, a person should have an effective, efficient and speedy way of getting the property back and not have to wait for the prosecution and conviction of the defendant.

SENATOR CANNIZZARO:

If property is seized, the purpose of S.B. 358 is to ensure that it is the result of a criminal offense. I agree. If you commit a criminal offense, the instrumentalities or property related to the crime should be seized. I likewise agree that, if you are not charged with a crime, the police should not take your property. What section 19 of S.B. 358 seems to do is to put into the criminal case an avenue for a court to make decisions about the final judgment in the criminal case. It also seems to relate to motions to suppress. I am wondering about the practical aspect of litigating a criminal case in which there is property subject to potential forfeiture. We are asking the court to make a preliminary determination about someone's guilt or innocence. That is something that is reserved for the jury. This particular section of this bill concerns me because it seems to be a motion to suppress requesting the return of property in the middle of a criminal case.

MR. MCGRATH:

I regret that I have answered the question twice and not persuaded you that it is replevin and not suppression. The attempt here is to offer mostly innocent property owners an efficient vehicle to get their property back. I think we are saying similar things. We are just using different terminology.

SENATOR CANNIZZARO:

I understand that you keep saying replevin, but then you also keep coupling that with innocent person. Section 19 does not relate to just an innocent third party who may have allowed a defendant to use a car or a weapon. This also relates to a defendant. That is my sticking point. I do not know if other states have similar language and, if so, how it has been used. Maybe you can follow up with me. I am struggling with this.

Section 22, subsection 1 states that any time after a determination by the trier of fact, the defendant may petition the court to determine whether a forfeiture is unconstitutionally excessive. What effect does this section have if a defendant is convicted following the denial of a motion to suppress?

Section 22, subsection 3 states that in determining whether the forfeiture of the property is unconstitutionally excessive, the court may consider a list of relevant factors. I do not think the listed factors are based on constitutional rights. They are additional considerations. What happens when a defendant is convicted and then files a petition under this section? What does court look at? If a motion to

suppress was denied and there was no finding by a court of a violation of Fourth Amendment rights, would the court consider these additional factors to return instrumentalities or proceeds from criminal activity to the convicted defendant?

MR. McGRATH:

This is the classic Eighth Amendment protection of proportionality. It has some added features beyond current Eighth Amendment jurisprudence. It is not a question of suppression. It is a question of punishment. Forfeiture is punishment. The question is how much punishment is proportional to the crime. If there is a conviction for a crime in which the value of property seized is radically disproportionate to the crime, forfeiture of all of the seized property would be disproportionate punishment. This is an added process for the property owner to seek a return of some of the property.

JEANINE HANSEN (Nevada Families for Freedom):

We support S.B. 358. We have supported Senator Gustavson's efforts to do something about asset forfeiture in the last several Sessions. We appreciate his efforts to protect and defend our individual constitutional liberties. The Nevada Constitution, Article 1, section 8, subsection 5 says: "No person shall be deprived of life, liberty, or property, without due process of law."

I was interested in the story of John Adams defending the British soldiers on trial following the Boston massacre. He quoted a famous person—whose name I cannot remember now—who essentially said that it is far more important that innocence be protected than that the guilty be punished. We always need to keep this in mind. We have had a situation where a few bad actors have given law enforcement a bad name. The problem is that civil asset forfeiture tends to encourage police to pursue profit instead of the neutral administration of justice. That is what S.B. 358 is trying to correct.

I was thinking about my own situation in the last few months. In January, I had a fire in my home. I had to move out. I have been living in a motel. I had to take my valuables, including the cash and coins, out of my house. I could not leave them in the motel room. I could not leave them in my house while repairs were underway. Consequently, I have had my valuables and cash in the trunk of my car while driving back and forth between Carson City to Elko. I was glad I was not stopped by law enforcement. I do think that there are only a few officers

who have created this problem; nevertheless, the law needs to protect the innocent. We need to stop the abuse of asset forfeiture.

TODD BAILEY (Nevada Accountability)

Senate Bill 358 changes the subtle unspoken incentive to abuse civil asset forfeiture. The officer's pride was on display in the picture of him holding up the money with his dog. That picture was posted on Facebook and other places and actually created a competition among a certain few law enforcement officers. If you were to amend this bill to provide that forfeited property never stay in the agency of seizure, this problem would go away. The unspoken incentive would go away. Seized assets should go to the general fund or the Distributive School Account. The seized assets should never stay in the agency of seizure.

If you have any doubts about the necessity for S.B. 358, let us load up your car with \$50,000 cash in the backseat and speed down Interstate 80. Let us see what happens. I think this type of asset seizure happens quite a bit. We do not know about it because of the way the law is written. It is too easy to add money to a budget through civil asset forfeiture.

We all swore an oath to protect the Constitution. Your No. 1 job is to protect Nevada citizens from what is happening through the abuse of civil asset forfeiture.

COLE AZARE (Omega Delta Sigma, National Veterans Fraternity, Inc.; Mainstream Partners):

We support S.B. 358. *Nevada Revised Statutes* 179.1165 and NRS 207.490 allow property to be seized without legal process as part of lawful arrest or search. Law enforcement can search the vehicle and seize the property. There is nothing in either of these statutes that would require the individual to be charged with a crime. *Nevada Revised Statutes* 207.490 does require the property to be processed through the system, but property can be seized without charges being filed.

We propose amending NRS 207.490 and NRS 179.1165 to provide that a lawful search leading to an arrest be required and that charges must be filed against the property within 30 days of the seizure of the property. Additionally, should the district attorney fail to file charges within the 30 days, all property must be returned to the lawful owner and all expenses incurred for the seizure, storage and return of said property be paid by the seizing agency. We have

provided a proposed amendment ([Exhibit E](#)). We believe this will take away the incentive for agencies to utilize civil asset forfeiture as a revenue base.

SENATOR CANNIZZARO:

Nevada Revised Statutes 179.1165 states property may be seized incidental to an arrest, a search pursuant to a search warrant or an inspection pursuant to a warrant for an administrative inspection. I see an arrest, a search warrant or probable cause triggering the civil asset forfeiture process. At the hearing on the forfeiture of the seized assets, a presentation would be made to the judge that the assets are related to a criminal activity. I am not sure whether the officer in the video was acting within or outside the scope of the law. I open that question for anyone to answer.

MR. AZARE:

Nevada Revised Statutes 207.490 definitely says a lawful arrest or a search. That is allowed without a legal process.

SENATOR CANNIZZARO:

Nevada Revised Statutes 207.490 is racketeering.

HOLLY WELBORN (American Civil Liberties Union of Nevada):

We will try to get some answers to Senator Cannizzaro's questions. A January 21 opinion editorial in the *Las Vegas Review-Journal* stated that Nevada received a transparency report card in the case of civil asset forfeiture that would embarrass Beavis and Butt-Head. The grades were two Fs, D, C-, C and A. This is not a laughing matter when we consider the price people pay when their homes, businesses, cars, cash and other property are seized. This is a problem across the United States. It is an epidemic. Since 2001, state and local police have had more than 61,000 seizures of cash and property amounting to over \$2.5 billion. The Department of Justice Assets Forfeiture Fund topped \$4.5 billion in 2014.

Senate Bill 358 addresses many problems regarding civil asset forfeiture. It is model legislation. It institutes a number of important protections. It requires a criminal conviction prior to forfeiture. It removes joint and several liability for forfeiture. It provides protections for innocent owners and provides important due process protections for those whose property is seized. It also restricts the way in which any seized property can be used by prohibiting law enforcement from benefiting from the forfeited property. This helps remove

conflicts of interest and incentives to misuse the civil asset forfeiture laws. It also prohibits equitable sharing with the federal government. The reporting requirements are made stronger, increasing the transparency and accountability of law enforcement. This bill goes a long way to ensure that Nevadans are not deprived of their right to due process.

WENDY STOLYAROV (Libertarian Party of Nevada):

The Libertarian Party of Nevada has provided a letter of support for [S.B. 358 \(Exhibit F\)](#).

SEAN NEAHUSAN (Joey Gilbert Law):

Nevada Revised Statutes 179.1165 requires a search warrant. A search warrant is issued by a magistrate. *Nevada Revised Statutes* 179.1164 discusses what can be seized. Any proceeds attributable to the commission or attempted commission of any felony may be seized. That determination is made by the officer. We saw in the video that officers are fallible. That is where we get into the civil asset forfeiture versus criminal asset forfeiture.

Law enforcement officers do not have to arrest a person to seize the objects found in a search pursuant to a search warrant. For example, they do not have to know who put the seized objects in the car. They can seize the objects if they can in some way to attribute the objects to the commission of a felony.

VICE CHAIR CANNIZZARO:

The officer in the video is not acting pursuant to a search warrant. He does not have probable cause to stop the vehicle. He is not issuing a citation. He is not initiating any criminal process whatsoever. There is no probable cause to justify the issuance of a search warrant by a magistrate. There is no criminal citation or case otherwise initiated. That is different from the execution of a search preceded by an application for a search warrant detailing who, where and what and a warrant signed by a magistrate. Those are two different situations.

We keep talking about what happened in the video and relating that to these statutes. I am having a hard time seeing how the officer's conduct is permissible under the statutes. The officer's conduct shown on the video would not be permissible because there was no criminal activity, no search warrant and no valid search.

MR. NEAHUSAN:

A search warrant can be issued by a magistrate. The magistrate is supposed to be detached and impartial. The officer executes the search. Under NRS 179.1164, it is up to the officer to determine whether an asset is attributable to a felony. In the video, the officer seems clearly over the line. It is not beyond the scope of reason to assume that an officer can execute a search pursuant to a search warrant, find items that can be attributed to the commission of a felony or the attempted commission of a felony, not charge anyone with a crime but seize the property. That is what we are talking about when we look at civil asset forfeiture. An officer can seize an item that is clearly attributable to a criminal act but not know who committed the act. The individual is not charged with a crime, but the property is forfeited. We can all agree that the officer in the video went beyond the scope of his authority, but we do not know if he had probable cause for the stop. We do not know if it was a valid search. If the search was valid, then you go to NRS 207.490.

VICE CHAIR CANNIZZARO:

That statute is specific to racketeering. It relates back to items that are used in the course of a racketeering proceeding. That is different. I do agree that NRS 207.490 does say search, but that relates to racketeering. We need to focus on NRS 179.

I am not disputing the necessity of looking at these statutes. I am trying to identify what the problem is and whether there is a way to fix it. Some of the language in S.B. 358 and how it would be used in the course of a criminal case gives me pause.

MR. NEAHUSAN:

As a former prosecutor, I can see both sides. This bill does not change the process for prosecutors in Washoe County. It would change who does the forfeiture motions.

LISA RASMUSSEN (Nevada Attorneys for Criminal Justice):

Nevada Revised Statutes 179.1165, subsection 2, paragraph (d) allows an officer who believes he has probable cause to seize property. That is a subjective standard. I think that answers your question. Whether what the officer in the video did was proper is another issue. The Nevada Attorneys for Criminal Justice support S.B. 358.

I have worked the last couple Sessions with former Senator Greg Brower trying to improve the statutory scheme for forfeiture. It is still broken. I have a client who was pulled over and a search of her vehicle resulted in the discovery of a stolen firearm. Her car was seized. It was a used BMW. She had paid about \$8,000 for it. By the time she was acquitted, the storage fees the Las Vegas Metropolitan Police Department had amassed were \$6,500. I argued that the district attorney's office should pay the storage fees and return the vehicle. They did not agree. Their position was that she should pay the storage fees.

Senate Bill 358 provides an opportunity for a defendant to request security in instances like this. The defendant can request the State post security. Alternatively, it allows the defendant to post a bond. It prevents an unjust result for someone who is innocent.

I currently have an even worse case in Nye County in which a mother moved her daughter out of a shared apartment. The daughter was at work. Mom had a truck and a trailer, which she and her husband owned. Mom moved what she identified as her daughter's belongings. She erroneously took some pots and pans and an end table that belonged to the roommate. The roommate called the police. A search warrant was issued. The search was executed. Law enforcement seized the \$25,000 truck, the \$2,500 trailer and all of the contents on the trailer and in the truck. The State is holding those items, and I have been informed that it is going to move for forfeiture—over pots and pans and an end table. No one in this room would think that forfeiture of the truck, trailer and all of the items that belong to an 18-year-old daughter is an appropriate remedy, even if the State proves the pots and pans and end table were intentionally taken. These are the cases that we have to deal with and these are the examples of why the current forfeiture law is inappropriate.

Senate Bill 358 fixes so many things that we have worked hard in past Sessions to make better. Senate Bill 358 puts everything in the criminal proceeding where it belongs because forfeiture is a form of punishment. There is certainly no doubt that when a Cessna flies in from Mexico filled with cocaine and lands at the North Las Vegas Airport, the Cessna is subject to forfeiture. Senate Bill 358 also allows the defendant to request and the court to order the return of money or property sufficient for the defendant to obtain legal counsel. The federal system has always permitted a defendant to petition the court to allow a portion of whatever was seized to be used in the criminal defense

because, otherwise, the defendant will have appointed counsel, and it costs the system more in the end.

BRETT KANDT (Chief Deputy Attorney General, Office of the Attorney General):
We are opposed to S.B. 358. The law enforcement community does not want to see illegal seizures. We are confusing a seizure with a forfeiture proceeding. Many of the proponents of S.B. 358 are using these terms interchangeably. They are working under the assumption that a seizure equates to a forfeiture. These are two different things.

The video has driven much of this policy debate. The video highlights unlawful seizure activity by the deputy sheriff. The video has nothing to do with civil asset forfeiture proceedings. In fact, John Olson, the attorney for the victim, expressly stated that there was never a forfeiture proceeding in his client's case. The money was simply illegally seized.

The media has confused the issue. The media used the term forfeiture even though the illegal seizure activity had nothing to do with and was never followed by a forfeiture proceeding. In fact, the reporter three times used the term forfeiture stop to describe the activity that was happening. There is no such thing as a forfeiture stop. You can have a stop, you can have a search, you can have a seizure and, perhaps, eventually you can have a forfeiture proceeding. I have never heard of a forfeiture stop. That is not a term with legal meaning.

The video we viewed today was played during the 78th Session. Senator Gustavson introduced S.B. No. 138 of the 78th Session. We worked with Senator Gustavson to try to address some of concerns raised. Senate Bill No. 138 of the 78th Session was amended to do two important things. First, it changed Nevada civil asset forfeiture law to expressly provide that a forfeiture proceeding is stayed unless and until a criminal conviction is obtained. It codified what should have been the existing practice.

Mr. McGrath testified that passage of this bill would move from a parallel track system to a single-track system. He indicated that civil asset forfeiture is a system in which guilt is irrelevant. That is not true. The changes made by S.B. No. 138 of the 78th Session made guilt relevant. The civil asset forfeiture proceeding is stayed unless and until there is a criminal conviction. In addition, Mr. McGrath testified that the process needs to be sequential. It is a sequential

process because the civil asset forfeiture proceeding is stayed unless and until there is a criminal conviction. A conviction is a prerequisite.

Senate Bill No. 138 of the 78th Session did one other important thing. It instituted a reporting requirement to gather data on what revenue is being generated through forfeitures by all the various law enforcement agencies. On an annual basis, all law enforcement agencies file a form prescribed by the Office of the Attorney General reporting their forfeiture activities. My office compiles that information and makes it available to the Legislature and the public. We have had only one reporting period since enactment. It is too early to have meaningful data on forfeitures in Nevada. We want to ensure that all the agencies are reporting data consistently, so that it is useful and meaningful. With the statutory reporting requirement, we will have meaningful data on what type of forfeiture numbers we are looking at so that the Legislature can make informed decisions on our forfeiture laws in the future. Those are the two important things that S.B. No. 138 of the 78th Session did. That is the law.

Another important piece of legislation enacted during the 78th Session touches on the issue of potentially unlawful seizures. Senate Bill No. 191 of the 78th Session amended NRS 179.085, which is the statute that allows a defendant to move for the return of property that is illegally seized. The statute expanded the process to allow anyone, not just the defendant, to move for the return of his or her property if the retention of that property by law enforcement is not reasonable under the circumstances. Many of the concerns raised here today were addressed through the enactment of S.B. No. 138 of the 78th Session and S.B. No. 191 of the 78th Session.

A.J. DELAP (Las Vegas Metropolitan Police Department):

I am here to introduce the in-house attorney who oversees all of the seizures and forfeitures for the LVMPD.

MATHEW CHRISTIAN (Assistant General Counsel, Las Vegas Metropolitan Police Department):

I pursue all the LVMPD civil asset forfeitures. I heard many misperceptions today about how the statutory system in Nevada works. Two years ago, statutes were changed and additional due process rights were afforded to the criminally accused when their assets are taken. This system affords anyone whose property is taken with every civil process right imaginable. It strikes a

good balance between the seizure tool to help combat crime and the legitimate due process concerns raised two years ago regarding forfeiture. The right balance has been struck and the statutory scheme works well.

What we saw in the video is outside the norm. Eighty percent of my cases are drug-related. For example, there is a traffic stop. The officers detect the existence of drugs in the vehicle. Pursuant to a search of the vehicle, they find drugs and money. The drugs and the money are seized. That is not what we saw in the video because in the video there were no drugs in the vehicle. In the typical case, there are going to be drugs in the vehicle and the money is seized because it is traceable to the crime of drug sales. A criminal case is filed, and the money seized is found to be 100 percent related to a felony.

The other typical case is a search warrant. The LVMPD gets a tip that someone is selling illegal drugs in a certain location. They obtain a search warrant, execute the search and find illegal drugs and money. The money is seized. There is a criminal case. There is a nexus between the illegal drugs and the money. These types of cases account for at least 80 percent of my job.

After the seizure and the filing of the criminal case, my office files a civil forfeiture case. There are two proceedings at the same time. The civil forfeiture case is a placeholder that exists while the criminal case is pending. In the criminal case, there may be a plea agreement. In the plea agreement, the deputy district attorney will often include a forfeiture of the seized assets. The forfeiture is completely taken care of inside the criminal case. Senate Bill 358 would not change that case at all.

A civil forfeiture case might proceed because the defendant will allege the money was not drug money but rather birthday money, money earned through a job or money from a jackpot. Our office conducts discovery of facts beyond what is normally done in a criminal case. That is why the civil case exists. The district attorney normally does not do the kind of discovery required to determine whether the money is related to drugs or a jackpot. The civil process is the better venue because it provides the means by which to discover the truth.

There is a two-track system. Senate Bill 358 does not change that. Under S.B. 358, there would be a second procedure in the criminal case. It is a matter of who is going to pursue the forfeiture. Is it a district attorney overwhelmed

with criminal cases and not accustomed to doing civil discovery? Is it a civil attorney more adept at the type of discovery needed to figure out where the money actually came from? That is why there is a criminal procedure and a civil procedure in Nevada law.

The first misperception we heard today is that there does not need to be a charge, a crime or a conviction. That is absolutely incorrect. In order for the officer to seize the assets in the first place, the officer must be able to articulate a nexus between a felony and the assets as required by NRS 179.1164. Nevada caselaw makes this clear as well. There are two elements that must be met in any forfeiture case. The first element is a felony. The second element is a nexus between the felony and the asset that was seized. It is a misperception that officers can run around and seize assets without linking the assets to a crime.

Another misperception is that the burden falls on the accused to prove that the seized assets are not related to a crime. That is not the case. Nevada law is clear that the burden is on law enforcement to prove the assets are related to the crime by clear and convincing evidence as opposed to a preponderance of the evidence, which is the typical standard in a civil proceeding. The burden of proof is not on the accused. It is just like any other criminal case. The burden is on the State.

There is a misperception that the accused has no ability to contest the seizure or forfeiture and that due process rights are trampled. That is not the case. If the matter is still in the criminal court and the accused believes the property was seized in violation of the U.S. Constitution, he or she is entitled to file a motion for the return of the property. I see these motions on occasion. My office sees them all the time. There is a process in place that allows someone to petition the court demanding the return of his or her property. A judge has the ability to order the return of the property.

If there is a problem with the probable cause for the search and seizure of the property, a defendant is entitled to move to suppress the evidence. In those cases, if the criminal case is dismissed, Nevada law specifically says that the property must be returned. When a motion to suppress is granted, I have no choice, even if I think I could prove in a civil case that there is a relationship between the money and a crime, I must return the property.

Another misperception is that if the civil case proceeds, the claimant to the property does not have any defenses. The claimant does have defenses such as the Eighth Amendment or the statutory defense of innocent owner. A drug dealer borrows his girlfriend's car to deliver the drugs. This happens over and over again. The drug dealer is arrested while in the girlfriend's car. The car is seized because it is an instrument in drug trafficking. The owner of the car has an innocent owner defense. If she can claim that she knew nothing about the use of the car, then the car will not be subject to forfeiture. It was seized, but it would have to be returned if I could not prove the girlfriend had sufficient knowledge of the criminal activity to warrant the seizure.

Another misperception is that the goal of law enforcement is to augment its budget. I do not know if that is true in some other jurisdictions, but I can tell you with absolute certainty that the amount of money the LVMPD seizes is a very small percentage of its overall budget. The LVMPD's budget without the operation of the Clark County Detention Center is over \$500 million. Last fiscal year, less than \$2 million worth of assets were forfeited. Once the costs of administering the 400 cases we processed are subtracted and the school district is paid the money it is entitled to statutorily, there is almost nothing left for the LVMPD. The motivation is not revenue. The motivation is exactly what it has always been. Seizure and forfeiture of assets are important crime-fighting tools. If crime pays, there will be more crime. If the financial incentive for crime is removed, there will be less crime.

Section 19 of S.B. 358 permits the use of drug money to fund the criminal defense attorney. This is a highly controversial concept. There has been litigation all over the County regarding this issue. Defense lawyers in state and federal courts attempt to get property released that is otherwise subject to forfeiture in order to pay for the criminal defense. My understanding is that courts universally reject these requests. Why would the proceeds of illegal activity be available to the criminal defendant to use in any way? I think that is a dangerous concept, and I do not think most Nevadans would approve of that.

COREY SOLFERINO (Washoe County Sheriff's Office):

We oppose S.B. 358. While I echo the comments of my partners in opposition, I offer experience from the field and from having been a part of a northern Nevada regional task force for the better part of ten years as a canine handler and interdiction officer. The videos shown were appalling. We have addressed the elephant in the room that policies and procedures were not followed. When

done correctly, the system works. This is a knee-jerk reaction to the actions of a lone wolf.

KRISTIN ERICKSON (Nevada District Attorneys Association):

We oppose S.B. 358. This bill attempts to blend civil asset forfeiture and criminal justice process. This will cause numerous problems, including having people not associated with the criminal case intervening to assert a property interest. In S.B. 358, the defendant has a pretrial right to determine the validity of the seizure. This overlaps the criminal case. Who will litigate this pretrial right to determine the validity of the seizure? A public defender is not appointed to forfeiture cases, but clearly the defendant's legal rights are impacted at this pretrial proceeding. Therefore, the public defender should be appointed in order to ensure the defendant's rights are protected. This will be an additional expense to the counties and the State. Public defender representation would extend beyond the criminal trial because the forfeiture trial must take place subsequent to the criminal trial. This would also expand the duties and costs of the public defenders. Crime does pay. Section 19, subsection 6 of S.B. 358 provides that the court may give the defendant property that is subject to forfeiture to pay for legal counsel. That does not make sense.

Senate Bill 358 is too sweeping and too broad. It provides too many opportunities for unintended consequences. We are more than happy to work with the sponsor, as we did last Session, on ways to improve the system. This is simply too much too soon.

TODD PETERS (Deputy Chief of Police, City of Henderson)

We are opposed to S.B. 358. I have submitted prepared remarks ([Exhibit G](#)).

DANIEL HONCHARIW (Nevada Policy Research Institute):

We are neutral on S.B. 358. Senate Bill No. 138 of the 78th Session started civil asset forfeiture reform. It was pretty good when introduced but was watered down when all was said and done. It ended up a basic bill that mandated more reporting requirements. Essentially, it mandated the Office of the Attorney General to aggregate data and issue a report. I have it in my hands. The report by itself is practically and functionally useless. All it really offers is the agency involved, the case number, value and type of asset, and relevant law invoked against the party. It offers very few details on the underlying facts or context of the seizure and forfeiture. I encourage the

Committee to boost the level of these reporting requirements to offer more substance going forward.

The most salient issue in this area is the incentive. By incentive, I am referring to the fact that proceeds can funnel directly to law enforcement at the local level through programs like equitable sharing. We are all human. This incentive is inappropriate, mildly perverse and, at the very minimum, bad optics and public relations for law enforcement. Removing the incentive is the right thing to do.

SENATOR GUSTAVSON:

I would like to have Mr. McGrath respond to some of the issues that have been raised during the hearing on this bill.

MR. MCGRATH:

The representative from the district attorney's office is right in the sense that S.B. No. 138 of the 78th Session does require a conviction as a prerequisite of forfeiture. Senate Bill 358 would engage in some judicial efficiency by allowing a single process in the criminal justice system in which constitutional rights are recognized, including the right to an attorney. That attorney would be present throughout the entire litigation. The United States Supreme Court recognized some of these rights in the civil forfeiture case *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). Senate Bill 358 would unite these protections for all Nevadans and all property owners. This shift is not only judicially efficient but an important constitutional protection.

I commend Ms. Rasmussen for bringing her experience to this Committee. I have testified in other states, and, sadly, it is a common practice to throw a rogue, lone-wolf police officer under the bus and to suggest, mixing metaphors, that he is just one bad apple. I think it is clear that what Nevada faces is a systematic problem. This problem exists across the State and across the Country. This system is inherently flawed. It is inherently flawed because it is no longer based on the problem that it was designed to address. It was designed to address the problem of lack of personal jurisdiction, lack of the ability to arrest someone. The use of in rem litigation against property, as U.S. Supreme Court Justice Clarence Thomas pointed out two weeks ago, no longer has historical foundation. Senator Gustavson is right to propose legislation to end this misapplication of admiralty law.

SENATOR GUSTAVSON:

I appreciate the spirited discussion we have had here today, and I appreciate the concerns of our law enforcement agencies. This legislative proposal is by no means being brought forward to demean the difficult job they do. This legislation does not handcuff law enforcement's efforts to stop drug cartels and other illegal activity. It provides protection and recourse to innocent parties. Without reforms, these abuses, intentional or otherwise, can continue to flourish. There will always be bad actors in any profession. We know that. Unless the incentives to profit are removed, we are going to still have bad actors. I am willing to work with all parties to make a better bill.

Remainder of page intentionally left blank; signature page to follow.

Senate Committee on Judiciary
March 31, 2017
Page 26

VICE CHAIR CANNIZZARO:

We will close the hearing on S.B. 358. We will adjourn the hearing at 3:00 p.m.

RESPECTFULLY SUBMITTED:

Connie Westadt,
Committee Secretary

APPROVED BY:

Senator Tick Segerblom, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit / # of pages		Witness / Entity	Description
	A	1		Agenda
	B	5		Attendance Roster
S.B. 255	C	1	Tiffany Banks / Nevada Association of Realtors	Proposed Amendment
S.B. 358	D	2	Senator Don Gustavson	Presentation
S.B. 358	E	2	Cole Azare / Omega Delta Sigma, National Veterans Fraternity, Inc.; Mainstream Partners	Proposed Amendment
S.B. 358	F	1	Wendy Stolyarov / Libertarian Party of Nevada	Letter of Support
S.B. 358	G	2	Todd Peters / Deputy Chief of Police, City of Henderson	Letter of Opposition