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

**Eightieth Session
March 19, 2019**

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:06 a.m. on Tuesday, March 19, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Jill Tolles
Assemblywoman Selena Torres
Assemblyman Howard Watts

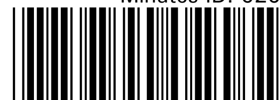
COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Connie Munk, Assembly District No. 4
Assemblyman William McCurdy II, Assembly District No. 6

Minutes ID: 525



STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Karyn Werner, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Erica Souza-Llamas, Criminal History Repository Manager, Records, Communications and Compliance Division, Department of Public Safety
Alison Lopez, Criminal Records Unit Manager, Records, Communications and Compliance Division, Department of Public Safety
John T. Jones, Jr., representing Nevada District Attorneys' Association
Sandra DiGiacomo, Chief Deputy District Attorney, Clark County District Attorney's Office
Jeri Burton, President, Nevada Chapter, National Organization for Women
Corey Solferino, Lieutenant, Legislative Liaison, Washoe County Sheriff's Office
Eric Spratley, Executive Director, Nevada Sheriffs' and Chiefs' Association
Serena Evans, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Nadia Hojjat, Chief Deputy Public Defender, Clark County Public Defender's Office
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office
Holly Welborn, Policy Director, American Civil Liberties Union of Nevada
Alanna Bondy, representing Nevada Attorneys for Criminal Justice
Bailey Bortolin, Statewide Advocacy, Outreach and Policy Director, Nevada Coalition of Legal Service Providers
Timothy Conder, Cofounder and Chief Executive Officer, Blackbird Logistics Corporation
Zachary Kenney-Santiwan, Private Citizen, Las Vegas, Nevada
Gary Peck, Private Citizen, Las Vegas, Nevada
William Adler, representing Silver State Government Relations
Alex Goff, Private Citizen, Reno, Nevada
Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada
Madisen Saglibene, Executive Director, Las Vegas NORML
Mackenzie Baysinger, Intern, Human Services Network

Riana Durrett, Executive Director, Nevada Dispensary Association
Michael Cathcart, Business Operations Manager, Finance Department, City of Henderson
Ryan Black, Legislative Liaison, Office of Administrative Services, City of Las Vegas

Chairman Yeager:
[Roll was called. Committee protocol and rules were explained.] We have a quorum. We will move on to the agenda. We have three items on the agenda. We will take them slightly out of order. We will start with the presentation and then reverse the order of the two bills. At this time, I will open the presentation from the Records, Communications and Compliance Division of the Department of Public Safety. The presentation is on the Nevada Electronic Legislative Information System.

Erica Souza-Llamas, Criminal History Repository Manager, Records, Communications and Compliance Division, Department of Public Safety:
I am presenting on Mindy McKay's behalf. I am the Criminal History Repository Manager of the Records, Communications and Compliance Division under the Nevada Department of Public Safety. With me is Alison Lopez, the manager in our Criminal Records Unit, which is responsible for the sealing of criminal history records and working on our disposition backfill project. I am going to toss this over to Ms. Lopez and she will present to you on the sealing process and provide us with a status update on our disposition backfill (Exhibit C). When she is finished, I will briefly conclude the presentation.

Alison Lopez, Criminal Records Unit Manager, Records, Communications and Compliance Division, Department of Public Safety:
We will start off with the record sealing process. This slide [page 2] shows who is responsible for getting what documents together for a record seal. The petitioners or their attorneys do all of the legwork for this. It starts with a complete set of fingerprints, our standardized DPS-006 form, and a fee of $23.50 to get the process started. This will get you a copy of the Nevada criminal history record to start the seal process. We call this a "proof of identity" and it is required for record sealing. There are actually four units within the central repository that are involved in the seal process. That process begins with the fingerprint-based background check and goes through our fiscal department to process the money and the data entry of the fingerprint card. That information then goes to our fingerprint examiner unit, and then to the civil unit to actually process the criminal history report before it gets sent off to the petitioner or the attorney.

This slide [page 3] talks about the steps of the actual sealing process. The petitioner will start with step 1. Read the slide from left to right and then it goes back to step 2. This part of the sealing process is done by the fourth unit in the Records, Communications and Compliance Division, which is either the criminal records unit or my unit. On behalf of the state, the criminal records unit's responsibility is to remove those records as ordered by the court. This includes reviewing the court order, pulling fingerprint cards, reviewing and obtaining information from criminal justice agencies as needed, waiting for law enforcement agencies

to notify the state of compliance, sealing the state record, and notification to the fingerprint examiner unit because those fingerprint cards have to be sealed by the automated biometric identification system unit. We then seal the Federal Bureau of Investigation (FBI) record or send those seal orders to the FBI for their expungement process. When all of that is complete, we send a compliance letter to all parties involved.

This is an update on our backfill disposition status [page 4]. As of March 6, 2019, the remaining balance of our dispositions to be entered for what we call our Nevada State Library and Archives Project is 131,805 dispositions. The biggest upcoming backfill project that we have is our electronic dispositions: sentencing reports received from Las Vegas Justice Court and the Las Vegas Municipal Court. That process is electronic. We receive the actual disposition code, but we do not receive any sentencing information, so that is a manual process. We also have to backfill all of the electronic dispositions on the state for the sentencing and to the FBI as well. There are also error reports, which are any electronic dispositions that were not able to pass through. We have to do research on those to obtain the dispositions and manually enter them for the state and the FBI.

We are also continuing our outreach and education [page 4], focusing on reporting deficiencies; prosecution reporting, emphasizing denials or no charges filed; timely fingerprint requirements; submissions for citations, summons, and indictments; and seal order submissions with complete information.

The next slide [page 5] shows our missing dispositions. We have a total of 2.2 million arrests in our state system right now, and of those arrest events, over 900,000 are still missing dispositions. That puts us at about 59.63 percent complete. We are actually meeting the national average for completeness of records.

Erica Souza-Llamas:
I will conclude this presentation with one final slide [page 6] that briefly describes the Nevada Criminal Justice Information System (NCJIS) Modernization Program. Modernizing our systems will make it easier for us to send and receive criminal justice information electronically, which would improve the timeliness and completeness of our records. The NCJIS will allow for easier connections and interfaces and allow all information to be shared. As an example, Alison brought up the electronic dispositions. We are receiving those currently from the Las Vegas Municipal Court and Las Vegas Justice Court via interface to our criminal history system that feeds our records with the disposition data. However, it does not currently include sentencing information. Modernizing our systems means we can more easily interface with more courts and more timely receive all of the necessary information to do so. The NCJIS module will also allow us to participate in federal programs to further enhance information sharing while maintaining the integrity of our records.

Chairman Yeager:
The backfill disposition status says that, as of March 6, 2019, there are still 131,805 dispositions to be entered. What exactly are those dispositions? Are they

convictions, and if so, are we talking misdemeanors or felonies? Do we have that level of information for that backlog?

Erica Souza-Llamas:
We do not know what is contained in those or if they are convictions, dismissals, or no charges filed, nor do we know the severity without digging through all 131,805 and separating them all.

Chairman Yeager:
Are those paper copies that you have?

Erica Souza-Llamas:
Yes, they are paper.

Chairman Yeager:
Is there a timeline for when you think those 131,000-plus might be entered into the criminal records repository?

Erica Souza-Llamas:
We are anticipating that we will be finished with that part of the backfill by August of this year.

Chairman Yeager:
I take it that the missing dispositions are different. You have received notice that arrests have been made but you do not know what became of those cases. Is that correct?

Erica Souza-Llamas:
Yes, that is correct. On those records that are missing dispositions, we have never received them. It could be that they are still going through the adjudication process or they are old arrests and we will never get the dispositions for those that have aged out.

Chairman Yeager:
Do you think any of the dispositions are contained in the 131,000-plus that you are waiting to enter? Could they be linked together in some fashion?

Erica Souza-Llamas:
Yes, that is a possibility.

Chairman Yeager:
You mentioned they are from Las Vegas Justice Court and Las Vegas Municipal Court and that you get an electronic record. Statewide, can you give us how many courts and agencies are transmitting to you electronically versus those still sending paper judgments of convictions that you have to enter manually?

Erica Souza-Llamas:
We are only receiving the electronic dispositions from the two courts in Las Vegas. All of the other courts are sending manual dispositions. We receive them in several different formats. We get them in the mail, through fax, and they drop out on the printer through Crystal Reports. Those come directly from the courts since they are connected to our printers through the IP address. They all require manual data entry, both the state and the FBI.

Chairman Yeager:
On the second to last slide [page 6], about the NCJIS modernization, do you believe that once that is complete, some of the courts that are transmitting manually will be able to transmit electronically to expedite the process of getting those entered?

Erica Souza-Llamas:
That is our goal. We are trying to automate as much as we can through this project.

Chairman Yeager:
You mentioned that when a record is ordered sealed by the court, you receive notice of that, and then on your side you have to actually seal the record and the accompanied documentation that you have. You also have to let the FBI know. Can you tell us about how that process works? Over the years, we have had questions about what we can do on the state level to ensure the FBI is doing what we ask. That means taking those records of convictions out of their databases. Do you get a confirmation that this has happened? Tell us what your interface with the FBI looks like.

Alison Lopez:
Our unit actually monitors that. We have the ability on the state side—if their entire record is being expunged at the FBI—to actually do that at the state. If only specific charges or specific arrest events are being sealed or expunged at the FBI, we call it "batching." We send this to the FBI and monitor it. We monitor the record and once it has been removed, we then send the compliance letter. We will not send the compliance letter out to the petitioner or the attorney until we know that all of the records have been sealed.

Assemblywoman Tolles:
How are criminal records shared between states? It sounds like the FBI may be the mechanism for that. I imagine people do not stay here indefinitely, that they move around from state to state. I also imagine other states have different procedures and laws in regard to record sealing, et cetera. Is it the FBI that makes the continuity between states? How does that work in terms of sharing records between states?

Erica Souza-Llamas:
States share nationwide with law enforcement agencies for multiple purposes, as well as civil applicant purposes. Information is shared interstate through the state Switch. It comes through what is known as Nlets, but I cannot tell you the meaning of the acronym right now [national law enforcement telecommunications system]. The data is shared through Nlets between the different states. Someone in Oregon would have access to the Nevada criminal

history. The FBI also maintains the records of criminal history, and that is shared when queries are run against their records.

Assemblywoman Tolles:
If we want to know more information on the state exchange system, where would we go? I have an interest in comparing state sealing laws across the nation. You may not have the answer to this.

Erica Souza-Llamas:
You want to find out how other states handle record seals?

Assemblywoman Tolles:
Yes.

Erica Souza-Llamas:
I can get some information for you. I will provide that information to you.

Assemblywoman Peters:
I am curious about the project you mentioned. I want to clarify that the goal is one-touch data, so the person who puts in the initial data is the only person who has that data. Right now, with the paper system, it is one person who writes it down and another person transcribes it and then it gets faxed or sent. We lose information from that. As we develop these digital processes, I want to make sure that we are using one-touch data so the person who inputs it initially is the only person who touches it.

Erica Souza-Llamas:
That is the goal. The different courts have multiple case management systems. The goal is to create those interfaces with the multiple case management systems across the jurisdictions. When their staff at the court is making the entry into their case management system it should talk to the state system and populate those records into the state criminal history.

Chairman Yeager:
I will give you two different scenarios and will start with this one. Someone comes to your agency and wants to do a background check on someone. You have a record of arrest in the database, but there is a missing disposition on what happened with that case. How is that information reported to the person asking for the background check on that individual?

Erica Souza-Llamas:
Today, when we have an arrest record that does not contain disposition information and there is a request made against that record, the complete record is provided. We call it a "naked arrest." It does not have an underlying disposition. The state record will have a note on it that says there is no disposition on file.

Chairman Yeager:
I have not seen what one of those looks like. Does it essentially give what the person was arrested for and the date of the arrest?

Erica Souza-Llamas:
Yes. It provides the date of the arrest, the arresting agency, and the offense or offenses for which the subject is being charged. It may display a booking facility if they were arrested by one agency and booked into another. If there is disposition data, it would show that. If not, it would just say, "No disposition date on file."

Chairman Yeager:
I assume when you provide those records, you have individuals come back to find out what happened with that arrest. What advice do you give them when they come to you wanting additional information about the disposition of the case?

Erica Souza-Llamas:
We generally go out and do research ourselves. I usually ask Ms. Lopez and her staff to conduct that research, to reach out to the courts and the district attorney, or even the arresting agency, to see if we can obtain that information and update the record.

Chairman Yeager:
I think I know the answer to my second scenario. Someone is arrested for three felony charges and, ultimately, it is negotiated to either one misdemeanor or the charges were dismissed. You have the disposition for that. When you report that out, I assume it is going to show the initial charges and what they were. Will it also show the actual disposition, that it went in as a misdemeanor or dismissal? Is that right?

Erica Souza-Llamas:
Yes, that is correct. It will show that the initial underlying arrest was a felony. If it was amended down to a lesser severity, it will also display what the new severity is and the amended charge.

Chairman Yeager:
If you have an order from the court to seal someone's record, you remove it from your database. If someone makes a background check request and the person who is responding to the request does not know about the sealed record, what safeguards do you have in place so that it does not accidentally get revealed once it has been sealed? Is there some kind of procedure in place?

Erica Souza-Llamas:
When we suppress our records at the state, they are physically suppressed in our system. When any queries are made, even by our own internal staff, that record will not display. We remove the fingerprints from our fingerprint matcher in our automated biometric identification system. If it is a civil applicant who comes in, it does not have the potential to hit against those criminal fingerprint cards either.

Assemblywoman Hansen:
When records are sealed, they are not sealed to every entity. Is it true the military can see the sealed record if someone is applying to go into the military? I wonder if those records are completely sealed.

Erica Souza-Llamas:
In Nevada, we do completely seal them. It would require a court order to unseal it. I believe statute allows certain authorities to review a sealed record. I am not sure what the FBI does with their records for military purposes. I am of the understanding that when they expunge, they destroy it completely, so it is not available even for military purposes. Ms. Lopez just confirmed that.

Assemblyman Fumo:
When a case is sealed and there is a codefendant on the case, if it is sealed for defendant A, does it also get sealed off of defendant B's information?

Alison Lopez:
No, it does not. Defendant B would have to petition the court separately to have his record sealed.

Assemblyman Fumo:
If it is not right for defendant B to seal his record, defendant A's record would still be on there even though his record was sealed. Could people still access defendant A's record through defendant B's record?

Alison Lopez:
That is correct.

Chairman Yeager:
Assemblyman Fumo brings up an interesting question that we have not touched on. It is the idea of certain records being out in the public domain, like arrest records. I would assume you, as an agency, do not have the authority to tell someone hosting a website that gives information about arrests to remove the record. You are only responsible for the records that your agency maintains and for the records that are transmitted to the FBI. Is that right?

Erica Souza-Llamas:
Yes, that is correct. We do not have any control over any records that other agencies or private entities may have in their possession.

Assemblyman Fumo:
I was specifically referring to your database, not other public domain websites. Is there a way for you to address or seal or block out or redact defendant A's information from defendant B's record if you had to?

Erica Souza-Llamas:
The central repository does not have information regarding cases where there are codefendants. We are not privy to that information. That is generated through the arrest and the court system. That is not something we would be able to accommodate.

Assemblyman Fumo:
I do sealing of records. What if I provided you with that information? What if I tell you that my client, defendant A, has an order to seal his record but he was a codefendant with defendant B, so I would also like A's information redacted from B's records in your repository as well?

Chairman Yeager:
I think the confusion is that the central repository does not actually keep the judgment of conviction that would include codefendants. Do you log them somehow so that defendant A would have separate records from defendant B so they would not cross each other? If there was a sealing, you would not be able to tell there was a codefendant on either record.

Alison Lopez:
That is correct. At the repository, each arrest would be completely separate. If two people were involved in one particular crime, they would be arrested separately. If they were tried together, we could get that information, but we still have to separate the dispositions and post them separately to each individual. For sealing purposes, we would not know, so they would have to petition the courts separately to have those records sealed.

Assemblyman Fumo:
I totally understand that.

Alison Lopez:
It would be up to the law enforcement agencies if they were arrested together and they had that information. They would redact that information in their sealing process. I cannot speak on their behalf, but that is my understanding.

Assemblyman Fumo:
Even if the person who is sealing the record provided you with the information—they gave it to you and to every department—and told you he was a codefendant with B and needed to be redacted off of B's information, would you have the capability to do it?

Erica Souza-Llamas:
I do not believe statute would allow that. Statute requires that the subject of the record petition the court to seal the record.

Assemblyman Fumo:
If the statute was changed to allow you to do that, would you be able to do it with your current software programming?

Erica Souza-Llamas:
I believe our system would allow us to do it now.

Assemblywoman Nguyen:
You mentioned your software. I am not sure if I missed it, but do you use third-party software applications, or do you use something that was created specifically for you?

Erica Souza-Llamas:
We use an in-house built system that the Division of Enterprise Information Technology Services (EITS), Department of Administration, designed for us.

Chairman Yeager:
I see no more questions. If the members have any further questions, they can follow up off-line.

At this time we will formally open up the hearing on the second bill on the agenda, Assembly Bill 227. The members should have a conceptual amendment from Assemblywoman Munk (Exhibit D) and that is what we will be working from.

Assembly Bill 227: Revises provisions governing sexual assault. (BDR 15-837)

Assemblywoman Connie Munk, Assembly District No. 4:
I am a counselor for sexual assault victims. I am here today to present Assembly Bill 227 for your consideration. Also presenting is John Jones, representing the Nevada District Attorneys' Association, and Sandra DiGiacomo from the Clark County District Attorney's Office in Las Vegas.

Sexual assault is any type of sexual activity or contact that you do not consent to. Sexual assault can happen through physical force or threats of force, or if the attacker gives the victim drugs or alcohol as part of the assault. Sexual assault without consent is sexual assault or rape. "Consent" means that, at the time of the act of sexual intercourse or sexual contact, there were actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. By enhancing the definition of sexual assault and consent in this bill, we are not creating a new act, but rather, clearly defining sexual assault and consent, holding all perpetrators accountable for their actions.

In the United States, someone is sexually assaulted every 98 seconds. One out of every 6 women and 1 out of every 67 men are victims of an attempted or completed rape. Ninety-one percent of victims of sexual assault and rape are female. I am bringing this bill forward because Nevada law does not include intoxication, unconsciousness, or incapacitation. Nevada law is very vague. However, more importantly, I am bringing this bill forward because a member of my family was brutally raped and left alongside of a road like a piece of garbage. We were unable to prosecute at the time due to the elements of that particular state law.

I want to read you something from Oklahoma, relating to a Court of Criminal Appeals unpublished opinion from March 24, 2016.

> A 17-year-old in Oklahoma was charged with rape and forcible oral sodomy after he allegedly sexually assaulted an intoxicated and unconscious 16-year-old girl. While he claimed the acts were consensual, the victim does not remember the series of events and several other witnesses described how she was drifting in and out of consciousness throughout the night. However, both charges against the defendant were dismissed by the district court in Oklahoma because the state's sexual assault laws do not mention either intoxication or unconsciousness as elements of the crimes with which the defendant was charged.
>
> In a 5-0 decision that incited outrage from prosecutors and the many people who were surprised with the ruling, the Oklahoma Court of Criminal Appeals affirmed the lower court. The court held that under the law as it is written in Oklahoma, "forcible sodomy cannot occur where a victim is so intoxicated as to be completely unconscious at the time." Despite the fact that this decision meant that the defendant would go unpunished, the court stood by its reading of the law saying "we will not, in order to justify prosecution of a person for an offense, enlarge a statute beyond the fair meaning of its language." Though the decision was unpublished—ensuring that it cannot be cited as precedent—and Oklahoma legislators have already begun the process of amending state laws to fix this loophole.

This bill before you revises provisions governing sexual assault by focusing on consent. *Nevada Revised Statutes* (NRS) 200.366 states:

> 1. A person is guilty of sexual assault if he or she:
>
> (a) Subjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct.

However, our law is not clear on exactly what is considered consent or what the conditions are that the perpetrator knows or should know. The question of consent often comes down to the word of the victim against the word of the perpetrator—he said, she said—unless others were witness to the act or physical evidence suggests that the act was not consensual.

I urge you to support this important piece of legislation. I will turn this over to Mr. Jones.

John T. Jones, Jr., representing Nevada District Attorneys' Association:
Prosecutors in the Clark County District Attorney's Special Victims Unit (SVU) that specifically handle these types of cases reached out to Assemblywoman Munk regarding the

issues we are here to discuss today. The results of those discussions are Assembly Bill 227 and the conceptual amendment. With me in Las Vegas is one of those Special Victims Unit prosecutors, Sandra DiGiacomo, and I would like to toss it to her to continue the presentation.

Sandra DiGiacomo, Chief Deputy District Attorney, Clark County District Attorney's Office:
I have been with the Clark County District Attorney's Office for 20 years and with the SVU since last May. The reason we have asked for section 1, subsection 1, paragraph (c) to be added to NRS 200.366 under the conceptual amendment (Exhibit D) of A.B. 227 is, under our current law in Nevada, lack of consent is an element of sexual assault which the state must prove. We have to show that there was a lack of consent from the victim for the sexual conduct. If you look at subsection 1, paragraph (b) of NRS 200.366 that was added in 2015 to remove the element of lack of consent when dealing with the sexual assault of a child under 14 years [Assembly Bill 49 of the 78th Session], actual consent is not a defense. What happened in our state law is that a step was missed. There is a difference between being able to legally consent and actually consenting. The state's concern is, when there is a person intoxicated to the point that she does not know what she is doing, or she is asleep or unconscious, how can the state prove the lack of consent when these victims have no idea what happened. Some victims do not even wake up while it is occurring. It hampers the prosecution of those rapists. With this addition, it would require the state to prove that the person was intoxicated, asleep, or unconscious to the point that they had no legal capacity to consent. It is not just did they consent, but whether they had the capacity to consent.

I will give the Committee some examples. Currently we have a pending case in which a victim is on video surveillance all over a hotel. She is passed out on the sidewalk outside the hotel and on the casino floor. She is unable to walk. Security contacts her, but later she does not remember speaking to them. Security could not understand her, and they try to get her back up to her room. Next the security video shows the defendant taking her out into the parking lot and having sex with her. She was clearly not in any position to make a decision.

Consent is an affirmative action. It is having the choice, free will, and rationale to be able to make a decision whether to have sexual intercourse or sexual relations with someone. When someone is in an intoxicated state, she does not have that ability. In that case, the state has an issue with prosecuting because she does not remember anything that happened; the defendant just has to say that she wanted it and consented. Then he is entitled to an instruction for reasonable mistaken belief as to consent, an instruction that is modeled after a California instruction. In California, this instruction is given in cases when the defendant says it is consensual. I will read it to the Committee:

> It is a defense to the charge of sexual assault that the defendant entertained a reasonable and good faith belief that the alleged victim consented to engage in sexual intercourse. If you find such a reasonable good faith belief, even if mistaken, you must give the defendant the benefit of the doubt and find him not guilty of sexual assault. A belief that is based upon ambiguous conduct by

> the alleged victim, that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another, is not a reasonable good faith belief.

This instruction does not touch upon "rape by intoxication" as California calls it. In their leading case, *People v. Giardino*, 82 Cal. App. 4th 454 (2000), California has basically said when you have a case where the person does not have the ability or the legal capacity to consent, actual consent is not even an issue that is given to the jury. It is a two-step process. Victims have to actually know the consequences of their actions and be given the rational choice to make the decision, then, if they have the ability, you get to actual consent. However, if you have a 13-year-old child, she cannot consent. They do not have the ability to give legal consent to have sexual relations. It does not matter if they may have consented to have sex with their stepfather. Also in *Giardino*, the court said that if the level of intoxication is such that the victim is incapable of exercising the judgment that is required to decide whether to consent to intercourse, you do not even get to actual consent.

An example of another case is doctors drugging their patients and then sexually assaulting them. We have video of it. That is how we are able to prove it when the victims have no idea what happened to them, when the victims can only say they do not know if they consented. They do not remember anything, then the defendant says she did consent. That is when they get the reasonable but mistaken belief instruction.

We have another case about a man who was asleep. He had been drinking, went into his room, and fell asleep. The next thing he knew he woke up and his hard penis was in another man's anus. The defendant says that it was consensual and that he wanted it. When someone has been asleep and has no idea what happened before he woke up, it hampers the state's ability to prosecute these rapists because the burden of proof is to show lack of consent.

What the state is asking you to look at is section 1, subsection 1, paragraph (c) (Exhibit D). If someone does not have legal capacity, he or she does not have the ability to make a rational decision, and we should not get to the point of actual consent. This is a necessary amendment, and a lot of people who commit sexual assault will not walk on the charges or have the charges dismissed simply because the victim cannot remember what happened. It is not up to the victim to remember what happened. If you look at these cases, the defendants know how to pick their victims. In the case of the woman who was passed out all over the casino, he clearly knew how to pick his victim. He knew she was intoxicated and would probably not remember. The law should protect these victims and not allow their rapists to walk free.

Assemblywoman Nguyen:
I have some concerns. In a situation where you have two intoxicated people in a casino, falling all over the place, and they have a sexual encounter, when they wake up maybe one of them remembers but the other does not. How does this bill account for that? They are equally drunk and equally unaware of engaging in sexual behavior.

Sandra DiGiacomo:
The law has protections in place for the defendant because we have what is called "voluntary intoxication instructions." If they are intoxicated to the point that they cannot form a criminal intent, the jury is instructed on that. However, the jury does not get instructed on a victim who does not have the ability to form the intent to consent.

Regarding the conceptual amendment, it does not negate or have anything to do with the defendants' state of mind. This just shows that a victim in this type of state—and it would be the state's burden of proof beyond a reasonable doubt—is at the point where she could not make the free decision to have sexual relations. There are still requirements. The defendant who is intoxicated is protected under the law, but the victim who is intoxicated is not. We have to show that she did not consent. If they do not remember what happened, that is a huge burden.

Assemblywoman Nguyen:
This invades the province of the jury and lowers the burden for the state against anyone who is accused in a situation like that. Do you think this lowers the burden for the state?

Sandra DiGiacomo:
No, I do not think it lowers the burden; the state has the burden. If you look at section 1, subsection 1, paragraph (a) (Exhibit D), it talks about having to be "against the will." We have to show a lack of consent or, under the conditions, the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of her conduct. The state still has the burden to show that she did not have the legal capacity for consent, which is hinted at in paragraph (a). That would be the state's burden to show. This would not be the case where someone had two drinks. You have to find that she cannot legally consent. That is not what is being asked for. If the state meets its burden and proves that a person does not have any legal capacity to consent, then actual consent should not come into play. This includes 12-year-olds who do not have the ability of legal consent. If we cannot show that, actual consent is still a defense.

Assemblywoman Miller:
My question is regarding your second case and if the victim is under the influence. You said the burden would be on the prosecution, or the state, to prove the level of intoxication at which that individual was not able to give consent. How do we prove that and what is the level of intoxication? You said we are not talking about someone who has had two drinks, but how do we know? We know that driving under the influence has specific levels at which the law says you are no longer allowed to drive. We know that level of intoxication is different for every single individual who partakes in alcohol or other substances. What is "intoxicated" and at what level of intoxication do we say that person is no longer able to make a decision? That is my concern, and I am very sensitive to victims in situations that happen. There is not one person in this room who does not know someone who was intoxicated and things happened that they did not want to happen. Where is that level?

Sandra DiGiacomo:
That is what I would call a jury question. The way we try to show that now is through friends who know she was so drunk she could not stand up. They put her to bed as she passed out, but they later came into the room and someone was on top of her having sex. It is a case-by-case situation, but we would have to show that she was so impaired that she could not make a decision.

In the scenario I just told you, she was still unconscious. We still have an uphill battle because the defendant can just simply say that she woke up and wanted it and consented to having sex with him before she passed out again. It would not just be the word of the victim that she did not remember anything because she was too drunk. There would be other signs of it as well. The question in these cases would not be whether he had a reasonable mistaken belief. It should be, Did he have a reasonable belief, although mistaken, that she had the capacity to consent? That would be part of the burden. We are trying to shift it from having to prove actual consent—which is almost impossible in those situations—to proving that she did not have the legal capacity to consent. There is a whole spectrum. There is not going to be a hard and fast rule; it depends on the circumstances of each case.

Assemblywoman Miller:
That is where my concern comes from. The idea of allowing the jury to determine the capacity or ability of the accuser case-by-case instead of basing something on a specific standard or guideline will change for every individual and every jury decision. I know that in law, when we do not have something structured, that is where bias and problems can enter. Without identifying what we scientifically determine is intoxicated, there are many levels where someone under the influence is still able to make a decision to consent or not. I am looking for where the line is and where the distinction is.

John Jones:
I understand exactly where you are coming from. I do not think there is anyone in this room who would not agree that there is a point where someone is intoxicated, or under the influence of drugs, that would render them incapable of offering consent. The question is, Where is that line? I think the proposed amendment is where our burden, as prosecutors, would be to prove beyond a reasonable doubt, and a juror must have an abiding faith in the truth of the charge that the person was intoxicated. This is much like the situation back in 2015 where we all agreed that someone under the age of 14 cannot consent. Even if they did give consent or indicate that they consented, we said they cannot do it because of their age. What this bill seeks to do is say that there is a point at which you are intoxicated or under the influence so that you cannot consent even if you have given an indication that you can.

What Ms. DiGiacomo was indicating is that we are facing an uphill battle with these offenses because we have a victim who cannot remember anything. She was either asleep, intoxicated, or under the influence. We have a defendant who says she consented. We have a juror who is presented with, She does not remember what happened. But intercourse occurred versus a defendant who said that she consented. That is where we are. What this bill seeks to do is, if we can prove they were intoxicated to the extent that it prevented them

from being aware or giving their consent, we would get the conviction. That is all this bill is trying to do, similar to how it was done for someone who is under the age of 14.

Assemblywoman Miller:
You used the example that the person was intoxicated and passed out and did not know. This is, of course, an obvious scenario. There are also times that someone is not passed out, and I would also argue that they were not aware of what was going on or able to give consent. There are also different types of drugs. If you use a different type of substance, you may not pass out, but you may not be consciously aware of what is happening or have the ability to give consent. There is also the side where you can be intoxicated or under the influence and be fully aware of what is going on. That is why I am trying to find the line when you say they are not able to give consent. I would like to find a clear line where that is.

John Jones:
I understand where you are going, and we—Assemblywoman Munk and others—are willing to work with anyone to find where the Committee is comfortable with that line. I would say in virtually all of criminal law we are practicing in the shades of gray. Unfortunately, with this it is difficult.

Sandra DiGiacomo:
There is no way to come up with a bright-line rule regarding 2 drinks versus 16 drinks. That is the way the law is now. In any case, it is the state's burden to prove the elements of the crime. What the state is asking here is to be able to prove that a rape occurred despite the fact the victim says that she has no idea if she consented or not. Right now, it is the state's burden to prove a lack of consent. This will change the question from if she actually consented to whether she had the legal capacity to consent. Obviously, the state would have to prove that. The defense would have the right to present contrary evidence that she clearly had that capacity, and, based on these factors, he believed she consented. We are trying to change the question and not our burden.

I have a picture that you may be able to see of a person who is a victim of sexual assault who is completely passed out on the sidewalk. This other person is awake, but she has her pants down and is peeing all over the sidewalk. The question is whether she had the legal capacity and was able to make a rational choice to have sexual relations. It should not be if they actually said yes. That is what we are trying to change. How can a person consent who is asleep, unconscious, or incapacitated to the point she cannot make a rational decision? They do not know what they are doing and are not aware of the consequences of their actions. A bright-line rule is not possible.

Assemblywoman Miller:
Let me shift gears. Why does this bill only reference penetration when there are obviously other sexual assaults and different levels of sexual crimes?

John Jones:
Sexual assault in Nevada specifically requires penetration. Piggybacking on what we are talking about, we would still have to prove sexual penetration along with the intoxication under the amendment on A.B. 227 (Exhibit D). There are other crimes, such as open and gross lewdness, et cetera, that deal with unwanted touching.

Assemblywoman Tolles:
I can understand clarifying what it means to be mentally or physically incapable of giving consent. I also understand the technical difficulties of coming up with a list that may open doors of interpretation. I was reading through section 1, subsection 2, paragraph (a), subparagraph (1) of the bill. This may already be defined in law, but I am referring to, "The total circumstances, including, without limitation, the age of the victim and his or her relationship to the perpetrator, are factors to consider in appraising the existence of duress." I understand the intent is to give background and perhaps to strengthen a conviction, but I wonder if it might have a reverse effect in some cases if the factors to be considered are things like an existing relationship or marriage. Is that covered somewhere else in statute?

John Jones:
You are reading from the bill but we have proposed to strike all of that language in the conceptual amendment (Exhibit D). We are proposing to strike all of section 1, subsection 2. The language that came out through the drafting process was not remotely close to what we were intending to do with the bill, which is why we are working off of the conceptual amendment submitted by Assemblywoman Munk.

Assemblywoman Peters:
We have people who live alternative lifestyles who already have to walk a line of legality on the things they do. I look at this and wonder if this expands the burden on people who have consenting relationships that include relations that would be covered under these stipulations. I do not think the intention is to make consensual relations illegal, but I have concerns that this does not have "consent" in the language and that it is broad enough that it would create some legal gray area in those relationships that currently would not have that.

John Jones:
We are only intending to cover instances where someone is intoxicated, under the influence, unconscious, or asleep. Those are the four states that we are seeking to outline in the law. I do not know of any consensual activity that occurs in those states. If you could enlighten me, we could have this conversation off-line.

Chairman Yeager:
The way I understand the conceptual amendment (Exhibit D) is essentially that we are defining what sexual assault is. We have section 1, subsection 1, paragraphs (a) and (b) that exist now, and paragraph (c) seeks to say, if you engage in sexual conduct when these things are present, that is also a sexual assault. In a marital relationship or if you have people who are dating, you could have a situation where someone says, "No matter what happens tonight I want to have sex with you," or a married couple may have some kind of arrangement where

it might be said, "If you wake up and want to have sex, it is fine by me." The question is, when there is that kind of an arrangement where consent is given when the person is not intoxicated or impaired—a prior consent—and the sexual activity happens when someone is asleep, is it still consent? Unconscious is a pretty safe one because I cannot think of a scenario where that would be appropriate. I do not think it is out of the question that someone could be asleep but gave prior consent. Does this define that de facto as a sexual assault because it is sexual conduct that is happening when the person is asleep, or would there be the ability for someone to say they gave prior consent? That is the discomfort we are seeing. We are defining this as a sexual assault in the language rather than as a factor to look at. I realize that someone would have to complain to the police for this to go anywhere. I am not trying to pick a far-fetched example. Does paragraph (c) make it sexual assault if you are asleep? Is it too broad and does it cover areas that you are not intending to cover?

Sandra DiGiacomo:
The intent is obviously not to try to encompass more than what would be criminal conduct. If two people are in a consensual relationship and they go out drinking, that is a different situation. Yes, it could be a sexual assault or it may not be. If you have been dating and you have a consensual agreement, but you get drunk and wake up while your partner is having unwanted sex with you, it would be difficult to prove because you have a consensual sexual relationship. That is not what this amendment is trying to get at. However, there was a case about 18 years ago where a doctor was taking his wife to his office, drugging her to the point of her not knowing what was happening, and was sexually assaulting her. That was a crime because there was no consent ahead of time. There were more extenuating circumstances in that case.

The key to what we are trying to do is to take the focus away from did the person say no or were they even capable of saying no. That may require tweaking if you think it is too broad. That is not the intention.

John Jones:
To be clear, in Nevada you can still sexually assault someone you are married to or in a relationship with. I do not want to carve out an exception so broad that it would limit prosecutions in those incidents where someone, in spite of being in a relationship, still did not give consent.

Assemblyman Watts:
For a sexual assault to lead to an arrest or prosecution, does the victim or the alleged victim have to file a complaint? Would there be an ability for video evidence or a statement from a witness to be sufficient to start that process? The reason I ask is that, looking at the addition of a new definition—and the potential for the people involved in the act not to come forward—instead of defining it under what is consent or against the will of the person, can you clarify why you decided to move away from the structure of the original bill towards the structure of the conceptual amendment?

Sandra DiGiacomo:
The original bill, with all of the additional language, was taken partially from California Penal Code 261, which defines rape in that jurisdiction. California has what they call "rape by intoxication." It has its own definition. In Nevada you are not required to have force in order to sexually assault someone. When the bill was originally drafted, too much of the language came over. What is listed does not necessarily apply to our definition of sexual assault as it does to the California penal code. It went past our intention with what we were trying to add to our definition. A lot of it was not relevant to our case law and how sexual assault is defined here.

Regarding how these cases come about, they are reported by the victim, and additional evidence comes from friends who saw or heard what happened. We have a case where a husband and wife were drinking in a hotel recently, and the wife disappeared and was found on a stairwell, half naked and covered in blood. There was blood all over the stairs but she had no idea what happened. Based on surveillance video, they were able to find the perpetrator. Many times the victims will wake up and their lower extremities or vagina will hurt, but they will have no idea what happened to them. In order to build a case, they need to report it. It is okay if they say they have no idea what happened because there generally are other witnesses and other ways to prove the crime. However, if there is no other evidence, it is very difficult to prove.

Chairman Yeager:
At this time, I am going to open it up for testimony in support. If there is anyone who would like to testify in support of Assembly Bill 227, please come forward, both here and in Las Vegas. We will start in Carson City.

Jeri Burton, President, Nevada Chapter, National Organization for Women:
The Nevada Chapter of the National Association of Women supports Assembly Bill 227 because Nevada law needs to have clear language defining what sexual assault and consent mean. If a person is intoxicated, unconscious, or incapacitated, and unable to give consent, or is too young to consent, we need to hold perpetrators accountable for their actions toward the victims. I ask that you support this bill.

Corey Solferino, Lieutenant, Legislative Liaison, Washoe County Sheriff's Office:
We are in support of the bill with the conceptual amendment (Exhibit D) that was provided by Assemblywoman Munk and the Clark County District Attorney's Office.

Eric Spratley, Executive Director, Nevada Sheriffs' and Chiefs' Association:
I am here in support of A.B. 227 with the conceptual amendment. I want to add that it seemed in the conversation and the questions that we were thinking about a person who was intoxicated and had gotten to the point where they could not consent. If we think about gamma-hydroxybutyric acid, or GHB, and flunitrazepam and the other date-rape drugs, the witnesses could say that she had one drink and then got silly. She was definitely saying yes that she wanted to and was hanging all over that guy all night long. Now she is saying this happened.

Talking about GHB—and I am no expert—it has a very short half-life. It dissipates very quickly in the body, usually in a couple of hours, and certainly within 24 hours; then you can no longer test it in the urine. When a person ends up in that state and wakes up in the morning with the headache and possibly pain elsewhere, and she starts asking her friends what happened, the clock is ticking. The time to get a urinalysis for GHB is going away, which means the evidence is going away. They have been in the state that this bill is trying to bring forth. They were not able to consent because someone snuck a couple of drops out of a Visine container into their drink. Yes, they only had one or two drinks, but they are in a state of mind where they really cannot give consent. Even though they might be doing it on the dance floor and giving consent in an altered state, I would point to drugs.com to research GHB and you will get facts on that drug. Certainly, people get intoxicated and take drugs themselves to put themselves in this state, but you are talking about a drug that is used offensively against them that changes the outcome. That is the intent of this bill and we support it.

Assemblywoman Cohen:
Are you saying if someone gives another person a date-rape drug and then rapes them, they cannot be prosecuted for rape?

Eric Spratley:
That is not what I am saying. I am saying that this outlines the state of the person who cannot really give consent because they have had this done to them. It enhances their feeling of freedom to think, "I dance better than anyone else and I want to party and I love this guy." They are in an altered state immediately. That is when all of the friends can say that she or he never acted that way before. It can be proven now. The intent of this bill is to bring in language that codifies the state of mind of that victim.

Assemblywoman Cohen:
I wanted to be clear about that. We can still prosecute people for that as the law stands.

Serena Evans, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence:
We are here in strong support of Assembly Bill 227. According to the National Institute of Justice, alcohol is a factor that increases one's risk for sexual assault. Alcohol-facilitated sexual assaults are most commonly seen on college campuses, where 20 to 25 percent of women and 15 percent of men are victims of sexual assault. Of these sexual assaults, at least half occur after the perpetrator, the victim, or both have consumed alcohol. Consent cannot be validly given by a person who is incapacitated or otherwise unable to provide affirmative agreement to the act, whether they are asleep, unconscious, or under the influence.

I would also like to bring up that consent at one point in time, under one state of mind, does not give consent for a later date and time when you are incapacitated and in a different state of mind. Clarifying this in our state law will improve our ability to prosecute rapists and provide survivors with more confidence in the system.

Stand with survivors of sexual assault and support their right to affirmative consent to any sexual activity.

Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
We are here in support with the amendments.

Chairman Yeager:
Is there anyone else in support of Assembly Bill 227? Seeing no additional support, we will take opposition testimony at this time. I see no one in Las Vegas, so we will start here.

Nadia Hojjat, Chief Deputy Public Defender, Clark County Public Defender's Office:
I am here to testify in opposition to the bill. Our proposed amendment (Exhibit E) was based on the original version of the bill that was proposed. We have since received the conceptual amendment. We are here in opposition of the bill with the conceptual amendment.

The law as it currently stands does protect against the conduct that is being posited as what we need to protect against. If you look at the statute, it is very clear that it is sexual assault to have penetration against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting. This is not a situation where our law currently does not cover an individual who is too intoxicated to consent. When we are being given examples of people being unconscious on the sidewalk, unable to stand, unable to walk on their own, or urinating themselves, this is absolutely covered by the statute as it stands right now. The statute says if a perpetrator "should know," and it is not just knows, it is when they should know. Someone can get up there and say they did not know, but if the person is unconscious on the sidewalk, they should have known. This is absolutely covered by the current language of the statute.

What this amendment does (Exhibit E), is to create an alternative element. This is not a situation where section 1, subsection 1, paragraph (c) of (Exhibit D) would work in conjunction with subsection 1, paragraph (a) of NRS 200.366; it is an alternative. The standard is an "or," right? The state is not required to prove that they knew or should have known and that the victim was intoxicated. It is now an "or" (Exhibit E) and we are shifting away from what the perpetrator knew or should have known and going entirely to the state of mind of the victim at the time of the incident. That is very problematic.

We have all seen people who are out talking and walking and you do not realize that they are so drunk that they will not remember any of it tomorrow. We have all encountered people like that because everyone reacts to alcohol differently. Not every person who is so drunk that they will not remember tomorrow is unconscious on the floor. You can have a situation where a third party is talking to someone and has no idea what their level of intoxication is. Realistically, we are in Nevada, and people go to Las Vegas to the clubs and meet strangers. They do not know these people and things happen in Las Vegas. I do not mean that in a disrespectful manner, but the reality is people go to clubs, and some people go to clubs for very specific reasons, both men and women. This is completely shifting away from what the

perpetrator should have known. If they are talking to you, how should you have known? This removes that element completely. That is what this bill does. We are now talking about the subjective state of mind, and you have to be able to get into the mind of the person in front of you and know what they are thinking and know what their level of intoxication is. If you get it wrong, you are now a rapist. That is problematic.

There have been a lot of references to age and conversation about section 1, subsection 1, paragraph (b) of the bill. This is not even remotely similar. We are talking about two adults. The testimony was quite clear. We are talking about an adult who appears to be a consenting adult. This is not just a situation where there are two adults and one person appears to give consent. This amendment is asking that we now say for this adult who appeared to be giving consent, whom you thought gave you consent, that consent does not count. That consent is invalidated by law and by statute. It is not a defense any more. It is burden shifting. It is a presumption of innocence, and the state has to meet their burden beyond a reasonable doubt. It is not as if the current law does not allow them to do that; the language is very clear. If there is evidence, such as video, people testifying, or any number of things that show the person was obviously too drunk to consent, that is more than enough to obtain a conviction in this state. All of the cases that the district attorney talked about are currently being prosecuted. None of those cases were thrown out for lack of evidence or declined to be prosecuted for lack of evidence. They are all ongoing cases, and that speaks to the fact that our law covers that conduct.

I want to briefly address the contention that voluntary intoxication on the part of the defendant would be a defense, and that is inaccurate. Sexual assault is a general intent crime. It is not a specific intent crime. Voluntary intoxication is only available as a defense in specific intent crimes. The suggestion that a defendant was as drunk as the victim and therefore cannot be prosecuted, or that it is somehow a defense, is legally inaccurate. The defense would be allowed to put forward such a defense under the law.

The jury instruction that Ms. DiGiacomo read to you is accurate. She talked about some good words that were in that jury instruction—reasonable and good faith—when we are talking about the instruction that they are given if the defendant had reasonable and good faith belief that consent was given. That is a defense. It is not a defense if the defendant gets up there and says he believed it despite the fact that she was unconscious. The defendant's assertion has to be reasonable and based on good faith. The law, as it stands, protects victims, but also makes sure we are not creating a strict liability crime where it is per se sexual assault to have sex with someone who is intoxicated. We oppose the amendments.

Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:
We understand and appreciate that sexual assault is something that needs to be addressed. This is an issue that unfortunately has touched many in this community and many in this room. I would note that, unfortunately, we do not believe the conceptual amendment (Exhibit D) captures the intent of what we have heard today.

What we are discussing in this conceptual amendment is basically how we determine whether something was a welcomed encounter or a sexual attack, which subjects them to the severe penalty of sexual assault. That is where the problem lies in this amendment: When we say that someone is guilty of sexual assault if the individual committed a sexual penetration upon a person who is intoxicated, what does that mean? Intoxicated. Is that one or two drinks? We have heard that it is difficult to quantify. If two individuals go to a bar and both have two drinks, and there is a sexual encounter, is it the first person who regrets it in the morning and goes to the police and says he or she was assaulted? Is the other person guilty of sexual assault?

My concern with this bill is that we are being overly inclusive to the point of potentially capturing innocent individuals. I have grave concerns with the statement that we will just let the jury figure it out. When you look at sexual assault, it has a severe penalty. The allegation alone is something that follows the individual. As soon as they are arrested and it gets out, it will impact them forever. I understand that we have discussed it with the victims and that has a lasting impact on them as well, so I am not trying to minimize the impact on those individuals. I am just concerned about the way this bill is written. We are welcoming the potential allegation to cover individuals who are innocent—or where there was misconception and not criminal intent—and it is not that they knew that person was so intoxicated that they were not able to consent. That is my concern with this bill.

Holly Welborn, Policy Director, American Civil Liberties Union Nevada:
I do not have anything to add but I concur with my colleagues from the Washoe and Clark County Public Defender's Offices. We firmly believe that the mental state should be based on the offender and their actions at the time of the offense without them having to guess what the level of intoxication is when they are engaged in these particular acts.

Assemblyman Fumo:
In Nevada, the age of consent is still 16, correct?

Nadia Hojjat:
That is correct.

Assemblyman Fumo:
When the state was talking about a 12-year-old accuser waking up, was that accurate?

Nadia Hojjat:
No. In the state of Nevada, any sex that occurs with an individual under the age of 14 is per se sexual assault. The state does not need to prove anything beyond sexual conduct occurred and that the victim was under the age of 14.

I want to clarify one thing. Penetration under the law includes cunnilingus and fellatio. When we talk about penetration, oral sex is included as a sexual assault.

Assemblyman Fumo:
It appears to me, as a practicing trial attorney, that this actually shifts the burden to the defendant, that there was consent. Is that the way you read it as well, and is that constitutional?

Nadia Hojjat:
Yes, I read it the same way. I read it that it is now on the defendant to prove that the person was not so drunk and now they have to prove the level of intoxication. That is burden shifting and, under the law, the state has the burden of proof. The defendant should not have to prove anything.

Chairman Yeager:
Are there any more questions from Committee members? Seeing no further questions, we are still on opposition testimony. Is there anyone else who would like to provide testimony in opposition to A.B. 227? Seeing no one, we will take neutral testimony if there is anyone who would like to testify in the neutral.

Alanna Bondy, representing Nevada Attorneys for Criminal Justice:
We are neutral with Assemblywoman Munk's amendment (Exhibit D). I would like to add that the amendment is fine in our opinion; however, we do think existing law covers these scenarios that were pointed out earlier. The existing law provides that, if the victim is under conditions where the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct, that would constitute sexual assault. We do not necessarily think this law needs to be changed. All of the scenarios that were described earlier are prosecutable under the law. With the amendment, we are neutral.

Chairman Yeager:
Is there anyone else in the neutral position? Seeing no additional testimony, I will invite our sponsors back up to the table for concluding remarks.

Assemblywoman Munk:
I think it is important to emphasize that the definition of lack of consent is an enhancement to the law that simply holds perpetrators accountable and to have clearer language around what sexual assault and rape really are. I want to also let you know that there are two conceptual amendments that were uploaded on the Nevada Electronic Legislative Information System [(Exhibit D) and (Exhibit E)], and I will be working with all of the stakeholders on those two conceptual amendments.

John Jones:
I do want to toss it down to Ms. DiGiacomo with your permission, but first I want to say that there was some discussion about paragraph (b) that makes it a strict liability to have sexual contact with someone under the age of 14. That was added to statute [NRS 200.366, subsection 1, paragraph (b)] because we were seeing consent being argued in criminal prosecutions involving victims who were under the age of 14. The Legislature said that

consent is not an element. It is per se sex assault with respect to them, and that is why it was added.

Sandra DiGiacomo:
When I brought up paragraph (b), yes, it is clear. The case law states that the age of consent is 16 in Nevada. However, as Mr. Jones pointed out, we were seeing in sexual assault under age 14 cases that the defense was actually arguing consent. What my point is in paragraph (b) is that it clarifies that you stop once you know she is under 14. They cannot consent. It does not matter if they consented because the law holds that they cannot consent. That is what paragraph (c) (Exhibit D) is trying to do. We are trying to shift the focus from did the intoxicated, unconscious, asleep person actually consent, to moving the conversation to not actually consenting just because they may rouse in their sleep and consent and then go back to being passed out.

The conversation should not be actual consent. Right now, in those situations, the state has to prove—because of paragraph (a) [NRS subsection 1]—that there was a lack of consent on the victim's part. You are talking about cases where the victim cannot say what happened. They do not know if they said yes; they do not know if they said no. We try to prosecute these cases and when we get to trial, the defense attorney raises the defense that she consented. We then have the burden to prove she did not, and that is an impossible scenario. We cannot prove she did not or that there is a lack of consent since she herself does not know what happened. She did not have the legal capacity to make a rational decision and make a choice to have sex or not.

The focus of paragraph (c) is not to change our burden, it is to change what we are arguing about in these cases and to change it from whether there was actual consent to whether she had the legal capacity. That is mentioned in section 1, subsection 1, paragraph (a), but what happens pursuant to case law and pursuant to the instruction I read, we argue that she could not have legally consented. She was so intoxicated she could not have made that rational choice. Even if a jury agrees and the state has proven that beyond a reasonable doubt, the defendant just has to take the stand and say that she consented so I thought it was okay, despite the fact that she was passed out at the time. It is a reasonable doubt issue.

Let us say that she only had two drinks and her friends all said she was fine. Then you get to step 2 and whether she actually consented. If you are at step 1, and we show she had no ability to make a rational choice or to legally consent, that is where it should stop, and that is what paragraph (c) does. It does not move on.

The instruction that the defense uses clearly says that it only deals with cases of forcible rape. It does not apply to cases of rape by intoxication. What is happening here under Nevada law and with our prosecutions is that the defense is able to muddy the line. They are able to skip over if the victim had the legal capacity and go right to, "She said yes." It is not shifting the burden and that is not what the state is intending to do, but right now it has our hands tied. We are trying to prosecute these people, but the defense just has to say that she consented. We lose a lot of these cases.

Chairman Yeager:
I will close the hearing on Assembly Bill 227. I will now open the hearing on the first bill on our agenda, Assembly Bill 192. We will also be working off of a conceptual amendment, so make sure you are referring to that.

Assembly Bill 192: Establishes a procedure when certain offenses are decriminalized. (BDR 14-319)

Assemblyman William McCurdy II, Assembly District No. 6:
Assembly Bill 192 and the amendment (Exhibit F) establish the process for the sealing of a record for persons convicted of an offense that is later decriminalized. In 2016, Nevada voters approved a ballot initiative, State Question No. 2, to regulate and tax marijuana. As a result, the *Nevada Constitution* allows a person who is 21 years of age or older to possess and consume retail marijuana. Revenues from marijuana taxes continue to outpace projections. In addition to revenues generated, the marijuana industry in Nevada supports over 8,000 full-time jobs. Governor Steve Sisolak has recently created the Cannabis Compliance Board in order to make Nevada the gold standard for regulations and operations of the cannabis industry, as we are for gaming.

Prior to the passage of Question 2, a person who was convicted of possessing one ounce or less of marijuana was guilty of a crime. Prior to 2001, possession was a felony. From 2001 to 2017, it was a misdemeanor. Over the past five decades thousands of people were convicted of this crime and now, obviously, they have a conviction on their record despite the fact that the activity they engaged in is no longer a crime. We need A.B. 192—that I will call the "Nevada Second Chance Act"—in order to align the criminal records of persons convicted of possessing small amounts of marijuana with the fact that such possession is no longer a crime. This will have a number of beneficial results. It will eliminate difficulties in gaining employment and restoring civil rights, clearing the way for more of our citizens to vote or serve on a jury, and remove the stigma of having a blot on their record.

I am joined by Bailey Bortolin and Holly Welborn. They will be copresenting with me. I will briefly walk through the amendment and then we will field your questions.

What does the bill do with the amendment (Exhibit F)? Subsection 1 of section 1 authorizes a person convicted of an offense that has been decriminalized to notify the court that has custody of the criminal history of the conviction. Subsection 2 of section 1 requires the court to inform any other agency with custody of the record, as well as the prosecuting attorney. The attorney has ten days to object to the removal of the records and has the burden to prove that the record should not be sealed. Otherwise, the court must seal the record related to the conviction as soon as practicable. Section 1, subsection 3 requires a criminal justice agency that receives the valid notice to seal any record of the criminal history in its possession. Subsection 4 says that the conviction and all proceedings never occurred and that the person convicted may answer accordingly to any inquiry. Subsection 5 immediately restores the person's civil rights if they have not already been restored and the person is otherwise eligible

for restoration. Sections 2 and 3 of the bill prohibit the courts from charging a fee for filing a notice to seal criminal records under this act.

In conclusion, when the people or the Legislature determine that an activity that was previously a crime is now lawful, it is only fair that we allow persons convicted of that activity to have their record sealed and restore their rights and privileges. I urge your support.

Holly Welborn, Policy Director, American Civil Liberties Union of Nevada:
It became very clear during our discussions that the current systems we have in place lack the technological resources and capabilities for an automatic expungement. I do want to say at the outset that, in a variety of jurisdictions where marijuana has been legalized, we are seeing the district attorneys' offices are taking the time to expunge those records automatically. I think that conversation will continue, but the goal and intent of this bill is to provide immediate relief to those individuals who are eligible for record sealing.

We have seen in Massachusetts, Colorado, Maryland, Vermont, and New Hampshire—a variety of jurisdictions where marijuana has been legalized—a system where an individual has a streamlined record sealing process they can engage in. Currently, under Nevada law, a record sealing petition is about $275 and varies across jurisdictions. What this bill would allow us to do is to waive those fees to make sure we are dismantling any barriers for a person to seal that record so they can move on with their life and seek employment, et cetera.

I will walk through the bill from a more technical perspective to describe how this system will work. Ms. Bortolin will then describe how legal aid will help facilitate this process and get this information out to the public so that people will participate in this record sealing process.

Section 1, subsection 1 says the person can alert the court in writing. That would mean a form would be developed that would be accepted by a court in the same way a record sealing petition would be drafted and presented to a court. It would be a streamlined process, a much simpler form. I submitted a sample form from Vermont (Exhibit G). This is what their legal aid groups work with when they do different fairs and they do record sealing petitions with folks on crimes that are no longer criminalized. As you can see, it is pretty simple. This is something that would have to be jurisdiction-specific. Legal aid would work on it, and we would assist legal aid in developing it. I think it gives a clear example of what it is we are looking for. This would be the written form that a person would fill out with the assistance of an attorney or volunteers that they would send to the court. The court would automatically have to seal the record. That is the point at which our current record sealing laws are triggered. They seal the record just like any other type of record sealing.

As for subsection 2, in our discussions, the Nevada District Attorneys Association (NDAA) wanted an opportunity to contest the sealing under certain circumstances. We are still working with the NDAA on what that language should look like. It was important

to Assemblyman McCurdy that there be a high burden of proof—clear and convincing evidence—that the record should not be sealed. We are still discussing with the courts and the NDAA on whether we are going to limit the circumstances under which they may be able to contest, so that is a conversation that will be ongoing.

This bill is forward-looking. In the future, if there are any other acts that are decriminalized, an individual can seal their record. I think it is a pretty simple, straightforward process. There have been some questions about what the public awareness and education campaigns can look like, and I will turn to Ms. Bortolin to discuss that.

Bailey Bortolin, Statewide Advocacy, Outreach and Policy Director, Nevada Coalition of Legal Service Providers:
We work on record sealing in a community outreach to assist people and ensure they are able to turn their lives around. For example, our law school does a full day of record sealing where a lot of people come who need assistance. We get volunteer law students and attorneys from all over the community. I think everybody leaves saying, "Wow! It is really hard to seal your records." I think the attorneys who volunteer expect to come to this full day of volunteering and make a difference in a lot of peoples' lives, but by the end of the day, they may have had one case that they will be able to assist going forward. I think this will make a big difference in reducing the burden for people whom the Legislature has declared what they did is not worthy of punishment going forward. Let us streamline the process in those specific instances.

For our clients, the filing fee can be very burdensome. Taking time off work to go have another hearing or opening another court case can also be very intimidating and burdensome. This process would allow someone to simply submit a request. By submitting their request, they would have this conviction taken out of their record. I think the ease of the process is really important. Yes, people have the ability to utilize our record sealing process right now, but it is very difficult.

I am here to ensure we can do the community outreach, we can work with other stakeholders, and we can make sure people utilize this process. The main complaints we heard from stakeholders was not that people should not be able to do this. It was things like, "Who is going to have the triggering responsibility? Who is going to have the burden of identifying everybody who should have their records sealed? Who is going to have to comb through all of those? Who has the time and the resources to do that?" Whether these people should be able to seal their records is really an IT [information technology] concern and not a policy question. From that standpoint, we thought if the burden is shifted for fiscal IT purposes, we can provide assistance to ensure the community knows how to take advantage of this and is able to do so.

Chairman Yeager:
A number of years ago, we did a record sealing clinic, and a number of folks in this room participated. I have a memory of driving there and seeing a line of about 400 people. We had a lot of attorneys, judges, and city attorneys trying to work through it. I was paired up

with then-Senator Segerblom. I think we were there about eight hours, and we helped two people. That is how long the process took. Certainly there is a need for this in the community. I would hope, if we are able to pass this legislation, that we can do something similar. I think there really is a hunger in the community to do this. As you said, it is expensive if you go to an attorney, and many attorneys will not even do it because it is really complicated. We are trying to streamline that procedure. If you want to know more about that, I know Mr. Piro was at that record sealing event as well. It was really eye-opening. I do not have a question, I just wanted to make that comment. Hopefully, we can do another one of those.

Assemblywoman Cohen:
My question is about restoration of civil rights. What happens so that people understand what it means to have their civil rights restored—the right to vote and all that it encompasses?

Holly Welborn:
We have a variety of ways. As an organization, we do community events where people learn what rights restoration is. We go into reentry programs to talk to people about what record sealing looks like, what it entails, and exactly what it means to have your rights restored. It is like a clean slate, but it does not always apply to certain gun issues. That would be part of this process. It is something that is provided to an individual through the record sealing clinics in Washoe County once his record is sealed. We do our best to make sure the person we are assisting with either a rights restoration petition or a record sealing petition knows what it means to have his rights restored and exactly when he can register to vote, et cetera.

Assemblywoman Cohen:
Besides the marijuana laws, is there anything else we have decriminalized that this will affect?

Holly Welborn:
The first thing that comes to mind is that we decriminalized sodomy laws in the early 1990s. I am not sure how many people are out there with a sodomy conviction, but that is the first thing that comes to mind.

Assemblywoman Torres:
Can you talk about the consequences of having this charge on your record for the individuals who were charged with marijuana possession before it was legal?

Assemblyman McCurdy:
One of the initial concerns I had was, when we had the record sealing event, we had folks who wanted to move forward with their lives. They wanted certain jobs, such as gaming. If you have a marijuana conviction on your record, you are essentially prohibited from gainful employment. I cannot go over the entire scope of the jobs for which this would now allow employment, but there are thousands of folks in our state right now who would be positively impacted by the passage of this bill. There is also the workforce issue that we

have. I do not know all jobs, but if we move forward with this, our state will be impacted in a positive way.

Holly Welborn:
Yesterday, we had a lobby day. It was a partnership with the American Civil Liberties Union, the Progressive Leadership Alliance of Nevada, and Americans for Prosperity. I am not sure how many of you had an opportunity to meet with some of those activists who were out talking about criminal justice reform. I got to talk to a few of the individuals who came up from Las Vegas. There was one person in particular who has a marijuana conviction who would really like to work in a certain construction trade where they require drug testing, and that could affect this person's employment prospects. What was most important to this person was the waiving of the fees. Also, the complexity of the current record sealing statute was too much for that individual. He could not find time, as a single parent, to go and file these petitions or attend a legal aid clinic. This faster process would be very meaningful to that individual.

Assemblyman Roberts:
This bill does a lot to fix some of the past convictions for folks. It is a good move forward. Does this apply to anything that is decriminalized? I know we are going to be discussing decriminalizing traffic offenses at some point. There are thousands of those records in each database. Would this apply? If we decriminalize traffic offenses, would we have to expunge all those records in the state repository and local jurisdictions?

Assemblyman McCurdy:
That was brought up in our recent discussions. In my opinion, if we do move forward with this measure, folks who could be positively impacted would be able to benefit from the passage of the Nevada Second Chance Act.

Assemblyman Fumo:
This is a positive thing and will get hardworking Nevadans back to work. I have had communications from several students here in Nevada. They say the criminalization of traffic tickets adversely affects them when they apply for things like medical school, graduate school, and jobs because it is not a criminal notch on the records of students from other states. Even though they can explain it, it looks bad when they have to say, "Yes, I have had 10 traffic tickets since I was 16. It is a criminal conviction, but I am not a bad person. I still deserve to go to medical school." I would be happy to support this bill, and I think it absolutely should affect everything we decriminalize. That is the purpose. It is no longer a criminal offense; it should no longer be on the person's record. As I said, it will help people get back to work and into graduate school.

Assemblywoman Tolles:
I appreciate the intent of the bill. I had the same question that Assemblyman Roberts brought forward regarding how it might apply to future things that we decriminalize. It led to a second question. If there were a dozen traffic offenses or something where it shows a repeated pattern, that can be helpful in seeing how it ties into other repeated patterns.

Is there a limitation on that? How might that apply to patterns of behavior over a period of time versus just one or two offenses that have now been decriminalized?

Bailey Bortolin:
I think it would be situation-specific. I hesitate to get into a full-blown traffic bill hearing. I think it would depend how they have been charged. I would suspect that you would get charged differently as you continue to repeat offenses. The district attorneys may be able to speak to that and what that record would look like. In my experience, a repeat offender for small instances tends to get charged differently as it becomes repetitive behavior. They would not necessarily all appear as the same minor offense.

Chairman Yeager:
Let me remind Committee members that we have not yet decriminalized traffic tickets. I am hopeful that all of you will support that legislation when we hear it. We can have that discussion as well in the context of that bill and how it might interplay. We certainly have the option of writing that out of this bill. We will need to get more information because I understand convictions of minor traffic infractions are not maintained by the central repository, so they do not appear on background checks. However, as Assemblyman Fumo said, one of the issues is when people apply to medical school, they are obligated to list all criminal offenses. They might not show up on a background check, but they are still supposed to put them on the application. In the context of traffic infractions, perhaps we can have a statement that past infractions are not criminal for the purposes of employment or education. Those are just some things to keep in mind. That bill is not out yet. I am hopeful we will see it soon, but we are not quite there yet. I want to let the Committee know we can have further discussions about how these two bills interplay with one another once we have a hearing on the traffic infraction bill.

Assemblywoman Tolles:
In terms of this bill before us—and this may not be applicable—I wonder if there is some way to acknowledge that graduated penalties would not necessarily automatically apply. As I read the language, it is "automatic" sealing, so it would be hard to make it on a case-by-case basis. Maybe my understanding is off, but if there are graduating offenses, maybe it would be useful to still have that record available.

Bailey Bortolin:
I would say that it is definitely a conversation we will be having. When is a record appropriate? When is a record not appropriate? What we have all found is—and you may hear other opinions at this table—when people have other offenses, those other offenses remain. It would be rare that we would seal a bunch of marijuana offenses and, if that person was a bad actor in society, his record would be completely wiped clean of anything that indicated that he was a bad actor. These specific acts do not necessarily impact that record; it is not going to tip the weighing scales.

The reason we felt it was important to have this more than the marijuana record sealing bill is so that people are not left in the lurch in the future. This is something we have done before, although we might not do it very often. What is the policy consideration when someone has done something that we no longer consider wrong? Do we need to wait another session to come back and help those aggrieved people? Can we have a process in law that allows them a remedy? That is why we wanted to leave it open for the future, but you would have the ability to exclude bills from that process as you consider them.

Assemblyman Edwards:
I want to look at this through the eyes of the businesses. If you have a casino—large or small—you need to make sure your workforce is sober in what they do. This puts them into a bit of a bind. If they do not know that someone has one or multiple convictions for drugs, they might be held liable for the conduct of that individual if they continue to use drugs. In the vetting process for employees, are we not, in fact, handicapping businesses such as the casino industry? If it comes to traffic violations, how do companies such as Lyft, Uber, or any of the taxi companies know they are putting safe drivers on the road with passengers? In sealing the records, are we not actually putting a lot of businesses at risk for hiring people they should not?

Assemblyman McCurdy:
We have a piece of legislation before us that will allow folks who would benefit from what we have deemed as a state to be legally permissible as of 2016 to move forward with their lives. This does not prohibit the casinos from looking at some of those past convictions. I believe the gaming industry can still see some of those past convictions even if you have sealed your records. We will have gaming come up and answer that. I am not sure, but I believe that is the case. We have to think about what is currently happening with our workforce. We have people who want to move forward with their lives. We have people who, even if they have made mistakes in the past, are not still engaging in what is now legally permissible. We really have to ask ourselves what we are going to do to help those who want to move forward.

Assemblyman Edwards:
I understand we want to help people move forward with their lives. What about the businesses that might be put into a situation where they are taking an undue risk—not just because of drugs, but maybe drunk driving? What if they increase the blood alcohol limit from 0.08 to 0.10, and then they expunge those records and companies start hiring drivers? What about the potential for liability? Additionally, what if this gets recriminalized?

Assemblyman McCurdy:
If it is recriminalized, it would have to go through the voters because it is now in the *Nevada Constitution*. That has a process. As of 2016, we voted as a state to legalize this for recreational and medicinal use. To your point about liability for businesses, there is a liability in everything you do in this life.

Assemblyman Edwards:
I understand there is always risk, but we may be adding to that risk by putting not just the business at risk, but also the passengers in vehicles and the other drivers on the road. This bill is not just about marijuana, it is anything we decriminalize. I do not know if we have put enough thought into all the consequences yet. We may need to limit what you are trying to accomplish here, because right now, it seems to cover everything. That has a lot of risk, especially with the federal system. What if the federal government says, "You know what? We do not care what the people voted on. It is illegal because the federal government says it is illegal, and they have jurisdiction." There is a lot of potential there, and I think we need to look at this more thoroughly.

Assemblyman McCurdy:
Those may be your concerns, but in reality, I think the reward is greater than the risk. The reward is allowing those folks who have made mistakes in their past to move forward with their lives and to have an opportunity to participate in a growing economy.

Going back to the business owners, as an entrepreneur, you are taking a risk every single day. I believe we need to move forward with this discussion with the intent of allowing folks who have committed a crime before it was decriminalized to have the ability to seal their records and move forward with their lives.

Assemblyman Edwards:
What if the industry that is involved is the airline industry and we allow the records to be sealed? The pilot we put in that seat might crash the plane with a lot of people on board. Not only do the people die, but the airline may go out of business, and all those people you wanted to help no longer have jobs.

Assemblyman McCurdy:
That would be a crime. There are pre-employment screenings that take place, as you know, that would prohibit a person from being employed in that area if they are not able to pass the background check. I think what you are saying is a bit of a reach, but I definitely respect it. I know there is another discussion about pre-employment drug screenings, but when we get to that bridge, we will cross it. At this point, for this discussion, we have an obligation to allow folks who have participated in consuming marijuana before it was decriminalized to have the ability to seal their records and move forward with their lives. It is a workforce issue. What you are insinuating is that people who may have committed a mistake in their past have not moved forward.

Assemblyman Edwards:
Some do not. Frankly, they do not just make one mistake; they make several. If somebody who was a drunkard goes on the wagon, but then falls off, do you not think the businesses have a right to know so they can protect their customers and the public they are serving in whatever line of business they are in?

Chairman Yeager:
I am going to ask you to take this off-line because we have to move on with this bill. I will make a couple of points. First, this bill does not prevent pre-employment drug screening. It does not change any of the drug-free workplace provisions. We can all think of examples. On the federal pilots issue, an applicant would probably be required to disclose any prior marijuana convictions—even if a state deemed it to no longer be a crime—because it is still a crime under federal law. In terms of the liability issue, I do not think a business in this state would be liable if we, as policymakers, decriminalize it and tell people they can seal their records. With the current record sealing law, a business would not be liable as long as they performed a background check and found what is supposed to be there. If, as a policy, someone can seal his record, I do not think that would implicate liability. I invite you to keep discussing that. I just want to make sure we get through the rest of this hearing.

Assemblywoman Nguyen:
Just to clarify, my reading is that this is only for state convictions within our own state. Any concerns that Assemblyman Edwards has about violations of federal law would not be included in here. Is that correct?

Assemblyman McCurdy:
That is correct.

Chairman Yeager:
Members, if you have additional questions, I will invite you to take them off-line. I want to ensure we get through the testimony. A number of people are signed in to weigh in on this bill. At this time, I will open it up for testimony in support of A.B. 192.

Eric Spratley, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We are here in support of A.B. 192 with the amendment from Assemblyman McCurdy. We appreciate the Assemblyman inviting us to the meeting to be a part of the process. We were very much opposed to the original language, but we can now support the bill and are thankful for the compromise.

John T. Jones, Jr., representing Nevada District Attorneys Association:
We are here in support of the bill. I do want to talk about some conversations Assemblyman McCurdy, Bailey Bortolin, Holly Welborn, and I had yesterday regarding this bill. We have agreed conceptually. We are still working on language to address two issues, one of which was brought up by the Committee. Right now, if you decriminalize something, it is not retroactive unless the crime is deemed unconstitutional. What we are asking for is something like what Assemblyman Roberts indicated. Every time the Legislature decriminalizes something, they would indicate whether this process would be applicable for that crime. When we talk about decriminalizing traffic citations through that process, the Legislature or future legislatures can decide whether to let people who have been convicted in the past to avail themselves of this expedited streaming process.

Further, we are working on language regarding the clear and convincing standard the district attorney would have to prove if we object to the sealing. In speaking with folks in my office, the Clark County District Attorney's Office will generally only object to a sealing when the Legislature has deemed something decriminalized but the offense is tied to another record that is not eligible for sealing. An example would be if someone has a felony case in which they also plead guilty to a possession of marijuana. We would not be able to seal that case because there is no way to go in and parse out the marijuana conviction. With that, we are here in support. We do have a little bit of work to do, but Assemblyman McCurdy and other folks have agreed to work with us on those changes.

Timothy Conder, Cofounder and Chief Executive Officer, Blackbird Logistics Corporation:
I am the cofounder and chief executive officer of a cannabis company called Blackbird. Blackbird is a technology and logistics company serving the cannabis industry. We started our business in Nevada, and currently operate in three states with planned expansion into six additional states this year. We hold seven cannabis distribution and delivery licenses. Blackbird transports tens of millions of dollars in legal cannabis every 30 days. We touch 95 percent of Nevada's legal pot. We are the largest legal cannabis distributor in the world. This new industry is exciting and challenging, and it has the capability to change the world.

However, there is a serious inequity in who benefits now, and who has been harmed in the past. We cannot accept that the new players in this industry make millions of dollars, while people doing the exact same thing just a few years ago sit in prison, are barred from gainful employment or housing, and are denied services. We have an immense responsibility to try to correct the imbalance the failed war on drugs disproportionately had on poor and low-income communities, black and brown communities, and on young people and women. As many national leaders are now in agreement, it is time to help those who have suffered in the period of prohibition.

The laws that put people in prison have now changed. We also need to change and give those unfairly affected or suffering consequences that are no longer applicable a second chance at leading a peaceful and free life. Nevada has an opportunity to join other states that have reduced their prison population while also seeing crime rates decline by implementing policies and procedures grounded in evidence and research rather than fear. Cannabis is no longer a feared gateway drug; it is a treatment for countless illnesses, a sleep aid, and a dog treat.

Nothing about the plant has changed, only our perception of it. We have spent decades condemning those who sold and/or consumed it, targeting the most vulnerable of populations. Now, we revere those who are capitalizing on the "green rush." This is injustice at its most acute. I hope I speak for the entire legal cannabis community in Nevada as I advocate for those who came before us—many of my own friends, neighbors, and family members—whose shoulders we stand on every day as we build our businesses. We have to be diligent about correcting the wrongs of the past, and I hope we have the support of this Legislature in doing so.

I also want to take a second to address some comments from earlier. As a business owner who pays a significant amount of money to maintain insurance and hiring practices, I would have absolutely no concern about potentially hiring individuals who have been convicted of a crime that has now been sealed. It has been my experience as a business owner that the most beneficial tools we have are to employ the right individuals for the positions, pre-employment drug screening, and an intensive interview process to really understand why a person wants to work for our company, in the industry we work in, and alongside the rest of our workforce.

Zachary Kenney-Santiwan, Private Citizen, Las Vegas, Nevada:
I am a volunteer with the Mass Liberation Project. For the record, I would like to point out that the push for the legalization of marijuana was never just about people wanting to smoke marijuana. It was about mitigating the negative impacts of the war on drugs and recognizing the suffering that many communities of color and low-income communities went through because of policies such as making marijuana illegal. All of the effort that went into making marijuana legal would be ultimately pointless if we do not make amends to those communities. What this bill will ultimately allow us to do is stop punishing people for something that should never have been illegal in the first place and is now legal. To echo what Assemblyman McCurdy said, getting rid of those records that follow you around will immediately improve job prospects, education prospects, et cetera. Working with the Mass Liberation Project, I have met people and have heard the organizers talk about people who have landed back on their feet after getting out of jail. They have been doing everything right, but have lost their jobs due to marijuana convictions that are still on their record. If I smoked marijuana right now, I would be fine.

To address some comments that were made earlier, I find it a bit strange to worry about whether businesses can refuse to hire people for smoking marijuana. Obviously, if they have a DUI or something, that is a different matter. I do not see how simply using marijuana is necessarily a big deal. To my knowledge, businesses are not too concerned about whether potential employees like to drink alcohol in their off time. That has a worse effect on individuals. If that is not a concern, I do not understand how simply smoking marijuana would be a concern. Obviously, if it is a DUI, it is a different matter.

Gary Peck, Private Citizen, Las Vegas, Nevada:
This bill is long overdue. I am part of that coalition that Ms. Welborn referred to, and it is a very broad-based coalition. It includes the Faith Organizing Alliance, which is comprised of over 16 churches. It includes the Nevada Policy Research Institute. It includes Black Lives Matter. It includes the Progressive Leadership Alliance of Nevada, the American Civil Liberties Union, and the National Association for the Advancement of Colored People, and members of the private criminal defense bar.

These are nonpartisan issues about being smart and cost-effective on crime, not just "tough on crime." I do not want to burrow too deeply into this because I know I have limited time, but I will say the comments about habitual traffic law violators were utterly befuddling to me. If the activity is not criminal, it is not criminal. If you are a habitual speeder, you are

not a criminal and should not be treated as a criminal if those offenses are decriminalized. Take away someone's driver's license—driving is a privilege under exceptional circumstances—but do not recriminalize behavior and punish people for engaging in behavior that ought not to be treated as a crime.

I also want to address the notion—and I understand the sentiment behind it—that the expungement of these records is an IT issue and not a policy issue. It would be hard for me to disagree with that more vehemently. This is a policy issue, and in some ways it is a very central policy issue. Right now, when going to a diversion program, you are told that if you make it through the diversion program, your record will be cleaned up. There are tens of thousands of people in the state who have no idea that their convictions or arrests remain on their records and that they have to proactively clean it up. The price tag associated with cleaning up your record should not be an impediment to people being treated fairly, particularly in a system that has disproportionately punished and damaged the lives of black people, brown people, and poor people. We should not compound those problems.

I grew up in a white, middle-class, overwhelmingly Jewish community in the suburbs of Washington, D.C. I probably smoked pot four times a week when I was a college student. I was never arrested; I was never convicted. I went to a fancy Ivy League school and earned a Ph.D., then a fancy law school and earned a law degree. I had a very nice career in which I did work that I cared about very deeply. Meanwhile, down the road from me, in a city affectionately called "Chocolate City"—that has one of the largest of-color populations in the country—there were lots of people engaging in exactly the same behavior. Their lives were irreparably damaged by unfair, inequitable laws and a broken system. I hope the prosecutors and police can find common ground with civil rights organizations, faith-based organizations, and those who are working in alliance to fix this. It is the government's responsibility to take the initiative to fix it.

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

We are here in support of the bill as amended. We appreciate Assemblyman McCurdy's meeting with all the stakeholders to address our concerns with the original language of the bill. We all have the same goals in mind: we want people to be able to turn their lives around and start with a clean slate. Record sealing can be a very resource-intensive process. As you heard, we have held all-day events to help people seal their records and only a couple of people were able to get through the whole process. One of the reasons behind that is that one arrest alone may have hundreds of documents associated with that arrest—everything from evidence impound documents to arrest reports to witness statements to vehicle impounds. When we receive a request for sealing, our folks have to go through each of those documents and redact information or seal them so that the crime is deemed to have never existed.

Regarding Assemblyman Fumo's question—based on the conversations I have had with our records folks—when we have cases with multiple suspects, and I am getting my record sealed, my name may be listed in the police report of my co-conspirator. We go through the other person's file and redact my information out of that person's files and cases as well.

It can be very cumbersome. Those reports and documents may be in the Shared Computer Operation for Protection and Enforcement, or SCOPE, system, or they may be in file cabinets. It is a very intensive process. We appreciate Assemblyman McCurdy working with us. We believe the amendment addresses our concerns.

I want to address one more thing. I am not suggesting this bill is a vehicle for it, but there does exist a loophole that I mentioned in the past. The only way for someone to get their rights to possess a firearm back is through a pardon. If you have your record sealed and that crime is deemed to have never existed, law enforcement cannot look at it. I think there are only a few exceptions. Gaming control, for example, can unseal a record to look at it. Basically, by law, you are prohibited from possessing a firearm, but the crime you committed to create that prohibition is sealed and deemed never to have existed. That is a current loophole that does exist within the law.

William Adler, representing Silver State Government Relations:
I support A.B. 192 as amended. On a personal note, a big portion of Question 2 was the inequality of criminality of marijuana. In some districts, when you were pulled over and got a ticket, they would take the marijuana and say, "Boys will be boys," especially in rural Nevada. Marijuana was tried unequally in communities of color and communities of poverty. Throughout the state, there are disparities in what was enforced on the books because it was up to officer discretion. Whereas one joint would be nothing in Las Vegas, it could be a huge deal in Elko. It is not just a single district or some part of the state, but there is inequality of marijuana convictions across the state. Now that we have legalized marijuana, there should be a mechanism for those who did this in the past so they are not treated unfairly. For those in the future who get a conviction, it is going to be a misuse of marijuana and not the criminal effects we sought before.

On a final note, this is timely because I wrote an article last night saying this is the tightest employment market in 50 years. We are already seeing employers either ignoring past marijuana convictions or saying they will not take a stand if it is before or after work hours. It is not really the black eye it used to be.

Alex Goff, Private Citizen, Reno, Nevada:
There was a time in this country when the marriage to my wife was illegal. She is a white woman. Given history and our perspective, our outlook on that has changed. For the people who are going to be covered under this bill in the future, we will look at this differently. The voters in Nevada voted to pass this and make it legal. Our obligation is to allow those people to be full members of our society: to allow them to vote, to seal their criminal records, and to help them get good-paying jobs. If we do not, we funnel them toward criminal acts. Ultimately, it makes our community safer when people are able to get good jobs and to be able to vote. Just that civil act makes you feel like a member of society and improves your overall nature. I urge you to support this bill.

Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office:
We would like to thank Assemblyman McCurdy for meeting with us and allowing us to engage in this conversation and for bringing forward this Nevada Second Chance Act. It really is a second chance for a lot of our clients. Several times throughout these hearings we have discussed the consequences that a potential felony or misdemeanor has on an individual, including employment, housing, loans, family rights, grants, educational opportunities, and even things such as volunteering in different places. We really believe this is an opportunity for individuals to have a second chance, to move forward with their lives, and to become active and engaged members of our community.

I would note that, as a criminal defense attorney and while I was in law school, I participated in record sealing programs. I went to law school in California. Before the record sealing process, I received a one-page worksheet on how to help somebody seal a record. That was it. We were able to assist several individuals throughout the day. I have attempted to do that here in Nevada as well, and it is a much more difficult process. As an attorney in Washoe County, I look forward to working with legal aid to help more individuals in our community.

Christine Saunders, Policy Director, Progressive Leadership Alliance of Nevada:
I want to echo the sentiments of everyone who has spoken before me and add to the impacts mentioned before. Marijuana convictions can prevent students from being able to access financial aid, and parents from being able to participate in activities with their children. Nobody should be denied these productive opportunities when their former actions are now legal. We ask that you support A.B. 192 to give Nevadans a second chance.

Madisen Saglibene, Executive Director, Las Vegas NORML:
Passage of this legislation will make it so thousands of petty marijuana offenders are no longer stigmatized and disenfranchised by the collateral consequences of marijuana prohibition. We are in full support. Regarding the record sealing program we started with our Las Vegas chapter, we partnered with attorneys to get this process taken care of pro bono for a lot of individuals. As mentioned, it was very lengthy and somewhat ineffective in some ways. We focused instead on providing community education on what the process is. It has been going well. However, we notice that even though a lot of potential applicants are low-income or unfamiliar with the process, there are actually a lot of professionals who are also having a hard time navigating the system. As far as another consequence, people who have a marijuana-related offense cannot necessarily get into the cannabis industry. That is a big thing. People need to get their records sealed, which is possible but difficult. A lot of other states are implementing this very thing as part of their legalization or their adult-use efforts from the very beginning. What is being said across the country is that we do not want legalization by any means necessary, but rather with a focus on providing second chances to those who have been deeply impacted. As you all know, this has disproportionately affected many communities of color. Being arrested in the first place is completely unfair. There was a lot of support last session, and passage this session would demonstrate a clear effort on

behalf of Nevada to achieve social justice for many individuals while reaping the many economic benefits of the adult-use program here.

Mackenzie Baysinger, Intern, Human Services Network:
As social work students, we believe in social justice and the dignity and worth of a person. This bill embodies both of those standards. I would also like to again highlight how this bill would positively affect people of color. In a Nevada study, there are over 3,000 people of color incarcerated per 100,000 compared to 600 white people per 100,000. This pattern of arrest and sentencing disparities for drug-related crimes continues to persist, resulting in a devastating impact on the lives of those affected. It is important that we, as Nevadans, support one another and address the issues of poverty, unemployment, and discrimination, which this bill will do singlehandedly. We urge your support.

Corey Solferino, Lieutenant, Legislative Liaison, Washoe County Sheriff's Office:
I am here in support of A.B. 192 as amended. I want to thank the Chairman for appointing me during the interim to the Advisory Commission on the Administration of Justice's Subcommittee on Criminal Justice Information Sharing. When A.B. 192 first dropped, looking at the databases across the state and how far-reaching these were was no small undertaking. I appreciate Ms. Welborn, Ms. Bortolin, and Assemblyman McCurdy's staff coming together to assemble all the stakeholders to address our concerns and make this piece of legislation impactful to those it is intended to help.

Riana Durrett, Executive Director, Nevada Dispensary Association:
I cannot add anything to some of the amazing testimony that happened this morning, so I would just echo all of that. The one thing I would add is that, when I practiced criminal and immigration law, I had dozens of post-conviction cases, many relating to immigration cases that were ongoing at the same time between Nevada and California. Not one of them was someone who wanted to seal their records so they could commit more crimes. They were people who wanted to seal their records to get a job or do something to improve their lives or the lives of their families.

Chairman Yeager:
Is there any additional testimony in support? [There was none.] Would anyone like to testify in opposition? [There was no one.] Is there anyone neutral?

Michael Cathcart, Business Operations Manager, Finance Department, City of Henderson:
We are here in the neutral position. We are most likely going to get to support with the conceptual amendment. We did file a fiscal note on the original bill. We filed a fiscal note to add one full-time-equivalent records technician to our police department because they are the ones who have to do the sealing. I believe, with the conceptual amendment, we can withdraw that fiscal note.

Ryan Black, Legislative Liaison, Office of Administrative Services, City of Las Vegas:
I will say "ditto" to my colleague from Henderson.

Chairman Yeager:
Is there any additional neutral testimony? [There was none.] I will invite Assemblyman McCurdy back up for any concluding remarks.

Assemblyman McCurdy:
What we witnessed this morning is what can happen when folks come together with a desire to make a positive impact on the lives of the residents of the state of Nevada. We know what the impact of the war on drugs was on many communities, not just the African-American, Latino, and poor communities, but on many communities. We have an opportunity to show not only the residents of our state, but folks all across the country who may be realizing that this is a new Nevada. This is a Nevada that wants to improve the lives and well-being of every citizen of our state. We have an opportunity to shed light on folks who feel as though the system does not work for them. I am profoundly grateful for all of the stakeholders who have come forward and shared their testimony as to why they are in support. It happened because we came together with a desire to do good. I am profoundly grateful for them. This is not just about me; this is about an entire state and an entire community that is hurting, waiting, and looking for a reason to believe again in a government that will put them and their families first. Let us get this done. Let us give folks a second chance.

Chairman Yeager:
I did want to share a story with the Committee. Those who were here last session might remember we heard some record sealing bills, particularly about folks who had been dishonorably discharged from probation and whether they would be able to go back and seek to seal their records. We passed some legislation allowing that to happen in certain circumstances. I was in court in Las Vegas six months to one year ago, and I was there on a civil matter. An attorney pulled me aside and asked if I knew why he was in court today. I said "No, I have no idea." He said, "Well, my client back there has a dishonorable discharge, and she has wanted to seal her record for years. She wants to work in some industry where she was precluded because of her criminal conviction." Obviously, that made me feel good. After the judge beat me up on my case, I left the courtroom and that same attorney texted me and said the judge had, in fact, granted the petition to seal, and at that point his client had broken down in tears. She could finally get employment in the area she wanted. Obviously, that made me feel good.

Sometimes in this building we are a little bit removed from what the practical effects of what we do really mean to the community. I share that because, when it comes to some of these convictions, there are real barriers. Obviously, people can get their records sealed now, but anything we—as policymakers—can do to streamline that procedure and to address workforce and inequity issues makes sense. Hopefully, that will make you feel good for the rest of the day, knowing what we do here really does help folks on the ground.

I will close the hearing on A.B. 192. Now would be the time for public comment. Is there any public comment? [There was none.] We have an 8 a.m. meeting tomorrow with two bills scheduled. We are going to have meetings on Thursday and Friday as well. We have a very full week with all of our congressional and judicial speeches this week, and we have a lot of work to do on the Assembly floor. I hope everyone has a fantastic day. This meeting is adjourned [at 10:54 a.m.].

RESPECTFULLY SUBMITTED:

____
Karyn Werner
Committee Secretary

APPROVED BY:

____
Assemblyman Steve Yeager, Chairman

DATE: ___________________________________

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a copy of a PowerPoint presentation titled "Records, Communications and Compliance Division," dated March 19, 2019, presented by Alison Lopez, Criminal Records Unit Manager, Records, Communications and Compliance Division, Department of Public Safety.

Exhibit D is a conceptual amendment to Assembly Bill 227 presented by Assemblywoman Connie Munk, Assembly District No. 4.

Exhibit E is a proposed amendment to Assembly Bill 227 submitted by John J. Piro, Chief Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office; Nadia Hojjat, Chief Deputy Public Defender, Clark County Public Defender's Office; and Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office; presented by Nadia Hojjat, Chief Deputy Public Defender, Clark County Public Defender's Office.

Exhibit F is a proposed amendment to Assembly Bill 192 presented by Assemblyman William McCurdy II, Assembly District No. 6.

Exhibit G is a copy of a form titled "State of Vermont Petition to Expunge or Seal Criminal History," presented by Holly Welborn, Policy Director, American Civil Liberties Union of Nevada.