MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eightieth Session
May 30, 2019

The Senate Committee on Judiciary was called to order by Chair Nicole J. Cannizzaro at 9:12 a.m. on Thursday, May 30, 2019, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Nicole J. Cannizzaro, Chair
Senator Dallas Harris, Vice Chair
Senator James Ohrenschall
Senator Marilyn Dondero Loop
Senator Melanie Scheible
Senator Scott Hammond
Senator Ira Hansen
Senator Keith F. Pickard

GUEST LEGISLATORS PRESENT:

Assemblywoman Teresa Benitez-Thompson, Assembly District No. 27
Assemblyman William McCurdy, Assembly District No. 6

STAFF MEMBERS PRESENT:

Patrick Guinan, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Jenny Harbor, Committee Secretary

OTHERS PRESENT:

The Honorable James Hardesty, Chief Justice, Nevada Supreme Court
Holly Welborn, American Civil Liberties Union of Nevada
Kendra G. Bertschy, Deputy Public Defender, Office of the Public Defender, Washoe County

John J. Piro, Deputy Public Defender, Office of the Public Defender, Clark County
Jennifer Noble, Nevada District Attorneys Association
Tonja Brown, Advocates for the Innocent
Chuck Callaway, Las Vegas Metropolitan Police Department
Eric Spratley, Nevada Sheriffs' and Chiefs' Association
Michelle Feldman, Innocence Project
Odilia Berry
Alanna Bondy, Nevada Attorneys for Criminal Justice
Jim Sullivan, Culinary Workers Union Local 226
Christine Saunders, Progressive Leadership Alliance of Nevada
Laura Fitzsimmons
Jim Hoffman, Nevada Attorneys for Criminal Justice
Rebecca Gasca, American Civil Liberties Union Foundation
Dagny Stapleton, Nevada Association of Counties
Darin Imlay, Public Defender, Office of the Public Defender, Clark County

CHAIR CANNIZZARO:
I will open the hearing on Assembly Bill (A.B.) 80.

ASSEMBLY BILL 80 (2nd Reprint): Makes various changes relating to the Nevada Sentencing Commission. (BDR 14-469)

THE HONORABLE JAMES HARDESTY (Chief Justice, Nevada Supreme Court):
I am here as Chair of the Nevada Sentencing Commission for the last Interim. Assembly Bill 80 has been modified by the Assembly from the Sentencing Commission's original bill draft request (BDR), but it is in substantially the same form. The Sentencing Commission was created by the 2017 Legislature and includes 25 members of the criminal justice system: judges, law enforcement, public defenders, district attorneys and the like.

It is not often one is able to secure a unanimous vote on topics like this, but the bill that comes to this Committee is a product of the unanimous vote of the Sentencing Commission during the Interim.

The overarching concept behind A.B. 80 is to provide Nevada with a full-time, independent, stand-alone central staff to assist the Sentencing Commission in fulfilling its salutatory duties. During the Interim, we heard testimony from sentencing commission representatives from Virginia, North Carolina,

Connecticut, Utah and Oregon, as well as the Executive Director of the Robina Institute of Criminal Law and Criminal Justice. In all of those instances, the sentencing commissions have the benefit of full-time, nonpartisan dedicated staff services to coordinate and compile necessary exchange of data between criminal justice agencies and policy makers on which important criminal justice decisions can be made.

At least 11 states have sentencing commissions located in the executive branch, 6 others are located in the judicial branch and only 3 are in the legislative branch. Assembly Bill 80 leaves the existing Sentencing Commission function as an advisory body to the Legislature while dedicating necessary resources to allow it to make informed, data-driven policy recommendations.

I will briefly describe sections of the second reprint of A.B. 80 approved by the Assembly Committees on Judiciary and Ways and Means.

Section 2 provides definitions.

The Department of Sentencing Policy has been created in section 5. The Executive Director will be appointed by the Governor from a list of three persons recommended by the Sentencing Commission. It is an unclassified service position and must be filled by an attorney. This individual will supervise the activities of the Sentencing Commission from a staff standpoint.

The Executive Director is given authority to employ necessary employees or consultants within the confines of the budget as approved by the Legislature each biennium.

Section 6 outlines the Executive Director's responsibilities, which are significant but essential to the operation of the Sentencing Commission.

Section 9 outlines the various members of the Sentencing Commission. We removed the Attorney General individually because of the demands on that Office's time. While he or she can sit; this bill allows him or her to designate someone from that office. This section also makes an adjustment on the representation from the public defenders' offices to one each from Clark and Washoe Counties.

Assembly Bill 80 also requires and increases the number of meetings the Sentencing Commission can conduct. One of the difficulties in the last Interim and one of the difficulties the Advisory Commission on the Administration of Justice (ACAJ) faces is the limitation on the number of meetings necessary to provide meaningful and quality input and recommendations to the Legislature. This bill requires the first meeting to be conducted on September 1, and requires meetings at least every three months in order to perform the numerous tasks outlined in section 10.

Fiscal issues are oftentimes referred to the Finance Committee, but I want to note this has been vetted by the Governor's Finance Office. It was included in the Governor's recommended budget and has been reviewed by the Assembly Committee on Ways and Means.

CHAIR CANNIZZARO:
We had a bill that expanded, in a more general sense, the duties and responsibilities of the ACAJ in an effort to provide the Sentencing Commission more latitude to focus on the things that need to be studied versus some of the dictates in statute. What is the interplay with A.B. 80 and how it would affect the ACAJ?

CHIEF JUSTICE HARDESTY:
Assembly Bill 236 is a major criminal justice reform bill that was recommended by the ACAJ and approved by the Assembly.

ASSEMBLY BILL 236 (2nd Reprint): Makes various changes related to criminal law and criminal procedure. (BDR 14-564)

There are a number of additional data analysis requirements to be performed by the Sentencing Commission in that bill. The Sentencing Commission is the oversight commission for purposes of collecting data and assessing that data is consistent with sentencing practices. The first couple of sections of A.B. 236 lay out tasks for the Sentencing Commission to track the effects and the fiscal, criminal justice and public safety impacts of the reforms suggested in the bill.

CHAIR CANNIZZARO:
I was referring to A.B. 112.

ASSEMBLY BILL 112 (1st Reprint): Revises provisions governing the Advisory Commission on the Administration of Justice. (BDR 14-589)

I am reading A.B. 80 as an expansive set of duties to more fully study some things. I understand A.B. 112 will expand the ability of the ACAJ to direct its capabilities and capacity to whatever is deemed an appropriate criminal justice topic to study.

CHIEF JUSTICE HARDESTY:
The intent of A.B. 112 was to reduce some of the activities the Legislature previously assigned to these criminal justice commissions. The Legislature has deferred to these commissions a potpourri of activity that have neither the staff nor time to assess. The ACAJ has given some flexibility on criminal justice issues, but the specific purpose of the Sentencing Commission revisions was to collect and coordinate data for future sentencing recommendations.

SENATOR OHRENSCHALL:
I was on the Assembly Corrections, Parole, and Probation Committee last Session. We added the Director of Employment Training and Rehabilitation to the membership of the Sentencing Commission, and I remember how interested he was in trying to help folks who had served their time and gotten out of prison, tried to start over and get trained in new positions. We also added "representative of an organization that works with offenders upon release from incarceration to assist in reentry" language in section 9, subsection 1, paragraph (u) of this bill. I was pleased in those changes to the membership.

I am concerned about losing the language regarding *Nevada Revised Statutes* (NRS) 218D.216. What is the thought behind losing that?

CHIEF JUSTICE HARDESTY:
I was disappointed the Assembly pulled that provision out of the bill. I testified in front of the Assembly Judiciary Committee that this Commission should be able to request the drafting of legislative measures. Frankly, that provision brought A.B. 80 forward.

I hope the Sentencing Commission submits a BDR next Session that not only responds to the numerous issues being raised by criminal justice reform efforts this Session but also outlines specific changes that can be set forth by the

Legislature. It does not mean this Body has to agree with it, but having that ability facilitates an examination and understanding of those issues.

The Advisory Commission has never submitted a BDR; it makes recommendations and hopes to find either the chair of a judiciary committee or a Legislator to carry them out. One would think the Legislature would want to hear directly from this legislative Commission through a BDR.

I disagree a bit with the way A.B. 80 came out of the Assembly, and I do not know why this language was pulled out as I was not a part of those discussions. I want to state, on behalf of the Sentencing Commission, this is an important provision that should have been left in the bill.

SENATOR OHRENSCHALL:
I thought it was important last Session as well.

HOLLY WELBORN (American Civil Liberties Union of Nevada):
We support A.B. 80. The continuation and the formation of this Department is critically important for the State.

KENDRA G. BERTSCHY (Deputy Public Defender, Office of the Public Defender, Washoe County):
The Sentencing Commission is vital to Nevada; we support A.B. 80.

JOHN J. PIRO (Deputy Public Defender, Office of the Public Defender, Clark County):
We support A.B. 80. Studying these issues in the Interim will lead us to better solutions in coming Sessions.

JENNIFER NOBLE (Nevada District Attorneys Association):
We support A.B. 80.

TONJA BROWN (Advocates for the Innocent):
We support A.B. 80.

CHUCK CALLAWAY (Las Vegas Metropolitan Police Department):
We support A.B. 80.

ERIC SPRATLEY (Nevada Sheriffs' and Chiefs' Association):
We support A.B. 80.

CHAIR CANNIZZARO:
I will close the hearing on A.B. 80. I will open the hearing on A.B. 356.

ASSEMBLY BILL 356 (1st Reprint): Revises provisions governing criminal procedure. (BDR 3-863)

ASSEMBLYMAN WILLIAM MCCURDY (Assembly District No. 6):
Assembly Bill 356 establishes provisions for the filing of a petition to establish factual innocence.

Before I get into the details of the bill, I would like to share a story. On April 24, 1994, a man armed with a pistol robbed a Carl's Jr. restaurant in North Las Vegas. Although most of the employees were unharmed, Charles Burkes, the restaurant manager, was killed during the incident. The suspect was able to escape on foot.

After receiving several tips and eyewitness testimony from the employees, the police investigation identified an 18-year-old man named DeMarlo Berry, who was also in the area that night, as the main suspect. Despite inconsistent testimony from eyewitnesses and a lack of physical evidence linking Mr. Berry to the crime, he was convicted of first degree murder, robbery and burglary, and sentenced to life in prison with the possibility of parole.

In spite of his conviction, Mr. Berry maintained his innocence throughout the trial. He filed several petitions for his case to be considered in light of circumstances that arose both during and after his sentencing, including an admission of guilt from the actual perpetrator of the crime in 2013. Nearly all the petitions were dismissed, resulting in Mr. Berry spending more than 20 years in prison for a crime he did not commit. In late June 2017, with the help of the Rocky Mountain Innocence Center, the charges against Mr. Berry were finally dismissed, and he was released from prison after 22 years in custody.

According to the National Registry for Exonerations compiled by the University of Michigan, over 2,400 people have been exonerated of crimes since 1989. This equates to approximately 21,000 years of their lives lost in prison. Under

NRS 176.515, a defendant can be granted a new trial based on newly discovered evidence. Though there is no time limit for introducing new DNA evidence of innocence, statute only allows persons to present new, non-DNA evidence within two years of his or her conviction, even if there is no way the evidence could have been discovered within that time frame. The average time spent in prison for someone who is later exonerated is nine years. Not only are innocent people in prison for crimes they did not commit, they are also incarcerated for longer than necessary under statute.

Since 2011, there has been a steep increase in exonerations based on non-DNA evidence such as false testimony, mistaken identification or misconduct of officials, all of which played a factor in the process that put Mr. Berry in prison.

Additionally, 80 percent of wrongful convictions in the United States have been overturned with the types of non-DNA evidence just mentioned. Assembly Bill 356 creates an outline of specific processes for both the court and the petitioner to follow when establishing factual innocence, regardless of when the new evidence is discovered.

I recognize our criminal justice is not perfect. Although we may never live in a society completely free of situations like DeMarlo Berry's, this legislation helps rectify wrongful convictions quickly and effectively.

MICHELLE FELDMAN (Innocence Project):
There is an amendment to A.B. 356 (Exhibit C) representing the compromise language to provide some structure for people who have new, non-DNA evidence of their innocence.

There is a gap in statute when someone has new, non-DNA evidence that is discovered beyond two years of his or her conviction. Right now, if you get DNA testing and it is favorable to a person's case, the standard to get relief is "establishes a reasonable probability the defendant will be acquitted." Under the motion for a new trial law, if you discover new, non-DNA evidence within two years of the conviction that is the same reasonable probability standard, the defendant will be acquitted. A final way to get relief is through State habeas claims when evidence that was not presented can be tied to a constitutional violation. An example would be if the State illegally withheld exculpatory evidence from a defendant and the judge rules it is so powerful it would

establish a reasonable probability of a different outcome. All those standards are reasonable probability the defendant would have been acquitted.

The standard in A.B. 356 is much higher. In a perfect world, I would have removed the two-year time limit and the motion for new trial statute. Several states have recognized sometimes new evidence that is not DNA comes out beyond two years of someone's conviction. But this bill represents a compromise; it is a narrow way for a person who has new, strong and compelling non-DNA evidence that shows his or her innocence to get relief.

Sections 1 through 5 are definitions. Factual innocence is defined in section 4; these are high standards for somebody to even get his or her petition through the door with a judge.

Section 6 outlines additional criteria. One must show there is new, non-DNA evidence that establishes his or her innocence and is material to the case. It is not merely cumulative of what was known or recantation evidence; it is distinguishable from prior claims. Those requirements have to be met for a petition to not be summarily dismissed by a judge. It is a high gateway claim but a fair compromise.

If the judge finds someone's petition meets those requirements, he or she can either hold a hearing or provide relief if the State agrees the person met the criteria and is actually innocent. If the relief is contested, the judge can hold a hearing, and the burden for the defendant to meet would be clear and convincing evidence of factual innocence.

There are few people who would be able to meet this high standard, but A.B. 356 provides some pathway to bring new, non-DNA evidence after two years of a conviction for individuals like DeMarlo Berry. He provided strong and compelling evidence including the real perpetrator confessing to the crime, the corroboration of that confession by people who were with him and the recantation by the jailhouse informant who claimed DeMarlo confessed to him. There was no way for Mr. Berry to bring that evidence to court. He had to allege a constitutional claim through State habeas; it was dismissed and went back and forth through the court system until the Clark County District Attorney's Conviction Review Unit took it up and exonerated him.

SENATOR OHRENSCHALL:
Is there a reason for the two-year time limit? Is it part of the compromise? Will it keep some people from pursuing this remedy?

MS. FELDMAN:
The two-year time limit after a conviction is under the motion for a new trial statute. Assembly Bill 356 removes any time limit; a claim can be presented whenever that new, compelling evidence becomes available.

SENATOR SCHEIBLE:
This is an excellent policy proposal. I am a stickler when it comes to opening up postconviction litigation avenues, but A.B. 356 hits the right balance of being available to people who need relief without opening the floodgates.

It seems this would fall under the category of postconviction release. What kind of rights would a person have to an attorney if he or she wanted to file this type of claim?

MS. FELDMAN:
It is a new and different chapter within the State habeas law, but whatever the provision is in the State habeas provision would apply to this bill.

SENATOR SCHEIBLE:
We have a form in statute that is useful for pro per clients. It outlines 13 questions, and the answers are handwritten in. Would this be added as a section to that form that may read, "Are you claiming actual innocence," with bullet points provided of what they have to plead?

MS. FELDMAN:
That would be a great idea if it was added to the form; that is the general idea.

ODILIA BERRY:
I am DeMarlo Berry's wife; he wanted to be here, but he had to work. I support A.B. 356.

MS. WELBORN:
This bill is a more conservative approach to innocence statutes from other states, but most of the parties have come together to develop something that

provides relief for people like DeMarlo Berry. For these reasons, the American Civil Liberties Union of Nevada supports A.B. 356.

MR. PIRO:
The Clark County Office of the Public Defender supports A.B. 356. This is probably my greatest professional fear and a fear shared by many prosecutors as well.

Assembly Bill 356 provides a mechanism to bring in that new evidence. We work in a system that oftentimes values finality over getting the right results. This provides a pathway to get to that right result. Hopefully, if somebody ever makes that mistake where he or she did not get everything needed to prevent a wrongful conviction, there is a pathway to find relief before 22 years of someone's life goes by.

MS. NOBLE:
Assembly Bill 356 strikes a good balance between ensuring factually innocent persons can assert newly discovered evidence supporting their innocence in an efficient way, ensuring criminal convictions have a presumption of integrity and taking victims into consideration.

People think this process is over for victims at the time of conviction; I can assure you it is not. I am still in weekly contact with victims whose family members were murdered in the 1990s. This process goes on and on for them. Our existing procedural mechanisms such as the petition for writ of habeas corpus and direct appeal, appeals of those decisions for omnibus other writs in most cases provide a procedural mechanism that would allow newly discovered evidence if it was the result of some sort of constitutional error such as ineffective assistance of counsel or a *Brady* claim, to assert that with our existing petition for writ of habeas corpus.

However, the Nevada District Attorneys Association has heard the concerns from representatives of the Innocence Project. It is good that this is a narrowly tailored procedural mechanism because it is a small class of persons who will have newly discovered evidence that truly cannot be connected to a constitutional claim in an efficient manner.

We want to ensure that district courts conduct meaningful reviews prior to ordering the State to respond, and part of our Exhibit C amendment captures

that intent. As attorneys who handle these petitions on a daily basis, we find a lot of duplication and petitions from folks who file in proper person after they have been represented on their first three petitions for writ of habeas corpus. Many people will endeavor to use this procedural mechanism for claims that do not fit within A.B. 356 as amended, so the courts need to conduct meaningful reviews and indicate to the parties what parts of the petition may support factual innocence. Otherwise, we incur the danger of righteous claims—potentially meritorious claims—getting lost in the shuffle.

Criminal convictions are entitled to a presumption of integrity, and when we disturb those, it needs to be for a good reason. Assembly Bill 356 as amended will allow persons who have newly discovered, non-DNA evidence a more efficient means of getting that in front of a court and not having to shoehorn it into a constitutional claim.

The Nevada District Attorneys Association supports A.B. 356 as amended.

ALANNA BONDY (Nevada Attorneys for Criminal Justice):
We support A.B. 356. This is a compromise piece of legislation, but it is a good and necessary bill that helps make Nevada's criminal justice system more fair and just. Wrongful convictions are a serious problem in the State, and it is important for those wrongfully convicted to have an ongoing ability to raise credible claims of innocence based on newly discovered evidence.

It is important those convicted in Nevada have an effective, fair and ongoing method to challenge their convictions based on evidence of factual innocence. Individuals like DeMarlo Berry, Kirsten Lobato and Fred Steese spent decades in prison for crimes they did not commit. There should never be a time limit to correct an injustice.

MS. BERTSCHY:
The Washoe County Office of the Public Defender supports A.B. 356. Unfortunately, juries sometimes get it wrong and convict innocent people. This bill allows a mechanism for individuals to address a wrongful conviction. We do not want innocent people languishing in our prisons for years just because proper procedural mechanisms were not in place.

JIM SULLIVAN (Culinary Workers Union Local 226):
We join the Nevada Coalition for the Wrongfully Convicted to fight to change Nevada's outdated criminal justice laws this Session. It is shameful that Nevada is only one of five states that has a timeline on presenting non-DNA evidence for the wrongfully convicted. It is past time to change this law. Assembly Bill 356 does just that, and we support this bill.

MS. BROWN:
I have provided an amendment (Exhibit D) to include posthumous petitions. On April 3, I appeared in front of this Committee on behalf of Senate Bill (S.B.) 384.

SENATE BILL 384: Revises provisions relating to criminal procedure. (BDR 14-857)

That bill was similar to this bill; however, that bill did include "posthumously." While S.B. 384 did not make it out of Committee, there did not seem to be a problem with the term "posthumously."

What happened to DeMarlo Berry was tragic. Fortunately for Mr. Berry, he was exonerated. But what if the outcome had been different? What if he had been executed first and then the real perpetrator confessed to the crime? Would the lawmakers say to Mr. Berry's widow, "So what, we don't care. He's dead"? It should not matter if the person who has been wrongfully convicted is alive or dead; justice delayed is justice denied.

The families of those who have passed away should be permitted to exonerate their loved ones' names and give the families the closure they have longed for. As someone who has had a loved one who has been wrongfully convicted, I know the anguish and suffering one feels on a daily basis. I have also been fortunate in an odd sort of way compared to others who have been wrongfully convicted. Some have never had the opportunity or chance to search for the truth and find out what went wrong in the case. I have. I have been fortunate to speak to a member of the jury that convicted my loved one, Nolan Klein. This was put into a postconviction petition, and neither the District Court nor the Nevada Supreme Court addressed this or 22 other claims. It eventually went to federal court, and the federal court sent it back to District Court in which the District Attorney's office argued those claims were procedurally barred.

In 2000, I was fortunate to have former Governor Kenny C. Guinn take an interest in my brother's case and conduct a thorough investigation. At the end of the investigation, former Governor Guinn was going to try to have Mr. Klein placed on the Nevada Board of Pardons Commissioners' agenda. An application was sent, and the Pardons Board denied his application as it does not accept anyone who is still appealing his or her conviction.

In 2009, Mr. Klein and I were fortunate to learn former Second Judicial District Court Judge Brent Adams ordered former Washoe County District Attorney Dick Gammick to turn over the entire file in the case. In the file, it showed the prosecuting attorney did not turn over the materiality and exculpatory evidence that supported the defense's case of mistaken identity.

On September 20, 2009, Mr. Klein died prior to any motion for a new trial being filed. In 2011, Mr. Klein's attorney filed a petition of exoneration posthumously which was denied. The judge issued an order stating "the petition failed to provide any controlling legal authority which provides this court with the authority to grant the subject petition." It was appealed to the Nevada Supreme Court. The Court lacked jurisdiction and went on to state,

> [Contrary to appellant's suggestion that] "[t]his court is the only body in the State of Nevada that can set the course for petitions for exoneration after death," it is for the Legislature to create a cause of action or remedy and provide for an appeal.

My amendment, Exhibit D, will create a petition of factual innocence. If the petitioner is deceased,

> the petitioner through his or her spouse, biological or adopted children, biological parents, siblings, executor or heir to his or her estate may file a petition for factual innocence in the district court as provided in the sections above as though the person were alive except that the standard of factual proof in order to be granted a new trial shall be more likely than not.

I have asked to change section 1 to include section 15.

I have asked to include section 15 in section 2.

The amendment also proposes to move "This act becomes effective on July 1, 2019," to section 16, and to replace it with the language previously stated.

I am happy to provide my correspondence to the Governor's Office dated October 2, 2000, if the Committee wants to verify former Governor Guinn had performed the investigation and was attempting to get Mr. Klein onto the Pardons Board.

It should not matter whether a person is alive or dead. Justice should be equal. Coming from someone who has had someone wrongfully convicted, I have made a promise to clear his name no matter what. I am hoping this will work.

CHRISTINE SAUNDERS (Progressive Leadership Alliance of Nevada):
I echo the comments made by the ACLU and the Public Defenders Offices of Clark and Washoe Counties. We support A.B. 356.

ASSEMBLYMAN MCCURDY:
This bill will have a significant impact on the lives of so many. The system is not perfect, but A.B. 356 would bring us one step closer to making sure it performs better for the citizens of this State.

CHAIR CANNIZZARO:
I will close the hearing on A.B. 356. I will open the hearing on A.B. 81.

ASSEMBLY BILL 81 (3rd Reprint): Makes various changes relating to the oversight and provision of legal representation of indigent defendants in criminal cases. (BDR 14-436)

ASSEMBLYWOMAN TERESA BENITEZ-THOMPSON (Assembly District No. 27):
Assembly Bill 81 was introduced on behalf of the Nevada Right to Counsel Commission, which was created by the passage of S.B. No. 377 of the 79th Session. The Counsel Commission was comprised of 2 Legislators, myself and Senator Richard S. "Tick" Segerblom, as well as 11 other members representing various stakeholders from local government and the legal community.

The Counsel Commission met ten times throughout the Interim. The purpose of this Commission was to study issues related to the provisions of indigent

defense in the State. A report prepared by the Sixth Amendment Center (Exhibit E) provides a comprehensive look at criminal defense in Nevada, including a discussion of the manner in which criminal defense is provided, the framework of the courts and the observation of the Center after conducting the study. It is worthwhile to read the study as it includes an incredible amount of detail. One has to be able to know what the drive is like to understand the logistics and complications that are unique to the State, so we were able to allocate additional dollars for the folks from the Sixth Amendment Center who came out to the State to travel to all the courts and drive rural Nevada.

Together through extensive conversation and deliberation, we have before us a reasonable, well-structured model. Although no one gets everything they want, A.B. 81 allows counties to continue to provide indigent defense while allowing the State some ability to control what is happening and ensure adequate counsel is being provided.

Assembly Bill 81 provides a new framework for oversight of criminal defense in the State. To do this, A.B. 81 establishes a Board on Indigent Defense Services and a Department of Indigent Defense Services. This Board acts as a policy maker, and the Department carries out the day-to-day responsibilities for the overseeing the provisions of indigent defense services in the State.

In the initial draft, the composition of the Indigent Defense Services Board was nearly identical to that of the Nevada Right to Counsel Commission. However, section 6 was amended at the request of the counties. This revised Board consists of 13 members appointed by the Governor and the Legislature. Five members represent small counties, four of whom are selected by the Nevada Association of Counties. The Chief Justice of the Nevada Supreme Court or his or her designee also serves in a nonvoting capacity. There is a one-page document (Exhibit F) that outlines the makeup of the Board of Indigent Defense Services as it is listed in A.B. 81.

The Executive Director will collaborate with this Board on the activities of the Department and the manner in which indigent defense services are provided throughout the State. In addition, the Board of Indigent Defense Services is required to establish standards for the delivery of indigent defense services to ensure those services meet constitutional requirements and attorneys are not compensated in a way that provides a disincentive for effective representation.

We heard contract attorneys, for example, are paid with flat fees. If an attorney makes the same amount regardless of whether the case goes to trial, there could be a strong incentive to settle that case. The Board of Indigent Defense Services will also work with the Department of Indigent Defense Services to develop a manner to receive and resolve complaints about indigent defense services. It is also required to adopt regulations to establish standards for indigent defense. Regulations are needed because standards apply to the provisions of all indigent defense services. In addition, by establishing standards by regulation, there is public notice and a public hearing. The regulations will also have to be approved by the Legislative Commission so the Legislature stays informed.

The other important piece is found in section 8 and requires the Board of Indigent Defense Services to adopt regulations to establish a formula for determining the maximum amount a county will be required to pay for the provisions of defense services.

By adopting these regulations, the potential amount counties are required to pay will be decided in a public hearing. What the cost will be and who will bear that cost has been a bone of contention. Because this also must be approved by the Legislative Commission, there is also legislative input into the formula. This seems fair since the State will ultimately be responsible for any amount above which counties are required to pay.

Assembly Bill 81 also establishes the Department of Indigent Defense. The Executive Director of this Department is selected by the Governor from a list of three persons recommended by the Board of Indigent Defense Services. Once selected, the Executive Director will collaborate with this Board.

The goal is to give independence to this Department in the oversight of indigent defense services, so there was much deliberation over how it was structured. In addition to the Executive Director, the Department will include two deputy directors.

Section 12 states one deputy director will be responsible for oversight of the provisions of criminal defense in smaller counties. In addition, the deputy has the oversight of the State Public Defender's Office, which is going to be moved from the Department of Health and Human Services. This deputy director will

also be responsible for developing and providing continuing education programs for attorneys who provide free criminal defense services.

Section 12, subsection 4 contains a requirement for the deputy to provide assistance to counties required to revise the manner in which indigent defense services are provided because of the standards adopted by the Board of Indigent Defense Services. This change was requested by the counties.

The second deputy director will be responsible for auditing the manner in which indigent defense services are provided throughout the State. This deputy will collect statistics regarding caseloads, salaries and other information as well as conduct on-site visits of court proceedings. This function is similar to what the consultant did for us in the Interim but on an ongoing basis.

Although the State has allowed counties to choose to accept the responsibility for providing indigent defense services, the State remains responsible for ensuring these services are effectively taking place. Therefore, it is critical to have continuing review of how services are provided to ensure defendants are properly represented.

The deputy director will report and address any person found to be providing these services in an inappropriate or ineffective manner. In addition, the deputy director may suggest entering into a corrective action plan with any county that fails to meet the minimum standards. A corrective action plan will allow for collaboration between the deputy director and the appropriate board of county commissioners regarding the time and manner of the specifics to be put into that plan. Any disagreement will be resolved by the Board of Indigent Defense Services.

If the addition of a correction action plan causes the county to expend more money than it spent during the previous budget year plus inflation, the Executive Director is required to add that amount into the next budget cycle in order for the Department of Indigent Defense Services to assist that county in providing those services. However, if money is needed sooner for the county to meet its responsibilities, this Department has the authority to request money from the contingency account through the Interim Finance Committee.

Section 14, subsection 4 states if additional money is not made available to the county, it has the option to continue to provide indigent services or turn that

responsibility over to the State. If a county fails to comply with a plan in a timely manner, the Executive Director will be informed.

Section 14, subsection 5 instructs the Executive Director to review the issue. He or she may determine whether to enter into another corrective action plan or recommend transferring authority to provide indigent defense services to the State Public Defender. Any recommendation must be approved by the Board of Indigent Defense Services.

Assembly Bill 81 also provides the process for transferring the responsibility to the State as well as back to the county once it shows it is able to meet the standards.

This framework with the Board and Department creates a check and balance. The Board creates a policy, the Legislature approves the policy and the Department oversees the system to ensure compliance. This is fair. Any proposal that seeks compete indemnification of local governments from additional costs of providing effective defense counsel is not feasible.

With a lawsuit pending against the State that alleges it is not meeting its obligation to provide adequate defense services to indigent defense persons, we need to be mindful of our duty as a State to ensure effective assistance of counsel is provided.

There are a few provisions that are a bit unrelated to the overall framework, but I want to mention them.

Section 1 revises the provisions relating to the appointment of counsel. This was added at the request of the counties to ensure anyone who declines the appointment of counsel does that knowingly and voluntarily with an understanding of the consequences of doing so.

A section was also added at the request of the counties. Since an attorney must be provided anytime a defendant could serve time in jail, that concept was added.

Section 31.3 staggers the terms of the members of the Board of Indigent Defense Services, so approximately 30 percent are selected every year to avoid a 100 percent turnover.

I have submitted an amendment on sections 8 and 14 (Exhibit G). The intent of section 8 is to make sure we balance the role of the Department of Indigent Defense Services and its Executive Director. They need to be able to answer to their Executive Branch and to the Governor on an equal footing with their Board.

This amendment also requests to replace "agree" with "collaborate" in section 14, subsection 1.

Others will bring their amendments and speak to their concerns. There is a lot of history with this bill, and some amazing, smart, passionate people have been working on this issue for over 20 years. This is a nuanced issue.

Ultimately, we as a State must provide this oversight. In the report, Exhibit E, our consultant noted a lack of oversight does not mean indigent defense is not adequate in all cases. It means we leave open the possibility of serious harm to our citizens and potential liability to the State. This is not acceptable.

Assembly Bill 81 provides a compromise that everyone is not happy with, but, ultimately, we are setting up a fair process full of checks and balances, the opportunity to express concerns around policy and funding, and a way for this conversation to continue.

SENATOR PICKARD:
I was surprised to hear our counties were not doing a good job with the Public Defender's Office, so we are creating an entire department to oversee public defenders, presumably because the counties have not risen to the occasion.

How will the line of authority work? Does this create another level of oversight whereby the group created in A.B. 81 will oversee county public defenders' offices, which in turn oversee the attorneys working who are working cases? How does this vertical structure work?

ASSEMBLYWOMAN BENITEZ-THOMPSON:
The Sixth Amendment Center Report, Exhibit E, talks about the fact that Nevada is uniquely structured. Our two-largest counties oversee their own public defenders' offices and different things are happening in rural counties. The Nevada State Public Defender's Office provides services for a couple of small counties, but then the other counties are providing their own services.

The system we have now was born out of necessity. Counties picked up the ball and have been doing the work that the State should. The Nevada Right to Counsel Commission produced a report that indicates, while the counties are doing their best effort, the State is not doing its job in terms of being the final oversight for the provision of service deliveries for indigent defense. We have no idea what the quality is, no manner to measure and no ongoing discussions. Ultimately, that is where the State falls down on its responsibilities.

Assembly Bill 81 will require the State to own this responsibility. It creates the Department, comes up with regulations and standards, collects data and finds a better way of doing this.

SENATOR PICKARD:
As I understood this, the initial responsibility for prosecution and defense is at the county level, and it is up to the counties to provide those services in an adequate fashion. If we have a conflict, we turn to the Office of the Special Public Defender or the Office of the Attorney General to get involved on the prosecutorial side. I thought there was a structure in place, so I am surprised we are not requiring the counties to do what has been required of them. Has that been attempted and it failed, so now we need to step up and create a new bureaucracy to oversee this?

ASSEMBLYWOMAN BENITEZ-THOMPSON:
Yes. What we are seeing is a trend where similarly structured states are facing legal challenges and are not prevailing. We need to get ahead of our constitutional obligation.

SENATOR OHRENSCHALL:
Assembly Bill 81 is needed and will help ensure people are receiving and exercising their constitutional rights.

ASSEMBLYWOMAN BENITEZ-THOMPSON:
I was one of two Legislators who sat on the Right to Counsel Commission; I am a social worker and I do not live in this world at all. We are here out of necessity and function because we have the question before us regarding due diligence and whether the State can show there is a framework in place that meets its constitutional obligations. Whether A.B. 81 prevails, we will have an answer and have to work from that point.

SENATOR HANSEN:
I represent several rural counties, and there has been concern over how the State is going to finance this because some counties have struggled for years to be able to afford public defenders; they have done the contract thing. What is the funding mechanism for the counties?

ASSEMBLYWOMAN BENITEZ-THOMPSON:
First, I would look to the composition of the Board of Indigent Defense Services which is created by A.B. 81. We worked hard to make sure we had adequate county representation in that Board since it is going to be part of the conversation about every regulation and standard that is put forth and what is happening with the State office. We have a balance so we do not unintentionally do too much too fast and incur unrealistic expenses that would cause counties to simply hand their programs back over to the State. There is ongoing concern about the corrective action plans and whether the State had to assume the county responsibilities; ultimately everyone likes the system that works. The counties do not want a State takeover, which is fair because the State is in no position to do that. We see a better product with a collaboration between the State and counties, so building the Board in a way that has healthy county representation is important.

Within the structure of A.B. 81 and creating the Department, there are a number of different ways in which the financing parts are going to be discussed. One: we know there is going to be an additional fiscal burden if we put in place things like caseload standards that cause counties to hire more staff. The Department of Indigent Defense Services has to build those additional costs into its budget and request that money through the Governor's Office just as every other department does. You have to come back and fight for your money every two years by making your case and justifying your expenses. We are giving them the avenue to do that, and it does not exist right now. Giving them that avenue is important.

Second: we are also allowing the Department to come to the Interim Finance Committee should there be an urgent need and dollars need to move sooner rather than later. Once again, it would have the ability to come to this Body and request those dollars to help meet the standards it promulgates.

SENATOR HANSEN:
Hopefully, we can work something out because those were the concerns expressed.

LAURA FITZSIMMONS:
I support A.B. 81. I was appointed by former Governor Brian Sandoval to serve on the Nevada Right to Counsel Commission. It was a huge amount of work; it took State funds and a lot of support by a lot of people who were involved. There were a lot of county members, including those who represented the rural counties. The function of this Commission was to focus on rural counties, and I have had substantial professional experience representing indigent people in rural counties.

We came up with a unanimous vote that these issues needed to be addressed, and the most important thing was the preamble. The State needs to recognize it has the constitutional obligation to provide effective assistance of counsel. So the preamble on this bill gave the rural counties a sense of comfort that funding would increase if needed.

We now have $1.7 million in the budget from former Governor Sandoval. That is enough money to staff the Department, hire an Executive Director, appoint a Board and create agreed-upon standards. In terms of the funding concern, in two years we are going to know which rural counties are not compliant and the additional costs needed to bring them into compliance.

It is my understanding this Commission never focused on Clark and Washoe Counties because they are fully funded and are compliant with national standards. We are talking about two categories; the rural counties are different.

JIM HOFFMAN (Nevada Attorneys for Criminal Justice):
We support A.B. 81. It is kismet this bill was heard on the same agenda as A.B. 356 because the latter bill is what happens when you make a mistake. As Ms. Noble testified, the process to try to correct that mistake can be long and arduous. Assembly Bill 81 creates a structure so we can do a better job in the first place. This results in a better quality of counsel and fewer mistakes so we do not have to go through that long, arduous, expensive process.

On a policy level, A.B. 81 is a good bill because it fixes these issues before problems arise. We also support the amendment by the Clark County Public Defender's Office, but we support A.B. 81 with or without it.

MS. BROWN:
Advocates for the Innocent supports A.B. 81.

REBECCA GASCA (American Civil Liberties Union Foundation):
My history extends back to 2008 on this matter when ADKT No. 411 was first issued by the Nevada Supreme Court regarding caseload standards. At the time, I was working for the ACLU of Nevada. While we support the massive amount of time and effort that has gone into this bill by the Indigent Defense Commission, the ACAJ and the tireless efforts of the Right to Counsel Commission as well as the intent and remarks put on the record by Assemblywoman Benitez-Thompson, we oppose A.B. 81 as section 14 needs to be changed.

Section 14 has been amended to allow for some Interim budgetary issues to be addressed via the contingency account. It is our fear that contingency account is not the appropriate way to address this long-standing issue. For a sustainable approach to adequately providing defense services, there needs to be permanent, programmatic funding of the Department itself beyond administrative personnel.

That money was put into the Governor's budget, so we appreciate the creation of this mechanism as a whole, but it is necessary to begin funding the work this Board and Department will be doing to respond to the severe deficiencies the ACLU has alleged in a lawsuit against the State, most recently requesting for class certification to move this forward and have some declaratory relief. It would be our preference that this Body have this funding mechanism issue considered by the Senate Finance Committee before the end of this Session because this is the opportunity the State has to move forward in good faith to adequately address these issues, particularly with respect to rural counties. The lawsuit against the State does not allege Clark or Washoe Counties are engaging in any inadequate defense. This is about providing rural counties with adequate funding to address the structural deficiencies noted in the Sixth Amendment Center report, Exhibit E, and considered throughout the Interim by the Right to Counsel Commission.

SENATOR HANSEN:
What is the status of the lawsuit you discussed? We normally do not do legislation that may get in the middle of something like that.

MS. GASCA:
You are correct; this is an extremely abnormal case. The lawsuit is pending, the class certification has been filed, the Attorney General has responded, Governor Steve Sisolak is named in his official capacity as is the State in general. This is out of the ordinary because the State has nearly a dozen years of continued inaction in adequately funding the rural counties. For that reason, I am here to put on the record the unique position in which we find ourselves. We do believe this is the opportunity the Legislature has to move forward and address those structural deficiencies, much of which is being done by this bill, but that funding mechanism is incredibly important.

DAGNY STAPLETON (Nevada Association of Counties):
Important and far-reaching reforms are being proposed, and counties understand that as they are the main providers of this service. Though we are opposed to A.B. 81, Nevada's counties are not opposed to reform. We do support much of what is in this bill. We appreciate the preamble language that articulates the State's constitutional responsibility to provide indigent defense; I will provide some background on this issue from the county perspective.

Nevada has a strong history of providing indigent defense. In fact, Nevada was one of the first states to guarantee this right over 100 years ago. However, over the last few decades, Nevada's counties have taken this responsibility over from the State. Rural counties have testified to the fact that, due to the reduction in State resources for these critical services in years past, there have been situations where defendants were left sitting in jail without adequate representation. As a result, most rural counties step up and pay for almost 100 percent of the indigent defense services in the State. Fifteen out of Nevada's 17 counties provide and pay for 100 percent of this service.

The Nevada Association of Counties (NACO) has been proactively engaged on the issue of indigent defense for over a decade. We have been part of the Supreme Court's Indigent Defense Commission; NACO introduced legislation seeking reforms and funding for indigent defense four out of the last five Sessions.

This is something our organization and our counties—including rural counties—care about. County representatives also participated in the Right to Counsel Commission during the Interim.

In light of this history and the fact that counties are the primary providers of this service, we view ourselves as full partners in this. While we agree reforms need to be made, the crux of this legislation for us rests on the acknowledgment and assurance the State recognizes its responsibility as well. Counties are willing to continue their partnership and financial contribution to this, but additional costs for reforms should be borne by the State.

Assembly Bill 81 provides the framework for doing that. However, our opposition is based on two things. First, there were a few amendments we asked for—one that Clark County was interested in—that could not be incorporated.

Secondly and most importantly, this bill was introduced with funding to pay for the anticipated reforms. That funding is no longer in the bill, and without it we are concerned about the State's ability and commitment to fund reforms in the future. As Ms. Gasca mentioned, we need that sustained funding mechanism for the actual reforms that need to take place in the counties.

MR. PIRO:
The Clark County Office of the Public Defender disagrees with sections 14 and 15 of A.B. 81 that deal with takeover provisions that could possibly happen. A good analogy was made to me before the hearing that the State taking over Clark County's public defending would be like an ant trying to eat an elephant. We are concerned the State would not be able to handle both the budget and what we do; the amendment proposed by County Manager Jeff Wells would provide a carveout for Clark County in that regard.

State oversight is important. Public defense systems in Colorado and Kentucky are overseen by the State and work well, but we do not want to run into a situation like Missouri where it is poorly run. Clark County is not perfect by any means, and definitely the rural counties need help—I am learning that more and more.

The other concern is that there are a lot of county officials who are going to be part of the makeup of the Board on Indigent Defense Services. Public defenders

have different concerns than those of the counties. Counties are concerned with budgets and containing costs, while public defenders are concerned with vigorous defense and holistic rehabilitation which is not always convenient for county budgets. That is where the head banging sometimes happens—that is where our differences lie. It will be important to watch how this Board works.

This Department should be created and progress should be made, but we are concerned with the takeover provision.

DARIN IMLAY (Public Defender, Office of the Public Defender, Clark County):
In addition to being the Public Defender of Clark County, I also sit on the Indigent Defense Commission. Our concern is with section 14, subsections 5 and 6 of A.B. 81.

As you have heard, the primary concern is A.B. 81 is intended to deal with is the rural counties. As Ms. Fitzsimmons mentioned, Clark and Washoe Counties are in compliance and are well-funded, so the focus is on the rural communities.

As Senator Pickard was questioning about the surprise for the counties and representation, the representation provided by Clark County Public Defender's Office as well as the County's Special Public Defender's Office is the gold standard for Nevada. Because of the resources we have and the size of our Office, I have the advantage of being able to recruit some of the top law students from throughout the Country. I have 30 to 50 law students who come every year from top universities and law schools because of the training and resources we provide. I am also able to recruit some of the best social workers, investigators and mitigation specialists to handle homicide cases.

In my Office, we have some of the best attorneys in Las Vegas handling everything from juvenile cases through the Juvenile Office to specialty teams that handle DUI cases, homicide cases as well as sexual assault cases. Every one of these attorneys is exceptionally well-trained. We are able to send them to different states to receive additional training.

We request an amendment in section 14, subsection 5 first sentence "to exclude counties with a population of 100,000 or more," so this subsection would apply to counties with a population of 100,000 or less. This would not take Clark County out of the oversight of A.B. 81; we would still be able to receive recommendations from the Executive Director and address any

shortcomings or concerns. We recognize indigent defense is continually evolving and changing, and we need to evolve and change as well. We need to continually improve—we can always do things better. But the representation of indigent clients in Clark County is not only being adequately met, but receiving some of the best representation in Las Vegas and in the State. We are providing those services now. My concern is if there is a transfer, voluntary or involuntary, there is no way the State Public Defender's Office would be able to take over the 25,000 cases we handle every year, the 200-plus employees or the 120 attorneys in my Office. I do not see how the State Public Defender's Office would be able to handle that transfer without causing life-altering consequences to the indigent clients in Clark County.

For those reasons, we oppose A.B. 81. If that amendment is accepted, we would be in support of this bill.

MS. BERTSCHY:
The Washoe County Office of the Public Defender is neutral for A.B. 81. The policy regarding indigent defense is long-needed, so we do appreciate Assemblywoman Benitez-Thompson for bringing forward this important legislation. The principles in section 8 are necessary requirements of providers of indigent services to meet the requirement of the Sixth Amendment of the United States Constitution and *Gideon vs. Wainwright*, 372 U.S. 335 (1963).

Specifically, we support sections 8 which discuss caseload standards, proper training and education of attorneys, fair compensation and, most significantly, vertical representation whereby the client has the same attorney throughout his or her entire case. Additionally, we support the performance standards in section 8 which would comply with caselaw and what is appropriate for attorneys.

This bill would codify those worthy goals and ensure Nevadans receive high quality, zealous representation. In the Assembly hearing, Clark County proposed an amendment. If that amendment would be accepted, we would support A.B. 81.

ASSEMBLYWOMAN BENITEZ-THOMPSON:
I do not necessarily agree with moving out Clark and Washoe Counties, but it is fine. The holdback on that has been due to legislative concerns about the use of population caps and how they apply in statute, so it is not that I have a

complete disregard for the acceptance of those proposed amendments. They make a lot of sense and their arguments are spot on; the internal conversation about the use of population caps is where the biggest amount of consternation comes from.

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CHAIR CANNIZZARO:
I will close the hearing on A.B. 81. This meeting is adjourned at 10:49 a.m.

RESPECTFULLY SUBMITTED:

Jenny Harbor,
Committee Secretary

APPROVED BY:

Senator Nicole J. Cannizzaro, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	5		Attendance Roster
A.B. 356	C	1	Michelle Feldman / Innocence Project	Proposed Amendment
A.B. 356	D	1	Tonja Brown	Proposed Amendment
A.B. 81	E	190	Assemblywoman Teresa Benitez-Thompson	Evaluation of Indigent Defense Services
A.B. 81	F	1	Assemblywoman Teresa Benitez-Thompson	Testimony
A.B. 81	G	1	Assemblywoman Teresa Benitez-Thompson	Proposed Amendment