MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eightieth Session
March 19, 2019

The Senate Committee on Judiciary was called to order by Vice Chair Dallas Harris at 8:07 a.m. on Tuesday, March 19, 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:

Senator Heidi Seevers Gansert, Senatorial District No. 15

STAFF MEMBERS PRESENT:

Patrick Guinan, Committee Policy Analyst
Eileen Church, Committee Secretary

OTHERS PRESENT:

Tessa Laxalt, National Rifle Association of America
John R. McCormick, Administrative Office of the Courts, Nevada Supreme Court
Mindy McKay, Acting Administrator, Records, Communications and Compliance Division, Department of Public Safety

Michelle Grisamer, Program Officer, Records, Communications and Compliance Division, Department of Public Safety
Valerie Wiener, Nevada Youth Legislature Foundation Board
Olivia Yamamoto, Nevada Youth Legislature
Rachel Rush, Nevada Youth Legislature
Brad Sears, UCLA School of Law
Alyssa Cortes, Human Rights Campaign
Zachary Kenney-Santiwan, Intern, Human Rights Campaign
Brooke Maylath, President, Transgender Allies Group
André C. Wade, State Director, Silver State Equality
Sherrie Scaffidi, Director, Transgender Allies Group
Veronica Melton
Mackenzie Baysinger, Human Services Network
Kelly Chaffin, Human Rights Campaign
Ashley Fluellen, Human Rights Campaign
Sarah M. Adler, Nevada Coalition to End Domestic and Sexual Violence
Elisa Cafferata, Planned Parenthood Votes Nevada
William Ledford, Director of Advocacy, Lutheran Engagement Advocacy in Nevada
Amy Coffee, Nevada Attorneys for Civil Justice
Jennifer Noble, Nevada District Attorneys Association
John Arrascada, Public Defender, Washoe County
John J. Piro, Deputy Public Defender, Office of the Public Defender, Clark County

VICE CHAIR HARRIS:
I will open the hearing of the Senate Committee on Judiciary with Senate Bill (S.B.) 265.

SENATE BILL 265: Revises provisions relating to certain records of mental health. (BDR 14-1042)

SENATOR HEIDI SEEVERS GANSERT (Senatorial District No. 15):
Senate Bill 265 is looking to close communication gaps between the various courts across the State and the Central Repository for Nevada Records of Criminal History which is run out of the Department of Public Safety (DPS).

When there is a mental health adjudication, which can be a record concerning the appointment of a guardian for a person with a mental defect, a plea or

finding of guilty but mentally ill, a verdict acquitting a person by reason of insanity, a finding of incompetence for trial or an involuntary admission to a mental health facility, those criminal records are supposed to be transmitted within five days to the Central Repository. When the information is received, it is supposed to be uploaded to the National Instant Criminal Background Check System (NICS). That information is critical—if someone is looking to purchase a weapon, we know if that person is mentally ill.

My understanding is the courts fax information into DPS, and it is uploaded within 24 hours. The Department of Public Safety has not had the resources to make sure all the information is being transmitted and done within five days.

Section 2, subsection 2 of the bill requires the Central Repository to contact all the courts and coordinate efforts to ensure timely submission of records. Further in section 1, the Central Repository is required to prepare and submit a report to the Governor and the Director of the Legislative Counsel Bureau for transmittal to the Legislature, identifying each instance in which a record required to be transmitted by a court to the Central Repository was not submitted in a timely manner during the previous fiscal year and to provide the reason for the untimely submission.

Mindy McKay from the Department of Public Safety is going to offer a friendly amendment to expand monitoring to include misdemeanor convictions of domestic violence and felony convictions. That information is also required to be transmitted to the Central Repository, but the Repository has not had a monitoring program to make sure it is getting all of it and within a timely manner. This is a step to make sure, if we are going to run background checks, we do it in an effective manner and close those communication gaps.

SENATOR PICKARD:
This is just for adjudications for someone deemed legally mental ill. This is not intended to capture every Legal 2000 that takes place in the State, which might represent a temporary crisis but not a long-term one. Is that correct?

SENATOR SEEVERS GANSERT:
This would cover involuntary admissions to a mental facility. These statutes are already on the books. We are just making sure the information is being transmitted so we are not expanding what is required in a background check. We are making sure the information is readily available so if someone under

Nevada statute cannot purchase or possess a firearm, that information is available.

SENATOR PICKARD:
We just want to make sure we are not creating issues for people who do not have long-term problems. The Legal 2000 is a process used for any crisis where someone needs some extra attention.

TESSA LAXALT (National Rifle Association of America):
I am here on behalf of the tens of thousands of Nevadans who are proud members of the National Rifle Association (NRA) to testify in support of S.B. 265. I have submitted a letter of support from the NRA (Exhibit C).

In our long-standing advocacy and support efforts to address mental health issues in Nevada and across the Country, we are proud to support this legislation that will help ensure timely and accurate record-sharing between our Central Repository, mental health agencies, this Body and the public in general. The NRA was supportive of the underlying legislation which established a reporting deadline, and we are equally supportive of this legislation that will further promote timely and accurate reporting of mental health records.

JOHN R. MCCORMICK (Administrative Office of the Courts, Nevada Supreme Court):
We oppose S.B. 265. In 2014, this issue came to light, and the Administrative Office of the Courts worked with all the courts to ensure they were reporting these mental health decisions in a timely manner. This is not necessary at this time as we have not been made aware by DPS or anyone else that this reporting is not occurring.

We have some concern with section 1 that the report does not also go to the Chief Justice who, under the Nevada Constitution, has the authority to compel the judiciary to do things.

The involuntary commitments under *Nevada Revised Statutes* (NRS) 433A, as contemplated in this bill, do not include temporary Legal 2000s.

VICE CHAIR HARRIS:
You stated you were not informed the courts were not doing the reports. Are you sure they are doing the reporting, or do you have any evidence they are not doing the reporting?

MR. MCCORMICK:
We have not been informed whether these reports are being made. Anecdotally, those court administrators and other court personnel have indicated they are in compliance.

SENATOR HAMMOND:
Even if you are not getting these reports back, this makes an assurance the reports are coming in. No one will deny the reports are necessary.

MR. MCCORMICK:
We are not opposed to making sure this reporting occurs.

MINDY MCKAY (Acting Administrator, Records, Communications and Compliance Division, Department of Public Safety):
We audit criminal justice agencies, law enforcement, prosecutors, courts and multiple other agencies both in the criminal and civil sector. We have multiple programs to audit the use of our criminal justice systems and the Federal Bureau of Investigation (FBI) criminal justice systems. This includes not only use of the systems but contributory information to those systems from the agencies.

We do not monitor the courts with respect to mental health adjudication submissions. We would need an additional staff person at the level of our auditors—Nevada Criminal Justice Information System Program Specialist or equivalent to a Program Officer I—which is a Grade 31 in the State.

The fiscal note states DPS would need one position. We do not have a mental adjudication database. We receive these reports via fax, and they are kept in a metal file cabinet. The data is uploaded and entered by staff into the NICS database. The only way we can access the NICS database is when we run a background check for a firearm transfer. We have received about 100 reports a month since the date of inception of A.B. No. 46 of the 75th Session. We have 8,141 records in the system and stored in file cabinets.

SENATOR SCHEIBLE:
It is my understanding the Criminal Repository was for criminal information and a mental health adjudication would not be a criminal record. Are you able to keep those?

MS. MCKAY:
We have the statutory authority to maintain those in NICS for the purpose of firearm background checks. This takes it a little further as it will give us the authority to monitor the courts to make sure we are receiving the information and on a timely basis.

SENATOR SCHEIBLE:
I understand the background check done for a firearm transfer is different, or is it one of those reports?

MS. MCKAY:
It includes all of those. We check not only our State criminal history databases, warrants database, Offender Tracking Information System on Parole and Probation and anyone who is being supervised on D.O.N.S., the Dangerous Offender Notification System. We also check Department of Motor Vehicle files, State protection order files, State Sex Offender Registry files, along with the FBI multiperson files and the Single Scope Background Investigation (SSBI).

SENATOR SCHEIBLE:
I have never seen any of those records include a finding of incompetence or a Legal 2000.

MICHELLE GRISAMER (Program Officer, Records, Communications and Compliance Division, Department of Public Safety):
The NICS system we are putting these into only responds on a firearm-related background check, so you would not have seen that. It will only respond when people are purchasing or redeeming firearms from gun stores. If they are applying for conceal-carry permits, as in some states, law enforcement can see if they are releasing guns out of evidence. It is not something that can be used for investigations or for court purposes, only firearms purchases.

SENATOR SCHEIBLE:
My confusion is you are saying you are pulling it from SSBI and NICS. If the information is not in NICS, how is it going to be pulled from there?

MS. MCKAY:
The mental health adjudications we receive are entered into NICS; it is a different file. It is not NICS, SSBI or a State database. It is a separate database dedicated solely to those individuals who have prohibitors for firearm transfers.

SENATOR HAMMOND:
What I am gathering from this bill is that while there is supposed to be a report submitted, sometimes it may not happen. You are the redundancy, you are the backup and you are the source making sure it happens. The bill is written to make sure these people do not get weapons they could use to do harm to others. Is that correct?

MS. MCKAY:
That is correct. The monitoring aspect of this bill and the reporting does help to ensure that not only are we receiving the reports, but we are receiving them in a timely manner in accordance with statute. It is something in line with what we already do. It also aligns with the friendly amendment we would like to work on with Senator Seevers Gansert, tracking this information we receive fingerprint submissions, arrests with respect to dispositions, which come out of the prosecutors' offices and the courts, and protection orders from the courts as well.

We received a letter from the U.S. Attorney General about the Fix NICS Act that asks all of the states, tribes and federal agencies to come up with a four-year plan on how to improve the NICS background checks system and our criminal justice information sharing.

SENATOR PICKARD:
Now that we are tasked with helping the federal government improve the NICS system, how does this all dovetail? Are we then paying for the new person to help with the NICS? Is the auditing and reporting a full-time function? How would an additional staff person be used?

MS. MCKAY:
If a friendly amendment is going to add additional monitoring, tracking or auditing, at least one staff member would be dedicated full-time because of the volume of records we receive and the number of courts in the State. This is a new process, although it falls in line with the process we follow for our audits. It is not similar, so tweaks are going to be done. The new person creates this

process and implements it in cooperation with the agencies we monitor. He or she will solely be dedicated to the creation and monitoring pursuant to this bill.

VICE CHAIR HARRIS:
Aside from this bill, is there any way to know how many adjudications do not get reported?

MS. MCKAY:
Not from our standpoint because we do not have the authority to reach out. This bill gives us the authority to reach out and get the courts into compliance if they are not.

SENATOR SEEVERS GANSERT:
I will make sure the Chief Justice receives a copy of the report if this legislation is passed. This is not an expansion to prohibit people from getting firearms. This is about making sure information which resides with the courts is transmitted and there are no gaps in communication to the Central Repository, which is required by statute. This does not change statute. It is a monitoring program to make sure the Repository gets all the information, appropriately uploads into NICS and then stores it.

We want to make sure if we are running background checks, they are effective and the different reasons individuals may be prohibited, such as mental health, felonies and domestic violence, are in the system as flags so those people do not obtain firearms.

VICE CHAIR HARRIS:
I will close the hearing on S.B. 265.

CHAIR CANNIZZARO:
I will open the hearing on S.B. 97.

SENATE BILL 97: Prohibits use in a criminal case of certain defenses based on the sexual orientation or gender identity or expression of the victim. (BDR 15-559)

VALERIE WIENER (Nevada Youth Legislature Foundation Board):
The Nevada Youth Legislature is a two-year program which gives high school students an opportunity to learn the legislative process and take an active role

in State government. This includes presenting one bill per term to the Nevada Legislature on an issue important to Nevada youth. Interested students may submit an application to the Senator in the Senatorial District in which they live or attend high school. Each of Nevada's 21 State Senators then appoints a Youth Legislator to represent his or her Senatorial District.

OLIVIA YAMAMOTO (Nevada Youth Legislature):
Last year, a freshman from my high school was murdered by his father. According to the Pew Research Center, lesbian, gay, bisexual, transgender, questioning, plus (LGBTQ+) are more likely to be targets of hate crimes than any other minority group. This oppression is further perpetrated by the gay and trans panic defense—a defense used in American courts to justify murder or other brutal acts because of a person's sexual orientation or gender identity.

Our justice system has accepted homophobia and transphobia as a reason to murder or brutalize an LGBTQ+ member. Senate Bill 97 calls for the banning of the gay and trans panic defense under its three uses: diminished capacity, heat of passion and self-defense. The American Bar Association has called for the banning of this defense, but only California, Rhode Island and Illinois have followed through. Nevada should be the next state to take a stand against this unjust and antiquated defense. This defense holds no psychological claims, as homosexuality and homosexual panic was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM). By upholding this defense, we are telling LGBTQ+ members their lives are worth less than others and their sexual orientation or gender identity is to blame for their deaths.

RACHEL RUSH (Nevada Youth Legislature):
This bill was originally proposed during our bill drafting session along with 17 other bills from my fellow youth legislators. The Human Rights Campaign has stated there are over 10,000 LGBTQ+ identified youth ages 13 to 17.

SENATOR PICKARD:
In section 1, subsection 3 is the policy decision the Legislature gets to make whether a person is justified in any respect. To section 1, the medical community has already removed from the DSM any reference to this defense. This defense is not allowed in the State of Nevada. Is that correct?

MS. YAMAMOTO:
That is correct.

SENATOR PICKARD:
With respect to section 1, subsection 2, we are making a legal determination of a diagnosis where we say a person does not suffer from reduced mental capacity based on this defense. Are you aware of any law in NRS where we make a determination of a medical diagnosis?

BRAD SEARS (UCLA School of Law):
I am not aware in Nevada of that determination being made. We do know from how these cases get argued throughout the Country that provocation, diminished capacity and self-defense are all used frequently to make these arguments, and there is no medical or scientific research backing up that a gay and trans panic reaction exists in people.

SENATOR PICKARD:
I just want to make sure we understand if we are setting a precedent here for determining a medical diagnosis in a statutory scheme. I have never seen that, but I do not pretend to know the entirety of NRS. If we are talking about the defense, my understanding is this defense is not allowed per se in Nevada. We may have other things like insanity or some of these other defenses on their own that will remain. It appears we are making it a diagnosis here in the law.

MS. YAMAMOTO:
Are you talking about the diagnosis of homosexual panic?

SENATOR PICKARD:
Section 1, subsection 2 says "A defendant does not suffer from reduced mental capacity based on the discovery of ... ." So we are saying in law what a person does not suffer from; that might be dangerous to legislate as to what a diagnosis is. If this is not the first time—if there are other examples of this—I just wanted to put that on the record.

CHAIR CANNIZZARO:
The reduced mental capacity in section 1, subsection 2 of this bill would relate to a defense of diminished capacity. That is my understanding of what that language is trying to get at.

MR. SEARS:
That is correct.

CHAIR CANNIZZARO:
In Nevada, there is not a defense of diminished capacity. The DSM does not list diminished capacity in its manual. That is different than what would ordinarily be diminished capacity under the law as a defense to a crime.

SENATOR PICKARD:
I am aware of the distinction. The first was just regarding the medical community's establishment or disestablishment of the condition. The second had to do with the defense and the apparent diagnosis—making a statement in law as to a person's mental condition or capacity. I was just wondering if there was any other place in the statute where we made that determination.

SENATOR SCHEIBLE:
We are talking about a finding of fact by a jury. Diminished capacity is one finding of fact within the purview of the jury to make—not a finding of law, which is for the judge to make—that would indicate there is some self-defense claim at hand. The finding of fact can be based on a diagnosis, testimony, medical evidence or any kind of presentation by the defense at trial. We are not indicating in this law there is any kind of medical condition or lack thereof; rather, we are indicating to the court a particular finding of fact that will not be allowed in a Nevada State court. Would that be accurate?

MR. SEARS:
Yes. There would be expert testimony of a mental health phenomena of a gay or trans panic. That has been discredited by those professions as being pseudoscience.

VICE CHAIR HARRIS:
Given we do not have diminished capacity here in Nevada, are we opening the door to that defense by mentioning it in the statute?

MR. SEARS:
The bill is modeled off a model law which takes into account how these defenses came up throughout the Country. Sections in the criminal code could be modified, perhaps, without using the term diminished capacity.

SENATOR SCHEIBLE:
Would this also apply to other cases? Could you see the application in a battery case or attempted murder case?

MS. YAMAMOTO:
Yes.

MR. SEARS:
I support S.B. 97. Nevada has done a tremendous job in creating a more-welcoming environment for its LGBTQ+ community. This month, The Williams Institute released new estimates of the size of the LGBTQ+ population in each state. Nevada is in the three top states in terms of the percentage of adults who identify as LGBTQ+. What we know from this data is that LGBTQ+ Nevadans live throughout the State, are in every economic class, work and contribute to the economy. Over one in five is raising children. They are more likely to face discrimination and violence and are more likely to have lower incomes and health issues.

One of the disparities is an epidemic of violence against LGBTQ+ people. We know on a per capita basis, LGBTQ+ people are more likely to experience hate crimes than any other group protected by hate crime statutes. The LGBTQ+ people of color are more likely to be targets of hate crimes. Gay men of any protected group are the most likely to be subject to physical and violent attacks on their body. While anti-Semitic crimes—hate crimes—are most likely, in terms of crimes, focused on property, for the last four years, there have been a record number of transgender women of color who have been murdered.

The value of this bill is for the State to take a stand against this epidemic of violence and to say Nevada protects LGBTQ+ people. When it comes to provocation, a statement has developed in our law that it is not only understandable an LGBTQ+ person could be violently attacked and murdered but reasonable. What is in the provocation defense or mitigation is that it is objectively reasonable—this is what an average person or reasonable person would do.

This is not only an important stand in ending violence against specific people who might be killed, but it is sending a message throughout the State that LGBTQ+ people are full equal citizens.

SENATOR OHRENSCHALL:
Have there been any constitutional challenges in the three jurisdictions which have passed this legislation, and what was the outcome? Have there been less hate-based attacks after those statutes passed?

MR. SEARS:
One of the issues is the three laws were recently passed. It might take a few years to get the data.

We have not seen any constitutional challenges to those three statutes. The constitutional argument that could be brought against the statute would be the defendants have a due process right to present any evidence that might excuse, justify or mitigate their crime. A due process challenge would look at this defense as a fundamental principle of our constitutional tradition, and it would look at the length the defense has been around.

ALYSSA CORTES (Human Rights Campaign):
As an advocate for LGBTQ+ individuals, a perpetrator's realization of a victim's actual or perceived sexual orientation or gender identity should never be available as a legal defense for violent crimes.

The so-called gay and transgender panic defense allows a criminal defendant to justify violent crimes on the purported grounds of the defendant's shock at discovering the victim's sexual orientation or gender identity.

While it might be tempting to dismiss these defenses as relics from a less tolerant era, they have been used to drastically reduce the sentences of violent perpetrators as recently as April 2018.

The continued use of these defenses is especially alarming in the face of a rise in hate-motivated crimes against LGBTQ+ individuals. The National Coalition of Anti-Violence Programs recently reported hate-motivated homicides of LGBTQ+ individuals has steadily increased since 2012 and has increased 86 percent between 2016 and 2017.

Gay and transgender panic defenses send the destructive message that LGBTQ+ victims are less worthy of justice, and their attackers are justified in their violence. Their continued availability in Nevada courts of law is a direct attack to the dignity and safety of LGBTQ+ residents.

ZACHARY KENNEY-SANTIWAN (Intern, Human Rights Campaign):
I support S.B. 97.

BROOKE MAYLATH (President, Transgender Allies Group):
We support S.B. 97. Adding language that would mandate the court to instruct juries on implicit bias in these types of cases will go a long way to help understand why this kind of stigma is unacceptable when an LGBTQ+ person has been murdered.

ANDRÉ C. WADE (State Director, Silver State Equality):
I support S.B. 97. The bill seeks to eliminate the gay trans panic defense. This defense is used in three different ways to reduce a murder charge from manslaughter to a justifiable homicide: provocation, diminished capacity and self-defense. The defense has the discovery or potential disclosure of the victim's actual or perceived gender identity, gender expression or sexual orientation a reason enough to not only murder someone but also request a lighter or no sentence at all because a panic was involved.

It is nothing more than an attempt to use a victim's sexual orientation or gender identity to not only justify a perpetrator's violent crime but to appeal to others' irrational fears and hatred toward lesbian, gay, bisexual, transgender and queer persons and ask them to excuse the crime which can result in unwarranted acquittals or sentence reductions.

SHERRIE SCAFFIDI (Director, Transgender Allies Group):
I support S.B. 97 and submitted my testimony (Exhibit D).

VERONICA MELTON:
I am the mother of Giovanni Melton who was harassed, ridiculed and bullied by my ex-husband who eventually killed him due to his sexual orientation. I support the passage of S.B. 97.

MACKENZIE BAYSINGER (Human Services Network):
We support S.B. 97.

KELLY CHAFFIN (Human Rights Campaign):
We support S.B. 97. People in the LGBTQ+ community are being targeted by strangers and loved ones and subsequently paying with their lives. Allowing defendants to hide behind their actions by pleading gay or trans panic is archaic and discriminatory. Those individuals need to be held responsible for their violent actions against innocent people. Lives are being lost due to ignorance and hate.

ASHLEY FLUELLEN (Human Rights Campaign):
I support S.B. 97. The gay or trans panic defense describes a tactic used in court in which the defendant blames a victim's sexual orientation or gender identity for their own violent reaction. Passing S.B. 97 would disallow these unfair trials from continuing to happen.

SARAH M. ADLER (Nevada Coalition to End Domestic and Sexual Violence):
We support S.B. 97. A letter from the Coalition's Executive Director, Sue Meuschke, has been submitted for the record (Exhibit E).

ELISA CAFFERATA (Planned Parenthood Votes Nevada):
We support S.B. 97 and submitted a letter of support (Exhibit F).

WILLIAM LEDFORD (Director of Advocacy, Lutheran Engagement Advocacy in Nevada):
We support S.B. 97.

AMY COFFEE (Nevada Attorneys for Civil Justice):
The Nevada Attorneys for Civil Justice strongly supports the LGBTQ+ community. In the past, we supported enhancements for crimes against the LGBTQ+ community.

We do support the amendment the Clark County Public Defender's Office proposed (Exhibit G) with one exception: to take out the last clause after the words "expression of the victim" and the part which talks about unwanted advances.

Nevada does not recognize diminished capacity, which is recognized in some states; for that reason, the Nevada District Attorney's Association took out section 2 in its amendment (Exhibit H). However, the issue of provocation and state of passion does come up and is relevant in explaining the state of mind, often in murder cases. If this bill said you could not present the gay panic defense, I would 100 percent support S.B. 97, but that is not the way the legislation is worded. We are concerned the issues of provocation and state of passion are often relevant in order to present a complete defense.

One of the fundamental rights is the right to a fair trial and due process. The way this bill is written with broad language would prevent somebody who might have a rightful defense that has nothing to do with gay panic.

Nevada Attorneys for Civil Justice believes everyone has a constitutional right to present a defense and to have a fair trial because trials are about seeking the truth. No matter how unpopular someone's background or beliefs are, our justice system says everyone is entitled to a fair trial and a defense. We do not judge who is entitled to a defense.

As way of history, it should be noted that Legislators eliminated the insanity defense in Nevada years ago. The Supreme Court eventually said that was a denial of due process, reinstated it and said you could not just cut off a defense. There is a balance between what you can legislate and what the courts might say is a fundamental right to due process to allow a fair trial.

The last clause of the Exhibit G amendment is deleted. The only issue is you cannot assert LGBTQ+ status alone as a matter of provocation. No one would be allowed to come into court and say somebody was gay or transgender and that is what provoked them because we agree that should not be appropriate.

The point of my testimony is recognizing that, sometimes, in asserting the rights of one group, we need to make sure we are not taking away the rights of others. I hope we can find a way to pass this legislation in a way which balances those rights.

JENNIFER NOBLE (Nevada District Attorneys Association):
Our association is 100 percent behind the intent of S.B. 97. Our proposed amendment in Exhibit H simply eliminates subsection 2. As previously discussed by Senator Scheible and Senator Cannizzaro, Nevada does not recognize a diminished capacity defense—we do the McNaghten test. Some creative defense attorney will argue the Legislature did recognize the existence of the defense in Nevada by this piece of legislation and use it in a case where we are talking about someone murdering someone in another protected class or protected community. For that reason, I am in opposition of S.B. 97. We would love to work with the members of the Nevada Youth Legislature and Ms. Wiener on the language of this bill to more effectuate whatever intent they wanted in that subsection. I reviewed the proposed amendment by the Clark County Public Defender's Office, and it would dilute the intent of this legislation.

JOHN ARRASCADA (Public Defender, Washoe County):
We support equality and fundamental rights for all people. We oppose all legislation which categorically prohibits certain defenses. It is our position that

such laws undermine the foundational principles of our criminal justice system and unnecessarily supplant well-established rules of evidence that balance principles of relevance and due process rights of accused persons. The right to due process is enshrined in the Sixth and Fourteenth Amendments to the United States Constitution, and our State Constitution includes the right to confront, cross-examine and compel the attendance of witnesses. Considered together, all of these rights are integral to ensuring the singular fundamental right of a criminally accused person to present a defense. The right to present a defense encompasses the presentation of any evidence which shows an accused person either did not commit the crime or his or her actions were excused, justified or mitigated in some way. Where the law allows an affirmative defense, mitigation or justification, it reflects society's collective determination enshrined in the law that conduct which may otherwise be considered worthy of punishment, may be excused or considered less blameworthy.

In some defenses like defense of self or defense of others, necessity and duress are such fundamental precepts which are universally understood to afford context and justification for otherwise unlawful conduct. Other defenses and forms of mitigation reflect enormous advances in our understanding of human psychology and brain development. Regardless of why a criminal or violent act may have been committed, proof of guilt beyond a reasonable doubt is always required.

Outside of the courtroom, the tragic circumstances of many cases justifiably give rise to a public outcry. Sympathy for victims of crime targeted because they are vulnerable, oppressed or marginalized often leads to important and meaningful community advocacy to legislate policy changes which protect and make life safer for members of these groups. The impulse to legislate solutions in the wake of tragic cases has led to bills that categorically prohibit certain defenses and thereby undermine the ability of defendants to present a defense. These prohibitions derive from the public discourse around high-profile cases which tend to stir passions into complicated facts and circumstances and to sensationalistic headlines and rhetorical sound bites.

Categorically prohibiting defenses through legislation may seem like a meaningful solution in the aftermath of a high-profile crime, but it is a misguided impulse. These laws dramatically impinge upon an accused person's right to confront the accuser and mount a defense. Evidence at trial, whether presented

by the prosecution or the defense, must be adapted, limited and shaped to comport with constitutional requirements and due process and to fulfil the practical purpose of trial—the pursuit of the truth. Categorical prohibitions of defenses do not evolve through well-considered caselaw and must be mechanically applied by judges without regard to the trial's truth-seeking function. Predictably, limiting the constitutional rights of accused persons to mount a defense results in coerced guilty pleas, false convictions and convictions of more serious crimes than legally justified by the circumstances. Statutes which limit defenses or the evidence juries are permitted to consider also undermine the trust the public has in the ability of juries to reach just verdicts.

This bill focuses on limiting the gay panic defense or state of mind defenses. Consequential media attention which follows encourages the public to believe incorrectly that trials are conducted by judges mechanically applying the law instead of through an adversarial process, culminating in a fair jury verdict which is based on thorough and searching consideration of all the relevant evidence at trial.

At the Washoe County Public Defender's Office, we seek to promote transparent trial processes and educate the public that trials must be a search for the truth through complete and rigorous examination of all relevant evidence and consideration of any argument for acquittal or mitigation presented by the unique facts and circumstances in each case. Thus, we oppose categorical legislative prohibition of specific defenses such as this. We stand in opposition of S.B. 97.

JOHN J. PIRO (Deputy Public Defender, Office of the Public Defender, Clark County):
Gay panic arguments are problematic because they seek to capitalize on unconscious bias and favor heterosexuality. Banning these arguments from the courtroom is not the best way to undermine the damaging effects of these arguments. The courtroom is the best place where these arguments should be aired and vetted.

In Nevada, there is no officially recognized affirmative defense which would recognize a gay panic defense. It has been used across the Country to bolster claims of insanity, diminished capacity, provocation and self-defense.

When you keep these things out in the open, it is the same way we question implicit racial bias. We want those things out in the open. We want to ferret the bias out during the trial process. Implicit racial bias questioning is still salient, and it is important to put in the forefront of the minds of people judging these. The courtroom is the place where our biases can and should be aired. Across the Country, these gay panic arguments have been largely denied by juries.

The Legislature tries to enact laws, but it cannot account for a one-size-fits-all approach. In general, criminal law and criminal cases deal with fact-specific instances. That is why these issues are best vetted through the court process, where factual context is critical to determining what punishment should be meted out. Based on the bill as written, we are in opposition of S.B. 97 and have submitted our proposed amendment, Exhibit G.

I respectfully disagree with Ms. Noble in eliminating section 3. Section 3 is already State law. You cannot just attack somebody because he or she made a nonsexual aggressive advance on you. You should not be able to prevent the res gestae. If you kept section 3, you would allow the prosecution to act like 2 people were just strangers, and that is how this violence came about. It is still not a justification that this person attacked another person based on his or her LGBTQ+ status, so this precludes a not guilty plea.

If we truly want to rid society of the cultural news which makes gay panic arguments persuasive, we need to openly battle these assumptions which underlie such claims. The best way to engage in this battle is in the courtroom where the defendant can raise the defense and an able prosecutor can expose the flaws and encourage jurors, who are seen as the conscious of the community, to deliberate on these biases that underlie our assumptions. That is why we put in the amendment about the judge giving the jury instructions regarding biases and allowing for voir dire on such things.

This eliminates covert bias and exposes overt bias which is beneficial because covert messages of bias are more powerful and harder to stop because it does not allow individuals to consciously correct or counter implicit stereotype responses. Keeping these biases out in the open in the courtroom can be open to interrogation and inquiry. Changing opinions in the jury box may be more effective than the legislative banning. The best way for claims of gay panic to lose their appeal in the long run is if the assumptions underlying these claims

are exposed for what they are—false, negative stereotypes about gay and trans people which have no basis in reality.

If the Nevada Youth Legislature accepts our amendments, we will move from the opposition into the support position.

SENATOR SCHEIBLE:
Jurors are finders of fact and do not answer questions of law. How are we supposed to instruct a jury to find factually whether a crime, murder or a battery with substantial bodily harm was motivated by somebody's perceived or actual sexual orientation, identity, etc., and then not give guidance to the judge on the law? How are we supposed to implement a law which is not clear as to whether that fact is a mitigating or aggravating factor?

MR. PIRO:
This is not an affirmative defense, so it is not like we would be instructing the jury or asking for an affirmative defense instruction on this topic to excuse it. It is generally used as a bolstering of a self-defense or a heated passion defense. That is a factual inquiry a jury would make, and I would also expect the added protections of inquiry during the jury selection process on implicit bias.

SENATOR HARRIS:
What facts could ever be presented where we should allow this to be a mitigating factor in someone's sentence?

MR. PIRO:
There are some issues with the language in the bill. How many nonaggressive sexual advances does it take before it becomes aggressive? How many times does somebody keep approaching you before it is okay for you to react? That is a gray area, a fact-specific area that could happen in court.

SENATOR HARRIS:
Zero. That is sexual harassment, and there are plenty of avenues for people to address that.

MR. PIRO:
You are out somewhere and you go home with somebody. It has never been discussed what is about to happen. I am not saying it is appropriate to kill someone in response to that. Those facts should come out about what

happened and what led to that, and it should be aired in court. An appropriate response would be "you're fine the way you are, but that is not who I am, so I am going to leave." That is a scenario where this defense could be raised.

SENATOR HARRIS:
It is my understanding of the bill that you are not allowed to use it as some mitigating factor or as a reason for provocation or as part of your self-defense argument. These are used to bolster self-defense or provocation. That is what we are trying to prevent in this particular bill. I am confused about why it is important to allow this to be used in the future and what harm might come of removing people's ability to attempt to strengthen their self-defense claims using this defense.

MR. PIRO:
Part of our concern would be this bill in its current form with no amendments would not allow any of those factors to be discussed during a trial. That is why we added in the language that you should not be attacking anybody solely because of who that person is.

SENATOR HARRIS:
If the term "solely" is placed into the bill, could someone then just say "Well it was not solely because they were gay, they also slapped me in the face"? "They also looked at me kind of funny." Does that not remove the whole purpose of the bill?

MR. PIRO:
I do not believe it removes the whole purpose of the bill. Other factors would be presented as well.

CHAIR CANNIZZARO:
Is there anything about the language of this bill that would prevent the defense from arguing at some point it reached the level of being unwanted and unforeseeable? At some point, a repeated sexual romantic advance becomes forceful. My reading of this bill is that it would still be a perfectly permissible defense, and it would be a perfectly permissible fact argued to the jury.

MR. PIRO:
I agree it is a gray area, and I am concerned the language would be construed to make that not a defense.

SENATOR HANSEN:
What is a judge not allowed to do currently that this amendment would fix?

MR. PIRO:
This would mandate it. Right now, it is judge-specific. If a judge does not believe implicit racial bias exists, he or she can just shut you down. If a judge does not believe LGBTQ+ bias exists, he or she can shut you down and not do anything about it. This would mandate that the judge does address it.

SENATOR HANSEN:
Why are some victims more important than others? For example, what if the father, instead of killing the son over the homosexual issue, had killed him to collect on an insurance policy. Is the victim somehow less than somebody else if it is a hate crime?

CHAIR CANNIZZARO:
Because this language relates directly to either provocation, sufficient heat of passion provocation—such that a murder charge could be reduced from a first degree to a second degree down to a voluntary manslaughter case or applied to self-defense in that it would be a reason for the use of force, justifiable use of force, in response to that—is a little different than the scenario where someone is killing for another implicit reason that would not be justifiable whatsoever. This pertains specifically to when the use of force would be appropriate in response to hearing the facts.

SENATOR HANSEN:
The motive in a crime can be hate, greed or jealousy. I hate somebody because I do not like gay people and I kill them—that enhances it. If a fellow gay person kills another gay person over a jealousy thing, is that somehow less? Does that make the victims somehow less important; therefore, we enhance the penalty for the murder of one but we do not for the other? The whole hate crime thing disturbs me because it seems like we are creating all these categories of victims where some receive extra penalties for the crime but for the exact same act, a defense may exist in another area because for some reason the motive is different. There is somehow a greater level of crime because of one type of passion, motive, than in another.

When I look at your amendment, what you have done to the bill, you essentially gutted the bill compared to the original intent. You added this amendment, and I understand why. Is there a danger here on how we approach victims?

MR. ARRASCADA:
I appreciate the big picture comments you provided to some degree which go to the heart of what I addressed in my opposition. All of these issues need to be addressed in a court of law. Our best place is a jury trial to have public discourse on the most sensitive and troubling topics, and a jury can resoundly then distill the facts in evidence as presented to them. For all the examples we provided, that does more to advance the position of the LGBTQ+ community in having this discourse and having it resoundly rejected as opposed to having it swept under the table and prohibited from being used as a defense.

SENATOR SCHEIBLE:
My question is about arguing in court and letting juries tell us what public opinion is, which defenses are good, which defenses are bad. Are we not supposed to play off of people's emotions and get them to come to a verdict based on public opinion and how they feel about the different characters in this story? Are we supposed to give the facts and then the Legislature is supposed to write the law the judge applies to the facts?

MR. ARRASCADA:
You are correct. A defense of this nature has many hurdles to get over before it is even presented to a jury. A judge has to determine if it is relevant and/or admissible. Are experts out there who can support the position the defense is taking? When these defenses are presented, we are not supposed to play to the passion of the jury, which is why the amendment regarding implicit bias has been presented requiring a judge in the jury selection process of voir dire to address implicit bias. Jury verdicts in these cases oftentimes reflect the conscience of our community and reject gay panic defenses.

SENATOR SCHEIBLE:
You described all the hurdles a defense has to overcome before you, as a defense attorney, are able to present it in court, including the admissibility and the relevance. You even touched on experts being able to opine on whether a defense has any basis in reality. You anticipate this defense is going to overcome all of those hurdles, and you want it available to you because you anticipate you will have experts who will back you up.

MR. ARRASCADA:
If a defense can overcome all of the hurdles it has shown to be relevant to the facts and circumstances of a specific case that it is led to be shown to be admissible, perhaps there is an expert who can support that was the person's state of mind and provocation that led to the crime. Then yes, it should be presented to a jury.

SENATOR SCHEIBLE:
How are you going to deal with deputy public defenders who are now stuck with the decision to make about their ethical obligations to represent their clients, their ethical obligations to the law and their obligations to follow their own moral compasses if no law prevents the introduction of this defense and they have a client who really wants to argue to the jury that he or she punched a guy in the face, thinking he was woman and finding out he was transgender? How are you going to deal with those cases with your attorneys?

MR. ARRASCADA:
What you are asking is the question public defenders are asked every day. How can you defend those people? As public defenders, we do not have a choice of turning away a client. We would need to analyze the case and make our own determinations because those strategic or tactical decisions are not within the client's decision-making wheelhouse. A client gets to decide on the lawyer, whether he or she goes to trial and whether to testify. The attorneys can decide the strategy and tactics. I would rely on the good judgment of my deputies to make their determination on the defense they want to present for the client.

SENATOR SCHEIBLE:
Plenty of other defenses are not available. A client walks in and says, "I was drunk when it happened." As a defense attorney, you get to say that is not a defense. Or the client says, "Well I was really mad when it happened." You can say that is not a defense. Would it be to your advantage if he or she came in and said, "Well I found out he was gay" and respond that is not a defense?

MR. ARRASCADA:
No. We need, as defense attorneys, to explore all options for our clients and make determinations on what is the best defense to put forward. I am opposed to the limiting of any defenses because there are all these controls and hurdles which must be overcome for a defense to be presented to a jury. It is in the

courtroom and in the jury system that these issues are best addressed as opposed to being legislated away.

SENATOR HARRIS:
I appreciate you as a public defender trying to ensure you have as many tools as you can to defend those who need your services. It is our intention to remove one of those tools in the same way we removed voluntary intoxication and however long the list is. Our government makes the laws; courts interpret and apply them. We have an opportunity to make another law the courts will then interpret and apply without infringing upon the Legislative Branch's ability to do its job.

MS. YAMAMOTO:
We are a group of young people fighting for this serious topic because we want Nevada to be among the states fighting for LGBTQ+ rights. One use of this defense is one too many. We are better than this.

This is completely constitutional and does not obstruct due process statutes. The gay and trans panic defense is not psychologically or medically backed as stated before. It is simply a weak excuse to justify violent behavior using LGBTQ+ members as scapegoats. The reason this defense is so important is that it is not to play to implicit and homophobic or transphobic biases of judges or juries. From how I understand the language of the bill, it is not to completely cut off defense arguments. It is just to ban the use of saying the defendant underwent a homosexual panic, which is not psychologically reasoned.

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CHAIR CANNIZZARO:
I will close the hearing on S.B. 97 and adjourn this meeting at 10:41 a.m.

RESPECTFULLY SUBMITTED:

Eileen Church,
Committee Secretary

APPROVED BY:

Senator Nicole J. Cannizzaro, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	7		Attendance Roster
S.B. 265	C	1	Tessa Laxalt / National Rifle Association of America	Letter of Support
S.B. 97	D	1	Sherrie Scaffidi / Transgender Allies Group	Testimony
S.B. 97	E	2	Nevada Coalition to End Domestic and Sexual Violence	Letter of Support
S.B. 97	F	1	Planned Parenthood Votes Nevada	Letter of Support
S.B. 97	G	2	Clark County Public Defender's Office	Proposed Amendment
S.B. 97	H	2	Nevada District Attorneys Association	Proposed Amendment