

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Eightieth Session
April 2, 2019**

The Senate Committee on Judiciary was called to order by Chair Nicole J. Cannizzaro at 8:16 a.m. on Tuesday, April 2, 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 Marilyn Dondero Loop
Senator Melanie Scheible
Senator Scott Hammond
Senator Ira Hansen
Senator Keith F. Pickard

COMMITTEE MEMBERS ABSENT:

Senator James Ohrenschall (Excused)

GUEST LEGISLATORS PRESENT:

Senator Yvanna D. Cancela, Senatorial District No. 10

STAFF MEMBERS PRESENT:

Patrick Guinan, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Eileen Church, Committee Secretary

OTHERS PRESENT:

Chuck Callaway, Las Vegas Metropolitan Police Department

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Matthew Christian, Assistant General Counsel, Las Vegas Metropolitan Police Department
Mike Ramirez, Las Vegas Police Protective Association Metro, Inc.
John T. Jones, Jr., Nevada District Attorneys Association
Rick McCann, Nevada Association of Public Safety Officers; Nevada Law Enforcement Coalition
Holly Welborn, American Civil Liberties Union of Nevada
John J. Piro, Deputy Public Defender, Office of the Public Defender, Clark County; Washoe County Public Defender's Office
Richard Karpel, Executive Director, Nevada Press Association
Lisa Rasmussen, Nevada Attorneys for Criminal Justice
Gary Peck
Randi Thompson, Nevada State Director, National Federation of Independent Business
Scott Anderson, Chief Deputy, Office of the Secretary of State
Nick Vander Poel, Reno + Sparks Chamber of Commerce
Bryan Wachter, Senior Vice President, Retail Association of Nevada
Paul Moradkhan, Las Vegas Metro Chamber of Commerce
Jennifer Noble, Nevada District Attorneys Association

CHAIR CANNIZZARO:

I will open the hearing of the Senate Committee on Judiciary with Senate Bill (S.B.) 294.

SENATE BILL 294: Revises provisions governing privileges. (BDR 4-572)

SENATOR YVANNA D. CANCELA (Senatorial District No. 10):

In the law of evidence, there are subject matters which are privileged. Statutes governing privileges are outlined in *Nevada Revised Statutes* (NRS) 49. This bill adds language to the chapter for the protection of certain kinds of evidence.

CHUCK CALLAWAY (Las Vegas Metropolitan Police Department):

Senate Bill 294 is an important bill to help law enforcement reduce police officer use of force and officer-involved shootings. This bill is not about keeping information from the public or being less transparent. Las Vegas Metropolitan Police Department (LVMPD) is one of the most transparent agencies in America. Within 72 hours of any officer-involved shooting, we do a press conference and release bodycam video to the public. We post final reports on officer-involved shootings and use of force on our website. In 2011, LVMPD was the first police

agency in the Country to participate in a collaborative reform process with the Office of Community Oriented Policing Services in the Department of Justice to reduce our use of force in officer-involved shootings. Even before the collaborative reform process we had implemented a Critical Incident Review Team (CIRT) and Force Investigation Team (FIT) process. This process was improved upon through collaborative reform and this segues into the bill.

Anytime we have an officer-involved shooting or use of deadly force, we have a bifurcated process. Our FIT team handles the criminal side and does a criminal investigation to determine if the officer's actions were criminal in nature, and their findings are turned over to the District Attorney's Office.

The CIRT process is an internal review that looks at policies, procedures, and training and how we can improve as an agency and reduce use of force. We also have established an Office of Internal Oversight and Office of Constitutional Policing that are the sections in our agency where this CIRT process takes place.

For example, imagine the Governor signed into law that there was going to be a review of the Legislature to determine improvements. As part of the review, an investigator would talk to every Legislator. The investigator would ask for candid feedback on how the Legislature could improve. Then, the next day in the newspaper you saw your name with comments you said to the investigator. Would you be willing to participate in that process? Would you be willing to provide candid information to an investigator if you knew what you said was going to be in the newspaper tomorrow? A final report from the investigator would be made public, but your comments to the investigator made in confidence about policies, procedures and practices of the Legislature would remain confidential to protect your integrity and to encourage people to participate.

An amendment ([Exhibit C](#)) has been submitted. If we do not have a candid discussion and review, we will not get cooperation and cannot improve as an agency. If through the CIRT process people believe their perspective about an incident, their feedback or thoughts about how an incident unfolded are not confidential, how can we improve? If information they said specific to them is going to be released, they will not participate.

Nevada Revised Statutes 49.265 already has this privilege for medical reviews and hospitals. Hospitals realized in 1971 that when someone dies on the operating table, hospitals need to have an internal review of the process, provide candid feedback and participate. That information must be confidential to improve and reduce deaths in the hospital rooms.

The intent of this bill is to reduce shootings, reduce use of force, save lives and make it safer for our officers. The intent is not to hide information from the public but for us to improve as an agency.

SENATOR HARRIS:

Attaching a name to a comment may chill an honest discussion—why not just keep the name privileged?

MR. CALLAWAY:

Often the name and feedback are vital components of the process. A person may not be willing to come forward and provide information.

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

The name is an important component of the privilege, but the main focus is the candid discussions, advice or recommendations given to a sheriff. There could be different opinions and recommendations that are not consistent. The decision maker needs to have various opinions to make the best judgment. The heart of the privilege is different recommendations.

SENATOR HARRIS:

If we do not allow all opinions to come forward, the public will not know there were varying opinions. They will just know the findings of the report. If you can get those honest opinions, I am not sure why we do not go down the narrower road. It also seems he or she would be worried about the supervisor finding out it was an internal police agency problem. There is a problem with fear of retribution.

MR. CALLAWAY:

When we have an officer-involved shooting or use of deadly force, there are a small number of officers involved. If a person believes the information and the feedback they are providing is going to be in the newspaper tomorrow, they are

probably going to be reluctant to cooperate with the process. Feedback helps us change the culture and grow as an agency.

SENATOR HARRIS:

In order to get honest feedback, we have to ensure that people do not feel like there is an issue with going against the grain. Otherwise, there is no benefit in making sure it is not in the newspaper.

SENATOR HANSEN:

Are the reports released to the public?

MR. CALLAWAY:

Common law keeps the discussions confidential and the findings of the report are released. We are trying to codify in the statute what happens through common law. We are not releasing candid conversations; we are releasing a final product which has the recommendations for change based on the investigation.

MR. HANSEN:

It is a big deal whenever there is a police-involved shooting. We had cases across the Nation where cops got out of control. With an agency the size of LVMPD, undoubtedly there are some rogue cops. The need for the public to absolutely have faith and confidence in their law enforcement officials is enhanced by keeping the processes as transparent as possible. If that is your goal, then it would seem to me the way to do that would be to redact the officers' names.

MR. CALLAWAY:

We are trying to accomplish an internal review process. The process is only as good as the cooperation you get out of it. If people do not want to cooperate with the process, it is useless. If it is useless, we cannot gain valuable information to reduce officer-involved shootings and use of force. If this process goes away, the same actions are taken but we are expecting different results. This is intended to enhance cooperation and reduce officer-involved incidents. We need transparency; LVMPD is a transparent agency. We release our quarterly Office of Integrity and Oversight reports to the public. On the FIT side, once a case is adjudicated, all of that information becomes a public record on the criminal side. The private conversations are confidential.

SENATOR HANSEN:

If you redact the names, the officers who may be criticizing the conduct of a fellow officer can be protected. This bill gives too much discretion to the agency to not release critical information to the public.

SENATOR PICKARD:

The language in the amendment seems to mirror what we see of attorney-client privilege or a physician-patient privilege. The facts are not privileged, but the process of coming to those conclusions is privileged. Law enforcement officers are not attorneys—the final conclusion is at the discretion of the district attorney's office. They are supposed to simply be the investigators, the gatherers of those facts. The language is not limited to use of force investigations but to anything which results in an administrative report. There are lots of different internal investigations which generate an administrative report not associated with use of force. How is this language limiting?

MR. CALLAWAY:

This is the administrative side of the investigation, not the criminal side. A sheriff ultimately makes the decision on whether a policy, procedure or training will be changed—not the District Attorney's Office. For a sheriff to get candid feedback, I do look at it like attorney-client privilege—the Sheriff being the attorney and the officer providing the information is the client.

Officer-involved shootings or use of deadly force where a person dies or in-custody deaths are typically the instances where the CIRT process is used and is intended to be specific for internal review processes.

SENATOR PICKARD:

How will this bill affect pending litigation LVMPD is involved in?

MR. CHRISTIAN:

I do not know if it would impact any litigation. There has been other litigation in the past where LVMPD has asserted the common law privilege. The deliberative-process privilege is another common law privilege similar to the attorney-client privilege. When an attorney gives advice to the client, the client is entitled to an honest discussion. The client is entitled to different options, and the client is ultimately the person who decides which path to take. This deliberative-process privilege exists in common law and applies to all public entities—the purpose of this bill is to codify in the specific context of critical

incident reports what law enforcement does. The purpose of it is to encourage frank discussions and self-evaluation. We already assert the deliberative-process privilege in litigation.

The amendment clarifies that the underlying facts are not privileged and we would continue to disclose the basic facts under this bill.

SENATOR PICKARD:

Twice now I have heard common law and we are not a common law state. In fact, in NRS 49.015 the Legislature has said the only privileges allowed are the ones enumerated in NRS 49. Have we adopted a deliberative-process privilege through another means? Is there decisional law to back that up?

MR. CHRISTIAN:

The Nevada Supreme Court adopted the deliberative-process privilege in the case *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000), which was a public records request. The Supreme Court has repeatedly cited to *DR Partners*, and I can tell you public entities around the State will cite to that privilege when it comes to internal reports. The privilege is very clear. It flows from the Freedom of Information Act where the privilege can be codified. The Nevada Supreme Court adopted it. It does not include the factual underpinnings in any report, and it does not include the final decision, but it does incorporate the self-evaluation, the self-analysis, the recommendations and the advice. It is a well-established privilege which exists throughout the Country.

SENATOR SCHEIBLE:

My confusion stems from our conversations about people's names and comments being published in the newspaper. A newspaper cannot compel testimony. Privilege is a protection against being compelled to testify. Where is the connection between creating a legal privilege and protecting people from media exposure?

MR. CHRISTIAN:

The Public Records Act refers to many different statutes which contain privileges, not only in NRS 49. The Public Records Act cites to NRS 49 which provides for privileges or confidences.

SENATOR SCHEIBLE:

I would like more clarity on the Public Records Act and how it connects to NRS 49.

I see in section 1, subsection 3 that privileges do not go in the disclosure direction. They do not prevent district attorneys from disclosing exculpatory information. I prosecuted an officer-involved shooting last year, and one of the officers sadly had already passed away and we relied on the CIRT report to piece together everything that happened. Would LVMPD assert its privilege to prevent us from reading the CIRT report?

MR. CHRISTIAN:

To your first question, NRS 239, the Public Records Act, was one of the first provisions to make government records public information. *Nevada Revised Statutes* 49 is cited in the Public Records Act as a source to locate various privileges. The inclusion of this bill into NRS 49 is appropriate.

In terms of how the CIRT report is used in criminal cases, my understanding is the facts are always available and any *Brady* or *Giglio* [*Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972)] material is not protected. The defense is entitled to information law enforcement develops that is exculpatory or impeachment material for the use of the defense. Nothing changes with regard to that in this bill.

SENATOR SCHEIBLE:

My concern is that it is the obligation of the prosecutor to provide *Brady v. Maryland* information. If there is a wall between the prosecutor and the law enforcement agency, we would not be able to faithfully discharge that duty and provide any information. What if, in an officer-involved shooting, you have three officers present and two thought they saw a gun and one did not? That is important information. If the officer can assert a privilege not to tell the prosecutor that one of them did not think he or she saw a gun, then how is a prosecutor going to convey the *Brady v. Maryland* information to the defense?

MR. CHRISTIAN:

The prosecutor is entitled to look at the report and determine whether any *Brady v. Maryland* material exists. That is our practice. This bill attempts to preserve the language within the amendment. The prosecutor is obligated to

find *Brady v. Maryland* material and turn it over to the defense. The intent of this bill is to not change that.

MR. CALLAWAY:

In section 1, subsection 3, it was never our intent to block the prosecution from disclosing *Brady v. Maryland* material. The privilege is not intended to affect obligations placed upon a prosecuting attorney by the Nevada Constitution or the United States Constitution. The intent was never to stop the prosecution from obtaining information they need to prosecute a case. We can amend the language with the stakeholders.

SENATOR SCHEIBLE:

We need an amendment. If an officer knows there is something questionable about an event and was the person who did the questionable act, he or she may want to invoke this privilege not to be compelled to testify. He or she may want to tell the field training officer or investigator he was improperly trained. When the prosecutor attends a pretrial conference, this information becomes known to the prosecutor. I want to be sure the prosecutor is entitled to that information so it can be shared with the defense. We want to prosecute any other criminal actions which may have occurred.

MR. CALLAWAY:

I understand your concern. We can look at amending the language to address that. This is in conjunction with the CIRT investigation—the internal investigation. In these cases, there is also the FIT investigation, which is the criminal investigation. The investigation from the FIT detectives is turned over to the District Attorney's Office. The FIT report is not privileged or protected.

SENATOR HARRIS:

Can you explain the impetus for this bill?

MR. CALLAWAY:

We are trying to improve as an agency. We try to reduce our officer-involved shootings and use of force. We have been on a downward trend since the collaborative reform process. The Sheriff has been very adamant about looking at ways to improve training, de-escalation and ways to reduce those incidents, making it safer for the community and our officers.

We have exerted this privilege under common law or under caselaw. We have had cases where various entities have tried to get the CIRT report. This bill will codify what is already in practice.

MIKE RAMIREZ (Las Vegas Police Protective Association Metro, Inc.):

I conduct interviews for officer-involved shootings and the use of force issues for the Department. This bill will help bring better training. The Sheriff tries to find ways to better our agency and decrease the amount of officer-involved shootings.

The training I received in the Academy is different now. Cadets are trained on ways to de-escalate; when they want to talk to investigators, they want to tell their stories.

JOHN T. JONES, JR. (Nevada District Attorneys Association):

The Nevada District Attorneys Association supports S.B. 294. The impetus behind the bill was to ensure law enforcement agencies get information needed to develop policies to make their agencies better.

RICK MCCANN (Nevada Association of Public Safety Officers; Nevada Law Enforcement Coalition):

The Nevada Association of Public Safety Officers and the Nevada Law Enforcement Coalition support S.B. 294 with its proposed amendment. We need to strike a balance between full transparency and fixing internal processes and procedures. We do not suggest withholding information from the public. Transparency is important. We fully support this bill.

HOLLY WELBORN (American Civil Liberties Union of Nevada):

We worked with LVMPD in a variety of capacities. The LVMPD is looking for opportunities to improve policies in a way which will decrease officer-involved shootings. However, providing a new privilege in a veil of secrecy is not the way to do that. It is poor public policy and undermines the spirit of transparency laws and privileges in general.

In section 1, the privilege looks like it is extending a gag order on third parties from disclosing information. It is ripe for First Amendment violations in preventing third parties from releasing information they might obtain.

Law enforcement officers are public officers. There is a public need to know what is happening with an officer-involved shooting. This very issue has been litigated.

This bill would stop a public document because law enforcement decides to attach an exhibit to the use of force policy. Attaching incriminating documents to the policy hides the entire use of force document. That use of force document is important for criminal prosecution. A use of force document is a tool to file a civil rights claim. If the information is privileged, then a person who has been harmed by a law enforcement officer will have no relief. We oppose S.B. 294 and the amendment in its entirety. We are willing to continue these conversations but this bill completely undermines the public trust.

SENATOR PICKARD:

You are saying everything should be available. There should be full transparency. How do we strike a balance similar to what is done with hospitals? Where will we acknowledge the human nature in this? We know if people think they are going to open themselves to civil rights actions, they are going to withhold information and thus stymie any efforts to improve. Where do you think the balance should be struck?

MS. WELBORN:

We are advocates for government transparency. If there are other individuals who need to be protected, let us say an incident involving a juvenile, there are other laws which come into place. That is where we strike that balance.

What we are hearing today from LVMPD is that the purpose of this bill is to somehow reduce officer-involved shootings, violent conduct or inappropriate conduct. What they are saying is the policy behind this is to reduce that activity. I disagree this is the type of policy this Legislature should adopt to do that. Creating a new privilege is not the way to make better policies on use of force within LVMPD.

SENATOR PICKARD:

It sounds like the privilege is already established. The Supreme Court has already made that determination. That did not speak to the question. The question is about acknowledging human nature. People may keep quiet to keep their jobs. That is human nature. The reality is we are trying to find a balance where we can get information to improve policies. Is it your contention they

should not be given that ability? Should they be transparent in all of these matters whether they lose their jobs or expose themselves to a 42 USC section 1983 action?

MS. WELBORN:

No. Law enforcement officers are entitled to due process. There are several protections in the context of the criminal investigation when it comes to a violation of a use of force policy. This new privilege would impact a variety of different laws, discovery issues and issues with violations of the Public Records Act. I do not agree with the legal analysis that this privilege is available in this particular context. That currently is being litigated.

SENATOR PICKARD:

There is litigation pending on this point?

MS. WELBORN:

My understanding is there was an order to compel documents in a district court in Clark County.

JOHN J. PIRO (Deputy Public Defender, Office of the Public Defender, Clark County; Washoe County Public Defender's Office):

The Clark County and Washoe County Public Defender's offices oppose S.B. 294. We put officers on a pedestal. We do that for a reason because they are heroes and we place a lot of community trust in them. This bill erodes the trust by making internal discussions private when it should be public.

In Las Vegas, officers carry little notepads in their pockets and these notepads never make it into the report. You are not entitled to the notes, you are just entitled to the final report. That is the part of the problem with this bill and is why we are in opposition.

RICHARD KARPEL (Executive Director, Nevada Press Association):

The Nevada Press Association opposes S.B. 294 because we believe it is bad policy for the citizens of Nevada but also for the police departments ostensibly designed to protect. I have submitted my testimony ([Exhibit D](#)).

Police are public employees. We cannot think of a quicker way for local police departments to lose the trust and confidence of the citizens they protect than

by hiding information from the public about the highly charged incidences those agencies are involved in.

LISA RASMUSSEN (Nevada Attorneys for Criminal Justice):

The Nevada Attorneys for Criminal Justice oppose S.B. 294 and have submitted a letter in opposition ([Exhibit E](#)).

The proposal in section 3 purports to give the protections we would already have under *Brady v. Maryland* with regard to exculpatory evidence. This bill does not protect people who may have a civil rights claim. Policy and procedure is often the subject of a civil rights case when there is a wrongful death lawsuit, an excessive force or shooting involving police misconduct. To make those records privileged with no ability to obtain those records is problematic. That could be cured by an amendment that the information could be available by court order.

GARY PECK:

This bill creates a wall between the general public and information about police officer behavior. The balance people talk about should be tipped in the direction of transparency. Transparency builds the kind of trust and confidence among people who have seen their confidence waiver when there are use of force incidents. I am absolutely befuddled at the suggestion the only way to get officers and police departments to be forthcoming about incidents is to provide a shield for them from accountability. They are officers we employ to protect citizens. Firearms have to be used in circumstances when public safety and officer safety are threatened. The public has a right to see all the information and weigh it for themselves. Any redactions from those reports should be de minimis and should absolutely only be kept from the public in circumstances where a case can be made. The best fix for this bill is to vote no. This bill erodes public confidence and trust.

SENATOR CANCELA:

What is most impactful about this bill is that it codifies the status quo. The information is not public today. There are real compelling reasons to keep it as the course of business.

MR. CALLAWAY:

We will work with stakeholders on this bill to address concerns. This bill is not about protecting bad cops. This is not about criminal reports from the FIT team,

which are done and released in their entirety to the public after a case is adjudicated. Nothing in the law requires us to do an administrative report. We do that because we want to get better as an agency.

CHAIR CANNIZZARO:

I will close the hearing on S.B. 294 and open the hearing on S.B. 375.

SENATE BILL 375: Exempts certain persons and entities who operate home-based businesses from the requirement to obtain a state business license. (BDR 7-773)

SENATOR IRA HANSEN (Senatorial District No. 14):

In 1991 or 1993, the issuance of State business licenses was established in Nevada and cost \$25 for a lifetime license. In the Seventy-eighth Session, the Governor tried to use that as a mechanism to raise revenue. Then, it was a gross income tax called a business license and was based on a sliding scale. Through the years there has been a constant expansion. The business license for most small unincorporated businesses is currently \$200.

When I met with the Secretary of State's Office, I realized I had a significant problem when I was told the fiscal note was approximately \$25 million to implement my bill as originally presented. The first thing that made me happy was the realization of how important small businesses are to Nevada. If 25 percent of all the revenue for the State of Nevada comes from businesses that would have been possibly exempted under my little bill, they are a big portion of the economic drive of our State. I am going to propose an amendment to eliminate section 1, subsection 2, paragraph (d) and section 2, subsection 7, paragraph (a), subparagraph 1, sub-subparagraph (III). The Secretary of State's Office was concerned, thinking that would open up all sorts of opportunities for abuse.

The Secretary of State's Office does not have an audit mechanism. Everything is based on self-reporting compliances. The Office felt those two sections I am going to remove from the bill would, in fact, cut it down from \$25 million to about \$2 million for a fiscal note.

What I was trying to do in section 1, subsection 2, paragraph (c) is a little bit confusing. You have to have 66.67 percent of the annual average wage, which is around \$31,000, according to the Secretary of State's Office. If you have a

gross income of \$60,000, then you could be exempt from the bill. If it is net earnings versus gross earnings, I would be making things worse by leaving it in the gross category. I would also like to get rid of annual gross to go back to annual net earnings of \$60,000. Unfortunately, I did not have time to talk to the Secretary of State's Office about that, but I suspect that would increase the fiscal note.

We have been tracking all of the fiscal notes that are not part of the Governor's recommended budget. By the end of this Session, we are going to be looking at a \$500 million shortfall if all the things we have been passing make it through the Senate Committee on Finance. My bill will impact between \$2 million and \$3 million—it is going to be substantial.

This bill makes it easier for small startup businesses. My goal is to reduce one layer of bureaucracy for startup businesses to minimize their initial economic costs.

Due to the fiscal impact, S.B. 375 may not pass; however, I wanted to put on the record how important small business is for Nevada. Small business is a huge driver in Nevada. Many people are trying to start businesses while keeping their households afloat, paying their mortgages and trying to live the American dream of having an entrepreneurial business. We should do everything possible to minimize the amount of bureaucratic layers placed in front of them.

This bill has fiscal issues. I would like to see the numbers increased to ensure small businesses are starting up and understand the rules when purchasing a State Business License.

SENATOR SCHEIBLE:

Regarding the procedural economic issue, if there is a State fiscal note to help out small businesses, is that coming from fees and taxes levied? Who is subsidizing the small businesses?

SENATOR HANSEN:

It is the amount of tax the business is paying. How much should we take from those small entrepreneurial people to put into our General Fund? It is not like other folks will be subsidizing. It depends on how much we spend as a Legislative Body.

RANDI THOMPSON (Nevada State Director, National Federation of Independent Business):

Small business is an important driver in this State. We create 60 percent of net new jobs in this State. You are required to obtain a city or county license. The city or county validates whether you are a home-based business and whether you have a legitimate address. Businesses pay a city business license fee and sometimes a county license fee. Operating a business requires a business license.

Prior to 2015, the small business fee for Nevada was \$25. In 2015, it increased to \$200. It is an escalation on top of a small business when they are just starting out. Apple was a home-based business. A lot of small businesses grow to be big businesses. Giving them a break at the beginning will help a lot of these businesses become bigger businesses and provide more payroll tax, creating jobs.

SCOTT ANDERSON (Chief Deputy, Office of the Secretary of State):

This is a policy decision. The Secretary of State's Office took over the state business licensing in 2009. It was estimated that 150,000 entities were not paying; which is why it was moved to the Secretary of State's Office through SilverFlume, Nevada's business portal. Shortly thereafter, it was found there were a lot of corporations and LLCs that were taking advantage of the home-based business exemption. At one point between 2011 and 2012, we had approximately 25 percent of all corporate entities and LLCs claiming this exemption. At the time it was about a \$12 million to \$15 million negative revenue to the Secretary of State's Office.

With the changes in the revenue structure, it is now estimated if we had the same 25 percent taking the exemption, we would be looking at anywhere from \$22 million to \$24 million negative revenue. The Secretary of State is a general-funded agency, and all of our revenue goes into the General Fund.

We have no auditing capabilities if this bill passes. It would require us to have additional compliance staff. There was a court case which found this would only apply to home-based businesses that were sole proprietors or general partnerships and not corporate entities.

SENATOR HARRIS:

Can you explain why this is the case since any sole proprietor can be a business entity? We allow tax pass-throughs in those instances. Sometimes a difference between a sole proprietor and an LLC is just the limited liability.

MR. ANDERSON:

When this was passed, it was a policy decision of the Legislature to have it apply to sole proprietors. The system had allowed for the corporate entities to apply for the exemption.

SENATOR PICKARD:

Large multimillion-dollar operations are paying the same fees as the sole proprietor who makes \$100. That seems inequitable to me. I recognize the Secretary of State's Office does what the Legislature sets it up for. How can this process be more equitable? Is it true you would require audit staff to verify that? My business has not made \$4 million this year. I just sign a form, submit it and say I have not made the \$4 million threshold—we are done. Can you explain that for me?

MR. ANDERSON:

We have one compliance officer for 350,000 business entities in the State. We respond to complaints and do not have proactive authority. When we receive a complaint, it is assigned to our compliance officer. We have an administrative process we go through to bring the business or the entity into compliance. If the business refuses to comply with the filing requirements, then it potentially could be turned over to the Attorney General's Office for doing business in this State without a State business license.

NICK VANDER POEL (Reno + Sparks Chamber of Commerce):

We are neutral on S.B. 375. Small and large businesses are part of our economy. Small businesses are the backbone, and we hope we can find a solution to this bill.

BRYAN WACHTER (Senior Vice President, Retail Association of Nevada):

This is more of a fee-based program allowing a business to gain access to products and liability through the Secretary of State's Office. It has been turned into a General Fund fee stream. We would consider it a fee and not a tax—we are hesitant to suggest a fee schedule based on the size of the business. Every business is receiving the same product from the Secretary of State's Office.

This is a base fee for the cost of business and other things increase that. The more we require of business at the beginning, the less they are able to invest back into their own company, hire new employees or provide benefits and services.

PAUL MORADKHAN (Las Vegas Metro Chamber of Commerce):

We need to review the fiscal note before we can take a formal position. From the Chamber's perspective, we are the State's largest business association, comprising 85 percent of small businesses that employ 50 employees or less. Our membership is driven by small businesses.

SENATOR HANSEN:

One of the things the Governor recognized was if you limit the sole proprietors, you are going to pick up millions of dollars to go into the budget. It is a small group, but collectively, it is a large amount of revenue put into the budget.

It is ironic that when it comes to taxation, we have the sliding-scale concept. That is not what a business license is supposed to be; that concept was rejected in 2015. When using the sliding scale, the business license fee for some businesses was extremely costly.

In section 1, subsection 2, paragraph (c), can we get a number easy to understand for small businesses? The other sections may prevent abuse. I would like to amend the section to pass out of the Committee and go to the Senate Committee on Finance.

CHAIR CANNIZZARO:

I will close the hearing on S.B. 375.

VICE CHAIR HARRIS:

I will open the hearing on S.B. 431.

SENATE BILL 431: Revises provisions relating to participation in organized retail theft. (BDR 15-1151)

SENATOR NICOLE J. CANNIZZARO (Senatorial District No. 6):

Senate Bill 431 updates our statutes relating to organized retail theft to account for theft occurring online. This is a necessary piece of legislation.

Senate Bill 431 expands the description of organized retail theft to capture this crime when it is committed over the internet. Section 1 strikes the word "participates" from the statute and provides instead a person who either "directly or indirectly engages in conduct in furtherance of organized retail theft is guilty of a category B felony" This change intends to capture persons who might not participate directly in theft by being present in a physical location. This would include using electronic means such as specific websites or the internet to resell those items.

The bill sets forth definitions of related terms as follows: the statutory definition of internet or network site is brought in from *Nevada Revised Statutes* (NRS) 205.4744, and the definition of organized retail theft is expanded to include theft conducted "either on the premises of a merchant or through the use of an internet or network site." This includes attempting to return, resell, trade or barter the merchandise in any manner, without limitation, through the use of an internet or network site.

Ordinarily when we see organized retail theft, it is simply a petty theft. It is quite common for organized retail theft schemes to go into the place of business, steal a bunch of small priced items and then facilitate escape through any manner of means which could include running through the business to distract the store security so another individual can run out of the business with the merchandise. What we see is a petty theft. It is regular individuals who are committing this and then reselling it in an organized fashion. It is a criminal enterprise where individuals are working together as cogs in a wheel. Different individuals can come in and steal the items but are working together to benefit and profit from the criminal acts which occur as part of that enterprise. This type of organized crime harms the economy.

MR. WACHTER:

The internet makes it difficult to keep up with organized crime rings.

In 2007, Florida police stopped an organized theft ring which had stolen \$100 million worth of health care products and baby formula. These are not small items. We are seeing people who engage in organized retail theft being knowledgeable about the felony threshold levels. They are sent into stores with shopping lists for specific items to sell online. It is not petty theft. It is not someone coming into the store and stealing something. Our industry has done a lot to divert many of these cases away from LVMPD and to stop tying up the

judicial system with someone who has stolen a pack of gum. We have put a lot of resources into diversionary programs with the court system. That program has been ongoing for 4 years and the recidivism rate for people who go into the program is 2 percent.

One of our members has developed a crime lab in Las Vegas to support the actions and forensics we need to address this. We put our resources to combat the thefts, and under S.B. 431, we ask for flexibility as the internet becomes more of an issue.

In 2017, the Federal Bureau of Investigation estimated \$30 billion worth of retail goods were stolen through organized retail theft rings in the United States. In a recent study in the United Kingdom, 40 percent of all returns were stolen items. In Nevada, it is closer to 20 percent.

Typically, shoplifting teams are made up of several people. There is an organizer who is making sure they have a fence or a market to get to and someone who is looking at prices to make sure the lists are under those felony thresholds levels. These are organized crimes.

We have conceptual additions we want to address. In section 1, subsection 1, paragraph (a), we ask to increase the period to 180 days. Since 2007, criminals know how much they can steal over a period of time to remain under those threshold levels—because that is how they can steal the most amount of product without facing an enormous amount of jail time. We ask to accumulate those fines over a longer period of time to attempt to capture more of our merchandise. For instance, baby formula is one of the No. 1 stolen items from a grocery store through an organized retail fence. To steal \$3,500 worth of baby formula is exceedingly difficult in one shot or over several months, but it adds up. Being able to look at a longer period of time would help combat those strategies.

The other issue is security, such as using an emergency exit. Things designed for public safety are not allowed to be obstructed for a specific purpose. This could be as simple as someone opening a door and getting into a car. It can be as complicated as trying to thwart the security system through different electronic means which seek to mask the strategies retailers have put in place to combat theft.

Our prices have to be increased to account for the loss of products. It means we are spending more employee hours and time on the floor dealing with security issues instead of taking care of customers or ensuring their experience in the retail store is at the level they expect. It provides for a general increase in the cost.

SENATOR PICKARD:

With respect to the language on indirect involvement, this bill extends to internet sales; we have numerous sites that sell products. I know there are protections put in place to ensure they are protected from liability. How does this change that? How are we defining indirect? I looked through NRS 205 and I do not see it anywhere else. I do not see any guidance on how we define that, and it is not in this bill.

SENATOR CANNIZZARO:

Indirectly is a common term and given its common and ordinary meaning. The reason that language is in this bill is because in these types of situations it is not just someone who walks into the store and steals. It is a larger problem. Direct and indirect is not just the person who is stealing, it is these other individuals who are participating in the theft.

SENATOR PICKARD:

This will take the ordinary meaning. That is the basis of my concern in that participants have a fair amount of caselaw. It is well developed that a person must have knowingly participated in the crime, as opposed to indirect involvement. I am looking for a little bit of clarity on the definition.

MR. WACHTER:

With technology increasing quickly, these free-flowing organizations move a lot quicker than the judicial system or the retail industry. We are moving into the internet marketplace realm. I know the Legislature must address what retail online looks like going forward.

SENATOR CANNIZZARO:

It is illegal to possess and to sell stolen property. Sites like eBay typically include in their user agreements that the individual selling an item has authorization, they own the property and it is theirs to sell. Sites like eBay are not held liable when someone goes on to its website to sell stolen property. They are not liable for being a participant in, for being part of a conspiracy of,

for aiding and abetting in or anything of that nature with respect to someone who sells stolen property on the internet. This bill is directed at individuals who are directly involved, indirectly involved or participating in that scheme. Ordinary marketplaces like eBay would not fall within this definition. Their user agreements and what individuals sign up for when they agree to use those sites would cover that as well.

SENATOR SCHEIBLE:

With regard to the definition of directly or indirectly engaging in conduct, would this be a jury question? The district attorney would choose whether to charge directly or indirectly. The prosecutor could explain to the jury why this case is either an instance of direct involvement or indirect involvement, and the jury would decide, correct?

SENATOR CANNIZZARO:

Yes. Fact-finding is a question for a jury. A jury is ultimately going to make a determination whether somebody was a participant in an organized criminal enterprise. The jury determines if the defendant was indirectly engaging in criminal conduct.

SENATOR HANSEN:

How effective has the law been regarding organized retail theft?

MR. WACHTER:

In 2007, the Retail Association first approached the Legislature looking for specific organized retail theft statutes. Since then we had one. The law has not been entirely clear as to how it is applied. We are here today to provide clarification and direction.

SENATOR HANSEN:

Only one prosecution? Is it that a substantial problem for retail businesses?

MR. WACHTER:

Do not quote me on the one, but it is very few, and we would be looking to hopefully see this statute prosecuted more.

SENATOR HARRIS:

It seems you are solving the problem twice. You have mentioned directly or indirectly, but also changed it to conduct in the furtherance of—which seems to

capture all of those people who are participating indirectly. Now we have people who are indirectly participating in conduct in the furtherance of the crime. Is there a need to get at the people who are indirectly involved in the conduct in the furtherance of the organized theft?

SENATOR CANNIZZARO:

Dissecting the law is confusing. How do we define a criminal enterprise? It is more complex than someone stealing an item. That is why it is directly or indirectly. Sometimes the conduct is not necessarily the theft. I see it as intending to encompass all of those actors to address this in a fashion that is understandable. It is larger than one person walking into a store and another person holding the door for them.

MR. WACHTER:

Collectively, the crimes are organized and create an enterprise. The example we found in Florida where \$100 million worth of healthcare and baby products were stolen was part of a complicated organization. There is a greater sum of all parts which suggests this is a massive, criminal, organized, sophisticated enterprise versus an individual who might be a small part of it but does not necessarily participate in the overall conspiracy.

VICE CHAIR HARRIS:

So you do not have to be directly engaged in the theft itself but you are directly engaged in conduct in furtherance of the retail theft? I cannot imagine a scenario where a defendant is going to be indirectly engaged in conduct in the furtherance of and deserve a felony.

SENATOR CANNIZZARO:

I can see where it gets complicated. This law is comparable to Rico. You have to prove this is organized retail theft. The burden is on the prosecution to prove a crime was committed beyond a reasonable doubt. This is not, "oh, well these two people committed two petty larcenies and seem to know each other so therefore they organized retail theft." You have to prove it is a criminal enterprise. When you are talking about proving criminal enterprises, you have to prove the thefts occurring in this particular case or the resale occurring is being done in furtherance of promoting a particular criminal enterprise for a profit. This bill is intending to prosecute all participants in the organized crime.

VICE CHAIR HARRIS:

Nevada has similar language in NRS 207.400, which is the racketeering statute.

MR. CALLAWAY:

We support S.B. 431. There is a problem with organized retail theft. The LVMPD has established an organized retail theft unit that investigates those types of crimes which are turned over to the District Attorney's Office. I do not have the numbers on how many of those are prosecuted. We have seen where employees of the business are participating and will put property out the back door for someone else to pick up. Those employees take the barcodes off merchandise and then put it on websites like Craigslist.

Individuals will come forward with a list and provide it to the organized retail theft group of the products they want, and the theft group steals those products on the list. We have seen a lot of cases where you get a call which seems like a simple shoplifting, but then when you go out and look in the offender's car, the car is full of stuff that they have been going from business to business for two days stealing and you have all these products with the tags still on them. We contact those businesses and follow up and the businesses say they have lost property. The businesses find their surveillance video, and then you are able to put a case together and track down others who might be involved.

We have taken a lot of effort to work with the businesses on summons in lieu of arrests programs. Those individuals who are simply involved in a shoplifting and not involved in this type of crime do not go to jail. They receive a summons to appear in court from the business, and it does not require a response in most cases from the officers. It is a very serious crime and ultimately it is the taxpayers who pay for it because the cost is turned over to the consumer.

JENNIFER NOBLE (Nevada District Attorneys Association):

We are in support of S.B. 431. We do not have a lot of prosecutions under this statute in Washoe County. It is not because these crimes are not occurring. The revised definitions in this bill facilitate our ability to prosecute individuals who are part of a premediated organized repetitive theft ring. This affects businesses and consumers in the community.

MR. MORADKHAN:

The Las Vegas Metro Chamber has large and small retail businesses within its membership. This bill will protect consumers and give retailers additional tools to help combat organized retail theft. The more tools and deterrents we have on this will be good public policy.

MR. RAMIREZ:

We support S.B. 431.

MR. VANDER POEL:

We support S.B. 431.

MS. THOMPSON:

We support S.B. 431. About a decade ago businesses were reporting the No. 1 loss in a store was employee theft. Ever since organized retail crime has started, it has been shifting now to the No. 1 leading cause. In 2017, the National Retail Federation did a survey and reported 91 percent of retailers had been hit by organized retail crime.

MR. PIRO:

Our issue with this bill is the "indirectly" language. That language is used in the racketeering statutes. In the racketeering statutes there is a pattern of behavior. This "indirectly" language inserted into this bill is too broad. We have conspiracy laws for people who participate in crimes. The "indirectly" is concerning because what about the guy who goes to the store one time and holds the door open one time. Is he now part of this organized retail theft ring because he indirectly participated in it? Or the guy who goes one time and he drives his buddy to the store and then he does not play anymore in this organized retail theft ring? That word, indirectly, is a little bit too broad. If the indirectly language was removed we would withdraw our opposition.

SENATOR CANNIZZARO:

Organized retail theft operates in the same fashion. There is a profit from a criminal organization, and the language is attempting to address this. It is more than just the individuals who participate. It is important to include "indirectly participating" because it is an important element of furtherance of the criminal enterprise.

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MR. WACHTER:

We will work with the sponsor for clarification to keep the original intent of the bill.

VICE CHAIR HARRIS:

Why was this language not included in the definition of racketeering?

SENATOR CANNIZZARO:

Racketeering requires a list of enumerated felonies. Racketeering carries a penalty of 5 to 20 years. Amendments may be proper from an organization standpoint. We are dealing with petty theft situations and resale of the stolen property, which is a felony as far as this bill is concerned. The resale of property is less than a felony threshold. The racketeering definition refers to a different area of law that this bill does not address.

SENATOR SCHEIBLE:

The Organized Retail Theft Unit at LVMPD indicates the office has had over a dozen cases submitted to the District Attorney's Office.

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VICE CHAIR HARRIS:

I will close the hearing on S.B. 431 and adjourn this meeting at 10:20 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	6		Attendance Roster
S.B. 294	C	2	Senator Yvanna D. Cancela	Proposed Amendment
S.B. 294	D	1	Richard Karpel / Nevada Press Association	Written Testimony
S.B. 294	E	1	Lisa Rasmussen / Nevada Attorneys for Criminal Justice	Letter of Opposition / Jim Hoffman