MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eighty-first Session
May 29, 2021

The Senate Committee on Judiciary was called to order by Chair Melanie Scheible at 7:06 p.m. on Saturday, May 29, 2021, Online and in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Melanie Scheible, Chair
Senator James Ohrenschall
Senator Dallas Harris
Senator James A. Settelmeyer
Senator Ira Hansen
Senator Keith F. Pickard

COMMITTEE MEMBERS ABSENT:

Senator Nicole J. Cannizzaro, Vice Chair (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Steve Yeager, Assembly District No. 9

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nicolas Anthony, Counsel
Pam King, Committee Secretary

OTHERS PRESENT:

Bailey Bortolin, Nevada Coalition of Legal Service Providers
John Piro, Chief Deputy Public Defender, Clark County Public Defender's Office
Kendra Bertschy, Deputy Public Defender, Washoe County Public Defender's Office

Michael Willoughby, Battle Born Progress
Jennifer Noble, Nevada District Attorneys Association

CHAIR SCHEIBLE:
We have one bill to hear today, Assembly Bill (A.B.) 219.

ASSEMBLY BILL 219 (1st Reprint): Revises provisions governing the sealing of criminal records. (BDR 14-137)

ASSEMBLYMAN STEVE YEAGER (Assembly District No. 9):
Assembly Bill 219 is intended to improve the record-sealing process to allow greater access to justice. It does that in three main ways: streamlines record-sealing for people who have received a pardon; clarifies the law on the role of the prosecuting attorney in the record-sealing process; and allows a petitioner to appeal a denial of a petition to seal a record.

BAILEY BORTOLIN (Nevada Coalition of Legal Service Providers):
Section 1 of A.B. 219 requires the court to grant a record-sealing petition without relitigating the merits of someone who has received a pardon from the State Board of Pardons Commissioners. This not only eliminates the burden on the petitioner but all of the parties that expend resources in this process.

A lot of confusion surrounds what happens after people are granted a pardon. They are told that it is as if they had never committed the crime; yet, it is showing up on their background checks because of a separate process to have those records actually sealed. Going forward, the Pardons Board could send copies of the pardon to the court and Central Repository for Nevada Records of Criminal History after the pardon has been granted or for prior cases.

If that does not happen, section 1, subsections 1 and 2 of A.B. 219 lay out the process for an individual to initiate the record-sealing process in a more streamlined way than just doing something completely separate from the pardon itself.

Sections 3, 4 and 5 of A.B. 219 clarify the law regarding what happens when the district attorney (DA) does not respond to a pardon application. The statute is not clear on this.

When a DA or prosecuting attorney stipulates to a record-sealing petition, the court shall apply the presumption passed in 2017, that if the person is eligible for sealing, then the record shall be sealed. Being eligible is having an eligible offense. There are different categories. The Legislature has declared some crimes ineligible. These offenders will never have their records sealed because of the crimes committed. Depending on the type of offense, an amount of time needs to have passed in order to be eligible for record-sealing.

If the prosecuting attorney objects to that request, then a hearing is set and the court conducts a hearing to determine what should happen next. The law does not say what happens if the prosecuting attorney does not respond. But it does not specifically compel a response.

This has left some cases in a precarious position with no statutory path forward. What you have before you in A.B. 219 is some clarity specifying that if the prosecuting attorney does not file a written objection within 30 days, the court shall apply presumptions set forth in *Nevada Revised Statutes* (NRS) 179.2445 and seal the records.

Processes are different in different jurisdictions, and they have different timelines. The timeline can be unpredictable and take a fairly long time in some places.

The first draft of this bill requested a ten-day window where the prosecuting attorney would have to respond to let the court know the prosecution will be objecting, or the presumption will be applied. That is because this is not a pro se friendly process. What is not in statute in the process is on the front end. Before the person applying ever goes to a court or files something with the court, he or she goes to the prosecuting attorney to seek that stipulation. It is always better to file your request with the stipulation that the prosecuting attorney approves and signs off so that can go through the court process more smoothly.

We wait many months to get that sign-off because the best way to file these is with every necessary party having stipulated and signed off. We go through this fairly burdensome process to collect all of that paperwork and get it in order.

If the prosecuting attorneys chose not to sign off, they have a heads-up this is coming and have made the conscious decision not to stipulate. When the case

is filed without their stipulation, the attorney receives notice from the court that this has been filed and that 30 days is an adequate window.

We have extended it to 30 days because in some of the smaller jurisdictions, that front-end process is not happening in the same way. In our larger jurisdictions, 30 days is not necessarily needed. The attorney will know relatively quickly that this is coming and can alert the court that he or she will be filing an objection. Thirty days is long enough to balance that interest of making sure this process continues with a clear progression in the case, allowing adequate time for review if they attorney has not previously seen it.

Section 5, subsection 7 of A.B. 219 also streamlines the record-sealing process in the same way for someone who has been acquitted, for those whom prosecution has been declined or charges were dropped.

Section 6 allows a person to appeal the decision if his or her petition is denied.

We thought the process of waiting two years and going back to someone who has rendered the decision was wasting everyone's time, but it would be appropriate to give the same right to appeal that exists in all other cases.

SENATOR PICKARD:
I missed the language when I first went through this bill regarding if the prosecution does not object, it removes the discretion of the court. Failure to object is a choice when you know that this is coming. If you do not make the choice to object, then you allow it to go forward.

I do not have a problem with "shall." But does the court still have to make the required findings? Do they still have to make the decision as to why this is going forward, or is it simply an automatic procedure by the judicial officer, whether in justice court or district court? Do they entirely lose the discretion, or do they still have to make the findings?

MS. BORTOLIN:
Yes. The court still has to undertake the process to ensure the presumption applies and it has met that burden. Some cases will never be sealed. This does not create a loophole where cases that otherwise should not be sealed could be. Presumption extends to those eligible cases where the Legislature has declared the policy to seal the records.

SENATOR PICKARD:
There is a significant difference between vacating judgments versus pardons. If someone has been pardoned, he or she has been pardoned; if the case has been vacated, those are dismissed without prejudice.

Are we waiting until the statute of limitations for bringing the action that has passed, or is this just vacated?

My concern is vacated cases are not the same as pardons or acquittals and are nonprosecution cases for various reasons. That does not mean the person did not commit the crime.

Those records, in my view, should not be sealed. Why not make the hearing mandatory, notwithstanding an objection from the prosecution?

MS. BORTOLIN:
Our thinking is that this occurs when someone is applying, so the case is still being reviewed. When we first looked at this, I had the inclination that this did not go far enough because we have done the eviction record-sealing, and those records affect someone's life.

In the civil context, if an eviction case does not end up turning into a granted eviction, those are automatically sealed the next day so that record does not follow an individual around.

The thinking is similar, but we are not going that far because of specifics to each of these cases that should be looked at. Should people feel this is an unfair burden on their records, following them and showing up on background checks, we are giving them an opportunity to apply to have the case reviewed.

SENATOR PICKARD:
I agree with that concept completely. Given the prosecution may not have an opportunity for whatever reason, is backed up or does not meet the 30-day requirement, it may not have been a choice because this is a different type of case, dismissed without prejudice and still subject to future prosecution if we are not waiting until after the window of time for that prosecution to be brought.

But when we are sealing the case, I am not sure that is necessarily appropriate without a hearing. On that issue alone, I would personally be more comfortable by saying, "We are going to mandate that hearing whether or not there has been an opposition." Then if they do not show up for that hearing, they have made a choice.

I resonate with such discretion in the court that has been pretty consistent over the years. I like putting discretion in the court for that reason. It sounds like this was a policy choice Assemblyman Yeager made, and I understand.

ASSEMBLYMAN YEAGER:
You are right; it is a policy choice. If the case is declined or dismissed and the person wants to seal the record, he or she should have an opportunity to do that.

If a prosecuting agency decides to still prosecute within the statute of limitations, it certainly can do that. This does not bar a prosecution down the road if it gets additional information. From a fairness perspective on some of these timelines, an individual might have to wait three or four years. If the agency decides not to seek prosecution—to make someone have to wait years before they can get it off their record—seems like a situation where we want the individual to have the ability to benefit from that presumption.

I have never prosecuted before so I do not know how often a prosecution is declined and then picked up later, but I would not think it happens too often. It is just a policy choice about the best course forward for the State.

MS. BORTOLIN:
An important context is that it is not easy to complete an application in the first place. While you will hear about some policy disagreements, we are all working well together to do these handoffs.

There will not be a lot of situations where people are blindsided or unaware of a request being made. We will not always try to get that stipulation and have that open line of communication because there is really no benefit to sneak one of these through that 30-day window, hoping they will not have a chance to read it. The real goal is to get the stipulation on the front end so that the process goes through smoothly.

SENATOR PICKARD:
That is an interesting statement based on statute, but if we change this, would the calculus say, "Maybe we will try to sneak one through?" That is the concern.

I will be interested to see what the other side has to say about this. I firmly believe in innocent until proven guilty. If we are messing up their lives over something that has never been proven, I have a problem with that. By the same token, I do not want to hide records that should be public if the person is worthy of being prosecuted. That is the balance.

I understand the policy choice, but if we change the status of the law, it might incentivize trying to slip something past.

Representatives from the defense bar are not trying to get the guilty off, they aim to protect society from the other side of the coin. I get that, I am looking to find a balance.

MS. BORTOLIN:
I appreciate that. I would say it has definitely been part of the robust conversations we have been having. I do not see that fear coming to fruition because the flip side is they do object. The hearing is set, and this is a burdensome process. If you take the time to track down all of these case numbers, scope numbers, the years, the dates and get all of that factual information gathered, pay for the process and file it, you do not want to do that in the hopes that you sneak one through. The other side is we might advise our clients to file an objection, and we go to a hearing.

Oftentimes, people have moved out-of-state and are trying to move on with their lives but find something from years ago is following them. He or she cannot risk a hearing because they cannot afford to fly back to Nevada to get this off their records. Then, they would spend months getting every single wet signature on the same piece of paper, which can take up to six months, sometimes up to a year—hoping there is no objection.

SENATOR OHRENSCHALL:
I appreciate the bill. A couple of years ago, I took part in a volunteer event at the Doolittle Community Center that the Legal Aid Center of Southern Nevada

had put together with my friend, John Piro, where they brought attorneys volunteering to help people with record-sealing.

They had Clark County judges from different courts, and it was challenging even where there was no opposition from the prosecuting agency in terms of getting all of the right records and scope numbers. For someone in pro se, it would be a huge mountain to climb. Of the five or six clients I had assigned to me that day, I successfully got one client's records sealed even though we had all courts and agencies trying to help people as much as we could.

SENATOR HANSEN:
I am more confused because I do not practice law. Say I have been convicted of some crime; if I do whatever the window is that the law allows, I can then apply to have my records sealed. Correct?

This seems to allow one accused of a crime but not convicted or prosecuted to be able to seal those records. How do other states handle that? Is Nevada stricter than Utah or California?

MS. BORTOLIN:
Record-sealing is a pretty state-by-state statutory beast. Assemblyman Yeager could tell you better than most that we are behind the ball because of our technological inability to automatically seal records.

In the civil context, there is automatic eviction record-sealing in place at the Clark County Justice Court. If we had the technological ability to do automatic criminal record-sealing, we would already be doing it.

The movement in the Country is placing these where you can quickly seal them automatically. But that has a huge fiscal note we could not afford today, so we are just moving the ball a little bit. Some states do the civil context I was talking about, where as soon as prosecution is declined, sealing is automatic. If the case has not been proven against you, then it should not show up on your background check.

SENATOR HANSEN:
Does this deal exclusively with criminal law? You also had mentioned eviction law. Eviction law is not criminal, is it?

MS. BORTOLIN:
No. I am probably confusing you more, but this is a criminal record-sealing bill, which is analogous to our eviction record-sealing process and is more streamlined. This moves the ball a little bit closer to where we are within the civil context.

SENATOR HANSEN:
An individual who works for me had an issue with anger management. He attended anger management classes and some kind of criminal conviction for this behavior. Under law, what length of time is required between when he was convicted and when he has been clean? Is there a statutory window in that situation, or is it completely flexible and up to the judge and prosecutors?

MS. BORTOLIN:
With an assist from John Piro, I believe it is typically two years, but it is specific to the offense that someone has listed. Different policy choices are laid out in statute that Mr. Piro could walk you through better than I could about timelines.

SENATOR HANSEN:
What is the difference between a pardon and sealing of the records? Is it technically the same thing?

MS. BORTOLIN:
No. That is a good question. Most people do not know the difference, and that is part of why we are bringing the bill. We intend to clear up that a pardons board issues the pardons in the State of Nevada. There are a lot of different types of pardons. A typical pardon would be the State saying, "This is as if you have not committed this crime." But the records for the crime still exist. It is problematic because in one way we are telling people you do not have to admit that this happened. On the other hand, if you do not disclose it and you do not seal your records, it shows up when someone runs a background check on you.

It is a confusing point of education that this difference exists in law, and perhaps it should not. We are trying to make it easier. We have already done the work at the Pardons Board to say this should not follow you around anymore, so let us connect that to sealing your records so it truly does not follow you around anymore.

CHAIR SCHEIBLE:
On page 4 of A.B. 219, section 3, subsection 4 reads, "If the prosecuting agency who prosecuted the petitioner ... ." This is for your run-of-the-mill, record-sealing request. The sentence has expired, the two or seven years have expired, and I am applying to get my records sealed because time has passed, and I have not gotten into any more trouble. I completely understand the presumption, and I understand the presumption applies if the prosecuting attorney stipulates.

What I am not understanding from a policy perspective is why we are changing "may" to "shall" in lines 39 and 40.

MS. BORTOLIN:
The goal is to get some consistency in how this is applied. If no one objects, there are courts that would say, if the person meets the presumption, the person meets the presumption. We have created an off-ramp for an objecting party. We are going to look at that part of the rebuttable presumption. But if no one is objecting and the person meets the presumption, then it shall be applied.

We have inconsistent results. There are courts that will look at certain offenses and say, "I am never going to seal these types of offenses." The Legislature has not made that policy choice. Hearings will occur independent of an objection where if that person had applied in a different courthouse or jurisdiction, the presumption would have been applied.

It is just some lack of direction in the law. The judiciary I have spoken to is comfortable putting in this clarity to ensure that if an individual meets the presumption, it is applied throughout the State consistently so long as there is no objecting party.

CHAIR SCHEIBLE:
Maybe I am just reading this wrong because on page 4 of A.B. 219, line 36 says, "If the prosecuting agency does not stipulate" and no objection is filed, "the court shall order the sealing of the records."

ASSEMBLYMAN YEAGER:
The key piece on line 39 reads, "... and the court makes the findings set forth in subsection 5." In subsection 5, defines the time period an individual has stayed

out of trouble. The court still has to make the finding that an individual has met the requirements.

The court would not say, "Well, you got in trouble last week, but nobody is here objecting." That language still requires the court to make the finding that you are eligible for the presumption. Assuming that finding is made by the court, so long as there is no objecting party, an individual "shall" have the record sealed. Did I confuse you more?

CHAIR SCHEIBLE:
No. I guess this is a question of law, not a question about the bill or policy, but if the court were applying the presumption and there was no objecting party, I interpret that to mean the court still has the discretion. But the presumption can be overcome by the court's own judgment without an objecting party.

We are skipping the presumption step and going directly to not only applying but not overcoming the presumption. You are sealing the records.

I am wondering why we are going directly to sealing the records instead of telling the court to follow the presumption and give the off-ramp for an especially egregious case because the requirements, the presumptions set forth in section 5, are not terribly onerous.

I understand that staying out of trouble is significant. I understand that the time periods are important, but also overlooks a lot of other factors. Someone could still meet the elements of the presumption, and there still may be good policy reasons for not sealing the records. Of course, a prosecuting agency should catch that and object to it. I am just not understanding why we are forcing the courts to seal the record without the input of a prosecuting agency instead of giving them the latitude to apply the presumption.

MS. BORTOLIN:
You are right. I would push back on the verbiage that we are forcing them in the sense that they are not going to object here today. This has been worked out. In terms of the policy, you are right that if these elements have been met, we want them sealed without additional off-ramps.

CHAIR SCHEIBLE:
What if a victim wants to be heard?

MS. BORTOLIN:
We did work on that. On page 4, section 3, subsection 4 of A.B. 219 we did change that in the first redraft on line 43 to "if no objecting party attends the hearing" because of an opportunity to notice other parties and for the victim to be heard. That would happen in conjunction with the prosecutors who, in my conversations, we did not want to mandate to notify people, but there was no other appropriate party to do so. The short version is "if no objecting party could encompass a victim."

CHAIR SCHEIBLE:
Yes, but that is when we are at the hearing stage. I have concerns about the part where we are sealing records, explicitly, in line 41 on page 4 "without a hearing."

There are many times I disagree with victims. I can foresee many situations in which I would be perfectly happy to seal someone's records, sign on the dotted line and stipulate to it. If I had a victim who really felt that was not just, I might just stay silent.

But the way I read statute it says that if I choose to stay silent, as the prosecutor, the record gets sealed. There is no way for the victim's voice to be heard unless I stand up and object to the sealing. That sounds like a worse situation for the person wanting to get his or her record sealed than being in the situation where the prosecutor is silent, but the victim still gets heard.

MS. BORTOLIN:
I am not sure how the victim gets noticed in either situation.

CHAIR SCHEIBLE:
I have victims who follow their cases forever. They know every time that the person who hurt them applies for parole, has a parole hearing, sends a letter, coughs, sneezes or appears in a courtroom. The victim will be at the hearing at the courthouse an hour before it starts.

MS. BORTOLIN:
I appreciate that. In 2017, these are the conversations we had. There is a lot of worthy debate on whether this should be a presumption.

We were looking to take that policy decision and fill a spot where there was lack of clarity and direction on what happens next. There is not a good direction if we leave the law as is now because we know what happens when the prosecuting attorney stipulates and when the prosecuting attorney objects.

If we leave the law as is, cases will hang in the balance. One jurisdiction has litigated on this and could probably speak to that further if we want to, but the judiciary handles them differently. Some of them will set them for hearing and some will wait because there is no timeframe in which the prosecuting attorney has to take either action.

So then what happens? Does that failure to take action mean that person can never continue in the process, and it will be held in limbo forever? The right policy choice was to continue to apply the presumption in a meaningful timeframe to allow people to get what that policy determination ultimately is in statute—if you qualify, the court shall apply the presumption and seal your records.

CHAIR SCHEIBLE:
We may have a disagreement on the connection between applying the presumption and sealing the record. I do not see them as the same. Presumption can be overcome unless I am misunderstanding, and a court does not have the discretion to overcome a presumption without an objecting party. That is my understanding of the law.

ASSEMBLYMAN YEAGER:
You raise a great point. Can the court, on its own volition as a judicial actor, overcome a statutory presumption? It is a tricky balance here because we have a separation of powers between an executive branch, district attorney and prosecuting attorney that will step in and object—then the court, wherein the Legislature, the other branch of government, has set the policy of the State to seal records when appropriate and to give people second chances.

That is what we are trying to avoid because if you asked certain judges, some are going to say it is not their role to overcome a statutory presumption.

Some will say that it is a district attorney or a prosecuting attorney's role. And, if they do not appear in court, the record is going to be sealed.

The problem to solve is making sure you are getting equal application of the law depending on which jurisdiction or judge you might be in front of. I certainly understand it is a policy choice we are making, but this is a tightrope to walk with the three branches of government intimately involved in this record-sealing process.

CHAIR SCHEIBLE:
That makes a lot of sense.

SENATOR PICKARD:
This line of questions spurred a thought. I had not considered the victim's rights. Does this implicate Marsy's Law at all? Is there a right to be heard at sealing hearings? Is that something we should investigate before we pass this law? I do not want to be contrary to the Nevada Constitution at this point.

MS. BORTOLIN:
The question has been raised. I am not a prosecuting attorney, so I do not want to speak to their interpretation of this; perhaps, those who are may do so. When that question was contemplated in conversations we have had with some members of the judiciary, the only appropriate place you could place that burden is on the prosecuting attorney.

SENATOR PICKARD:
I understood that part of the answer. Mine was specific to the requirements of Marsy's Law, which we passed in the Constitution. That is a higher standard we have to meet.

We are talking about the presumption. Presumptions need clear and convincing evidence in order to rebut them, and the court cannot bring evidence on its own volition unless evidence on the record would rebut the presumption in the first instance. This would probably be disqualifying information in the first place.

How does the court overcome any presumption without taking evidence? It has to be through a hearing, correct?

As I read the bill, the court cannot require a hearing on its own volition to get that evidence even if the judge thinks it might be appropriate. This is "shall," so we are taking that discretion away. Would it make sense to add a proviso that gives the court the ability to conduct a hearing if it finds a need for a hearing in spite of the lack of opposition?

I do not know how this would play out because you folks are the ones who play in that sandbox—not me.

MS. BORTOLIN:
If that obligation exists, I believe the prosecuting attorney would notify the victim, which would bring in an "ask to object."

To your second question, that is happening now when the prosecuting attorney stipulates and we already are not setting a hearing in light of those stipulations.

Like a lot of things we talk about in this Committee, I do not know if there is a better answer, but that is where we landed. If you are silent on something, there has to be a definitive timeframe to allow a case to continue forward.

SENATOR PICKARD:
This is similar to Governor Steve Sisolak. If we send something to him that he chooses to sign, it becomes law. I do not have a problem with that philosophical position. The practical one concerns me.

NICOLAS ANTHONY (Counsel):
Quickly reviewing Marsy's Law, in the Nevada Constitution, Article 1, section 8A, subsection 1, paragraph (g) provides that a victim is entitled "to reasonable notice of all public proceedings."

Whether a sealing would be a public proceeding is the question. I do not know how that has been interpreted, but that is the plain language of Marsy's Law.

It would be Article 1, section 8A, subsection 1, paragraph (g).

> To reasonable notice of all public proceedings ... at which the defendant and the prosecutor are entitled to be present and of all parole or other postconviction release proceedings.

CHAIR SCHEIBLE:
I appreciate you answering all of our many questions.

MS. BORTOLIN:
Thank you. It is not the same when you are not here, Senator Pickard, so I am glad we got to do those mental gymnastics.

JOHN PIRO (Chief Deputy Public Defender Clark County Public Defender's Office):
Most of you were here in 2017 when we applied that presumption. What we have not talked about on the record is the *Matter of Tiffee*, 485 P.3d 1249 (2021) where the Nevada Supreme Court makes clear that the public policy of the State favors second chances to offenders who are rehabilitated.

They also make clear that it is incumbent upon the State to rebut that presumption at a hearing. Kendra Bertschy will go into what happens when the State does not show up.

Ms. Bortolin is correct that these civil matters sometimes go to civil judges, and it is wildly different.

I do not think that putting the "shall" in this bill would conflict with the most recent opinion where it says that it should be sealed should the State not rebut the presumption.

Senator Scheible, we did talk about Marsy's Law a little. In 2017, I was here when that passed over our objection. I believe it is incumbent upon the prosecutor to notify them. The factors involved in this case now make it clear when sealing a record if the person has been rehabilitated.

You are not tracing over the facts of the old case because that is what the judge did in this new case. They tried to trace over the old facts of the case, and the Supreme Court makes clear it is not about the old facts. It is do they qualify under the statute? Have they filed all of the correct paperwork, meaning the criminal history from the Central Repository, scope and everything else that they needed? The court would pick up on whether new things have come up. They would have all of the paperwork in front of them when making the decision, and if the State rebuts the presumption. If not, the person is eligible for sealing unless this Body said one of those crimes is not ever eligible for sealing.

KENDRA BERTSCHY (Deputy Public Defender, Washoe County Public Defender's Office):
I am also testifying for Holly Welborn of the American Civil Liberties Union of Nevada, Ben Challinor Mendez with Faith in Action Nevada and Christine Saunders with Progressive Leadership Alliance of Nevada and Battle Born Progress. They asked me to put their support of A.B. 219 on the record.

I would like to address the section 2 language of A.B. 219 already in the law that reads, "The Legislature hereby declares that the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated ... ."

For those of you who do not know, it is important to have the ability to seal someone's record because a criminal record impacts almost everyday aspects of life. They include whether you can pursue a higher education; take out a loan; rent an apartment; obtain housing assistance, food benefits and things like that. It is important to have this option. I appreciate the hard work that Assemblyman Yeager and Bailey Bortolin have done to work on streamlining the process and having consistency.

In Washoe County, some judges act differently in terms of the process from other judges, so having this within the same jurisdiction is important.

When I first started practicing criminal law, it was common for the district attorneys or prosecuting attorneys to not show up for these hearings, which then caused a problem for the judiciary. Then the judiciary started to require that the State show up even if there was no objection filed.

This became really cumbersome on people who have rehabilitated themselves and moved on with their lives. For some crimes, it will take anywhere between five and seven years after they have completed parole or probation to be eligible to start the process. There are people who have moved on with their lives and started new jobs.

I can remember a time in court where I had someone who had moved to Florida and had to fly back for a less than two-minute hearing where the judge then apologized and said, "I am sorry that the State had nothing to say." They came to the hearing just to say, "No objection." That person had to take time off from work and take a costly flight just to have that two-minute hearing. It was so

important for that person to have his or her criminal record sealed, so it was vital to them.

Regarding some of the other questions. We did concede regarding the timeline. In motion practice, you have 14 days to respond to a motion. In current law in Washoe County, the practice is that you have 21 days. We do recognize there does need to be that time for the district attorney or the prosecuting attorney's office to take a look at the case, but it is also important to get this taken care of because they have already waited a long time.

As to Senator Pickard's questions. There are rules of practice where if you do not respond to a motion, the court should just agree even when there are presumptions.

The same thing applies to divorce and custody cases of having that default judgment. I would just note that this is important to help people understand the process.

While at the Legislature, I had the privilege of participating in a Lawyer in the Library clinic at Washoe County Law Library where I assisted people with trying to answer these questions, and they are at a loss with the whole process.

It is crucial that we clarify these issues. I urge your support.

SENATOR PICKARD:
You are right. If we do not have a response within a period of time, a default can be taken. But that default needs to be noticed, and then there is an opportunity for up to six months to have that default set aside for cause.

Does a similar provision in this bill allow for that sealing to be set aside and things restored? Is there a mechanism whereby if someone misses the hearing for good cause, he or she can come back and set that sealing aside?

MS. BERTSCHY:
I would have to double-check. The sponsors of this bill may have that information.

MR. PIRO:
It is a civil proceeding. Even after you get the order, you have to notice all of the parties with the order. The district attorney's office would get a notice to seal the record. I imagine they would be able to file something at that point in time.

MS. BERTSCHY:
An appeals process would add something to that. I would note that these are very different proceedings than with custody cases.

Also, Marsy's Law is an opt-in process where the victim would have to opt in to request to have notifications for all of those hearings.

MICHAEL WILLOUGHBY (Battle Born Progress):
I voice our support for A.B. 219 to remind everyone that, fundamentally, the rights of the accused are always at a premium. That is because the defendant has a unique stake within the criminal justice system. They are, simply put, facing down the entire weight of the State. Therefore, we need to give special care to those circumstances.

The entirety of this State represents the victims. Once a sentence has been served, if someone is convicted, or a case has been dropped, there has to be some kind of end certain to the position the defendant has been put in. This bill stops the record from haunting someone forever and puts an end to it.

JENNIFER NOBLE (Nevada District Attorneys Association):
I am in opposition to A.B. 219. Thank you to Ms. Bortolin for listening to our concerns and trying to work with us. We thought we may come to a consensus in this bill, but we are just not there.

Sealing is an act of judicial grace. The purpose of sealing is to let people who were previously involved in the criminal justice system pursue law-abiding citizenship unencumbered by the record of their past transgressions.

For this reason, in 2017, I sat here and supported the changes to our sealing statutes. I supported the Association and changing the timelines and making them shorter so people could apply for sealing sooner.

We did that with the understanding that in circumstances in which we did not stipulate, there would be a hearing. The statute specifically says that when we do not stipulate at the hearing, any person having relevant evidence can appear and present it to the court.

I would disagree that under the statutory structure with the representation, only the district attorney presents evidence because statute allows victims to appear along with anyone in the community who may have relevant evidence. It requires notification of all law enforcement agencies—all police agencies, officers that may have dealt with the person—in addition to the prosecuting attorney's office.

Regardless of whether we decide to stipulate or not to take a position, we agree to the shortening of those times with the understanding there would be a public hearing.

To answer the questions about Marsy's Law, it would be a public hearing; not a closed hearing. I have been to record sealing hearings and not one public defender appeared. I would argue that under Marsy's Law, if it is not a closed hearing, the victims are entitled to be present along with any member of the community.

Nothing in Marsy's Law alters the current obligations of a prosecutor. It imposes obligations on the entire judicial system. There is no special requirement that the prosecutor notify the victim. However, most of the time we do take it upon ourselves to make sure that happens.

A recurring theme in this piece of legislation is removal of judicial discretion to deny a petition for sealing even if our failure to object is simply an oversight. We may object and then not attend the hearing. I am informed that in Clark County, for example, the district court posts these hearings within a large calendar. Some of the hearings are for different prosecutor's offices. It is possible for someone to miss a hearing or for the paperwork to get lost in the shuffle. These are concerns we have.

Section 3, subparagraph (4) of A.B. 219 removes the opportunity for victims, employers and law enforcement to appear. It also takes away the discretion of the judge by providing that if we fail to object or if we fail to appear at the

hearing, the victim is not going to be heard, and the community is not going to be heard.

The judge has no discretion to decide not to seal. They do not get the opportunity to hear from members of the community or hear from the victim to see if there was a reason the case should not be sealed. We think this is important.

Section 4 of A.B. 219 amends NRS 179.247, which concerns sealing when the person was convicted of prostitution or a prostitution-related crime. We are not concerned about the changes related to just that section since it is a narrow scope of crimes.

Section 5 is troublesome regarding the crimes for which a person has been arrested and the charges were dismissed or the person was acquitted.

In the case of a dismissal, we often have a tool called dismissal without prejudice. If, for some reason, our witnesses are not at the hearing, we cannot locate them or there is a problem with the case, we can dismiss without prejudice.

In some felony cases, we have a long time to refile if the victim becomes cooperative or more evidence reveals itself, and the case becomes more viable in court. This section would not allow us to refile.

There was a comment made earlier that we could just go ahead and refile the case, but once a case is sealed, prosecutors no longer have access to the case. It is not in our records; we cannot look at it; we cannot see it. Once the case is dismissed and sealed, it is not getting refiled no matter the circumstances.

Section 6 of A.B. 219 changes the recourse for a person whose petition is denied. From a petition for rehearing to filing a direct appeal in front of the Nevada Supreme Court, we do not have a problem with it. It seems they will be getting a lot of frivolous appeals, but we are not as concerned about that from our perspective.

SENATOR HARRIS:
Can you give an example of when someone would be otherwise rehabilitated, but the victim of their previous crime could provide information that would overcome the presumption unrelated to the original crime?

MS. NOBLE:
As I understand your question, you want an example of something the victim could say at a hearing that would be unrelated to the original crime in terms of rehabilitation?

SENATOR HARRIS:
Let us say the victim did not show up for the hearing but the offender otherwise meets the rehabilitation presumption. Part of the concern I have heard is that the victim may not have a chance to be heard. I have also heard that the Supreme Court has said we should not be rehashing the original crime.

The key to whether a record should be sealed is if the offender is rehabilitated. What evidence could a victim offer that would overcome the presumption that would be unrelated—because that individual should not be rehashing the original crime—to his or her experience in the original crime.

MS. NOBLE:
The victim could testify that he or she is persistent in contacting me. They have approached me again with a similar type of scheme. I am thinking about instances of elder abuse, fraud and other things. There may be information that a victim would have that the police may or may not have to suggest that while we have not had a subsequent arrest, the person is not rehabilitated.

SENATOR HARRIS:
That makes sense. But in order for that situation to arise, the victim would have not felt threatened enough to contact the police and put that on the record. Right? That would mean law enforcement was aware of it, or the prosecuting attorney in the original case was not aware; otherwise, it would show up when the record-sealing case came forward and all of the records were provided to the judge. Right?

In your scenario, are you saying that the victim was completely silent up until the point where the perpetrator was persisting or attempting a similar scheme?

MS. NOBLE:
The part where we may disagree in your question or assumption, is that victims are not scared if they do not contact the police or are not bothered by a certain activity. That is not an assumption we can make. Victims fail to report for all kinds of reasons. It would take a long time to go into them.

SENATOR HARRIS:
I understand that happens all the time. I am concerned about victims coming forward after moving on with their lives with something they had never felt the need to speak about until that point.

MS. NOBLE:
I understand what you are saying. Certainly, that argument can be made by the petitioner or their attorney. Nonetheless, under Marsy's Law, the victim has a right to be heard. That individual may present evidence along with any other member of the community in assisting the court in making the decision regarding rehabilitation.

SENATOR HARRIS:
Is it your interpretation of the bill that the victim, absent a hearing, would not have a chance to object?

MS. NOBLE:
Yes. If the prosecutors do not object, then there is no hearing.

SENATOR HARRIS:
Could the victim not object in a similar manner that the prosecuting attorney would?

MS. NOBLE:
There is no mechanism in A.B. 219 for that type of objection.

SENATOR PICKARD:
Do you know if the victims are listed as one of the service contacts? When we went into the Covid requirements, all parties including defendants had to be listed. This has to do with civil matters. I cannot imagine victims would be part of the service list. Do you know if victims are listed? Is there any mechanism for notice to them of upcoming hearings?

MS. NOBLE:
Under the current requirements for the petition, I do not believe there is any notification or service requirement to the victim.

SENATOR PICKARD:
Okay. I am trying to figure out the mechanism. It sounds like you have quite a bit of time before you are required to move on charges against a defendant. I am balancing their right to move on with their lives as presumed innocent.

How do we strike that balance? Do we mandate that the court have a hearing? How do we address that? I tend to agree we should not leave these people out if four years later, there is no prosecution. How is that not a miscarriage of justice if we are dangling this over their heads, and they are never proven guilty?

MS. NOBLE:
We need to remember that we have statutes of limitation for a reason. If we are sealing a record before the statutes of limitation have expired, that is contrary to the whole purpose of the statutes.

SENATOR PICKARD:
I agree. When you say that someone may lose the records, I would imagine you have all the prosecutorial notes. Does this sealing also include your records at the prosecutor's office?

MS. NOBLE:
Yes. Sealing of records requires us to seal all of our records. That would be case notes, attorney notes—anything regarding the case must be sealed. It is completely out of our computer system.

SENATOR PICKARD:
I thought when we were talking about sealing, we were talking about public access to that record, not all records pertaining to the case. That might change how I approach this. I have to dig into the facts a little further.

MS. NOBLE:
Relevant to your question is that all police reports regarding the case must also be sealed. We cannot go back to an arresting agency and get information about the case. It is all gone.

SENATOR PICKARD:
If someone were to bring a motion to unseal, how does one unseal that record if everything is gone?

MS. NOBLE:
I believe records are retained by the courts in a sealed area. You could move to unseal the court's record.

SENATOR PICKARD:
But that is just the court records—the prosecutorial notes and investigatory notes are gone and nobody can access those records. Is that what you are saying?

If we adopt this language, the records will be sealed before the statute of limitations expire. Now, you come across enough evidence and witnesses to prosecute the case, but the record is sealed—you then move to unseal the records. If the judge agrees, can you get all of your prosecutorial notes and investigatory notes; those are gone forever? Is that what you are saying?

MS. NOBLE:
Yes. I have sat and watched as the system gets updated, and we cannot access them after that. They are removed from our computer system forever. We might access someone's notes in a paper file offsite somewhere. It is my understanding that sealed means sealed. You do not get to go back and look at the case file.

SENATOR PICKARD:
Even in spite of an order to unseal?

MS. NOBLE:
Hypothetically, if there was an order to unseal and the sealing of those records included our records, I suppose we could get to whatever we had at the time of sealing.

CHAIR SCHEIBLE:
I am thinking very practically about the petition for sealing of records which, I assume, requires some kind of proof that the person has not been charged with any additional crimes. Is it incumbent upon the applicant to provide a background check for lack of a better term?

CHAIR SCHEIBLE:
I see you are nodding your head in affirmance. My question is as a prosecuting agency, when you get those records, I am assuming the first thing you do is run an interstate identification index or a National Crime Information Center (NCIC) check or something of that nature. Am I correct?

MS. NOBLE:
Applicants are required to provide a certified copy of their criminal history from the Central Repository. Unless a big span of time has passed, we would not run a new criminal history in each case sealing.

CHAIR SCHEIBLE:
The kind of information that someone else might bring to the table—a victim, a family member—could be criminal records not picked up by the Central Repository when someone is arrested but not charged, or when someone is detained but not arrested, and if someone files a police report but there are no charges.

For example, if I am the victim of domestic violence and I file a police report but nothing ever happens, and then my abuser goes to seal his or her record six years from now, I might be the only person who still has a copy of that police report to bring to the judge and say, "Here is the police report I filed last year, and he was never arrested in Alabama."

MS. NOBLE:
Yes. That example is a good one, but remember that police may be investigating a person and the prosecution does not know about it because police reports are not received by our office until they have been completed and the case is ready to be prosecuted.

A police agency loses the opportunity to appear at a record sealing hearing if our office fails to object to the hearing under the rework of this bill. The police agency may have relevant evidence that the court never receives because it is not an NCIC check.

SENATOR HANSEN:
I do not practice law, but I enjoy shows like *Forensic Files*. In all seriousness, the *Cold Case Files* are always using evidence that is 20 years old and going back through it.

In theory, if this law passes and someone was never formally prosecuted, could that person have those types of records sealed, denying prosecutors digging through those files in trying to figure out a murder from the past?

MS. NOBLE:
Section 5 of the first reprint of A.B. 219 has to do with folks who have been charged but not convicted or the case was dismissed. I do not see a limitation in terms of the felonies to which it applies. But, I may not be reading this holistically enough.

The way I interpret the rework of this bill is someone could have a homicide that is not prosecuted. I do not know if those records have to be sealed because it was not prosecuted. If new information is attained, such as a forensics report, I do not know how that would work.

SENATOR HANSEN:
That is important because I am using a fairly extreme example. A lot of times where people have broken the law, the level of evidence is not there to prosecute them, but over time, more and more evidence is produced. If the court seals these records, and then there is a new development in the future, people who are doing the investigation at that time will be denied valuable documents and details provided to previous investigators.

Unless there are some significant limitations on what kind of crimes we are talking about, it seems extreme to me to allow someone to seal their records if he or she was never formally prosecuted.

SENATOR HARRIS:
At the heart of this policy decision, in your opinion, whose burden is it to decide whether records should be sealed?

We are talking about a bill where the prosecuting attorney, for whatever reason, has not stipulated and has not made a challenge. If not the prosecuting attorney, who then has the burden to show that the record should not be sealed? Is it incumbent upon the court to seek out any potential victims from Alabama who may have come up in the meantime or incumbent upon the court to research whether the Las Vegas Metropolitan Police Department has any impending cases? What is your philosophical view about who has the burden to show that someone's record should not be sealed, if not you?

MS. NOBLE:
There are two parts to your question: There is rebuttable presumption—there has to be evidence that overcomes it. But the way this is structured, it does not require that such evidence be presented by the prosecutor.

I agree with this. Anyone having relevant evidence—a community member; a former employer who had a lot of embezzlement and lost money because of what this person did; members of the police department who might know what the person is up to but have not filed anything yet—can all present evidence under the current statutory structure.

There being a presumption is the way it should be. Ultimately, the judge's decision in an exercise of judicial discretion should be at the heart of any record-sealing question. The judge is the only person who can decide whether that rebuttable presumption has been overcome.

SENATOR HARRIS:
I appreciate you explaining this to the Committee. I suggest we always have these great separation-of-power issues and the ability to speak up when someone's records should be sealed by putting that into the NRS.

MS. BORTOLIN:
There are clearly some remaining disagreements. Record-sealing is different from an expungement. If Nevada had an expungement process, that would necessitate the records being destroyed.

A record-sealing process, which is the policy choice we have made in this State, does necessitate exceptions to access those records. My legal understanding is that the police do maintain, as an exception to record-sealing, access to that information. We end up tracking down these types of scopes when we do the record-sealing. That information does exist and continues to exist.

The policy question is if prosecution has been declined, should that still appear on your record as something that comes up on a background check, or should you have an opportunity to apply to the court in which the prosecuting agency that declined prosecution would have an opportunity to say, "No, we do not think that should go away." We are dealing with the in-between and the gray area out of necessity. It is important to pull back and look at the real framework that already exists in law intended for the prosecuting agency to either stipulate

or object. That framework remains, and it would be a choice to continue to stipulate or object. We have been faced with the question of what should the policy choice be if that does not occur. The other policy choice would be to force a stipulation or an objection within a certain amount of time so that gray area does not exist.

From my viewpoint, it felt like we were giving a third option, which was a third tool for them to have. If they felt appropriate to not endorse but to not take a position giving them another option, this has in no way taken away the ability to get a stipulation or an objection.

Lastly, I would rebut the *Matter of Tiffee* that Mr. Piro mentioned. The order says, "We hold that the State must present some affirmative proof demonstrating that a petitioner is not rehabilitated despite complying with the statutory provisions governing criminal record sealing."

ASSEMBLYMAN YEAGER:
The problem is what do we do when the prosecutor does not engage in some fashion? We could require them to, but I have a feeling my prosecutor friends would not want to have to do that in every case. We have chosen a path forward in terms of what to do when the prosecutor does not engage.

In A.B. 219, section 2, page 3, beginning on line 10 is the language we put into the law in 2017 as a Body: "The Legislature hereby declares that the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated and the sealing of the records of such persons ... ."

That is what we are trying to achieve. Of course, there is always nuance. We have provided the solution in our mind that helps move the State forward. I wish we had expungement; but we do not. Some states have automatic record-sealing, Pennsylvania and Utah in particular. We do not have that yet because we do not have the capabilities. Until we get to that point, this is a step forward.

CHAIR SCHEIBLE:
I now close the hearing on A.B. 219. We have a brief work session on our agenda for A.B. 427 with the work session document (Exhibit B).

ASSEMBLY BILL 427 (1st Reprint): Revises various provisions relating to driving under the influence of alcohol or a prohibited substance. (BDR 43-373)

PATRICK GUINAN (Policy Analyst):
We heard A.B. 427 yesterday. In its first reprint, this bill revises provisions relating to driving under the influence of alcohol or a prohibited substance. There are no amendments.

SENATOR PICKARD:
We had a long conversation offline regarding the potential impacts of this with regard to child custody cases. After discussing it with Chair Scheible and Mr. Anthony from legal, it is my understanding that this does not rise to the same level as an offered plea in terms of its inadmissibility in a civil matter. It is about protecting kids.

I wanted to make sure my understanding of the intent of the bill is not to remove this information from access to the civil cases, particularly when it comes to ensure that the district court deciding custody matters has a full understanding of the facts surrounding the parents. With that, I am prepared to support the bill.

SENATOR HARRIS MOVED TO DO PASS A.B. 427.

SENATOR OHRENSCHALL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR SETTELMEYER VOTED NO.)

* * * * *

CHAIR SCHEIBLE:
We are now adjourned at 8:34 p.m.

RESPECTFULLY SUBMITTED:

_____
Pam King,
Committee Secretary

APPROVED BY:

_____
Senator Melanie Scheible, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit Letter**	**Begins on Page**	**Witness / Entity**	**Description**
	A	1		Agenda
A.B. 427	B	1	Patrick Guinan	Work Session Document