IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRICK GOLDSTRIKE MINES, INC.,

Petitioner

vs.

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE,

Respondents,

and

BULLION MONARCH MINING, INC.,

Real Party in Interest.

_____/

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District Court Case No. 18-A-785913

PETITIONER'S APPENDIX
VOLUME VI

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Docket 79652 Document 2019-39254

PETITIONER'S APPENDIX INDEX (CRONOLOGICAL)

PETITIONER'S APPENDIX INDEX (ALPHABETICAL)

EXHIBIT 1

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

BULLION MONARCH MINING, INC.,

Plaintiff,

v.

NEWMONT USA LTD., *et al.*,

Defendants.

Case No. CV-N-08-00227-ECR-VPC

DECLARATION OF SYBIL E. VEENMAN IN SUPPORT OF RULE 12(b)(2) MOTION TO DISMISS ALL CLAIMS AGAINST BARRICK GOLD CORPORATION FOR LACK OF PERSONAL JURISDICTION

I, Sybil E. Veenman, declare to the best of my knowledge as follows:

1. I am over the age of eighteen years old, and I am authorized to make this declaration on behalf of Barrick Gold Corporation ("BGC").

2. Currently, I hold the positions of Senior Vice President, Assistant General Counsel, and Secretary with BGC. I have been the corporate Secretary of BGC since 1995.

3. Through my duties with BGC, I am familiar with the business operations of BGC, as well as its relationship with Barrick Goldstrike Mines Inc. ("Goldstrike").

4. BGC is incorporated in Ontario, Canada, and its headquarters are located in Toronto, Ontario.

5. BGC exists as a parent holding company, managing its investments and interests in various wholly and partially owned subsidiary companies.

6. Although most of BGC's subsidiary companies are involved in the gold mining industry, BGC holds a diverse portfolio of interests and investments.

7. BGC's subsidiary companies operate in numerous countries throughout the world and operate and exist under the laws of those jurisdictions.

8. BGC is not licensed to do business in Nevada and does not regularly carry out, solicit, or transact business in the state.

9. BGC does not own any real or tangible personal property in Nevada, nor does it hold any bank accounts in Nevada.

10. BGC does not have any employees in Nevada and does not have an office, address, or telephone listing within the state.

11. BGC does not sell any goods or services in Nevada.

12. BGC has never paid income or property taxes in Nevada.

13. BGC does not itself engage in mining or processing activities, operate mining or processing facilities, or participate in activities ancillary to mining or processing activities within Nevada or the United States, nor does it own any equipment or facilities to do so.

14. BGC does not buy, sell, or trade commodities of any type, including gold or other precious metals, in Nevada.

15. There are two intermediate corporate parents between Goldstrike and BGC.

16. Goldstrike is a Colorado corporation and is a wholly owned subsidiary of Barrick Gold Exploration Inc. ("Exploration"), which is incorporated in Delaware.

17. Exploration is a wholly owned subsidiary of ABX Financeco Inc. ("ABX"), also a Delaware corporation.

18. ABX is a wholly owned subsidiary of BGC.

19. Goldstrike and BGC observe and comply with all applicable requirements for maintaining their separate corporate existence and identities.

20. Although BGC, consistent with its position as the ultimate parent company, monitors the overall business strategy of Goldstrike, Goldstrike's officers and managers perform the day-to-day management of the company and direct and control the company's activities in Nevada.

21. Goldstrike is not authorized to act for or on behalf of BGC.

22. BGC and Goldstrike maintain separate corporate by-laws, minutes, and records, and each company maintains separate bank accounts.

23. None of the directors of BGC is also a director of Goldstrike.

24. Any financial transactions between BGC and Goldstrike are documented on the appropriate financial reports of the two companies to ensure the funds are separately tracked and accounted for by each company.

25. Goldstrike has substantial assets in Nevada, including the Goldstrike Mine located north of Carlin, Nevada, and is capable of satisfying any judgments that may be entered against it in this case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 16th of July 2009.

Sybil E. Veenman

EXHIBIT 27

EXHIBIT 27

NEVADA LEGISLATURE
The People's Branch of Government

AB40

Introduced on: Jan 31, 2003

By: (**Bolded** name indicates primary sponsorship)
Oceguera

Extends period of limitations for commencing civil action after action has been dismissed under certain circumstances. (BDR 2-769)

Fiscal Notes

Effect on Local Government: No.
Effect on State: No.

Most Recent History Action: Approved by the Governor. Chapter 376.
(See full list below)

Past Hearings

Assembly Judiciary	Feb-13-2003	08:00 AM	Minutes	No Action
Assembly Judiciary	Feb-25-2003	08:00 AM	Minutes	Amend, and do pass as amended
Senate Judiciary	Mar-19-2003	08:00 AM	Minutes	No Action
Senate Judiciary	May-08-2003	08:30 AM	Minutes	No Action
Senate Judiciary	May-13-2003	08:00 AM	Minutes	Amend, and do pass as amended
Senate Judiciary	May-22-2003	08:00 AM	Minutes	No Action

Votes

Assembly Final Passage	Mar-05	Yea 41,	Nay 0,	Excused 1,	Not Voting 0,	Absent 0
Senate Final Passage	May-17	Yea 17,	Nay 0,	Excused 4,	Not Voting 0,	Absent 0

Bill Text (PDF)	As Introduced	1st Reprint	2nd Reprint	3rd Reprint	As Enrolled
Bill Text (HTML)	As Introduced	1st Reprint	2nd Reprint	3rd Reprint	As Enrolled
Amendments (HTML)	Amend. No.17	Amend. No.709	Amend. No.CA2		

Bill History

Jan 31, 2003
- Prefiled. Referred to Committee on Judiciary. To printer.

Feb 03, 2003

- From printer.
- Read first time.
- To committee.

Mar 03, 2003

- From committee: Amend, and do pass as amended.

Mar 04, 2003

- Read second time. Amended. (Amend. No. 17). To printer.

Mar 05, 2003

- From printer. To engrossment. Engrossed. First reprint.
- Read third time. Passed, as amended. Title approved, as amended. (Yeas: 41, Nays: None, Excused: 1). To Senate.

Mar 06, 2003

- In Senate.
- Read first time. Referred to Committee on Judiciary. To committee.

May 14, 2003

- From committee: Amend, and do pass as amended.

May 16, 2003

- Read second time. Amended. (Amend. No. 709.) To printer.

May 17, 2003

- From printer. To re-engrossment. Re-engrossed. Second reprint.
- Read third time. Passed, as amended. Title approved. (Yeas: 17, Nays: None, Excused: 4) To Assembly.

May 19, 2003

- In Assembly.
- Senate Amendment No. 709 not concurred in. To Senate.

May 21, 2003

- In Senate.

May 24, 2003

- Senate Amendment No. 709 not receded from. Conference requested. First Conference Committee appointed by Senate. To Assembly.

May 26, 2003

- In Assembly.
- First Conference Committee appointed by Assembly. To committee.

May 28, 2003

- From committee: Concur in Senate Amendment No. 709 and further amend. First Conference report adopted by Assembly.

May 29, 2003

- First Conference report adopted by Senate.
- To printer.

May 31, 2003

- From printer. To re-engrossment. Re-engrossed. Third reprint.
- To enrollment.

Jun 03, 2003

- Enrolled and delivered to Governor.

Jun 09, 2003

- Approved by the Governor. Chapter 376.

Effective October 1, 2003.

PA_1119

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MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Second Session
February 13, 2003

The Committee on Judiciarywas called to order at 8:00 a.m., on Thursday, February 13, 2003. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. John Oceguera, Vice Chairman
Mrs. Sharron Angle
Mr. David Brown
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Jerry D. Claborn
Mr. Marcus Conklin
Mr. Jason Geddes
Mr. Don Gustavson
Mr. William Horne
Mr. Garn Mabey
Mr. Harry Mortenson
Ms. Genie Ohrenschall
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Nancy Elder, Committee Secretary

OTHERS PRESENT:

John Arrascada, Nevada Trial Lawyers Association (NTLA), Las Vegas, Nevada
Daniel Ebihara, Staff Attorney, Clark County Legal Services, Las Vegas Nevada
Brenda J. Erdoes, Legislative Counsel, Legislative Counsel Bureau, State of Nevada, Carson City, Nevada
Jeff Parker, Solicitor General, Attorney General's Office, State of Nevada, Carson City, Nevada
Ernie Adler, Attorney, Washoe County, Reno, Nevada
Michael Pagni, Attorney, McDonald-Carano-Wilson, Reno, Nevada
Scott Craigie, Nevada State Medical Association, Carson City, Nevada

Chairman Anderson opened the meeting by announcing that one of the members of the Committee had approached him about introducing BDR 3-901, which changed provisions governing withholding of income that was ordered to enforce child support payments. Mr. Anderson explained that the introduction of BDR 3-901 would merely change its status from a personal piece of legislation to a Committee introduction. It would not count against the total amount of bill draft requests (BDRs) the Committee was entitled to introduce in and of its own volition. It was a matter of courtesy.

- BDR 3-901 — Makes various changes to provisions governing withholding of income which is ordered to enforce payment of child support. (A.B. 117)

ASSEMBLYMAN GUSTAVSON MOVED FOR COMMITTEE INTRODUCTION OF BDR 3-901.

ASSEMBLYMAN HORNE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY

Chairman Anderson read the summaries of eight other BDRs.

- BDR 14-279 — Removes requirement of separate penalty hearing for defendant who is convicted of first degree murder where death penalty is not sought. (A.B. 110)
- BDR 15-285 — Provides additional penalty for committing certain crimes in violation of temporary or extended order for protection. (A.B. 107)
- BDR 16-501 — Makes changes to provisions pertaining to the Department of Corrections. (A.B. 109)
- BDR 16-445 — Provides that eligibility for parole for prisoner serving consecutive sentences is based upon longest sentence. (A.B. 102)
- BDR 43-545 — Reduces concentration of alcohol that may be present in blood or breath of person while operating vehicle or vessel. (A.B. 104)
- BDR 16-550 — Provides additional credits against sentence of parolee under certain circumstances. (A.B. 105)

- BDR 43-606 — Revises penalty for driving under influence of intoxicating liquor or controlled or prohibited substance and revises qualifications of person who may apply to court to undergo program of treatment for alcoholism or drug abuse. (A.B. 106)

- BDR 14-532 — Eliminates requirement for Director of Department of Corrections to return certified copy of judgment of conviction to county clerk of issuing county. (A.B. 103)

Mr. Gustavson asked if BDR 43-545 was the "0.08" BDR that had already been introduced. Chairman Anderson clarified that it was similar to A.B. 7, which was Assemblyman Manendo's bill. Chairman Anderson reminded the Committee that the BDRs, which were just read, did not count towards the limit the Committee was allowed to introduce, since they were requested from various agencies of the state.

ASSEMBLYMAN CONKLIN MOVED FOR COMMITTEE INTRODUCTION OF BDR 14-279, BDR 15-285, BDR 16-501, BDR 16-550, BDR 43-545, BDR 16-445, BDR 43-606, AND BDR 14-532.

THE MOTION WAS SECONDED BY ASSEMBLYMAN SHERER.

Chairman Anderson called on Mr. Carpenter, and Mr. Carpenter said that he wanted to vote against BDR 43-545 from the Nevada Department of Transportation.

THE MOTION WAS WITHDRAWN.

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CHAIRMAN ANDERSON RECONSIDERED THE CONKLIN-SHERER MOTION FOR COMMITTEE INTRODUCTION OF BDR 14-279, BDR 15-285, BDR 16-501, BDR 16-550, BDR 16-445, BDR 43-606, AND BDR 14-532.

THE MOTION CARRIED.

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ASSEMBLYMAN CONKLIN MOVED FOR COMMITTEE INTRODUCTION OF BDR 43-545.

SECONDED BY ASSEMBLYMAN SHERER.

THE MOTION CARRIED. (Mr. Carpenter voted no.)

Assembly Bill 38: Ratifies technical corrections made to NRS and Statutes of Nevada. (BDR S-1027)

Chairman Anderson opened the hearing on A.B. 38. He called on Risa B. Lang, Committee Counsel, for a presentation to explain the bill.

Ms. Lang said the ratification bill, A.B. 38, was a bill that was introduced at the request of the Legislative Counsel Bureau (LCB) each session. After each legislative session, the Legal Division of the LCB codified all of the bills that had been passed during session. They published the newly codified laws in the *Nevada Revised Statutes* (NRS). During the process, the LCB would become aware of any technical corrections that would be necessary to make the statutes functional during the interim. The corrections would generally fall into one of two categories: non-substantive conflicts that had not been made during the legislative session; and corrections to inadvertent errors, such as incorrect or missed internal references. Ms. Lang explained the non-substantive conflicts would generally be a result of the Legislature requesting the legislative counsels to stop resolving the conflicts toward the end of session when time would become critical for the Legislature. The LCB would agree to stop creating conflicts amendments so that the legislative process would not be slowed down for this purpose, but rather would resolve such conflicts during codification. Because the LCB did not have specific statutory authority to have made the technical corrections during the codification process, the ratification bill, A.B. 38 was drafted so the Legislature would be able to approve all of the technical corrections that were made during the codification of the laws. Ms. Lang stated this BDR was a compilation of all the technical corrections.

Chairman Anderson asked for questions and noted that A.B. 38 consisted of 425 pages of legislation. He closed the hearing on A.B. 38 and opened the hearing on A.B. 39.

Assembly Bill 39: Directs Legislative Counsel to resolve non-substantive conflicts between legislative acts and to give effect to multiple amendments to sections of Nevada Revised Statutes. (BDR 17-1023)

Chairman Anderson called on Brenda Erdoes**,** Legislative Counsel, Legislative Counsel Bureau, State of Nevada.

Ms. Erdoes stated that A.B. 39 would amend two Sections of Chapter 220 of the NRS. It was a fairly obscure chapter that had rarely been amended. It dealt mostly with bill drafting and the codification of NRS. The two changes that were proposed were to NRS Section 220.120, and to NRS Section 220.170. She said A.B. 39 had come about as something the director of the LCB had asked the Legislative Counsel to do. This was a result of the numerous difficulties of ending the last session of the Legislature. She informed the Committee that the LCB director had asked the counsel to go back and look at all the processes that had been used to do their jobs, to assure that their time had been spent in the most constructive manner possible. She said after they had done this, they realized they could improve in the way they had handled conflicts during the session. She said they were proposing two new amendments.

Ms. Erdoes addressed the first amendment, Section 1, or NRS 220.120, which said, “the legislative counsel shall resolve all non-substantive conflicts between multiple laws enacted in any legislative session, as if made by a single enactment.” She noted that in the past, they had stacked every amendment that had been made to the same section of the NRS. She said it had been a difficult technical job, which had included a second-by-second timetable. They had been doing it the same way since the 1950s because they had been told it was required by the Constitution of the State of Nevada. The legal counsel had done some research and learned the traditional method of dealing with amendments was not actually required by the Constitution of the State of Nevada. She said that since technical advances had been made, and bills could be tracked through the aid of computers, it was no longer necessary for sections of the NRS to be tracked one at a time. They could all be tracked at the

same time. She added that they could only take advantage of these time-saving measures if A.B. 39 were passed.

Ms. Erdoes explained the second amendment, Section 2, or NRS 220.170, which regarded the official codified version of the NRS and read that someone could rebut any differences in the NRS from the *Statutes of Nevada* by showing the *Statutes of Nevada* section. This amendment stated that one could not use evidence of rebuttal if the change or difference was simply a technical change made by the legislative counsel pursuant to subsection 8, which was being added.

Ms. Erdoes noted that three other states had the same constitutional provisions as Nevada, and had implemented the same changes for a number of years, and that many other states had used this method without constitutional provisions.

Chairman Anderson pointed out that it was always difficult to move from comfort zones and tradition to modern reality. He asked the rhetorical question, "Why are you doing this?" He answered, "Because that is the way it has always been done." He claimed he was still concerned about the substantive questions. He wondered how the conflict resolutions would be handled. He asked if it would be in a major piece of legislation, or if the conflicts would be sent back to the committees that had initially dealt with them.

Ms. Erdoes replied the intent of the plan was to catch the conflict with a bill before it was sent to the Floor. She said there would be no way to alleviate the conflict system. There would still be an attorney who would sit, day after day, comparing bills to make sure that two bills would not do the same thing, or would not conflict with one another.

Chairman Anderson informed everyone in the room that while many legislators had never seen conflict notices, the chairmen, the front desk personnel, and the leadership had seen countless conflict notices, and they had not been allowed to proceed on the Floor until the conflicts had been resolved. He said that thanks to advancements in computer technology, the proposed system would eliminate a great many problems and would allow everything to run smoother. There were no questions from the Committee, so the Chair closed the hearing on A.B. 39.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS A.B. 38.

ASSEMBLYMAN BROWN SECONDED THE MOTION

THE MOTION CARRIED.

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ASSEMBLYMAN BROWN MOVED TO DO PASS A.B. 39.

ASSEMBLYWOMAN BUCKLEY SECONDED THE MOTION

THE MOTION CARRIED.

Chairman Anderson asked Mr. Horne to present the Floor statement on A.B. 38,and Mr. Geddes to present the Floor statement on A.B. 39.

Chairman Anderson opened the hearing on A.B. 40 and asked Mr. Oceguera to introduce the bill.

Assemblyman Oceguera announced he represented Assembly District No. 16 in Clark County. He said he was grateful for the opportunity to introduce A.B. 40 to the Committee. Mr. Oceguera claimed that previously an unnoticed injustice had been occurring in the Nevada civil court system. He explained that it was common that when a civil court case had been filed in a timely manner, it had later been dismissed on grounds unrelated to its merits. He explained that such a case had often been barred from being refiled due to a prior expiration of the applicable statute of limitations. Mr. Oceguera explained that A.B. 40 had been conceptionalized and designed to correct that unfair and recurrent result. He said the bill would provide an additional six-month period in which an attorney could refile a case that had been dismissed on any ground unrelated to its merits, regardless of the prior expiration of the applicable statute of limitation. Mr. Oceguera pointed out that the bill would provide a deserving litigant with two valuable resources, time and confidence–time in which to determine whether or not to refile an action, and confidence in knowing that claims that had been filed in a timely manner could not be challenged on the basis of the expiration of limitations at the time of refiling. Mr. Oceguera said a litigant who had originally filed his claim in compliance with Nevada's various statutes of limitation, only to find his case dismissed on some basis unrelated to its merits, was worthy of the consideration afforded in A.B. 40. Nevada's various statutes of limitations could be found in the NRS 11.010 through NRS 11.390. Mr. Oceguera further explained that in cases where dismissal had occurred within less than six months of when the limitations would have expired, the bill would provide an additional six months in which to refile. That would help the litigant to not be rushed to recommence his actions, for the purpose of protecting his claim against a challenge that could arise based on the expired statute of limitations. He added that it was not the purpose of A.B. 40 to allow for multiple refiling of the same cause of action under its gratuitous provisions. The bill specifically provided that an action might only be recommended a single time pursuant to the terms outlined in A.B. 40, and this bill would serve deserving litigants in the court system well. Mr. Oceguera said he had recently learned this one-page bill would have some controversy. He added that he had spent a significant amount of time the previous day talking with Mr. Lee, Mr. Andreas, and the Solicitor General about problems they had found with the bill. He said together they had agreed on an amendment to the bill that would work well. Mr. Oceguera expressed that he could understand the arguments to both sides of this bill. He could see the defense bar side, where they said a good lawyer would have filed in both places, but he could also see the other side that had to deal with the complicated rules of law regarding filing. He claimed it was not about being a bad lawyer; it was about judicial economy, and not having to file in both courts, and about someone getting their chance in court.

Chairman Anderson asked if there was a statute of limitations on the second filing.

Mr. Oceguera answered that there was not, and he requested to have his experts join him. Chairman Anderson authorized two experts to join Mr. Oceguera in answering questions: John Arrascada, Nevada Trial Lawyers Association (NTLA), and Daniel Ebihara, Staff Attorney, Clark County Legal Services, Las Vegas, Nevada.

The Chair asked Mr. Arrascada if this legislation affected civil cases and not criminal cases.

Mr. Arrascada replied that was correct.

Chairman Anderson asked for clarification of how A.B. 40 would allow for a statute of limitations to be altered, and how much time a person might be allowed to refile.

Mr. Arrascada said there would be a six-month period in which to refile. He also said that the bill applied to situations where there had been federal claims and state claims. He explained that at the current time the standard practice in the legal community was to file dual proceedings, one in state court and one in federal court. He added that from a judicial economy standpoint, it had not made sense to have dual actions running at the same time. There was also a federal statute that had tolled the statute for 30 days, so the matter could be refiled in state court.

Chairman Anderson called on Daniel Ebihara, Staff Attorney, Clark County Legal Services, Las Vegas, Nevada.

Daniel Ebihara testified from the Las Vegas location. He had previously mailed a letter of support for A.B. 40 to Mr. Oceguera. This letter was distributed to the members of the Committee at the time of his testimony (Exhibit C). He also provided a copy of his written testimony (Exhibit D). He said he was in support of A.B. 40. He said this bill provided protection for individuals who had asserted their rights, but for technical reasons their cases had been dismissed. He informed the Committee that a majority of states already had this protection, including every state that surrounded Nevada. Arizona, New Mexico, California, Colorado, and Utah were among the 26 states that had already passed similar savings provisions. This legislation would be applicable to every federal claim that asserted violations of federal and state law.

Mr. Ebihara reported one case in particular, where he had represented a young woman with a learning disability who was coerced into purchasing a vehicle that she could not afford. The dealership had been aware of her learning disability, but instead of accommodating her impairment, they had manipulated her into signing a contract. This case presented violations of the federal Americans with Disabilities Act (ADA), as well as fraud and deceptive trade practices, and other state law claims. The complaint had been filed in federal court originally, but because there had been a chance that the federal claims would not have prevailed, there had been no means for a federal case to have been transferred to state court.

Mr. Ebihara explained that a similar complaint would have to be filed in state court to prevent the entire action from being dismissed, in case the federal jurisdiction had been lost. If the federal causes of action were dismissed, the federal court could then dismiss the entire action, including the state court actions. There were dozens of reasons the federal court had to dismiss actions that had nothing to do with the merits of the case. If the statute of limitations had expired, the current laws had not allowed a case to be refiled in state court. He said that as a result, many meritorious claims that had been filed on time had never been heard due to technical problems. Mr. Ebihara said that result was contrary to the intent and purpose of the judicial system, and A.B. 40 would help claims to be heard on their merits. He also said that the courts would be less congested. He added that a defendant in a case who had a technical defense to a court action might choose to use protracted litigation tactics to delay a hearing until after the applicable statute of limitations had run out in order to foreclose the possibility of refiling an action. Such dilatory measures could be avoided if the defendant knew that the trial on the merits could still be obtained. Courts would be more likely to dismiss cases if they knew that a more appropriate venue was available. Mr. Ebihara said that to have filed under the current laws and court created remedies had been inadequate to protect the individual's rights in these instances. The federal statute permitting the 30-day extension after a claimant had voluntarily

dismissed the state claim would not prevent a duplicate filing in state court. Neither would equitable tolling with its numerous judicially created hurdles have provided the necessary security to have prevented a cautious attorney from filing a corresponding state court action. Mr. Ebihara concluded by saying that for the reasons of relieving court congestion and promoting trials based on merits, a majority of states had adopted saving provisions, tolling the statute of limitations during the pendancy of a timely filed suit.

Assemblywoman Buckley wanted it disclosed that she worked with Mr. Ebihara at Clark County Legal Services. She said it was a nonprofit organization that provided free legal help to low-income people who could not afford attorneys. She said the bill would not affect her personally, and that there was no conflict of interest.

Chairman Anderson said there had been some concerns raised by various groups and people on A.B. 40, and it was their turn to be heard. He called on Jeff Parker, Solicitor General, office of the Attorney General, State of Nevada.

Mr. Parker introduced himself and notified the Committee that he had only been in the position of Solicitor General for a week and a half, so he had brought with him Stan Miller, the Tort Claims Manager for the Attorney General. He explained that the Solicitor General handled all lawsuits against the state. He said there were a variety of claims against the state, with most of the litigation being criminal or inmate litigation, civil rights actions, and also cases such as the Yucca Mountain litigation.

Mr. Parker said that originally the office of the Attorney General had planned to testify in opposition to A.B. 40. He said they had had a conference with Assemblyman Oceguera the previous day and also had worked with the LCB counsel and some private attorneys. Together they had worked out some language for A.B. 40 that had resolved their concerns. He said a document had been distributed to the members of the Committee (Exhibit E) that was a proposed amendment. He pointed out that the material that was in brackets was the material that was proposed to be deleted. The material that was in italics was what was proposed to be added. The material that was to be deleted was the part that affected a defense counsel's right to dismiss a case early in the proceedings. He said it further complicated matters of *Nevada Rules of Civil Procedure*, Rule 41, which specifically had deemed certain categories of dismissals that would otherwise have been procedural as on the merits. He said that he and others had problems with the language that had originally been used, because they had understood that the purpose of the bill was supposed to:

- Improve the judicial economy by avoiding filing in state court and in a federal court, where jurisdiction was an uncertain issue.

- Not bar a plaintiff from refiling in state courts after the conclusion of a federal case.

He explained that the intent of the amendment had been to reduce the coverage of the original language in A.B. 40 strictly to cases that were dismissed in the federal court, based on lack of subject matter jurisdiction. They proposed new language and provided that an action could be recommenced in the proper court which referred to the subject matter jurisdiction within six months. In addition, Section 3 had new material, which had provided an essence of statute of repose. He added that should also have addressed the situation that Assemblyman Brown had alluded to earlier in the meeting. Under that material, there would be a five-year deadline from the original filing to recommence an

action. He concluded that in no event would a case proceed 11.5 years after it had originally been filed.

Chairman Anderson had to leave the meeting and announced Ms. Buckley would take the Chair. Chairwoman Buckley thanked Mr. Parker for his testimony and asked for questions.

Assemblyman Carpenter asked if it would be unnecessary to file in both courts. He wondered if a person had filed suit in federal court first, and the suit had been dismissed due to lack of subject matter jurisdiction, that person could still file suit in state court.

Mr. Parker replied that there might be some cases that would require a dual filing, but the intention was that the dual filing would not be necessary.

Mr. Carpenter asked if it was an option to file in state court, and if it there was a rule that would prevent someone from filing in state court if his or her federal court claim had been thrown out.

Mr. Parker responded that there was one other condition to the filing, and it depended on the timeliness of the original filing. He gave an example of how this would work:

> Say a case had been filed in federal court, with a two-year statute of limitations, and the case was timely filed, but the federal court did not dismiss it for some period of time beyond that two-year statute of limitations. Under the present law, with the exception of the federal statute that we mentioned, what it is intended to address is the plaintiff's refiling would not be timely in state court. The two years would have passed. So what the amendment is intended to do, and what the original bill draft proposal, is to allow for that filing.

He said that a portion of the situation had currently been covered under a federal rule, 28 USC Section 1367. He said the rule allowed for a 30-day tolling period in contrast to the 6-month period allowed in the original draft and proposed amendment.

Mr. Brown asked about a reference to comparable statutes in surrounding states. He wanted to know if they were similarly limited to the subject matter jurisdiction disposal.

Mr. Parker said he had only reviewed two such statutes given the time limitations he had had. One was from Georgia and the other from Kansas. He said those statutes had covered slightly different factual scenarios. He said that Georgia had covered voluntary dismissals. He said the subject matter jurisdiction of the proposed amendment was novel. He said they had just come up with it the previous day.

Mr. Brown told Chairwoman Buckley that there was some confusion, and he wanted to know if the language of the amendment had been agreed upon.

Chairwoman Buckley said that the language had indeed been agreed upon. She commented that it was probably only interesting to the lawyers on the Committee to have looked at what the other states had done. She thanked Mr. Parker for all of his work and his testimony. She called on former Nevada state Senator Ernie Adler, Attorney, representing Washoe County, Nevada.

Mr. Adler apologized that he had been unable to meet with Mr. Oceguera the previous day. He said he had already done some litigation on the same issue, so he had been chosen by Washoe County to represent their concerns. He said A.B. 40 was a complicated statute even though it appeared to be simple. He said it was full of difficult legal concepts. He pointed out that under 28 USC 1367(d), a litigant who had filed a federal court action with ADA claims, federal court jurisdiction claims, and what were called pendent state court claims, which were claims a person could bring into state court, could have been dismissed by the federal court. He added that they would have been allowed a 30-day period to refile in the state claims under federal law in state court. He explained there was a 30-day tolling period permitted. He said one of the complications would be the United States Supreme Court case *Raygor v. Regents of the University of Minnesota* from the year 2002. In that case the Supreme Court had said that statute did not toll the filing against the state of Nevada or any of the counties of Nevada. He said it would cause Congress to waive the immunity of the state of Nevada, when the state had not consented to having their immunity waved. He said this was an important statute to consider as it involved a waiver of the sovereign immunity to the state of Nevada.

Mr. Adler gave an example of a case he once had, filed against Washoe County in 1988. He said the county had won this case in federal district court. There had been three defense attorneys, and it went to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals upheld the judgment, and that had taken five years. Then the party who had lost the case refiled it in state court within the 30-day time period. He said it was still being litigated at the current time in state court. He said if Nevada were to extend the statute of limitations to six months, they would find that would be too long. He said he had sympathy for both sides, as he did plaintiffs' work and defense work. He said there should be some sympathy for a defendant. He said the defendant in the case he had referenced had had to put his life on hold for five years while his case went through the Ninth Circuit Court, and after all that time, he would still have to revisit the same case in state court for another five years. He said it was important to be careful about tolling. He said the time period of 30 days as it had been set up by the federal court was proper. He said the attorneys that had done the complex federal court litigation knew they would have to refile their state work claims within 30 days after the federal court had rendered a final decision. He said he had not seen many attorneys miss the deadline. He said Washoe County was not completely opposed to this bill, but that it needed to track the federal legislation. He said it should be limited to 30 days just as it was in 28 USC 1367, and it should talk about tolling. He also recommended that Rule 4 of the *Rules of Civil Procedure*, section (i), should be clearer. He said in Nevada there was a requirement that a complaint had to be served within 120 days after it had been filed, or else it would be dismissed.

Chairwoman Buckley asked Mr. Adler for clarification of whether the amendment resolved that concern, and Mr. Adler replied that the amendment did not. He said A.B. 40 needed to not apply to the state of Nevada or its political subdivisions; otherwise, Nevada was making a clear statement that they were waiving sovereign immunity.

Chairwoman Buckley thanked Mr. Adler and called on Mr. Oceguera to ask questions.

Mr. Oceguera asked if a defendant would not already know that he had been served. He said he should already have known he was involved in the litigation, and it should not have been a surprise. He also asked if the five-year limitation in the amendment would take care of prolonged problems. He pointed out that A.B. 40 was not intended to address complex litigation problems; it was designed to take care of the pro se problems for people who couldn't afford the lawsuits. He said he agreed that complex litigation attorneys would be aware of the 30-day filing period.

Mr. Adler opined that the average citizen would likely be surprised to get served in a state court case after a federal court case had ended. He said he had never heard of a non-attorney who had not been surprised. He said in federal court cases such as civil rights claims, the state court did have jurisdiction over those claims. Those claims did not have to go to federal court. He also said that the five years proposed in the amendment would be more restrictive than the federal law. In federal law, a case could take up to seven years to get through.

Temporary Chairwoman Buckley said she hated to see special rules allowed for the states and the counties. She said they should have to follow the same rules as everybody else. She said if there had been special rules that protected states and counties, the private citizen would not have had an equal opportunity in the courts. If a state had seized somebody's property through eminent domain, that person could file a civil rights case in federal court, and it could get kicked out because there was a new Supreme Court decision that had ruled states and counties were protected. She said special treatment was wrong and there should not be any special breaks.

Mr. Adler said the state is a sovereign and it does have governmental immunity.

Chairwoman Buckley replied that people have the right to demand that the state has to abide by the same rules, and should not be allowed to take advantage of someone based on a procedural tactic.

Mr. Adler said that would be a policy matter for the Legislature. Ms. Buckley agreed and thanked Mr. Adler. She called on Michael Pagni, Attorney, McDonald–Carano–Wilson, Reno, NV.

Mr. Pagni said his law firm opposed A.B. 40 for a number of reasons. He brought a document on judicial procedure for each member of the Committee to review (Exhibit F). He said there were problems with both the originally introduced language and the amendment. He said the original language seemed simple, but it was extremely broad and he thought it could have some serious unintended consequences. He claimed that there were numerous reasons a case could be dismissed, such as:

- Failure to comply with discovery requests
- Failure to comply with a court order
- Failure to prosecute in a timely order

He said there were also a number of reasons that could be related to the dilatory conduct of an attorney, and that it would be wrong to award an attorney for that dilatory conduct by giving him another chance. He said that would be contrary to the intent and purpose of the judicial system, and contrary to judicial economy. He said to have the rules in place that were already in place gave incentive to prosecute cases timely and to move them through the court system as they should be moved through the court system. He said regarding the amendment that the comments he would make would also apply to the original language. The amendment would be good in the terms that it narrowed the application to subject matter jurisdiction, but it was problematic. He said that legislation was not necessary. He pointed out that 28 USC 1367 tolled the statute of limitations for any action that was filed in federal court. He said that applied while it was pending in federal court plus 30 days. He explained that meant it was not a 30-day period, but an additional 30 days tacked onto the time a case had been pending in court. He said it applied to actions that the federal court could exercise supplemental jurisdiction over, and it applied to those claims that did not belong in federal court in the first place. He added that if a good faith error had been made and eventually

recognized, the error could be voluntarily dismissed. He said this meant there was already a remedy under the current law, which meant there was no need to make another one.

Mr. Pagni continued that there was a document in Nevada called Equitable Tolling. He made a reference to *Copeland v. Desert Inn Hotel,* 99 Nevada 823. He said this doctrine gave state court judges the discretion to look at the equities of a case and decide whether or not they wanted to toll the statute of limitations. He said a judge could decide to do this even if a statute had expired. He opined that the beauty of this was that it had given the courts the discretion to examine the particular facts and circumstances of a case, as opposed to establishing a blanket rule, which was what A.B. 40 would do.

Mr. Pagni encouraged the Committee to remember that the statutes of limitations were fundamental to the judicial system. He said they were important rules that should not be tampered with lightly. They had ensured that the claims that had been brought to courts were based on fresh evidence.

Chairwoman Buckley thanked Mr. Pagni, and since there were no questions from the Committee, she called on the final testifier, Scott Craigie, Nevada State Medical Association, Carson City, Nevada.

Mr. Craigie introduced himself and excused his colleague, Larry Matheis, Executive Director of the Nevada State Medical Association, who was supposed to have joined him at the witness table. He said the Nevada State Medical Association was opposed to A.B. 40, as they believed it was inappropriate for attorneys, who were professionals and who disciplined themselves, to have an "out" based on not having had properly filed a legal case. He said the Nevada State Medical Association thought A.B. 40 created a casual and forgiving atmosphere that would not help litigants, but could be harmful to litigants. He explained it could allow attorneys to dabble in some new areas of law without risk, and it would allow the court to give attorneys a second pass. He said they were not suggesting there would be widespread abuse with this. Mr. Craigie said he was the former chairman of the Public Utilities Commission, where they had to have very defined rules. He said in the areas where there had been small openings for discretion or opportunities of interpretation, there had always people who had taken advantage of those opportunities. He said there would need to be a level of accountability and professional responsibility that the legal décor of this state would have to live up to. He said the Nevada State Medical Association believed that A.B. 40 would also create an atmosphere of voyeurism. He suggested that a small group of individuals might try to take on litigations that they were not qualified for, or had not had any experience with.

Chairwoman Buckley asked if there were any questions for Mr. Craigie. Then she informed Mr. Craigie that she had found his testimony to be inappropriate lawyer bashing. She said she would not appreciate hearing that again in the Assembly Committee on Judiciary.

Mr. Craigie said if his testimony had been taken that way, he wanted to apologize.

Chairwoman Buckley said that Mr. Oceguera's intent had not been for lawyers to not be held accountable. She said courts typically dismissed cases based on subject matter jurisdiction, and the law had always changed. She said that intent had to be considered. She added that she had found his testimony to be completely inappropriate.

Mr. Craigie replied that when he opened up, he indicated that he had thought the intent of the legislation was appropriate.

Acting Chairwoman Buckley said he did not need to respond. She asked if there was anyone else who wanted to provide testimony on the bill. There was not, so she closed the hearing on the bill and adjourned the meeting at 9:26 am.

Acting Chairwoman Buckley reopened the meeting at 9:27 am when she learned there was one more piece of business that had needed to be addressed at that time. She said there was one more BDR that required a Committee introduction:

- BDR 15-436— Provides that Attorney General has concurrent jurisdiction with certain agencies to investigate and prosecute sale or distribution of alcoholic beverage to person under 21 years of age. (A.B. 108)

ASSEMBLYMAN HORNE MOVED FOR COMMITTEE INTRODUCTION OF BDR 15-436.

ASSEMBLYMAN GEDDES SECONDED THE MOTION.

THE MOTION CARRIED. (Mr. Mortenson was absent for the vote.)

Chairwoman Buckley adjourned the meeting at 9:28 am.

RESPECTFULLY SUBMITTED:

_____
Nancy Elder
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE:_____

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A. B. 40
(Revised February 13, 2003)

Section 1. Chapter 11 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Notwithstanding any other provision of law, and except as otherwise provided in this section, if an action that is commenced within the applicable period of limitations is dismissed [by a court on any ground other than on the merits] *based on lack of subject matter jurisdiction*, the action may be recommenced *in the proper court* within:

(a) The applicable period of limitations; or

(b) Six months after the action is dismissed, whichever is later.

2. An action may be recommenced only one time pursuant to paragraph (b) of subsection 1.

3. No action may be recommenced pursuant to paragraph (b) of subsection 1, beyond 5 years from the date the original action was commenced.

~~3~~4. Paragraph (b) of subsection 1 does not apply to a contract that is subject to the provisions of chapter 104 of NRS.

Section 2. This act applies to any action pending on October 1, 2003, or that is filed on or after October 1, 2003.

ASSEMBLY JUDICIARY
DATE: 2/13/03 ROOM: 3138 EXHIBIT E
SUBMITTED BY: Jeff Parker
PA 1135

MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Second Session
February 25, 2003

The Committee on Judiciarywas called to order at 8:30 a.m., on Tuesday, February 25, 2003. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. John Oceguera, Vice Chairman
Mrs. Sharron Angle
Mr. David Brown
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Jerry D. Claborn
Mr. Marcus Conklin
Mr. Jason Geddes
Mr. Don Gustavson
Mr. William Horne
Mr. Garn Mabey
Mr. Harry Mortenson
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

Ms. Genie Ohrenschall (excused)

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Deborah Rengler, Committee Secretary

OTHERS PRESENT:

Elana L. Hatch, Chief Deputy District Attorney, Family Support Division, Clark County, Las Vegas
Judge Scott Jordan, Second Judicial District Court, Department 11, Family Division, Washoe County

Mark Kemberling, Senior Deputy Attorney General, Office of the Attorney General, Las Vegas
Michael Pescetta, defense attorney, Las Vegas
Kristin L. Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney, and representing the Nevada District Attorney's Association, Reno

Chairman Anderson made opening remarks and noted a quorum was present. He remarked that during a work session, the Committee did not take public testimony unless expressly requested by the Committee. He called attention to the Work Session Document (Exhibit C) prepared by Allison Combs, Committee Policy Analyst. The Work Session Document contained the bills being brought forward for action with any previously submitted amendments. He pointed out that several bills would have fiscal notes attached; Ms. Combs would identify those bills to determine the potential economic impact if the Committee chose to move those pieces of legislation.

Allison Combs, Committee Policy Analyst, explained Assembly Bill 11.

Assembly Bill 11: Provides increased penalty for certain repeat offenses involving vandalism. (BDR 15-191)

Ms. Combs said A.B. 11 was requested by the interim committee to study Categories of Misdemeanors. The bill changed penalties for repeat offenses of vandalism. Those who testified in support and opposition were listed in the Work Session Document, as well as any proposed amendments.

The first amendment dealt with the protected properties section of the bill, which included existing language from another section of the law that was to be repealed and thus was included in the legislation on vandalism. There were three proposals within this amendment:

1. Add libraries to the definition of protected properties.
2. Add parks to the definition of protected properties.
3. Eliminate protected property provisions, so that all property would be treated equally.

Chairman Anderson noted that the City of Reno had submitted an amendment that proposed allowing aggregation of the value of the loss when a person committed multiple offenses.

Assemblywoman Buckley said she was not overwhelmingly convinced that the legislation was required. She expressed concern related to removing jurisdiction from the lower courts, which had more time to oversee community service. If these cases were taken to the District Court to be included with rapes, murders, and sexual assaults, the cases would most likely be plea-bargained away.

Ms. Buckley questioned whether legislation was required for second offenders. She said her preference would be to eliminate "vandalism," since this was the graffiti statute. The penalty for the second offense could be added, as well as including libraries and parks. The remaining amendments were not included in the bill and there were major implications to specify "multiple offenses" that might trigger numerous legal issues. "There is no such thing as a simple bill," Ms. Buckley said.

Assemblyman Horne recalled there had been discussion regarding a $250 threshold, which seemed extremely low. Ms. Combs clarified that the $250 level was the current penalty under *Nevada Revised Statutes* (NRS) 193.155 for a public offense. It also mirrored the thresholds that were included in the theft statutes. Mr. Horne asked if that was applied to gross misdemeanors. Ms. Combs replied graffiti was a public offense under NRS 193.155, which had a penalty for a gross misdemeanor of $250 to $5,000.

Assemblyman Carpenter questioned whether a library was already covered as an "educational facility." He expressed concern about changing the jurisdiction within the courts and suggested stipulating a "third offense" rather than multiple offenses.

Assemblyman Brown concurred with Assemblywoman Buckley; the testimony went to the nature of "taggers," or graffiti artists. Calling attention to Section 1, subsection 1, he said it was "so broad" and he particularly had a problem with the last portion of line 4, which said "otherwise damaged the public or private property without the permission of the owner." Mr. Brown stated that the legislation was ascribing a criminal penalty to what could amount to a mere accident. The legislation was addressing graffiti and the serial nature of taggers. Quoting page 2, line 8, where it stated the "second and each subsequent offense where the value of the loss is less than $5,000," Mr. Brown suggested amending the language to state that "the loss is greater than $250 but less than $5,000."

Chairman Anderson commented that the Committee did not appear to desire to move on the bill. There were two choices: indefinitely postpone the bill and take it "back to the board" to be killed at a later date, or pull it back and spend more time on it.

Assemblyman Sherer recommended that A.B. 11 be taken "back to the board."

Ms. Combs explained Assembly Bill 27.

Assembly Bill 27: Revises method for adjusting presumptive maximum amounts of child support owed by noncustodial parents. (BDR 11-244)

The bill proposed that the Consumer Product Index (CPI) would not apply to the income ranges for determining the presumptive maximum amounts of child support. One amendment submitted dealt with the calculation of interest, which would delete the provisions requiring the court to determine and include in its order the interest on arrearages and the attorney's fee for the proceeding. A copy of the proposed amendment was provided within the Work Session Document (Exhibit C, page 10).

Chairman Anderson admitted he had difficulty understanding why the Division of Welfare could not "pick up the interest payments." The person required to pay the interest penalty would probably be of a lower economic status, and less able to make the payments initially, and the chances that there would be an interest penalty could be dramatically greater. He said the person who stood before Judge Scott Jordan's court tended to be from the lower economic strata; obtaining the basic payment from those individuals would be the greatest service. Originally, Chairman Anderson expected the Division to "pick up the interest payments," but after listening to testimony he said he had changed his mind and he supported the amendment.

Assemblyman Carpenter spoke in opposition to the amendment. He said the court had the ability to determine whether the interest should be paid and waive payment if deemed appropriate. Mr. Carpenter said he favored A.B. 27 as submitted.

Assemblywoman Buckley said she concurred with Assemblyman Carpenter in support of A.B. 27 and in opposition to the amendment. There might be some low-income, noncustodial parents who might not be able to afford interest, but they might not pay child support anyway. There were numerous individuals who were able to pay their child support and should. She cautioned against creating a disincentive to paying child support on time when there was no penalty. Half of the states in the country assessed interest, Washoe County did it, and the rest of the state should do it as well. Ms. Buckley said NOMADS (Nevada Operations Multi-Automated Data Systems) could be fixed or interest could be calculated manually. Ms. Buckley suggested that when the Senate bill regarding penalties came over, amendments could include penalties being charged against those counties that were not assessing interest. The statute had been "on the books" for over ten years; Ms. Buckley said it should be followed.

Assemblyman Horne asked for clarification regarding the purpose of the legislation—reduction of the costs relative to the administrative task of collecting interest.

Elana L. Hatch, Chief Deputy District Attorney, Family Support Division, Clark County, Las Vegas, responded that A.B. 27 originated as a result of a meeting of the Title VI-D program in Nevada. She stated the concern was trifold:

1. Clark County was overburdened with 79,000 open cases, where current support and payment on arrears must be collected. Penalties and interest was "icing on the cake," but with limited resources, the primary focus was placed on what kept the children alive—food, clothing, and shelter.

2. In order to be funded at 82 percent, Clark County was required by the federal government to utilize the state computer system, NOMADS. Nevada Operations Multi-Automated Data Systems did not carry the functionality to assess interest and penalties. It was impossible to "pencil and paper" the magnitude of cases per month on penalty and interest questions and policy considerations, especially income withholding.

3. When a noncustodial parent received a paycheck on the 10th or the 25th of the month, payment on the 25th always came in after the 1st, forcing the assessment of interest and penalty. It was unlikely that paymasters would be willing to change the pay scheme to accommodate penalty and interest considerations.

Continuing, Ms. Hatch said what had been considered to be most equitable, since the collection of penalties was "on the books," was to focus on the penalties and not the interest. Talking to Leland Sullivan, the Chief of Child Support Enforcement in the Welfare Division of Nevada's Department of Human Resources, and to Judge Scott Jordan, if the Committee was interested in interest, since half the states collected interest, focus could be placed on the collection of interest and the penalties could be removed as a mandatory requirement.

Judge Scott Jordan, Second Judicial District Court, Department 11, Family Division, Washoe County, said he recognized that during a work session the Committee did not take public testimony, but he was willing to answer any questions. Chairman Anderson asked Judge Jordan to explain why Washoe County was able to calculate and collect interest, while the remainder of the state could not. Judge Jordan replied that Washoe County had been collecting interest for eight years through the District Attorney's Office. He reminded the Committee that whatever policy was enacted regarding this

provision, it would affect not only cases that went through the District Attorney's Office, but also cases such as child support ordered and collected through divorce cases not through the child support enforcement office. He said he respected what Ms. Hatch had said about the overwhelming numbers in Clark County.

Continuing, Judge Jordan said he agreed with Assemblywoman Buckley's comments that imposing interest did create an incentive for noncustodial parents to pay child support as ordered. Washoe County had a child support formula that was intended to set appropriate levels of child support for all income levels of the paying parent. In response to Chairman Anderson's comments, Judge Jordan agreed a large number of the families appearing in court were from relatively low-income levels, both the custodial and noncustodial parents, but he also saw families in all other income ranges. Some people did not pay because they could not, some because they were angry, and some had other priorities. He said the interest was an incentive to encourage individuals to pay on time. Judge Jordan said it was important that judges had the discretion, on a case-by-case basis, to determine in which cases the imposition of interest would be beneficial or detrimental.

Assemblyman Carpenter queried whether the judges had discretion currently. Judge Jordan replied that current law mandated interest but provided the judges with the discretion to waive that interest in appropriate cases.

Chairman Anderson entertained a motion on A.B. 27.

> ASSEMBLYMAN CARPENTER MOVED TO DO PASS A.B. 27 WITHOUT AMENDMENTS.
>
> ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.
>
> THE MOTION CARRIED WITH MR. ANDERSON VOTING NO. (Ms. Ohrenschall was absent for the vote.)

Chairman Anderson assigned the bill to Assemblyman Claborn to present the Floor Statement.

Ms. Combs explained Assembly Bill 33.

Assembly Bill 33: Provides additional penalty for manufacturing methamphetamines in certain circumstances. (BDR 40-817)

The measure did not have any proposed amendments. Background information on the enhanced penalty was provided on page 4 of the Work Session Document (Exhibit C).

Chairman Anderson entertained a motion on A.B. 33.

> ASSEMBLYMAN GEDDES MOVED TO DO PASS A.B. 33.
>
> ASSEMBLYMAN CONKLIN SECONDED THE MOTION.
>
> THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

Chairman Anderson assigned the bill to Assemblyman Horne, the primary sponsor, to present the Floor Statement.

Ms. Combs noted that A.B. 33 did have a fiscal impact, but not this biennium. She said she would include that information for the Assembly Committee on Ways and Means.

Ms. Combs explained Assembly Bill 40.

Assembly Bill 40: Extends period of limitations for commencing civil action after action has been dismissed under certain circumstances. (BDR 2-769)

There were two amendments proposed:

1. Jeff Parker, Solicitor General, Office of the Attorney General, proposed an amendment that would replace the language that provided circumstances under which the statute would be applied. The amendment also specified that the action might be recommended in the proper court. Finally, it placed a limitation that no action recommended pursuant to the authorization could extend beyond the period of limitations of five years from the date of the original action.

2. Ernie Adler, Washoe County, suggested that the bill be amended so that it did not apply to the state of Nevada or its political subdivisions.

While acknowledging Mr. Adler's proposal, Chairman Anderson suggested moving with the first amendment.

Chairman Anderson entertained a motion of amend and do pass on A.B. 40 with the first amendment proposed by Mr. Parker (Exhibit C, page 12) and agreed upon by the primary sponsor of the bill, Assemblyman Oceguera.

Assemblyman Brown said he supported the amendment, but he objected to the six-month period and suggested a 90-day period that would encourage quick movement through the courts.

Assemblyman Geddes said he concurred with Assemblyman Brown. He said six months was too long, the federal limit of 30 days would be an appropriate guideline, but he would accept the 90-day period as well.

> ASSEMBLYMAN CARPENTER MOVED TO AMEND AND DO PASS A.B. 40 WITH THE [PARKER] AMENDMENT IN THE WORK SESSION DOCUMENT AND THAT THE SIX MONTHS BE CHANGED TO 90 DAYS [LINE 9, SECTION 1, SUBSECTION 1B].

If it was the desire of the Committee to amend the bill to read "90 days," Assemblyman Oceguera said he would rather have had "a little wiggle room" to go to the Senate, but he accepted the "90 days."

Chairman Anderson said he preferred the "six months," but if the Committee desired "90 days," he would defer to Assemblyman Brown, who practiced in this area of law. Chairman Anderson accepted and clarified the motion.

ASSEMBLYMAN SHERER SECONDED THE MOTION.

THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

Chairman Anderson assigned the bill to Assemblyman Oceguera, the primary sponsor, to present the Floor Statement. Chairman Anderson said he would handle the amendments.

Ms. Combs explained Assembly Bill 42.

Assembly Bill 42: Requires drivers of motor vehicles to stop in obedience to direction or traffic-control signal of school crossing guard and not proceed until highway is clear of all persons. (BDR 43-109)

There was one proposed amendment (Exhibit C, page 13) on this measure from Chairman Anderson, which would revise existing law to allow schools to place portable signs such as cones in the middle lane of the school zones during school hours to indicate the presence of a school zone.

Chairman Anderson said the problem, particularly in smaller neighborhoods, had grown as individuals used side streets to avoid the major traffic jams. The cones would remind those drivers of the nature of the facility [school]. Chairman Anderson said this was a way to say, "Children are more important than the smooth flow of traffic."

ASSEMBLYMAN GEDDES MOVED TO AMEND AND DO PASS A.B. 42.

Assemblyman Geddes remarked he had talked to a number of school nurses in Washoe County, who confirmed that schools utilizing such temporary signs in the lanes had less incidents of children being "brushed" by cars. He stated he supported A.B. 42 as amended.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Brown said one child's death would require revisiting the issue regarding putting cones out; he said he supported the bill and the proposed amendment.

THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

As the primary sponsor, Chairman Anderson accepted the responsibility to present the Floor Statement and handle the amendment.

Ms. Combs explained Assembly Bill 53.

Assembly Bill 53: Enhances criminal penalty for committing assault or battery upon certain providers of health care. (BDR 15-826)

She noted the list of providers was defined in A.B. 53. The bill included providers of health care and enhanced penalties under the assault provisions of the bill. There were three amendments proposed; the first two amendments related to the definition of a "provider of health care."

- Amendment 1 proposed to clarify the "social worker" reference; currently the bill stipulated a "clinical social worker." It was reported by Bobbie Gang, representing the National Association of Social Workers, that there were different levels of licensed social workers, and she suggested removing "clinical" from the phrase.

- Amendment 2 recommended adding "lab technicians" from Fred Hillerby.

- Amendment 3 revised the battery statute, which mirrored the assault statute, to add providers of health care to the list of individuals for whom penalties might be enhanced.

Chairman Anderson entertained a motion on A.B. 53.

ASSEMBLYMAN GEDDES MOVED TO AMEND AND DO PASS A.B. 53 WITH AMENDMENTS TO "SOCIAL WORKER" AND ADDING "LAB TECHNICIAN."

Chairman Anderson did not accept the motion. He shared his personal experience with a lab technician taking his blood on a regular basis.

Assemblyman Mortenson suggested everybody should be included in the bill except the general public.

Assemblyman Gustavson voiced his concern that only selected groups of individuals were identified. If the penalties were to be enhanced, Mr. Gustavson queried why everybody was not included.

Assemblyman Conklin concurred with the Committee for the most part. He pointed out that health care providers took an oath to "keep people alive." At times, health care providers put themselves at risk to perform their jobs. Health care providers had historically been protected, on the battlefield, for example. While he considered A.B. 53 an important bill, he cautioned that too many amendments or inclusions were not necessarily a good thing.

Ms. Combs attempted to provide further explanation regarding the crimes that were included in the statute.

- Assault was defined as "intentionally placing another person in reasonable apprehension of immediate bodily harm."

- Battery was defined as "a willful and unlawful use of force or violence upon the person of another."

Assemblyman Oceguera said if it would help thinking about lab technicians, every person who had his blood drawn for a charge of driving under the influence might not be "happy" about the situation and might attempt to assault the technician. He concurred with Assemblyman Conklin that the purpose of the legislation was to enhance the penalties.

Assemblyman Horne said it was important to be mindful that these protected groups were individuals that were more likely to be in harm's way more consistently than an average person. He reminded the Committee of the enhanced penalties associated with assaulting a police officer.

Assemblyman Brown said that subsequent to the original hearing, he had reviewed the list in an attempt to justify a different treatment. For the most part, the individuals on the list fell into two categories: the Good Samaritan, and those who had a statutorily created relationship with the person who might assault them.

Chairman Anderson reiterated his understanding of the Committee's desire for A.B. 53. He entertained a motion that would remove the word "clinical" from line 13, page 2; add "lab technician" to the list; and amend language so that the battery statutes would mirror the assault statutes.

Assemblyman Mabey said he was honored to be a physician and he saw the issue from both sides. Chairman Anderson, for purposes of disclosure, said the statute would affect Dr. Mabey, as it would Mr. Oceguera.

> ASSEMBLYWOMAN BUCKLEY MOVED TO AMEND AND DO PASS A.B. 53 WITH ALL THE AMENDMENTS INCLUDED IN THE WORK SESSION DOCUMENT.
>
> ASSEMBLYMAN BROWN SECONDED THE MOTION.
>
> THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

Chairman Anderson assigned the bill to Assemblyman Oceguera, the primary sponsor, to present the Floor Statement and Chairman Anderson would handle the amendment.

Ms. Combs noted that A.B. 53 was a measure with a minimal fiscal impact to the Department of Corrections.

Ms. Combs explained Assembly Bill 63.

Assembly Bill 63: Creates exception to hearsay rule for certain testimony offered at preliminary examinations. (BDR 4-317)

No amendments were proposed to this measure.

Chairman Anderson entertained a motion on A.B. 63.

> ASSEMBLYMAN CARPENTER MOVED TO INDEFINITELY POSTPONE A.B. 63.
>
> ASSEMBLYMAN GEDDES SECONDED THE MOTION.
>
> THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

Ms. Combs explained Assembly Bill 73.

Assembly Bill 73: Revises provisions concerning certain crimes committed against older persons. (BDR 15-357)

The legislation reduced the age threshold of victims in some cases from 65 to 60 years of age, as well as required individuals to pay the cost of investigation or prosecuting the crime. There were two amendments proposed to the measure:

1. Section 6, page 8, provided that the change of the age from 65 to 60 years would not apply to crimes committed prior to the effective date of the bill.

2. Payment for restitution owed to the victim should be paid before any court-ordered amounts for the cost of investigation or prosecution.

Chairman Anderson entertained a motion on A.B. 73.

ASSEMBLYWOMAN BUCKLEY MOVED TO AMEND AND DO PASS A.B. 73 WITH THE FOLLOWING AMENDMENTS:

- KEEP THE LOWER AGE THRESHOLD [CHANGE IN AGE FROM 65 TO 60]
- DELETE THE VARIOUS PROVISIONS IN THE ORIGINAL BILL [PAGES 4 THROUGH 6] RELATED TO THE COST OF INVESTIGATION AND PROSECUTION
- ACCEPT THE FIRST PROPOSED AMENDMENT REGARDING THE EFFECTIVE DATE TO ENSURE THAT THE HABITUAL FRAUDULENT FELON STATUTE MADE SENSE
- SKIP THE ORDER OF RESTITUTION SINCE THE MOTION DID NOT INCLUDE THE COSTS OF INVESTIGATION AND PROSECUTION

ASSEMBLYMAN HORNE SECONDED THE MOTION.

THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

Chairman Anderson assigned the bill to Assemblywoman Kathy McClain, the primary sponsor, to present the Floor Statement with Assemblyman Horne acting as backup.

Mark Kemberling, Senior Deputy Attorney General, Office of the Attorney General, Las Vegas, asked if there was to be any discussion on A.B. 73. Chairman Anderson replied public testimony was not taken during a work session; a hearing had already taken place for A.B. 73 and the Committee had taken action on the bill. Chairman Anderson asked if Mr. Kemberling had identified an additional problem. Mr. Kemberling said he had concerns about the deletion of the imposition of the costs of investigation and prosecution. Chairman Anderson said Mr. Kemberling should bring forth his concerns when the bill was heard in the Senate.

Chairman Anderson announced the order in which he would attempt to take action on the death penalty bills: Assembly Bill 17, Assembly Bill 15, Assembly Bill 13, and Assembly Bill 14. He commented that additional testimony would not be taken on the bills.

Assembly Bill 17: Makes various changes concerning defense in cases involving first-degree murder. (BDR 1-201)

Ms. Combs offered an explanation of A.B. 17 and noted that it was included on page 25 of the Work Session Document (Exhibit C). The bill proposed to make various changes concerning the defense in

cases involving first-degree murder, increased presumptive limits on attorneys' fees, and required the court to appoint a team in cases of appointed counsel.

There were two proposed amendments to the measure, and a concern was raised related to the composition of the team, but no formal amendment was proposed. The first amendment would limit the appointment of such a team, under subsection 3, page 3, to only cases in which the death penalty was actually sought. The second amendment came from JoNell Thomas to raise the hourly fee for appointed counsel, page 1, line 9, which was currently $75, to $125 in capital cases (Exhibit C, page 55).

ASSEMBLYMAN CONKLIN MOVED TO ADOPT A.B. 17 WITH BOTH PROPOSED AMENDMENTS.

Chairman Anderson did not accept the motion; further discussion ensued on Section 3.

Chairman Anderson said he preferred "two attorneys and any other personnel as deemed necessary by the court, upon motion of an attorney representing the defense." He concurred with Assemblywoman Buckley's amendment that proposed to "limit the appointment of a team to cases in which the death penalty is sought." He queried whether that amendment would ameliorate his concerns. Ms. Buckley and Mr. Oceguera agreed it would cover his concerns. Chairman Anderson also included Ms. Thomas' amendment regarding raising the hourly rates.

Assemblyman Geddes voiced his concern regarding the list of specialists, but noted that Chairman Anderson's remarks resolved the issue. Mr. Geddes said it appeared that Section 2 also covered the situation where it stated that the attorney could "employ…such investigative, expert or other services as may be necessary for an adequate defense." He queried why the amendment was needed, except for the reference to the second attorney.

Risa B. Lang, Committee Counsel, clarified the proposal to "limit the appointment of a team to cases in which the death penalty is sought," was a mirror of Supreme Court Rule (SCR) 250, which was limited to cases where the death penalty was sought. Consequently, the only time a defendant would be entitled to two attorneys was in cases involving the death penalty. Chairman Anderson asked if the clarification was required. Ms. Lang responded that in order to be consistent with SCR 250, the clarification would be required.

Assemblyman Brown said he concurred with Chairman Anderson's comments and Ms. Buckley's amendment. Mr. Michael Pescetta submitted Exhibit D without testimony.

Assemblyman Carpenter said he agreed with Ms. Buckley, Mr. Brown, and Chairman Anderson. He said he had concerns related to raising the attorneys' fees to $125 an hour. Since many counties were experiencing financial problems, Mr. Carpenter suggested that $100 an hour would be more reasonable. Chairman Anderson said the $75 an hour was the going rate in 1991 when the issue was last addressed. "Inflation happened," explained Chairman Anderson, and $125 was not "outlandish." Assemblyman Carpenter said he withdrew his concern.

Assemblyman Horne said, as a law clerk, he billed just less than $125 an hour for civil work research. Thus, he considered the $125 low for a capital case.

ASSEMBLYMAN CONKLIN MOVED TO AMEND AND DO PASS A.B. 17 WITH THE FOLLOWING AMENDMENTS:

- AMENDMENTS 1 AND 2 AS PROPOSED IN THE WORK SESSION DOCUMENT, AND
- A THIRD AMENDMENT REMOVING IN SECTION 3, PARAGRAPHS 2, 3, AND 4.

ASSEMBLYMAN GEDDES SECONDED THE MOTION.

THE MOTION CARRIED. (Ms. Ohrenschall was absent from the vote.)

Chairman Anderson assigned the bill to Assemblywoman Sheila Leslie, the primary sponsor, to present the Floor Statement, with Chairman Anderson acting as backup and handling the amendment.

Ms. Combs offered an explanation of Assembly Bill 15.

Assembly Bill 15: Prohibits sentence of death for person who is mentally retarded. (BDR 14-199)

The bill established procedures to address situations involving someone who might be mentally retarded. Ms. Combs said numerous amendments were proposed and were listed in the Work Session Document (Exhibit C).

The first amendment dealt with the definition of mentally retarded (Exhibit C, page 21):

A. Recommendation by Assemblywoman Sheila Leslie to use the definition of mental retardation recently adopted by the American Association on Mental Retardation (AAMR).

B. Recommendation by W. Larry Williams to use "a diagnosis of mental retardation from a licensed, qualified professional with extensive experience in mental retardation."

C. Recommendation by Clark Peterson and Michael Pescetta to adopt Nevada's existing definition under NRS 433.174, which was the definition of mental retardation for the purpose of Chapter 39 of the NRS, "Mental Health (Exhibit C, pages 45 and 48)."

Chairman Anderson voiced his concern about the age of 18 stipulated in the definition adopted by the AAMR.

Assemblywoman Buckley said, if the lead attorney that represented the state and the defense agreed on this definition, the Committee should defer to the ones who would be litigating these issues for the next ten years.

Chairman Anderson questioned whether any Committee member had a problem accepting option "C," the current NRS definition, as the definition for mental retardation.

Assemblyman Geddes said he accepted option "C," the current NRS 433.174 definition, but questioned whether that definition was replacing the reference to "IQ of 70" in the original document. Chairman Anderson replied in the affirmative. Ms. Combs said it applied to subsection 8, page 2. Ms. Lang said it would be finalized in drafting where "IQ of 70" and subsection 8 would be

removed, to be replaced with whichever definition of "mentally retarded" the Committee chose to accept.

Continuing, Mr. Geddes asked if that would also remove the rebuttable presumption. Ms. Lang replied there was a proposal to remove the rebuttable presumption. Ms. Combs noted that the proposal to remove the rebuttable presumption was not necessarily required, but it was clearly related to the definition of mental retardation. Ms. Lang noted the definition in subsection 8 could be handled separately from the rebuttable presumption.

The second amendment included multiple choices (Exhibit C, page 22):

A. Limit to cases where a notice of intent to seek the death penalty had been filed.

B. Require motions declaring the defendant as mentally retarded to be filed no later than ten days before the trial date.

C. Holding a hearing to determine if the defendant was mentally retarded when the motion was filed: (i) current language of bill stated "if such a motion is filed, the court must hold a hearing within a reasonable time before the trial, or (ii) modify the language of the bill to state "if the defendant in his motion satisfies the court that there is a doubt as to whether the defendant is mentally retarded, the court shall suspend the proceedings until the question of mental retardation is determined."

Chairman Anderson noted there was agreement for parts A and B. In part C, there was some digression.

Assemblyman Carpenter admitted he had proposed the time limit, which was to be amended to 10 days. When a defendant waited in jail, there should be a longer period of time to file the motion, such as 30 days. Chairman Anderson said the question would be whether the resources were available to obtain the information in a timely fashion to make a valid determination as to whether to file such a motion.

Assemblyman Horne commented that 10 days was appropriate; 30 days was "far out."

Assemblywoman Buckley stated that an issue arising so close to trial would postpone the trial date anyway. Again, she said she would defer to the public defenders and district attorneys.

Chairman Anderson queried whether C(ii) posed a problem for any Committee member. It meant, if the determination was made after the trial began, the question must be set aside before the trial could continue.

Assemblywoman Buckley asked whether the defense had an opinion on the two options. Michael Pescetta, defense attorney from Las Vegas, said he did not have a problem with C(ii).

Assemblyman Oceguera concurred that C(ii) was a better option than C(i).

Chairman Anderson read the next two amendments (Exhibit C, page 23):

D. Eliminate "ex parte" hearing under Section 1, subsection 3 of the bill.

E. Examination by experts: (i) experts selected by prosecution was the existing language of the bill, or (ii) examination by multiple experts, which included psychiatrists, psychologists and/or a third expert.

Assemblyman Brown said he had assumed that the defense would have already conducted its own examination and this proposal would provide the prosecution the opportunity to perform its own investigation or examination. Mr. Pescetta replied the existing language in E(i) was intended to allow exactly that stated by Mr. Brown. It would preserve the adversary character of the proceeding. The defense would have an expert before making the motion suggesting that the defendant was retarded. The provision would require the defendant to submit to an examination by a prosecution expert. Mr. Pescetta noted that E(ii) tracked the competence statute in which the court conducted the proceeding. Once the defense made a motion, the court would hold a hearing, and the adversary process worked. Mr. Brown said he was content with either option.

Kristin L. Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney, and representing the Nevada District Attorney's Association, spoke in support of option E(ii), which would have the court appoint psychiatrists or psychologists. She noted the issue with E(i) addressed the defense's possible lack of cooperation with the state's expert. Chairman Anderson asked how option E(ii) clarified that situation. Ms. Erickson said the court would appoint two unbiased experts and it did not require the defense to seek out their own expert; it was not an "expert hunt."

Assemblywoman Buckley remarked she supported option E(i) because it was consistent with the legal process. There was an adversarial process in Nevada where both sides were allowed to choose their witnesses, cross-examine witnesses, expose bias, and then the jury decided who to believe. Nevada did not have a system where judges selected witnesses. Ms. Buckley said it made her uncomfortable and she voiced her concern that it violated the defense's ability to "take their best shot." Under option E(i) the defendant "must undergo examination." If the defendant did not cooperate, the judge would insist, and possibly preclude their testimony if he continued to not cooperate.

Assemblyman Brown said either option would be acceptable to him. He questioned if there had been a survey of the 50 states related to this issue. Nevada already had a system wherein the court made appointments regarding competency rules; there was precedence. Mr. Pescetta said he had no knowledge of any surveys; Ms. Erickson said she was not aware of any, either. Chairman Anderson offered to share the extensive materials gathered during the interim study.

Assemblyman Mabey said he was not familiar with the adversarial relationships being discussed, but he preferred option E(ii) because there would be two opinions.

Chairman Anderson questioned if the Committee supported option E(i), would the Committee be forced to support option F(ii), since it reaffirmed the cross examination of witnesses.

Assemblywoman Buckley commented that the interim committee that included both Assemblymen and Senators had selected option E(i). She questioned whether knowing the thought process of the interim committee would assist in this decision. Chairman Anderson said the interim committee had been concerned that the defendant must undergo the examination.

Mr. Pescetta said the importance of option E(i) was to provide access by the prosecution expert. If the rebuttable presumption was removed, the incentive not to cooperate would be eliminated. The defense would not achieve the rebuttable presumption and then decide not to cooperate. The defense

would submit its expert's analysis that stated the defendant was retarded. Then the prosecution could have its own expert also examine the defendant, review the records, and submit its evaluation. At the hearing the judge would decide who was more credible. In terms of the competency evaluation, it was relatively rare that the two experts did not agree. When the two experts examined the defendant simultaneously, the results were the same. Relating his experience in retardation cases, Mr. Pescetta said the prosecution and defense agreed that the defendant was retarded.

Assemblywoman Angle said she preferred option E(ii), whereby the defendant was examined by two experts because of the precedent that was set for competency and the possibility of masking tendencies of mental retardation.

Assemblyman Brown said Mr. Pescetta's last comment lent credence to the efficacious nature of the E (ii) option, noting that the two experts worked together. Mr. Brown reiterated that he supported option E(ii).

Assemblyman Carpenter stated that he preferred option E(ii); it could not be much fairer.

Assemblywoman Buckley asked Mr. Pescetta's opinion of option E(ii). Mr. Pescetta said the difference in the competency hearing was that the court had an independent responsibility to determine whether the defendant was competent where there was doubt. Assembly Bill 15 was structured so that it was the responsibility of the defense to make a motion and go forward allowing the prosecution access. He said it would be unheard of for the defense lawyer to make a motion for the hearing under the bill without having already retained an expert and received an opinion that the defendant was mentally retarded. Option E(i) allowed the prosecution to review the defense's examination report and if the prosecution agreed, the hearing could be stipulated away. Option E(ii) then added two more court-appointed experts to perform the same examination, in addition to what the defense might already have, which could incur additional costs.

Assemblyman Brown restated previous comments related to the court resolving doubt in a competency issue. He called attention to page 22 of the Work Session Document (Exhibit C), which listed procedures for cases involving issues of mental retardation, and the language that the Committee accepted was "if the defendant in his motion satisfies the court that there is doubt…" A motion brought the issue into doubt or question, and then the competency hearing and the issue of doubt could be resolved in the same manner. He thought there was reason to look to option E(ii).

Assemblywoman Buckley asked if there was a way to compromise. If the defense hired an expert in order to make the motion in good faith, one expert had been paid. She suggested amending the language to say, "require the court to appoint a second expert" or "require the court to allow the first one already retained to be one of them." Ms. Buckley asked if there was a method to "meld them" and move on.

Chairman Anderson asked if Ms. Buckley was suggesting that option E(ii) be modified, that "the court appoint a psychiatrist or a psychologist and if there was no agreement, the court may appoint a third." Ms. Buckley replied in the affirmative. Chairman Anderson said the Committee would modify option E(ii) and read E(ii) from page 23 of the Work Session Document (Exhibit C).

Assemblyman Brown said he personally preferred option E(i). There would always be someone who had predetermined that the defendant was mentally retarded. There was no benefit of neutrality under

option E(ii). He suggested that the defense and prosecution "duke it out in an adversarial proceeding." Chairman Anderson acknowledged that Mr. Brown did not like the Chair's suggestion.

Providing his perspective, Assemblyman Conklin said he preferred option E(i) for the reason that the defense, before it comes to court the first time, already had its psychiatrist/psychologist witness and already had its evaluation. If option E(ii) was accepted, evidence from the defense could skew the results no matter whom the court appoints. Once the defense had already chosen an expert and received its information, the fairest and most just system would be to allow the prosecution the same exact opportunity by finding its own witness and thereby protecting the prosecution's interest.

Chairman Anderson asked for an indication as to how the Committee was split on the two options. He suggested that the Committee accept option E(i). Assemblyman Carpenter noted if there were problems with option E(i), it could be further amended at a later date.

Continuing, Chairman Anderson reviewed the two options under "F," reading from page 23 of the Work Session Document (Exhibit C):

F. Introduction of evidence: (i) The court must allow the defendant and the prosecution to present evidence, and (ii) The defendant and prosecuting attorney may introduce evidence and cross examine one another's witnesses.

Assemblyman Brown queried whether the Committee was being asked to accept option F(ii). The full adversarial proceeding would require that ability. Consequently, he said he supported option F(ii).

Chairman Anderson said that if the Committee accepted option E(i), then it should reaffirm that by accepting option F(ii). He called attention to option "G," agreed to by both Mr. Pescetta and Mr. Peterson, which proposed to eliminate the rebuttable presumption of retardation at an IQ of 70. This concept would not be needed since the Committee was adopting the earlier definition of mental retardation.

Moving to option "H," Chairman Anderson read the three options on page 23 of the Work Session Document (Exhibit C) related to the appeal of court's determination concerning whether a defendant was mentally retarded:

- The existing language of the bill made the affirmation that it could be appealed to the Nevada Supreme Court. Chairman Anderson preferred the language in the bill.

- That a defendant "is" mentally retarded "may be" appealed to the Supreme Court. Mr. Pescetta wanted an absolute affirmation that an appeal would happen.

- The state "may appeal a finding of mental retardation."

Mr. Pescetta voiced his concern that the state had to be able to appeal pretrial before jeopardy was attached. With a finding that the defendant was retarded, thus eliminating the death penalty as an option, the challenge must be completed pretrial. The defense could appeal that determination at the end of the case, if a conviction and death sentence was imposed. That was the reason why a finding that the defendant was mentally retarded must be immediately appealable, while a finding that the defendant was not mentally retarded would not be appealable. Mr. Pescetta said either option H(ii) or H(iii) was basically the same provision.

Chairman Anderson questioned whether the legislation needed to be amended. Mr. Pescetta replied in the negative; his language was an effort at cleanup, in agreement with Mr. Peterson.

Kristin Erickson said she agreed with Mr. Pescetta in that the language attempted to make the legislation as clean as possible to enable the state to appeal if a finding was made.

Chairman Anderson asked for Ms. Lang's opinion. Ms. Lang deferred to the wishes of the Committee as to whether the language was amended. Chairman Anderson noted that proposed amendment "H" would not be amended into the legislation.

Ms. Lang asked for clarification from Ms. Erickson regarding the difference between the original language in the bill and that of option H(iii). Ms. Erickson agreed that the intent of option H(iii) was to give the state the right to appeal pretrial; once the trial began, it was too late.

Assemblywoman Buckley queried whether the Legal Division could review the existing language and add "pretrial" to make it clear.

Chairman Anderson read option "I," which dealt with post-conviction inquiries when the death penalty was imposed (Exhibit C, page 24).

Ms. Combs said two options were presented:

- Trial court must hold a hearing if there was no previous finding regarding mental retardation.
- If a motion was filed, the court must conduct a hearing.

Assemblywoman Buckley stated the Committee had already addressed this issue. She said she did not want to return to the discussion as to whether the court could appoint doctors to examine a defendant. She recommended the Committee accept option I(ii).

Chairman Anderson said the Committee would discuss retroactive application, which would add a new section to the bill specifying that "inmates currently under a sentence of death have one year…" He questioned whether this would dramatically limit the current practice.

Ms. Combs noted that the effective date of the bill would be October 1, 2003.

Mr. Pescetta said this amendment would provide substantial limitations beyond the current habeas statutes. The thought behind proposing option I(ii) was to cover post-conviction cases without limitation. The retroactive application would place a shorter limit than that for filing a habeas corpus proceeding.

Ms. Erickson said, although she was not an expert in habeas corpus proceedings, it was a concern of the state that these types of motions would be brought up years later. This statute was an attempt to limit those motions made five or ten years later.

Chairman Anderson commented that this issue was not addressed during the interim study. Mr. Pescetta stated the presumptive time limit for filing an initial habeas was a year after the conclusion of the case on appeal, after the Nevada Supreme Court had reviewed and affirmed the conviction and

sentence. The legislation would shorten that for any cases that were pending. The legislation would place those currently on death row on a track to file a motion by October 1, 2004, which would place a burden on the system in addition to the burden of raising those issues in habeas proceedings.

Chairman Anderson said that the inmates and the attorneys who defended them would pay attention to this statute. He asked if they would have an opportunity to make these types of filings anyway upon passage of this legislation. Mr. Pescetta said if an attorney had not recognized the issue already, a problem might not be addressed during the one-year time period and then be precluded from any relief, even if afterwards everyone agreed that the defendant was retarded and could not be executed.

Assemblyman Horne spoke in opposition to the retroactive application. If a defendant was not tested but was determined at a later date to be mentally retarded, the Committee did not want to execute the mentally retarded. To determine a person was mentally retarded "too late" was grossly unfair.

Chairman Anderson queried whether placing a one-year window "after trial" for the appeal process was appropriate. The defense bar should attempt to bring all those issues before the court as quickly as possible, rather than having them "waterfall" time and time again, thus carrying out a longer and continuing scenario. He questioned if that was the argument that the legislation was attempting to avoid.

Mr. Pescetta said that was not an impermissible incentive by any means; lawyers should pay attention to the issues. Unfortunately, he said his practice dealt with cases where lawyers have not found issues.

Ms. Erickson said the state's concerns had been expressed.

Chairman Anderson reviewed the amendments that were to be included in A.B. 15:

- Using the definition of mental retardation as outlined in Amendment 1C—"Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."
- Amendment 2A—"Limit to cases where a notice of intent to seek the death penalty has been filed."
- Amendment 2B—"Require motions declaring defendant is mentally retarded to be filed no less than ten days before the trial."
- Amendment 2C(ii)—"If the defendant in his motion satisfies the court that there is doubt as to whether the defendant is mentally retarded, the court shall suspend the proceedings until the question of mental retardation is determined."
- Amendment 2D—"Eliminate the ex parte hearing under Section 1, subsection 3 of the bill."
- Amendment 2E(i)—"The defendant must undergo examination by an expert selected by the prosecution on the issue of whether the defendant is mentally retarded at least 15 days before the hearing date," which was the existing language of the bill and would actually not be an amendment.

- Amendment 2F(ii)—"The defendant and prosecuting attorney may introduce evidence and cross examine one another's witnesses," an affirmative statement.
- Amendment 2G—"Eliminate the rebuttable presumption of an IQ of 70."
- Amendment 2H(iii)—"Provide the state may appeal a finding of mental retardation."
- Amendment I(ii)—"If a motion is filed, the court must conduct a hearing."

- Amendment 3—Retroactive application.

Assemblyman Horne questioned whether Mr. Pescetta had an objection to Amendment 3. Mr. Pescetta stated he did not like Amendment 3; the issue should be raised under Amendment I(ii) whenever the evidence arose. He voiced concern that Amendment 3 would place a burden upon the system. In terms of taking action on the bill, Mr. Pescetta said the legislation was more important than any part of it. He said he objected to Amendment 3; he preferred it not be included in the bill.

Assemblyman Carpenter quoted from page 3, Section 2, subsection 4, beginning at line 35, "where a court has found pursuant to Section 1 of this act that the defendant may not receive a sentence of death." He said that meant the defendant was mentally retarded, but that he did commit the murder. He said he had a problem allowing that person to be paroled if he was found guilty of murder. He voiced concern for a mentally retarded individual who was paroled and then committed another murder. He emphasized that if an individual was mentally retarded and committed a murder, he should not be paroled.

Ms. Lang responded that life with the possibility of parole (LWP) and life without the possibility of parole (LWOP) were the options in sentencing for murder of the first degree. There was also an option of a definite sentence. She said that Section 2, subsection 4, stated that if a person was not eligible for the death penalty, then he was only eligible for LWP or LWOP as currently specified. Chairman Anderson asked for verification that the legislation was not removing any current options for the court. Ms. Lang responded in the affirmative.

Assemblyman Carpenter stated that a person who was not eligible for the death penalty because he was found to be mentally retarded should not be allowed to be paroled.

Referring back to the Work Session Document (Exhibit C, page 24), Assemblyman Gustavson voiced his objection to the retroactive application (Amendment 3).

Responding to Mr. Carpenter's concerns, Assemblyman Horne said he was not ready to make an assumption regarding the recidivism of those found to be mentally retarded.

Assemblyman Geddes said he agreed with Mr. Carpenter on the issue. It was not a presumption that those individuals were more likely to commit murder again, but the entire intent and language leaned toward establishing a pattern of someone learning to deal with their disability, as well as masking and overcoming their disabilities leading up to the crime. He said the prison environment would not advance those individuals beyond that point. Mr. Geddes said he supported Mr. Carpenter's position.

Assemblywoman Buckley said Mr. Carpenter had brought up an intriguing point. She cautioned that there might be a due process concern for first-degree murder cases if it were determined that a mentally retarded person would automatically be sentenced to LWOP. The jury was allowed the discretion to consider the possibility of parole.

Assemblyman Brown said there were absolutely no grounds within the law. It would have to be determined that some of the causation or intent was actually "wrapped up" in their mental retardation to even consider that type of penalty.

Assemblyman Mortenson said he would guess that mental retardation did not necessarily mean that a person was more disposed to violence or murder than a person who was not mentally retarded. If the

group was treated differently, saying they must stay in jail, whereas another person who had committed the same crime had the possibility of parole, that was an uneven situation.

Chairman Anderson said he and Mr. Carpenter had disagreed before. He said he had an inherent fear that the prison would turn into a holding area for the mentally retarded, taking a step back to *Bleak House*, in another time period where the prisons were full of those who should have been in mental institutions. Chairman Anderson stated the Committee would move forward without Amendment 3 and let the Senate address the issue.

Chairman Anderson entertained a motion relative to A.B. 15 accepting the proposed amendments 1C, 2A, 2B, 2C(ii), 2D, 2E(i), 2F(ii), 2G, 2H(iii), and 2I(ii).

ASSEMBLYMAN HORNE MOVED TO AMEND AND DO PASS A.B. 15.

ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

MOTION PASSED. (Ms. Ohrenschall was absent for the vote.)

Chairman Anderson assigned the bill to Assemblywoman Sheila Leslie, the primary sponsor, to present the Floor Statement, with Chairman Anderson acting as backup and handling the amendment.

Chairman Anderson called a ten-minute recess.

Reconvening the meeting, Chairman Anderson said he would postpone taking action on A.B. 13 and A.B. 14 until the next scheduled work session on March 11, 2003, since both bills would involve lengthy discussions.

Chairman Anderson adjourned the meeting at 11:21 a.m.

RESPECTFULLY SUBMITTED:

_____
Deborah Rengler
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-second Session
March 19, 2003

The Senate Committee on Judiciary was called to order by Chairman Mark E. Amodei, at 8:00 a.m., on Wednesday, March 19, 2003, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chairman
Senator Maurice E. Washington, Vice Chairman
Senator Mike McGinness
Senator Dennis Nolan
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

GUEST LEGISLATORS PRESENT:

Assemblyman John Oceguera, Assembly District No. 16

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Bradley Wilkinson, Committee Counsel
Jo Greenslate, Committee Secretary

OTHERS PRESENT:

Elana L. Hatch, Chief Deputy District Attorney, Family Support Division, District Attorney, Clark County
Matthew L. Sharp, Lobbyist, Nevada Trial Lawyers Association
Ernest E. Adler, Lobbyist, Washoe County
Stan Miller, Tort Claims Manager, Litigation Division, Office of the Attorney General
Rose E. McKinney-James, Lobbyist, Clark County School District
Doreen Begley, R.N., Lobbyist, Nevada Hospital Association
Lisa Black, R.N., Lobbyist, Nevada Nurses Association
Lawrence P. Matheis, Lobbyist, Nevada State Medical Association
Neena K. Laxalt, Lobbyist, Nevada Podiatric Medical Association
Debbie J. Smith, Lobbyist, Service Employees International Union Local 1107, Operating Engineers Local No. 3
Carin Ralls, R.N.
Mary C. Walker, Lobbyist, Carson-Tahoe Hospital

CHAIRMAN AMODEI:
We will open the hearing on Assembly Bill (A.B.) 27.

ASSEMBLY BILL 27: Revises method for adjusting presumptive maximum amounts of child support owed by noncustodial parents. (BDR 11-244)

ELANA L. HATCH, CHIEF DEPUTY DISTRICT ATTORNEY, FAMILY SUPPORT DIVISION, DISTRICT ATTORNEY, CLARK COUNTY:
Assembly Bill 27 will correct an unintended result in *Nevada Revised Statutes* (NRS) 125B.070, by applying the consumer price index (CPI) to maximum presumptive amounts of child support, the cap on child support, and not applying CPI to income ranges. Last session I introduced a bill to improve the lives of children by increasing the presumptive maximum amount of child support in NRS 125B.070. This bill was widely supported. The final version of the bill passed by this Legislature had graduated presumptive maximum amounts of child support and has worked well. It also had consumer price indexing applied to presumptive maximum amounts of child support, which has also worked well. Additionally, the final version had CPI applied to income ranges, which has not worked well. The unintended result is that a noncustodial parent can be moved from one income range to another with no change in income, resulting in a large, inappropriate change in child support, either an increase or a decrease. It would appear CPI was properly applied to presumptive maximum amounts of child support and inadvertently added to income ranges.

I provided a handout (Exhibit C) containing tables. As you can see, the child support caps will fluctuate up, down, or stay the same based on CPI. That is the information on the right side of the tables. This is correct, and this is fair. In the income ranges on the left side of the tables, fluctuation is not based on noncustodial parents' income, but on consumer price indexing. This is incorrect and not fair. This is the unintended result. Assembly Bill 27 removes the CPI from income ranges and corrects this unfair, unintended result. This bill also has the support of the Washoe County District Attorney's Office, the Nevada District Attorneys' Association, and the Nevada Child Support Enforcement Program. If you would like, I could review the tables with you or I can answer questions.

CHAIRMAN AMODEI:
The record should reflect we received correspondence from Beverly Salhanick on behalf of the Nevada Trial Lawyers Association indicating their support of A.B. 27 (Exhibit D).

MS. HATCH:
We had two people in Las Vegas who planned to testify. I have their testimonies.

CHAIRMAN AMODEI:
For the record, the testimonies you referred to will be included. I will close the hearing on A.B. 27.

SENATOR NOLAN MOVED TO DO PASS A.B. 27.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:

We will now open the hearing on A.B. 40.

ASSEMBLY BILL 40 (1st Reprint): Extends period of limitations for commencing civil action after action has been dismissed under certain circumstances. (BDR 2-769)

ASSEMBLYMAN JOHN OCEGUERA, ASSEMBLY DISTRICT NO. 16:
A previously unnoticed injustice occurs in our civil court system each time a civil case that was timely filed at the commencement is later dismissed on grounds unrelated to its merits and barred from being refiled due to the prior expiration of the applicable statute of limitations. Assembly Bill 40 was conceptualized and designed to correct this unfair, recurrent result. Assembly Bill 40 achieves its objective in a simple and straightforward manner. The bill provides an additional 90-day period in which to refile a case that was dismissed on grounds unrelated to its merits, regardless of the prior expiration of the applicable statute of limitations. Assembly Bill 40 provides a deserving litigant with two valuable resources: time and confidence. Time in which to determine whether or not to refile an action, and confidence in knowing that if he proceeds, his claims, which were originally filed in a timely manner, cannot be challenged on the basis of the expiration of limitations at the time of refiling.

A litigant, who originally files his claims in compliance with various statutes of limitations, only to find his case dismissed on some basis unrelated to its merits, is worthy of the consideration afforded by A.B. 40. For your information, Nevada's various periods of limitations can be found in *Nevada Revised Statutes* (NRS) 11.010 through 11.390. In cases where dismissal occurs with less than 6 months of the original period of limitations remaining, the bill provides an additional 90 days in which to refile, so the litigant is not rushed to recommence his action for the sole purpose of protecting his claims against the challenge based on the expired statute of limitations. However, it is not the purpose of A.B. 40 to allow multiple refilings of the same case of action under its gratuitous provisions. Therefore, the bill specifically provides an action may only be refiled once pursuant to the terms outlined in A.B. 40. Assembly Bill 40 will serve deserving litigants and the civil court system well.

I thought we were videoconferencing to Las Vegas and I have a witness there who knows this issue well. Also, A.B. 40 was revised and amended on the Assembly side to limit this to subject matter jurisdiction. Secondly, we originally believed 6 months would be an appropriate time frame, but we limited it to 90 days. The federal statute is 30 days, so we extended that to 90 days. We also added the action may not be recommenced more than 5 years after the date it was originally commenced.

CHAIRMAN AMODEI:
The record will reflect we have testimony from Daniel Ebihara of Clark County Legal Services (Exhibit E).

SENATOR CARE:
Regarding lack of subject matter jurisdiction, what if the attorney made a mistake? It seems if the attorney is allowed to skirt on a potential claim for malpractice, for example, no harm is done if in the end the party is allowed to refile the claim. Another question I have is what happens if the case is dismissed because of sanction, failure to prosecute, and the court says it is going to dismiss the case with prejudice; it is over. Ostensibly, that does not go to the merits, and under A.B. 40, the attorney could refile. I am certain this must have come up on the Assembly side. Do you have any thoughts on that?

ASSEMBLYMAN OCEGUERA:
Yes, that did come up. I do not believe this is a "Save the bad lawyer bill." I believe this is more about judicial economy and not requiring a person to file in federal court and State court, but giving him the option to, if the case is dismissed in whichever court is chosen, go back and file in the other court. Currently the person would have to file in both courts.

SENATOR CARE:
I believe you are talking about the U.S. Supreme Court, which has in the last few years, some believe, come down on the 10th Amendment regarding states' rights. There is federal legislation, but it would have to be interpreted in such a manner that the remedy lies in state rather than federal court. An attorney files in federal court and finds out from the U.S. Supreme Court several years later federal court was not the correct court in which to file. He should have filed in state court.

ASSEMBLYMAN OCEGUERA:
The claim that came to mind was actually a contract claim under State law and an American with Disabilities Act (ADA) claim. The plaintiff filed an ADA claim; it went forward and was dismissed. He was unable to file the contract claim under State law. Assembly Bill 40 would give claimants 90 days in which to file in the other court, State court, in the example given. A federal statute already allows 30 days.

CHAIRMAN AMODEI:
You said under federal law, this mechanism is already in place, but currently has a 30-day time frame?

ASSEMBLYMAN OCEGUERA:
That is my understanding.

CHAIRMAN AMODEI:
Are you aware of other states' laws? Is this unusual?

ASSEMBLYMAN OCEGUERA:
No, I do not believe it is unusual at all. There are several states that have a savings clause.

SENATOR MCGINNESS:
Regarding the used car deal you mentioned, tell me what the person was unable to file so I can understand how this bill would work.

ASSEMBLYMAN OCEGUERA:
The case that brought this to my attention had several causes of action. Sometimes there are complicated issues regarding the choice of law you will use. There was a contractual issue over a used car or a car deal, and there were federal disability issues. The attorney in the case chose to file in federal court, went through proceedings, and by the time the case was finished, the State claim had tolled. The statute of limitations had ended, and the case could no longer be filed in State court.

SENATOR MCGINNESS:
Was the case in federal court dismissed?

ASSEMBLYMAN OCEGUERA:
I cannot tell you the specifics, but I would say it was dismissed on something other than its merits.

SENATOR MCGINNESS:
I was wondering if an attorney has to make the decision of whether to file a federal case or a State case. If he makes the wrong choice, as Senator Care mentioned, would he want to try the other court?

MATTHEW L. SHARP, LOBBYIST, NEVADA TRIAL LAWYERS ASSOCIATION:
I am president of the Nevada Trial Lawyers Association. We are here in support of A.B. 40. Assemblyman Oceguera has done an excellent job explaining the substance of his bill. I might be able to add information to address the specific questions just asked. In order to file a case in federal court, you must have what is called subject matter jurisdiction, which is specifically created by statute. It has to be an amount in controversy in excess of $75,000 involving a citizen from the State of Nevada and a citizen from another state. The second method is what is called a federal question, such as a claim under the ADA. When a lawyer pleads a complaint, he may plead alternative relief or may have several causes of action. The example Assemblyman Oceguera presented was two claims, a breach of contract and a claim under the American with Disabilities Act. Through the course of discovery, where you begin to learn more of the evidence of the case, you may find you have more evidence supporting the breach of contract claim than you do the ADA claim. Under that example, the court may say, "You do not have a claim under the ADA; therefore we do not have any jurisdiction." Under that context, the court has not said, "Your case is without merit." It is just that your case is a breach of contract case. In that case it makes sense to allow the litigant to go to State court to proceed with his breach of contract claim.

There are a lot of tactical issues you reach in deciding whether to begin in federal or State court. This is a means of protecting the litigant's ability to ultimately have his case heard on its merits.

SENATOR WIENER:
On the 30- and 90-day difference, could you explain why the State would have a longer time period?

MR. SHARP:
I think this would address Senator Care's concerns as well. I gave an example of where the breach of contract claim was meritorious and needed to proceed. The litigant needs an opportunity to decide whether it would make sense to proceed with a breach of contract claim. A 30-day time frame is not long enough for the attorney to evaluate the matter with his client. It requires litigants to file cases and perhaps dismiss later on. The 90 days gives additional time for the litigant to consider how he is going to proceed in light of the federal court's ruling.

SENATOR MCGINNESS:
Could you file both cases at the beginning?

MR. SHARP:
In a situation in my office, where I have a case that involves a State cause of action, such as a breach of contract and federal causes of action, we face a tactical decision. We could file some cases in State court, in which case we serve the complainant, and the defendant would have an opportunity to do what is called remove the case to federal court. In that case we would have a State court case removed to federal court. Down the road, the federal court may say, "We do not have jurisdiction," and it would go back to State court. That is one example. There may be a situation in which we know this is principally a federal court question, so we will not file in State court. We file in federal court, then the court dismisses our federal complaint, and we are left without any remedy in State court. It is the

second area that you are dealing with in this bill. To answer your question, sometimes you can file in State court, and other times you do not, and A.B. 40 would provide protection to that litigant.

SENATOR MCGINNESS:
I am not a lawyer, so that was "yes?"

MR. SHARP:
Yes, Senator McGinness, that was a yes.

SENATOR CARE:
If you file in State court, the case stays in State court; there is no federal question. Let us say you have an attorney for the party failing to prosecute. I have seen this happen, the case just sits there for 4 1/2 years, so the court dismisses the case with prejudice. Arguably, because you have not reached 5 years yet, the plaintiff could run out, find another attorney, and file again.

MR. SHARP:
I have never had the experience of not pushing a case for 5 years and had it dismissed, but it is my recollection when a case is dismissed on subject matter, it would be without prejudice and could be filed later on in State court. In a situation such as a motion to remand, the case is simply remanded back to State court. If the case is dismissed with prejudice, does that effectively imply there has been a ruling on the merits, and based upon your inability to act, you do not have a chance to come back? I do not know the answer, but I could research it for you, Senator.

SENATOR CARE:
I think Rule 41 does actually use the language, "judgment on the merits" or something to that effect. Let us say it is a sanction because the conduct has been so egregious by a particular attorney, such as destruction of evidence. Whether that is on the merits, I do not know. If they use those words, "with prejudice," maybe that is what it would be.

MR. SHARP:
I think in the context of a lawyer using an abusive litigation tactic, such as destroying evidence, the client is bound to that conduct. There was a products liability case in Nevada where the attorney did not preserve the product, and because of that the Supreme Court later dismissed the case with prejudice. The attorney did not do anything intentional, but the client was responsible for the attorney's conduct. I believe in that context, A.B. 40 would not protect the attorney.

SENATOR CARE:
Do you know if there is any matter on appeal pending before the Supreme Court where this question is addressed? For example, the case Assemblyman Oceguera presented, is an appeal perhaps already on the way?

MR. SHARP:
I do not know the answer, Senator Care.

ERNEST E. ADLER, LOBBYIST, WASHOE COUNTY:
We have a case pending before the Nevada Supreme Court on this issue. There is a U.S. Supreme Court case that says after you have fully litigated something in federal court, even if the State claims are not dismissed with prejudice, you cannot utilize the federal tolling statute to refile again in State court because it is a waiver of the State's 11th Amendment immunity, and only the State can

voluntarily waive that immunity. The reason I am here for Washoe County is because we do have a case pending before the Nevada Supreme Court. We are confident we will win under current State law, and the U.S. Supreme Court and A.B. 40 do not affect our case. If this was to pass and you had subsequent litigation, essentially you could have a case you litigated 5 years in federal court, in which the judge at the end issued an order dismissing all claims except the State-pending court claims, which he does not dismiss because he does not consider those. They could be re-litigated for another 5 years in State court against the county or the State. That is the reason Washoe County is not supportive of this bill, but there is litigation going on regarding this question.

CHAIRMAN AMODEI:
Could you provide the citation for the Supreme Court case to Bradley Wilkinson?

MR. ADLER:
Yes, there are states that have passed these statutes saying they believe it is important for people to be able to litigate against the State in both federal and State court back-to-back. That is a judgment call of this committee.

CHAIRMAN AMODEI:
Mr. Sharp, on page 2 of A.B. 40, section 1, subsection 2, there is an exemption for contracts under the Uniform Commercial Code. Can you tell me the rationale?

MR. SHARP:
I do not have an answer to that. I will get the answer for you. In respect to Mr. Adler's testimony, I do not think the intent of A.B. 40 is to add any substantive rights a litigant may have. This is a procedural issue. One thing I would like the committee to consider is that within the context of a litigant who takes a frivolous position, whether on the defense side or the plaintiff side, we have adopted the loser pay statute, which we have addressed numerous times in medical malpractice hearings. There are remedies against a lawyer who does the types of things Mr. Adler was discussing, and those are certainly not something our organization supports.

STAN MILLER, TORT CLAIMS MANAGER, LITIGATION DIVISION, OFFICE OF THE ATTORNEY GENERAL:
Our office proposed the amendment to A.B. 40. I am here to answer any questions regarding the amendment. Perhaps I can clarify something else for the committee. It seems there is concern a case could be dismissed as a method of sanctioning the attorney. It is my belief the attorney would not be able to bring that litigation back based on this bill, because the dismissal was not based on the fact the court did not have jurisdiction.

MR. ADLER:
I would like to put this into the context of an actual case. We had a case in which I represented Washoe County, and there were three other defense attorneys. We litigated the case for approximately 5 years. We won on summary judgment eventually, and it went all the way to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals told the other counsel they did not have a case. Washoe County and the other defendants spent in excess of $200,000 in attorneys' fees.

ASSEMBLYMAN OCEGUERA:
I believe the issue Mr. Adler is speaking of is taken care of in A.B. 40. If it is summary judgment, it is done, and we would not have the opportunity to refile under this bill. Mr. Adler is hinting the cities

and counties should have immunity from these kinds of cases. I do not believe that should be the policy we put forth.

CHAIRMAN AMODEI:
We have the testimony of Mr. Ebihara. I am going to leave the record open, even though we are done with the hearing on A.B. 40 for today, in case he would like to submit additional information.

ROSE E. MCKINNEY-JAMES, LOBBYIST, CLARK COUNTY SCHOOL DISTRICT:
I want to indicate at the onset that we did not participate in the discussions on the Assembly side. When this reprint surfaced, I received comments from our general counsel, and I only had the opportunity to briefly speak with Assemblyman Oceguera this morning. I would simply like to frame some of our concerns and perhaps Mr. Miller, Mr. Sharp, or Assemblyman Oceguera can respond to those concerns, which I will attempt to put on record. The concerns are as follows: A.B. 40 would extend the statute of limitations to any action which was commenced within the statute of limitations, but subsequently dismissed for any reason other than the merits of the action; would potentially reward those who failed to prosecute their actions; would violate the 120-day rule for service of process; would violate the 5-year rule for bringing matters to trial whose cases were dismissed as a sanction; and would allow plaintiffs to shop for the right judge by allowing multiple dismissals. I did have, through electronic communication with our general counsel, the opportunity to ask him to look at the reprint to see if any of these comments would be revised or modified as a result of the first reprint, and he indicated they would remain the same.

The final concern is A.B. 40 may result in an increase in the cost of litigation to the district, and as you know, the district has a substantial amount of litigation due to its size and scope of jurisdiction. Those are the comments Mr. Hoffman wanted me to share with you. I am not a litigator, and can therefore not speak from the standpoint of the practical implications. I apologize to Assemblyman Oceguera if these issues were within the scope of the discussions in the Assembly or those that resulted in the modifications for the first reprint.

CHAIRMAN AMODEI:
I will close the hearing on A.B. 40 subject to the ability of the bill sponsor to supplement, either in writing or through additional testimony.

I will open the hearing on A.B. 53.

ASSEMBLY BILL 53 (1st Reprint): Enhances criminal penalty for committing assault or battery upon certain providers of health care. (BDR 15-826)

ASSEMBLYMAN OCEGUERA:
Assembly Bill 53 concerns NRS 200.471, which is Nevada's criminal statute concerning assault. I have distributed copies of letters in support of A.B. 53 (Exhibit F). In general, this measure amends NRS 200.471 to provide if an assault is committed against a provider of health care, the punishment for the assault will automatically be enhanced. Let me give you a definition of assault. An assault occurs when a person intentionally places another in reasonable apprehension of immediate bodily injury. A person who is convicted of committing an assault is guilty of a misdemeanor. If an assault is committed against a person whose occupation places him or her within one of the occupational categories defined under the statute, for example, peace officer, prison guard, judge, and even taxicab driver, the punishment is automatically enhanced from a misdemeanor to a gross misdemeanor.

In reviewing the occupational categories defined under this statute, it strikes me that each category listed is an occupation, the nature of which places the employee at an increased risk of harm because of the public nature of the employee's job duties. It seems fitting, therefore, if one of the persons performing one of the listed occupations is a victim of assault, the punishment should automatically be enhanced.

It has come to my attention that health care providers: doctors, nurses, paramedics, social workers, and so forth, are not included in the occupational categories defined in the statute. Therefore, under the criminal assault statute, if, for example, a doctor, a nurse, a student nurse, an emergency medical technician, or a paramedic is assaulted while performing his or her job duties, the assault is only punishable by a misdemeanor. Assembly Bill 53 amends NRS 200.471 to provide that if an assault is committed against a provider of health care, the punishment is automatically enhanced to a gross misdemeanor. Such an amendment would bring Nevada's law in line with those in Arizona, California, Idaho, Iowa, and Washington, to name a few forward thinking states. Nevada's health care providers, which include, but are not limited to, Nevada's 3587 emergency medical technicians (EMTs), 268 emergency room physicians, and 2731 licensed nurse practitioners, are deserving of a detriment against assault and an automatic enhancement. There are health care providers in nursing and medical professions here to testify on A.B. 53.

DOREEN BEGLEY, R.N., LOBBYIST, NEVADA HOSPITAL ASSOCIATION:
The Nevada Organization of Nurse Leaders' president, Sandy Rush, is at the Grant Sawyer State Office Building. She was told her testimony would be transmitted via facsimile to this location. I am the nurse executive for the Nevada Hospital Association and will read my testimony (Exhibit G) on their behalf.

LISA BLACK, R.N., LOBBYIST, NEVADA NURSES ASSOCIATION:
I have brought written testimony, which I will read (Exhibit H).

CHAIRMAN AMODEI:
The record will indicate the testimony of Sandy Rush will be included (Exhibit I).

LAWRENCE P. MATHEIS, LOBBYIST, NEVADA STATE MEDICAL ASSOCIATION:
I am the executive director of the Nevada State Medical Association. We are pleased to support A.B. 53. There is a thin line of essential services we rely on socially. Every Nevadan depends upon the police officer, the firefighter, the educator, the emergency room team, the urgent care team. Some have concerns this creates a new right. We all have the same protection. The law says we cannot be assaulted. The question is, what happens when those we rely on for essential services are assaulted? It is not just an assault on that individual. It is an assault on all of us. It weakens our defenses, socially and culturally, and it is the sad reality that health care professions report with growing alarm the violence they now face in everyday circumstances. Virtually every emergency physician I talk to has a catalog of stories of violent incidents against the physician, the nurse, or the team, and the level of violence is growing. The expectation of violence is now assumed. Those are exactly the points in our health care system that are currently most vulnerable and where we have the hardest time keeping staffing levels sufficient to ensure we can provide emergency services.

Bills such as this serve, as much as anything, a public policy purpose of showing the commitment of the people of the State of Nevada to those who provide those essential services, and in letting them know their problems are understood. I believe A.B. 53 is more important for simply what it does, than

for the broader statement it makes in reaffirming why we value these various services. I encourage you to support A.B. 53.

SENATOR CARE:
First of all, I am not going to justify whether we ever should have included some of these occupations in previous sessions. I think you could perhaps make a case that in an emergency situation, such as an ambulance attendant on the scene of a shooting or a disaster, you would not want someone interfering with the services. However, I have a difficult time with occupations such as a marriage counselor or a podiatry hygienist. There was testimony from Ms. Black about the practitioner who was killed by an estranged husband, and we have letters about disgruntled students who killed doctors, that I do not believe had anything to do with their profession. I can see the emergency situation, but I do not understand it beyond that. I am not denigrating the professions at all, but as far as carving out a niche in the law for some occupations, I agree in emergency situations, but I am not certain about outside emergency situations.

MR. MATHEIS:
If restricted just to emergency responders, I believe part of the problem is we increasingly have a variety of other frontline facilities: urgent care centers, quick care centers, that are also, increasingly, scenes of violence. This is partially due to drug abuse and related things that physicians and nurses in outpatient and ambulatory settings can face. Until recently, these situations were only seen in the emergency department. Our emergency departments now are so strained and thin, we are seeing what, up until a few years ago, would only have been seen in emergency rooms, in other settings in the health care system. I believe we will begin to see the hostility and frustration in public health departments as we confront possible issues of concern about anthrax, smallpox, and so forth. We have already witnessed some tense situations a year ago when the anthrax concern arose. People panicked and there were serious security problems at public health departments.

I believe the settings in which violence occurs against health care professionals providing essential services have expanded. This is a sad commentary of where we are. I do not know if I could make a case for every one of the listed professionals for every setting, but I do not know every setting that exists. Almost all of these parties, at one time or another, or someone in one of the listed professions, have been in a setting in which there is now an enhanced possibility of assault happening to them or their colleagues.

SENATOR TITUS:
I agree. I believe some of this is meritorious, but I am looking at a podiatry hygienist, a dental assistant, an intern pharmacist; this definition is so broad. I also wonder, you hear more about professors being shot than you do about nurses being shot, and I see school employee, but I do not know if university employees are included. There are a number of instances of violence against university professors. Are they covered in A.B. 53? They are not, and they are certainly on the frontlines as much as podiatry assistants.

MR. MATHEIS:
Senator Titus, I certainly would support protecting our professors.

SENATOR NOLAN:
There are a number of professions in A.B. 53. In 1995 I brought a bill forward that addressed emergency workers, and there was a whole line of nurses in emergency rooms, EMTs, paramedics, and doctors who came forward with stories of being battered and assaulted. There were also cases I

had witnessed of nurses trying to treat people who spat on them, hit them, and sent them to the ground. My experience was limited to emergency rooms in the trauma center when these types of things were happening. We talked a lot about trying to prevent these acts and what we are doing here is enhancing the penalty for those who have already committed the act. In the case of the transit operator, that was a bill I brought forward in 1999 after a number of bus drivers were assaulted. One was knocked senseless while driving a bus carrying people. The transit industry said they were going to post signs saying according to NRS statute … if you assault a transit operator, it is an enhanced penalty with a minimum fine of $5000, and there actually was a deterring effect. They have had a decrease in the number of assaults on transit drivers. I have not yet heard how we are going to apply this to reduce the number of assault or batteries on health care providers.

MR. MATHEIS:
I do believe you will see each facility deal with it in terms of their perceived risk. I believe you will see signage, and the psychological impact is there will be a sense of more protection. It is just a step, but it is an affirmative step that says there are services being done that we expect to be done, that we all mutually benefit from having done; and when someone assaults the person doing those services, they are really assaulting us collectively.

NEENA K. LAXALT, LOBBYIST, NEVADA PODIATRIC MEDICAL ASSOCIATION:
I am here today representing the Nevada Podiatric Medical Association and the Nevada Dental Hygienists Association to say we are in support of A.B. 53.

DEBBIE J. SMITH, LOBBYIST, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1107, OPERATING ENGINEERS LOCAL NO. 3:
This testimony is given on behalf of health care workers from SEIU who were not able to testify from Las Vegas. At least monthly our union receives reports from nurses and other health care workers belonging to SEIU, who are victims of violence in the workplace. By way of example, a nurse in the trauma resuscitation department at University Medical Center (UMC), who was 7-months pregnant, was inserting an intravenous line into a patient when the patient tried to kick her. The doctor working on the patient had to subdue the patient. While trying to discharge a patient from the UMC pediatric department, the charge nurse was slapped in the head and pushed into a wall. A nurse who rushed to her aid was struck as well. Nothing was done except to file a report. A pediatric triage nurse had a computer thrown at her when a parent thought she was taking too long to assess the child's condition. A certified nurse's assistant was slapped by a patient and wrestled to the ground in a separate incident and actually prevented the stabbing of a nurse on a third occasion.

Each year more than 1000 people die as a result of violent acts in the workplace. More than 20,000 nonfatal, violent incidents resulted in missed days of work according to the U.S. Bureau of Labor Statistics. Nonfatal incidents are most common among social service and health care workers. The Occupational Safety and Health Association cites several factors that make health care workers particularly vulnerable to violence in the workplace. The stress and trauma inherent to health care, the unrestricted movement throughout hospital facilities, more patients with chronic mental illness living in the community, and the growing number of patients with substance abuse problems and histories of violence, make nurses and health care workers uniquely vulnerable. While our members are sensitive to the stresses facing patients and their families, we cannot tolerate any patient or family member who strikes out against the caregiver. Nurses and other health care workers give their lives to make sure we get well. They are the eyes and ears for patients in the hospital, making sure patients get the best health care possible. Assembly Bill 53 sends a public message, one that we honor the commitment nurses and health care workers make to our community, and any act of violence against a health care

worker will not be tolerated and will be prosecuted to the full extent of the law. We very much support A.B. 53, Mr. Chairman, and hope your committee will also.

SENATOR WIENER:
I am looking at the definition of assault, "intentionally placing another person in reasonable apprehension of immediate bodily harm." Regarding the incident where the estranged husband of the patient attacked the nurse, related in the letter from Ms. Black, let us say there is a lot of anger directed at the patient and the nurses in the room. Though not directly in front of the nurse, the nurse is in the proximity and has some apprehension even though she is not a party to the threat. Would this apply to that as well with the nurse in proximity, but not the victim of the assault?

MS. SMITH:
I do not believe I am the right person to answer. Perhaps the sponsor of the bill or staff should answer that question.

BRADLEY WILKINSON, COMMITTEE COUNSEL:
I believe it is up to the prosecutor to decide whether that would meet the definition of intentionally placing a person in reasonable apprehension of immediate bodily harm. Under those circumstances, it seems to me unlikely you would have a prosecution if it were not directed at a specific person.

SENATOR WIENER:
If a person is flailing about in anger, all he would have to do is turn his attention toward someone else in the room, even though not the intended party. I am trying to see how far this reaches, because there is an enhancement penalty.

MR. WILKINSON:
It is fact specific, so it is difficult to answer that question without knowing the exact circumstances.

CARIN RALLS, R.N.:
I am representing Operating Engineers Local #3 and over 800 Nevada health care providers. We are here in support of A.B. 53. The U.S. Bureau of Justice Statistics reports that during 1993 to 1999, an average of 1.7 million violent victimizations per year were committed in the workplace. Of that number, 429,000 per year occurred against nurses alone as compared to 84,400 taxi drivers, who this statute already protects. Working as a nurse, I have been physically attacked. Researchers have found that emergency room nurses believed violence was a part of their job. Why should we allow the abnormal to become normal in our workplace? On behalf of health care providers and myself, we urge you to pass A.B. 53.

MARY C. WALKER, LOBBYIST, CARSON-TAHOE HOSPITAL:
For the record, I would like to say violence occurs not only in the urban settings, but also in smaller, rural settings. We have had instances in Carson-Tahoe Hospital of assaults and stalking of nurses and health care workers. We would appreciate your support of A.B. 53.

SENATOR MCGINNESS:
You said you had a stalking problem? Is that because they were medical workers or was it personal?

MS. WALKER:
It was because they were medical workers caring for patients. They were stalked afterwards.

CHAIRMAN AMODEI:
Assemblyman Oceguera, could you tell me what the amendment was in your committee on the Assembly side?

ASSEMBLYMAN OCEGUERA:
Mr. Chairman, two things, the first is I forgot to include battery. The assault and battery statutes are mirrored, and I did not add battery to the charge. That was one amendment, and I believe the other amendment added a laboratory technician and deleted clinical from therapist in order to include any therapist.

CHAIRMAN AMODEI:
Mr. Wilkinson, I am looking for either new or existing language that talks about the new people in section 1, subsection 1, paragraph (c), being in the scope and course of their employment when the crime occurs.

MR. WILKINSON:
Actually, the way the statute reads, as an element of the crime, the person has to be performing his duty, and the person charged has to know or should know the person is acting in that category.

CHAIRMAN AMODEI:
Where is that?

MR. WILKINSON:
Page 2, line 39 of A.B. 53, states the person is performing his duty.

CHAIRMAN AMODEI:
Committee, I do not know whether you want to attempt to refine the listing in A.B. 53 in committee or on the floor?

Subject to anybody on the committee who feels strongly and comes up with an amendment on the floor to refine the list, I think the policy issue is fairly defined. In the context of it getting late in March, I would accept a motion to do pass, unless somebody has an amendment in mind right now.

SENATOR NOLAN:
I will make a motion to do pass, but I really think we need an amendment that exempts these people if, for example, a podiatrist is trying to remove an ingrown toenail or a dentist drills without anesthetic.

CHAIRMAN AMODEI:
Is there discussion regarding potential floor action or anything else on the motion to do pass?

SENATOR NOLAN MOVED TO DO PASS A.B. 53.

SENATOR TITUS SECONDED THE MOTION.

SENATOR CARE:

I will meet with Senator Nolan about a possible amendment on the floor. I have already expressed my perhaps narrower reading of what we need to do here, but as an underlying policy decision, I do not have a problem with the bill.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
Seeing no further business to come before the committee, we are adjourned at 9:25 a.m.

The meeting is reconvened at 9:26 a.m. to introduce Bill Draft Request (BDR) 14-441.

BILL DRAFT REQUEST 14-441: Revises various provisions governing sex offenders and offenders convicted of crime against child. (Later introduced as Senate Bill 397.)

SENATOR MCGINNESS MOVED TO INTRODUCE BDR 14-441 TO THE COMMITTEE.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
The meeting is adjourned at 9:27 a.m.

RESPECTFULLY SUBMITTED:

_____
Jo Greenslate,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chairman

DATE:_____

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-second Session
May 8, 2003

The Senate Committee on Judiciary was called to order by Chairman Mark E. Amodei, at 8:30 a.m., on Thursday, May 8, 2003, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chairman
Senator Maurice E. Washington, Vice Chairman
Senator Mike McGinness
Senator Dennis Nolan
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

GUEST LEGISLATORS PRESENT:

Assemblywoman Barbara E. Buckley, Assembly District No. 8

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Bradley Wilkinson, Committee Counsel
Jo Greenslate, Committee Secretary

OTHERS PRESENT:

Glen Whorton, Assistant Director, Operations, Northern Nevada, Department of Corrections
Kara Kelley, Lobbyist, President and Chief Executive Officer, Las Vegas Chamber of Commerce
Ernest E. Adler, Lobbyist
Nancy E. Hart, Deputy Attorney General, Office of the Attorney General
Stan Olsen, Lieutenant, Lobbyist, Las Vegas Metropolitan Police, and Nevada Sheriff's and Chief's Association/South

CHAIRMAN AMODEI:
We will start the work session with Assembly Bill (A.B.) 60.

ASSEMBLY BILL 60: Provides that decision of juvenile court to deny certification of child for criminal proceedings as adult may be appealed. (BDR 5-280)

CHAIRMAN AMODEI:
Mr. Anthony, would you give us a brief recap of A.B. 60.

NICOLAS ANTHONY, COMMITTEE POLICY ANALYST:
Assembly Bill 60 specifies the decision of juvenile court to deny certification of a child as an adult in a criminal decision, is a final judgment from which an appeal may be taken. There was no opposition to this bill. It was heard in committee on April 16. There was an amendment offered by Dr. Siegel. It is the same amendment he offered previously on another bill.

MR. ANTHONY:
The amendment was to assure a juvenile facing certification fully understands and comprehends the proceedings. It is included in the Work Session Document (Exhibit C. Original is on file in the Research Library.) in the legal-sized attachment, and in the bound Work Session Document under tab A. The only other committee concerns raised during the hearing were regarding what other states currently use, and if Nevada would be in the minority as far as following the proposed procedures.

SENATOR CARE:
In looking at Dr. Siegel's amendment, I support the bill, and I would support the amendment if it were really necessary. I do not know if the trial court would address this issue in the first instance. In reading the bill, it basically says if the juvenile court can do it, the prosecutors ought to be able to do it too. The issue of certification and whether the defendant would understand and comprehend the proceedings, I do not know. My question is if that determination would have already been made at the trial court level when it comes to the certification issue in the first instance. I do not know the answer. I suppose, since we are running out of days, we could move to amend, adopt the amendment, and straighten it out later.

SENATOR WIENER:
As I recall, during the hearing I asked which crimes are certified. There are different levels of crimes at which certification is mandatory. I do not recall testimony clarifying whether developmental or mental capabilities are taken into account. Do you recall whether that was answered during testimony? I believe it was the nature of the act that created the certification environment.

MR. WILKINSON:
The specific acts this amendment addresses are sexual assault involving the use or threatened use of force or violence against the victim or an offense or attempted offense involving the use or threatened use of a firearm, if the child was 14 years of age or older at the time of commission of the offense. Currently, the law provides for mandatory certification unless the court specifically finds, by clear and convincing evidence, the child's actions were substantially the result of substance abuse, emotional, or behavioral problems and such substance abuse or problems may be appropriately treated through the jurisdiction of juvenile court. This would provide an additional exception to mandatory certification for those specific offenses.

CHAIRMAN AMODEI:
Even without the amendment, I would assume if there were an issue regarding competency, it would still be germane to the process of certification.

MR. WILKINSON:
I believe the issue of competency, although I do not believe there are specific provisions in the juvenile chapter, would be something addressed just as it would for an adult.

CHAIRMAN AMODEI:
I do not have an objection to the amendment. It probably codifies what is already happening.

SENATOR TITUS:
I would support the amendment, based on what Mr. Wilkinson said. You would think this would be understood, but it is not stated specifically or explicitly. I believe we ought to add this amendment.

> SENATOR CARE MOVED TO AMEND AND DO PASS A.B. 60 WITH THE AMENDMENT FOUND UNDER TAB A OF THE WORK SESSION DOCUMENT.
>
> SENATOR WIENER SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.)

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CHAIRMAN AMODEI:
I will open discussion on A.B. 40.

ASSEMBLY BILL 40 (1st Reprint): Extends period of limitations for commencing civil action after action has been dismissed under certain circumstances. (BDR 2-769)

CHAIRMAN AMODEI:
Senator Care, do you have some amendments?

SENATOR CARE:
I would offer the following proposed amendments, which are not contained in the Work Session Document (Exhibit C). I have been corresponding with Assemblyman Oceguera, but I do not know where he stands on the proposed amendments. The amendments are as follows, in conceptual form, "If a party, who has had an action dismissed for lack of subject matter jurisdiction in federal court, wishes to recommence in State court, it would only be by leave of the State court judge." I believe the court would like to know why it was not filed in State court in the first instance.

The second proposed amendment is:

> No new claims for relief could be contained in the State court action that was not contained in the federal action in the last amended complaint. Any findings in fact and conclusions of law in the federal action would be law in the case in a recommenced action in State court.

Perhaps this amendment could be considered. Again, I am not quite prepared to make a motion because I have not spoken to Assemblyman Oceguera, specifically, about these proposed amendments.

CHAIRMAN AMODEI:
I appreciate that, and actually, I would not take a motion today based on these amendments being available for review today. Mr. Wilkinson, if you could make these proposals available to individuals who have expressed an interest in the issue to give them a few days to review them, we will revisit A.B. 40 in our next work session.

Mr. Anthony, with respect to A.B. 14, there is a reference on page 1 of the legal-sized portion of the Work Session Document (Exhibit C) to Mr. Pescetta's proposed amendment regarding burden throughout the penalty phase. Has anything been submitted to you in writing, or was it just from testimony?

ASSEMBLY BILL 14 (1st Reprint): Makes various changes to penalty hearing when death penalty is sought and revises mitigating circumstances for murder of first degree. (BDR 14-198)

MR. ANTHONY:
The amendment was actually in a memorandum sent to the committee after the hearing. The memorandum went through some case law, and I put that in. It is a counter proposal (Exhibit D). If the committee chooses not to adopt A.B. 14 in its current form, Mr. Pescetta would like language added stating the State bears the burden. That is why it is typed that way, Mr. Chairman.

CHAIRMAN AMODEI:
If you would get with Mr. Pescetta and Mr. Wilkinson to see what the amendment would look like, conceptually, we will review it at the next work session.

SENATOR TITUS:
I recall one of the things mentioned by Mr. Peterson was that you could not tell the jury the victim's family cannot ask for the death penalty. I support the bill whether or not the person has the last opportunity to plea for his life, but what about the bill with the additional jury instruction, "You have to realize the victims cannot ask for the death penalty." Could we look at that possibility?

CHAIRMAN AMODEI:
Yes, that is fine. It is my intention to go through all the bills today, even though I may not take a motion on some of them. If any member of the committee has a thought they would like explored for potential amendments for the next work session, please feel free to speak up.

We will next address A.B. 73.

ASSEMBLY BILL 73 (1st Reprint): Revises provisions concerning certain crimes committed against older persons. (BDR 15-357)

MR. ANTHONY:
Assembly Bill 73 lowers the age from 65 to 60 years for enhanced penalties for elder abuse or crimes against elders. During the hearing there was an amendment proposed by Mr. Kemberling of the Office of the Attorney General. It is attached as tab B to the Work Session Document (Exhibit C). The amendment attempts to address providing an intermediate level of penalty. In addition, at the hearing Ms. Coyne from the city of Las Vegas submitted an amendment, which is attached as tab C (Exhibit C). Her amendment seeks to make the penalty a felony. The committee has a policy choice of whether to go with Mr. Kemberling's lesser penalty or a felony, as Ms. Coyne suggested.

SENATOR CARE:
I spoke with Mr. Kemberling this morning. I am looking at the proposed amendment. If the first offense is a gross misdemeanor, does the municipal court still have jurisdiction? I am comfortable with the proposed amendment. Does the amendment include what was deleted on the Assembly side? That was the cost of investigation and prosecution. I guess not. I was going to suggest putting that

back in, but if it was left with the remainder of the proposed amendment, I am agreeable to it. It would be a gross misdemeanor for the first offense, and for a subsequent offense, the penalty would be a felony.

CHAIRMAN AMODEI:
The amendment at tab B (Exhibit C) would restore the bill to its original configuration, which would include those costs.

SENATOR CARE:
If the Chairman would entertain a motion, it would be to amend and do pass to restore the cost of investigation and prosecution and to adopt the language we received this morning; first offense gross misdemeanor and then it bumps up for the second and subsequent offenses to a felony.

CHAIRMAN AMODEI:
What about the city of Las Vegas proposed amendment at tab C (Exhibit C)?

SENATOR CARE:
They have withdrawn that, I believe.

SENATOR CARE MOVED TO AMEND AND DO PASS A.B. 73 WITH THE AMENDMENT FOUND AT TAB B OF THE WORK SESSION DOCUMENT.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.)

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CHAIRMAN AMODEI:
We will now address A.B. 78 (Exhibit C).

ASSEMBLY BILL 78 (1st Reprint): Revises penalty for certain sexual offenses committed against children and prohibits suspension of sentence or granting of probation to person convicted of lewdness with child. (BDR 15-1031)

SENATOR MCGINNESS:
This is the one in which I was concerned about the fiscal note. Is this the one that has a fiscal note in 2023 or something?

SENATOR NOLAN MOVED TO DO PASS A.B. 78.

SENATOR CARE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.)

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CHAIRMAN AMODEI:
We will address A.B. 89(Exhibit C).

ASSEMBLY BILL 89: Removes exemption for landlords who own and personally manage four or fewer residential dwellings from provisions relating to landlords and tenants. (BDR 10-952)

SENATOR CARE:
There are no proposed amendments to A.B. 89, and I believe it is overdue. I believe everyone agrees in the year 2003 there is no longer a reason to have this exemption.

CHAIRMAN AMODEI:
The notes here indicate you had concerns about disclosures on the landlord. Have those been satisfied?

SENATOR CARE:
Yes, Mr. Chairman. I believe that is the subject of another Legislative Session.

SENATOR WIENER MOVED TO DO PASS A.B. 89.

SENATOR CARE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.)

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CHAIRMAN AMODEI:
Mr. Anthony, would you please summarize A.B. 92?

ASSEMBLY BILL 92 (1st Reprint): Makes various changes to requirements governing filing and form of certain documents. (BDR 8-271)

MR. ANTHONY:
Assembly Bill 92 relates to the uniform commercial code and secured transactions. At the hearing, Mr. Anderson from the secretary of State's office offered an amendment to standardize the fees for utility filings. It is attached as tab D to the Work Session Document (Exhibit C). Also at the hearing, Mr. Daykin offered an oral amendment to simply change the word "such" to "the" on page 2, line 34 of A.B. 92. Those are the two amendments for the committee's consideration.

SENATOR TITUS MOVED TO AMEND AND DO PASS A.B. 92 WITH THE AMENDMENT AT TAB D OF THE WORK SESSION DOCUMENT AND TO CHANGE THE WORD "SUCH" TO "THE" ON PAGE 2, LINE 34 OF THE BILL.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.)

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CHAIRMAN AMODEI:
We will address A.B. 103(Exhibit C).

ASSEMBLY BILL 103 (1st Reprint): Requires Director of Department to submit list to each county clerk providing certain information concerning offenders who were released from prison or discharged from parole during previous month. (BDR 14-532)

GLEN WHORTON, ASSISTANT DIRECTOR, OPERATIONS, NORTHERN NEVADA, DEPARTMENT OF CORRECTIONS:
Assembly Bill 103 is a proposal put forward by the Department of Corrections to correct an archaic piece of statute that, in the corporate memory of the department, has never been used. It was established when communications and technology were not as broad as they are today. As the law is currently configured, it requires us to return a certified copy of a judgment of conviction to the county clerk, which in actuality, has never been done. We have checked with staff members who were in the department as far back as 1968. For many years, the Department of Corrections did not get certified judgments of conviction from our largest constituent, Clark County. We got minute orders, so there is no way to return these. It is counterintuitive for people to seek information regarding discharge from prison from county clerks. We get those calls every day our business is open. We now have a Web site indicating individuals who had been in the Department of Corrections in the past and those currently in the department.

In our experience, we have only had one complaint regarding this issue, which is actually a revenge lobby based upon a classification action I consummated on the individual of whom you spoke, Mr. Chairman, while he was incarcerated. He probably spoke to you about my being disingenuous regarding a lawsuit. In fact, this proposal was put forward years before that individual ever complained. As this issue is currently configured, it will actually provide more information to county clerks than they would get if there were a strict following of this statute, because it leaves out people who discharge parole. The way the language is presented, this corresponds to our practice of providing county clerks a monthly list of those people discharged from prison and discharged from parole. Of course, paroles are a major portion of what we do.

SENATOR NOLAN MOVED TO DO PASS A.B. 103.

SENATOR CARE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
A proposed amendment to A.B. 118 has been submitted.

ASSEMBLY BILL 118: Revises provisions regarding when sentence of death may be imposed. (BDR 14-856)

MR. ANTHONY:
This morning, Mr. Graham handed me a proposed amendment. It would combine A.B. 118 and A.B. 14. We can go ahead and distribute it to the committee (Exhibit D). The amendment provides for a mitigating circumstance for determination of age. It would take the juvenile question from A.B. 118 and combine it with A.B. 14.

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CHAIRMAN AMODEI:
If you would make the proposed amendment available to the committee and members of the public who are interested, we will take up A.B. 118 (Exhibit C) at the next work session.

We will address A.B. 156 (Exhibit C).

ASSEMBLY BILL 156 (1st Reprint): Abolishes plea of guilty but mentally ill and reinstates exculpation by reason of insanity. (BDR 14-131)

MR. ANTHONY:
Assembly Bill 156 abolishes the plea of guilty but mentally ill. During the hearing Mr. Graham offered an oral amendment to delete some language, but I understand he has since retracted his oral amendment since it was the language previous to "guilty but mentally ill." Additionally, Senator Washington proposed amending Senate Bill (S.B.) 403 into A.B. 156. Per the Chairman's request, Dr. Brandenburg of the Division of Mental Health and Developmental Services testified as to the need for standardizing assessments for evaluating competency to stand trial, which was the content of S.B. 403. Dr. Brandenburg said he believed this would be a good vehicle to move the amendment.

SENATE BILL 403: Requires certification of persons who provide reports or evaluations to courts regarding competency of defendants. (BDR 14-1245)

SENATOR WASHINGTON MOVED TO AMEND AND DO PASS A.B. 156 AMENDING S.B. 403, IN ITS ENTIRETY, INTO A.B. 156.

SENATOR MCGINNESS SECONDED THE MOTION.

SENATOR TITUS:
Mr. Chairman, would you remind me of what happened to S.B. 403, originally?

SENATOR WASHINGTON:
We thought it was a fee bill. It basically certifies those persons who evaluate the competency of defendants. Dr. Brandenburg told me it is a process currently done routinely. This would codify the process and put it into statute. Dr. Brandenburg said his division would charge a fee to do the evaluations, and it is necessary to continue operations. I told Dr. Brandenburg I would try to find a vehicle to amend S.B. 403 into A.B. 156.

SENATOR TITUS:
Did it just miss the deadline or was it exempt?

SENATOR WASHINGTON:
Actually, it was my fault. I spoke against S.B. 403 because I thought it was a fee bill.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
We will now address A.B. 160(Exhibit C, tab E).

ASSEMBLY BILL 160 (1st Reprint): Makes various changes to provide protection to certain persons. (BDR 3-160)

MR. ANTHONY:
Assembly Bill 160 requires the court to order an assignment of income to a party who obtains an extended order for protection that includes an order to pay child support. During the hearing there was no opposition. Assemblywoman Buckley offered an amendment to provide an alternative method of service for a party following at least two unsuccessful previous attempts to serve the party. The amendment has been reviewed by interested parties and incorporates comments from Ms. Blomstrom, Ms. Kelley, and Ms. Dugan. I believe the amendment is drafted to assuage their concerns, raised at the hearing, as to how A.B. 160 relates to employers.

CHAIRMAN AMODEI:
Mr. Wilkinson, I am looking through the amendment, and I do not have a problem with the ability, when service is frustrated, to serve an individual in a business context. Does the amendment contain anything clarifying when serving a business there is no liability for the employer, in a civil sense, for failure to properly deliver service? I do not want to make the business liable if the service document was put on the wrong desk or something of that nature.

MR. WILKINSON:
Mr. Chairman, there is no specific language in the proposed amendment currently stating there is immunity from liability for the employer under those circumstances. We could certainly add that.

CHAIRMAN AMODEI:
Does the committee have any objection to adding that provision?

KARA KELLEY, LOBBYIST, PRESIDENT AND CHIEF EXECUTIVE OFFICER, LAS VEGAS CHAMBER OF COMMERCE:
I had that discussion with Assemblywoman Buckley, and not being an attorney, I want to share with you what she relayed to me. She said if you are served, for example, at home, and your mother answers the door, as long as someone in the household is over 18, you are considered served, even if it was not personally handed to you. She believes that is equally applicable in a business context and did not believe the employer would fall under liability. Apparently, in terms of torts, there are certain standards you would have to meet. Assemblywoman Buckley did not believe it meant any of those standards of liability. That being said, she did say she did not have a problem with making a Senate Floor statement declaring legislative intent, but the purpose of A.B. 160 was not to further burden the employer and create liability.

CHAIRMAN AMODEI:
I appreciate that, but would feel better if the language was in there. Is there any objection by the committee to adding such language to this amendment? At this point, if somebody wishes to amend and do pass with the amendment at tab E and the additional language discussed about employer liability, the chair would accept such motion.

SENATOR TITUS MOVED TO AMEND AND DO PASS A.B. 160 WITH THE AMENDMENT AT TAB E OF THE WORK SESSION DOCUMENT AND ADDITIONAL LANGUAGE DISCUSSED ABOUT EMPLOYER LIABILITY.

SENATOR WIENER SECONDED THE MOTION.

SENATOR MCGINNESS:
That makes me feel a little bit better, but even in the amendment, tab E on page 2, it says they have to leave a copy of the documents with the manager of the office of human resources or another similar person, and that person shall accept service, identify another appropriate person, and contact the adverse party. I still think it puts way too much burden on the business. I will oppose the motion.

SENATOR TITUS:
Could I hear from legal or Mr. Anthony in response?

SENATOR CARE:
Under rule 4 of the Rules of Civil Procedure, when you serve somebody at his or her place of residence, and I believe the rule says a person of suitable age, the rule does not mandate the person who actually receives the summons and complaint deliver it to the defendant. I do not believe there is any corresponding legal duty.

MR. WILKINSON:
I do not believe there is any specific provision that puts a burden on a person who accepts service.

CHAIRMAN AMODEI:
Senator Titus, as the maker of the motion, do you have any objection to withdrawing the motion to allow the committee to consider these issues further?

SENATOR TITUS:
I hate to see the bill held up. Do we need more information or is anybody going to change his or her mind?

CHAIRMAN AMODEI:
Speaking only for myself, I guess the concern is not with the concept of having a business available as a service point. The issue arises by putting affirmative duties that are not put on those who are served individually in a residential context, on the business. Are we creating duties that apply in a business context that do not apply in a personal context?

SENATOR TITUS:
I appreciate that, but a business context is very different from a personal context. It is not nearly as structured, you cannot hold it as accountable. I would, perhaps, have more concern if we did not have Ms. Kelley speaking for the chamber of commerce, saying business has looked at this and seems to think it would work.

ERNEST E. ADLER, LOBBYIST:
I was not going to testify on this bill, but I have a client who has a primary human resources office in Nevada, with employees in Colorado, Arizona, and California. If you do not have some sort of obligation for the human resources office to transmit the documents to the employee, the employee may never receive them. The employee may be working at one of the out-of-state offices when the service occurs. Unless there is some means of transmitting the documents, the employee will not even know he or she was served. From an employee standpoint, that could be devastating.

NANCY E. HART, DEPUTY ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL:

I believe, in response to Senator McGinness' concerns, section 2 in the proposed amendment, on page 2 of tab E, is intended to offer several choices to the employer rather than levels of burden. My understanding is paragraph (c) was added quite recently, at the employers' suggestion, as an alternative way to convey the information to the adverse party without having to go find him or her. They could simply contact the adverse party and have him or her make arrangements to come in and accept service personally. This was added as a way to alleviate any burden in certain instances. In other words, section 2, as has been mentioned, is articulating different ways in which the actual papers could be delivered to the adverse party.

SENATOR NOLAN:
Senator Adler brought up a good point that I believe we have not given due consideration. I am uncomfortable at present with the motion. The primary employers in this State are large casinos. When papers are served, they go through a human resources department, where they will end up on a desk. The only way to get documents to the correct person would be to require it, and if we require it, there is usually some kind of penalty for not delivering the documents. I believe the bill has merit, but I agree with the Chairman there should be some type of amendment to provide additional protection to business. I would vote against the motion but am in favor of looking at it again.

SENATOR TITUS:
Since we have the sponsor of the amendment here, perhaps we could hear from Assemblywoman Buckley.

ASSEMBLYWOMAN BARBARA E. BUCKLEY, ASSEMBLY DISTRICT NO. 8:
As we said in our testimony, the numbers in the State of these orders not being served is overwhelming; 4000 out of 12,000 were not served in Clark County alone. We need another tool. Many other states have adopted this with no problems. I was so encouraged when the chamber of commerce, the manufacturers association, all of the employers involved said, "This affects our employees who are not getting their child support," and stepped up to the plate and worked on this amendment with me. Usually, employers' first thoughts are, "Ooh, I do not want any laws that might give me more to do." They did not see it that way and offered language to make it better, whereby they could call the employee in, serve it themselves, and not be involved. That, I thought, said a lot for the employers in our State.

I missed most of your discussion, so I am not sure where your concern was directed. Someone suggested there should be a sentence in the amendment to make it clear employers are not liable if it takes them 2 days to serve, and the person got beaten up in the meantime. If you want to add that, fine. I do not believe it is necessary though, because right now we have 4000 orders not being served.

Domestic violence victims are not serving the sheriff for not serving them. Quite frankly, they just want to be left alone, and sometimes an order does not mean much, as we see by the killings. What it does is make those who are not violent to finally pay child support. That is why they evade this order, because they do not want to pay, and this finally makes them pay. Certainly, later they can bring up, "I didn't get it in my hand," but at that point, who cares, because you finally have them in court, something they have been evading all this time.

SENATOR CARE:
What if we, just to get the bill moving, add something like, "An employer who can demonstrate a good-faith effort to comply with what is proposed in the amendment, precludes a cause of action against the employer."

ASSEMBLYWOMAN BUCKLEY:
If that raises your comfort level, it is fine with me.

CHAIRMAN AMODEI:
Speaking for myself, I do not believe there is intent to not move the bill. It is not a question of holding up the bill; it is just to get an appropriate comfort level. I am mindful of your comments about the people in support of A.B. 160. Clearly, I do not believe the future of the bill is in question. It would have been my hope we could have slipped this until next week to give those concerns a chance to be discussed in the same manner you have indicated. However, the maker of the motion wants to leave the motion on the floor, and it is pending. We will vote on the motion. Regardless of what happens with the motion, it would be the intention of the chair, if the bill does not move today, to revisit it in a work session on Tuesday. Maybe nothing will change, but I believe there have been concerns in terms of the mechanics of the business portion of it, people need to become comfortable with that part. It has nothing to do with the overall policy, which I believe is fully supported.

SENATOR WASHINGTON:
I think A.B. 160 is a good bill, and I believe the concerns regarding employers are justifiable. With respect to the maker of the motion, if the intent of the chair is to bring the bill back up, I will support the chair, as long as we have the opportunity to bring it back and address the concerns facing the employer for cause of action, at a later time. If the vote were to kill the bill, I would oppose that.

SENATOR TITUS:
I appreciate that, so let me amend my motion to amend and do pass to include the language that Senator Care suggested to make it clear this is not a cause of action and businesses cannot be held liable. I believe that should address those concerns.

> SENATOR TITUS MOVED TO FURTHER AMEND A.B. 160 TO INCLUDE LANGUAGE AFFIRMING THIS IS NOT A CAUSE OF ACTION AGAINST EMPLOYERS WHO MAKE A GOOD-FAITH EFFORT TO COMPLY WITH THIS LEGISLATION.
>
> SENATOR WIENER SECONDED THE AMENDED MOTION.
>
> THE MOTION CARRIED. (SENATOR MCGINNESS VOTED NO.)

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CHAIRMAN AMODEI:
We will address A.B. 163(Exhibit C).

ASSEMBLY BILL 163 (2nd Reprint): Makes various changes to provisions concerning financial practices. (BDR 7-383)

MR. ANTHONY:
Assembly Bill 163 prohibits a person from willfully offering items into evidence known to be forged or fraudulently offered. It also increases from 1 to 2 years the statute of limitations for suing a person who offers or sells a security in violation of Nevada's security laws. A proposed oral amendment was

offered by Senator Amodei to make section 5 of the bill only apply to publicly traded companies. No other comments or concerns were noted.

CHAIRMAN AMODEI:
Just to refresh the committee's recollection, section 5 provisions and testimony on the bill were aimed at those who engage in the securities market and to provide protection for individuals in the securities market through the programs in the Secretary of the State's Office. There were concerns about those gaming entities closely held and family operations who did not want to, since they do not engage in offering securities for sale to the public, have to engage in the services of another accounting firm to comply with a safety valve measure not applying to their securities, since they hold them all. Are there any thoughts from the committee on this amendment?

There is another issue that has arisen with respect to S.B. 298, which was the resident agents bill we passed out of this committee and this House, which appears to be in choppy waters in the Assembly.

SENATE BILL 298: Makes various changes to provisions pertaining to business. (BDR 7-987)

CHAIRMAN AMODEI:
At this point in time, with respect to A.B. 163, if anybody is so inclined, I would entertain a motion along the lines, to amend and do pass A.B. 163 with the section 5 amendment and to amend S.B. 298, in its entirety, into A.B. 163.

SENATOR WASHINGTON MOVED TO AMEND AND DO PASS A.B. 163 WITH THE SECTION 5 AMENDMENT AND TO AMEND S.B. 298, IN ITS ENTIRETY, INTO A.B. 163.

SENATOR MCGINNESS SECONDED THE MOTION.

SENATOR TITUS:
I originally voted against S.B. 298, so on the Senate Floor I will oppose the amendment because I voted against the bill, but support the bill once it passes.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
We will address A.B. 166 (Exhibit C, tabs F and G).

ASSEMBLY BILL 166 (1st Reprint): Makes various changes concerning transfer of right to receive payment pursuant to structured settlements. (BDR 3-231)

SENATOR TITUS:
My proposed amendment is under tab G of the Work Session Document (Exhibit C). This is the sunshine amendment, and we have worked hard on this amendment to take into account everybody's concerns. The original concerns included language to the effect a public hazard that caused, or might, or could cause harm. We eliminated "might" or "could" cause harm and left it as something that actually causes harm. We have narrowed the definition of public hazard to "serious" public hazard. We also narrowed the definition of harm as physical injury, and now you see "substantial risk of

death, or serious permanent disfigurement." We have eliminated prolonged pain, which is part of the existing definition of physical injury.

Finally, the concern expressed by Mr. Bacon was this would release information about the terms of the settlement. We do not care about that. We do not want to know how much somebody got paid, that is not important. What is important is the hazard itself. This now narrows the language to details about the hazard, not details about the settlement. It also keeps in place protection for any trade secrets that would not have to be revealed, which is something else with which businesses are concerned. All it is doing is saying part of a settlement cannot be a provision that information about a serious public hazard itself be kept a secret.

CHAIRMAN AMODEI:
It is the intention of the chair, since the Work Session Document was just handed out this morning, to allow review of the proposed amendment by the committee and others interested in this area. We will revisit this in Tuesday's work session.

Assembly Bill 250 is the Assembly speaker's version of the majority leader's bill. My purpose in calling it up today, since there was a lot of testimony and written material provided, is to receive any discussion, concerns, or requests for additional information from committee members before revisiting it in a subsequent work session.

ASSEMBLY BILL 250 (2nd Reprint): Makes various changes regarding certain acts relating to terrorism, weapons of mass destruction, biological agents, chemical agents, radioactive agents and other lethal agents, toxins and delivery systems and requires resort hotels to adopt emergency response plans. (BDR 15-49)

SENATOR WASHINGTON:
Just to follow up, I have not been tracking Senator Raggio's bill (S.B. 38), but I understand it may be in murky waters in the Assembly, as well. Does staff know where S.B. 38 is, currently?

SENATE BILL 38 (1st Reprint): Makes various changes regarding certain acts relating to terrorism, weapons of mass destruction, biological agents, chemical agents, radioactive agents, toxins and delivery systems. (BDR 15-89)

CHAIRMAN AMODEI:
I know there were proposed amendments concerning definitional things. Does anybody have any objections to taking a look at the Lusk, Grace, and Siegel amendments found under tabs H, I, and J, respectively (Exhibit C), concerning building arson definition, the definition of weapons of mass destruction, and combining them into one, so we can look at it during the next work session?

SENATOR CARE:
I have no objection. I was going to offer a suggestion myself about weapons of mass destruction. The concern here, by some people, is when you start talking about a weapon, and that is a firearm, although I believe firearm is a subset of weapon or device. I suggest something to the effect, a weapon of mass destruction means any device intended, or intended by its user, to create a great risk of death or substantial bodily harm for more than one person. That could be anything, even a legitimate weapon. It depends how it is used or how it is intended to be used.

CHAIRMAN AMODEI:
Include Senator Care's comments in anything we look at in terms of proposed amendments for the next work session.

SENATOR CARE:
I have a couple of other points to ponder. In section 7, I believe there was discussion about causing substantial destruction, contamination, or impairment of any building. I know what we all mean by that, I think, but I believe there was discussion about making what we mean by that more clear. A building could be just a shed. That was somewhat broad, I thought. There is also in the first section of A.B. 250, reference to resort hotels. We discussed having response plans, not just for resort hotels, but for example, shopping malls or any place where large numbers of people could be expected to congregate on personal property. I have not talked to the speaker of the Assembly about this, but I do not know if we want to confine this to resort hotels or include other locations.

CHAIRMAN AMODEI:
With respect to those issues, if you want to talk with Assemblyman Perkins and get with Mr. Wilkinson concerning anything necessitated by those discussions, that will be fine for the next time we see the bill in work session.

SENATOR WIENER:
On the language, "distressing or frightening," will that also be prepared in amendment form for discussion at the next work session?

CHAIRMAN AMODEI:
Yes.

Are there any other requests from the committee for further work sessions on A.B. 250?

SENATOR TITUS:
Senator Care talks about the other places. Staff, see if you can come up with a definition of other places, like fashion malls, as well as resort hotels.

CHAIRMAN AMODEI:
There has also been discussion about appropriate plans for centers of government in A.B. 250. I believe Senator Rawson had talked about whether or not there is a need to create an interim committee to study this issue.

SENATOR WASHINGTON:
In the Senate Committee on Legislative Affairs and Operations, we looked it up in the Constitution of the State of Nevada, and there are provisions that allow for the seat of government to be relocated, at the request of the Governor, in times of State emergencies. Since power to convene the seat of government in a different location is already permitted to the Executive Branch, we did not take any action on it.

CHAIRMAN AMODEI:
With respect to planning, Mr. Anthony, check with Senator Rawson to see if he is moving forward, or if he is interested in moving forward, with what he is working on in the context of this legislation, and report back to committee members before the next work session.

With respect to A.B. 274, A.B. 397, and A.B. 419 (Exhibit C), all heard in my absence, I have requested the disc so I can review the testimony. It is my intention to move all three bills to the next work session. If there are any discussion items now, for purposes of preparing for the next work session on those matters, please feel free to mention them.

ASSEMBLY BILL 274 (1st Reprint): Increases length of notice before person who is 60 years of age or older or who has disability may be evicted from certain periodic tenancies under certain circumstances. (BDR 3-1128)

ASSEMBLY BILL 397 (1st Reprint): Makes various changes concerning proceedings in actions concerning eminent domain. (BDR 3-1082)

ASSEMBLY BILL 419 (1st Reprint): Provides that landlord of dwelling units intended and operated exclusively for persons 55 years of age and older may not employ person to perform work on premises unless person has work card issued by sheriff. (BDR 10-833)

SENATOR CARE:
Regarding A.B. 274, which is Assemblyman Goldwater's bill, I e-mailed Assemblyman Goldwater last night, and I have not yet received a response. What I was going to suggest would go something like this: If you are a tenant in a periodic tenancy and you get a timely notice of termination of that tenancy and you believe, because of a physical disability or impairment or a circumstance relating to your age, you need an extra 30 days, and you are not in arrearage with your rent, you may petition the court for an additional 30 days, and the court may grant the petition. If the court denies the petition, nonetheless, the petitioner gets 5 days to move out. This is my proposed amendment, and since I have not yet heard from Assemblyman Goldwater, I cannot speak for him.

CHAIRMAN AMODEI:
Do you want it included in the work session document for next Tuesday?

SENATOR CARE:
Yes, I would, and I will talk to Assemblyman Goldwater in the meantime.

CHAIRMAN AMODEI:
Mr. Wilkinson, please get with Senator Care and make sure we have something to look at next Tuesday.

SENATOR CARE:
On A.B. 397 (Exhibit C, tab M), I have spoken to Assemblyman Horne. This is the eminent domain bill. The proposed amendment would be, if a party rejects an offer of settlement under the rule of the State in an eminent domain case, but does so in good-faith reliance upon an appraisal, it would be deemed to be a good-faith rejection of the offer in the event, following trial, and whether the verdict was for less than what was offered, if there is an attempt to impose the costs and fees associated with the rule and the statute. I would also include in the amendment, in the case of an eminent domain, it would not be 10 days to accept, it would be 30 days to give the property owner ample time to obtain an appraisal.

SENATOR WIENER:
I would like to build onto Senator Care's amendment, and add that appraisers have recognized credentials, so we could have an established standard for appraisers to ensure good faith.

SENATOR WASHINGTON:
Regarding A.B. 397, it has been indicated to me there is a tremendous fiscal impact on the county and local municipalities concerning this issue. We never did ferret out the impact to the full extent. If any municipalities would like to elaborate on the fiscal impact of A.B. 397 to taxpayers, they are free to do so in our next work session.

CHAIRMAN AMODEI:
Mr. Anthony, would you make the rounds of the local government and State representatives to provide input for this issue for the next work session?

We will discuss A.B. 341 (Exhibit C).

ASSEMBLY BILL 341: Effectuates specific and limited waiver of immunity of State under Eleventh Amendment to the United States Constitution with regard to certain federal laws regulating employment practices. (BDR 3-356)

SENATOR TITUS MOVED TO DO PASS A.B. 341.

SENATOR CARE SECONDED THE MOTION.

CHAIRMAN AMODEI:
I would indicate, with the fiscal note on the bill, I believe the committee's policy statement will be clear. We will see how it fares when we report it out.

SENATOR MCGINNESS:
With the fiscal note, are we going to re-refer it to the Senate Committee on Finance?

CHAIRMAN AMODEI:
They have a way of getting what they want, so I would just as soon let them continue to do what they do best.

SENATOR TITUS:
I believe that is appropriate, because there is really no fiscal note. There was just a concern this may cost more money.

THE MOTION CARRIED. (SENATOR MCGINNESS VOTED NO.)

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CHAIRMAN AMODEI:
We will next address A.B. 365.

ASSEMBLY BILL 365 (1st Reprint): Makes various changes to provisions regarding guardianship. (BDR 13-953)

MR. ANTHONY:
Assembly Bill 365 relates to the guardianship provisions. During testimony, Commissioner Henry submitted technical amendments to sections 62, 72, and 107. Those are attached at tab K (Exhibit C).

Also during testimony, Mr. Nielsen, an attorney with the Senior Law Project, offered an amendment to section 107, which he believed would address unfettered discretion of payment of attorneys' fees. Commissioner Henry believes the language she offered in the amendment to section 107, which states, "subject to the court's discretion," should satisfy Mr. Nielsen's concerns. However, apparently Mr. Nielsen believes his amendment, at tab L of the Work Session Document (Exhibit C), should be the amendment to section 107. This is a policy decision the committee has to make. There was no other opposition to A.B. 365.

CHAIRMAN AMODEI:
Are there any objections to either of the amendments?

MR. WILKINSON:
The amendments conflict with one another.

SENATOR WASHINGTON:
If the amendments conflict with one another, I suggest we accept Mr. Nielsen's amendment at tab L.

MR. WILKINSON:
When I said the amendments conflict, it is just with the final piece, so we could include two-thirds of the amendment under tab K and the final part of tab L.

SENATOR WASHINGTON MOVED TO AMEND AND DO PASS A.B. 365 WITH THE AMENDMENT AT TAB K UP TO SECTION 107 AND THE PORTION OF THE AMENDMENT AT TAB L REGARDING SECTION 107.

SENATOR MCGINNESS SECONDED THE MOTION.

SENATOR CARE:
Under the proposed amendment from the commissioner as to section 107, what would we not be including in this motion that conflicts with tab L, which we would be adopting?

CHAIRMAN AMODEI:
I believe Mr. Nielsen's amendment is more specific in providing guidance in what is looked at. I believe the commissioner wanted more along the lines, as indicated in section 62, subsection 2 of the amendment under tab K, "Subject to the court's discretion and approval." Those words are limited in no way, shape, or form. It is whether or not you are comfortable with granting unfettered discretion or a large amount of discretion subject to the specific factors provided by Mr. Nielsen.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
We will address A.B. 448 (Exhibit C).

ASSEMBLY BILL 448: Clarifies provisions governing arrest, involving violation of order for protection against domestic violence. (BDR 3-448)

MR. ANTHONY:
Assembly Bill 448 relates to warrantless arrests. During the hearing there were no amendments; however, Sergeant Roshak and Mr. Nadeau testified they believed this measure specified practices already in place by law enforcement. Therefore, committee concerns were whether the bill was necessary to specify what is already being done.

CHAIRMAN AMODEI:
In keeping with what we did earlier on A.B. 160, and trying to err on the side of those who need protection in this context, what is the pleasure of the committee?

SENATOR TITUS:
I appreciate that statement. It is fairly common for us to codify things that are practiced. I would support doing that in this instance as well.

SENATOR TITUS MOVED TO DO PASS A.B. 448.

SENATOR WIENER SECONDED THE MOTION.

SENATOR WASHINGTON:
I appreciate my colleague's motion and understand her concerns, but after listening to testimony from Mr. Nadeau regarding their practice, if law enforcement is already practicing what is called for in A.B. 448, it is probably not necessary to give them the authority to continue to do what they are doing.

SENATOR CARE:
I am going to support A.B. 448. I am somewhat uncertain about the necessity of it, but I will support it. I am going to suggest an amendment, however. The amendment would be, nothing could be construed in the bill to permit a practice that runs counter to existing statute and case law. I do not want an officer saying, "We could get a warrant easily in this case, but we have decided we are just not going to do it." A defense attorney could come up and say the arrest was illegal. I am going to support the bill, but would like to look at it for a possible amendment.

CHAIRMAN AMODEI:
Is that request in the context of running a Senate Floor amendment? The reason I am asking is because the minority leader has made a motion and it has been seconded.

SENATOR CARE:
That is fine.

CHAIRMAN AMODEI:
I am just trying to be parliamentarily correct.

SENATOR TITUS:
Mr. Chairman, I do not believe that is necessary. I appreciate the legal concern for all the legal details and legal arguments. However, we did not hear any testimony to the effect this would be a problem. I believe we can move the bill.

CHAIRMAN AMODEI:

Senator Care, your comments are noted for our record and you are free to proceed in any manner you deem fit on the Senate Floor.

SENATOR MCGINNESS:
In keeping with the theme today, it seems I am in opposition to some things, but we had testimony from Sergeant Roshak and Mr. Nadeau they did not believe A.B. 448 was necessary. I believe somebody on the committee asked the proponents of the bill what brought it forward. There was no testimony. They just kept saying they thought it would be good to pass the bill. I could not see the necessity. I will not bring an amendment to the Senate Floor, I will just vote against A.B. 448.

SENATOR TITUS:
Maybe we can hear again from the proponents why this is necessary.

NANCY E. HART, DEPUTY ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL:
I would like to reiterate there is a distinct reason for this bill, which is to provide clarity in the law, primarily for training. There was testimony during the hearing about the efforts of the Office of the Attorney General in collaboration with Peace Officers Standards in Training Commission, and we have conducted training throughout the State and continue to conduct training for law enforcement officers. Specifically, A.B. 448 is from feedback we have received through consultation with law enforcement officers requesting clarification around this, and it will be used for ongoing training efforts. It is definitely not just something to do, but something with the specific purpose of providing for clarity, primarily for training and for ongoing law enforcement.

I would draw your attention to the fact this is also mirroring an existing provision, also in chapter 33 of *Nevada Revised Statutes* (NRS), concerning workplace harassment orders. This language is already in NRS in another section, which is one of the reasons we are seeking clarification, so there will not be differing provisions around misdemeanor arrests in the same chapter. I also want to remind you that following the hearing a letter was sent from Lieutenant Simpson of the Las Vegas Metropolitan Police Department expressing their support of A.B. 448, and I believe all of you have received an e-mail from him, since he was unable to be here.

STAN OLSEN, LIEUTENANT, LOBBYIST, LAS VEGAS METROPOLITAN POLICE, AND NEVADA SHERIFF'S AND CHIEF'S ASSOCIATION/SOUTH:
If I may clarify, the e-mail you received from Lieutenant Simpson was authorized by me. It was representing his position, not the position of the Las Vegas Metropolitan Police Department.

CHAIRMAN AMODEI:
We have a motion on the floor to do pass A.B. 448. Is there any further of discussion?

THE MOTION CARRIED. (SENATORS MCGINNESS AND WASHINGTON VOTED NO.)

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CHAIRMAN AMODEI:
Mr. Anthony, would you give us a summary of A.B. 536?

ASSEMBLY BILL 536 (1st Reprint): Makes various changes to filing requirements for business entities. (BDR 7-454)

MR. ANTHONY:
Assembly Bill 536 relates to filing requirements for business entities. It was brought forth by the Office of the Secretary of State. At the hearing there was no opposition; however, Mr. Anderson proposed in the amendment to, in his words, "Accurately reflect the intent of the Assembly Committee on Judiciary." The amendment is attached as tab N (Exhibit C), and would allow the prescribed forms to control all matters in filing and for ease of filing with the Office of the Secretary of State.

SENATOR WASHINGTON:
I would like to reiterate my claim, in this case, to A.B. 536. Due to the fact we want to make sure we take care of our educational system and those students participating in our fine institutions and show them we are doing the responsible thing on their behalf. Based on the demonstrations at the biennial softball game of the Legislature, I would ask that we amend A.B. 536 to include S.B. 298. If Mr. Anderson has no objections, I would ask that he pass the message to Secretary of State Dean Heller that we are good policy makers.

CHAIRMAN AMODEI:
Does the motion include the amendment at tab N (Exhibit C), as well?

SENATOR WASHINGTON:
Yes, it does.

> SENATOR WASHINGTON MOVED TO AMEND AND DO PASS A.B. 536 WITH THE AMENDMENT FOUND AT TAB N OF THE WORK SESSION DOCUMENT AND AMENDING S.B. 298, IN ITS ENTIRETY, INTO A.B. 536.
>
> SENATOR MCGINNESS SECONDED THE MOTION.

SENATOR TITUS:
Did we not just amend S.B. 298 into another bill that is going back to the Assembly?

CHAIRMAN AMODEI:
Your perception would be entirely accurate.

SENATOR TITUS:
Do you think this is appropriate? Do you think we could send a message down the hall another way besides this? My next question, is there not room in here for a sunshine amendment, as well?

CHAIRMAN AMODEI:
Do you want us to hold another bill?

SENATOR TITUS:
I will state my same objection. I will vote against it on the Senate Floor because I did not support S.B. 298 to begin with. It did not have anything to do with money for schools. I support money for schools.

I just had concerns about protections for limited liability, limited partnerships that might lead us down the road to more corporate dishonesty.

CHAIRMAN AMODEI:
I want to thank you for the record for being so open about it, because you have been. Your reservations are noted for the record and for purposes of what you deem fit on the Senate Floor.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
The final item on the Work Session Document (Exhibit C) on which we had a hearing quite a while ago was the proposal to amend Rule 40 of the Senate Standing Rules to include in the jurisdiction of this committee the subject of administrative procedure, which is found under chapter 233 of NRS. As you will recall, the purpose is this committee has jurisdiction over juvenile procedure, criminal procedure, and civil procedure. While it is appropriate for the regulatory provisions found in that chapter to stay with the Senate Committee on Government Affairs, the intent was to provide jurisdiction in a procedural sense for all contested matters in the State with the Senate Committee on Judiciary.

The Chairman is looking for the appropriate motion to bring this issue to the Senate Floor to amend Senate Rule 40 to provide for administrative procedure jurisdiction to be within the jurisdiction of the Senate Committee on Judiciary.

SENATOR CARE MOVED TO AMEND STANDING RULE 40 IN ACCORDANCE WITH COMMITTEE DISCUSSION.

SENATOR WASHINGTON SECONDED THE MOTION.

SENATOR WASHINGTON:
I remember the hearings, and I strongly agree. I believe the Senate Committee on Judiciary should oversee administrative procedure, since we deal with many matters dealing with felonies and crimes within our statutes. I believe sometimes the administrative procedures get lost in overall judicial prudence, and sometimes they are used as a leverage to sway unpopular opinions and decisions. I believe we definitely need to keep tabs on what is going on with administrative procedure.

CHAIRMAN AMODEI:
Mr. Wilkinson and Mr. Anthony, we will be relying upon you to guide us as to the appropriate forum and procedure to bring forward a rules amendment. We are assuming it is on the floor, but we want to err on the side of doing this completely in the open.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
The meeting is adjourned at 10:21 a.m.

RESPECTFULLY SUBMITTED:

Jo Greenslate,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chairman

DATE:

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-second Session
May 13, 2003

The Senate Committee on Judiciary was called to order by Chairman Mark E. Amodei, at 8:35 a.m., on Tuesday, May 13, 2003, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark Amodei, Chairman
Senator Maurice E. Washington, Vice Chairman
Senator Mike McGinness
Senator Dennis Nolan
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Bradley Wilkinson, Committee Counsel
Barbara Moss, Committee Secretary

OTHERS PRESENT:

Stan Olsen, Lieutenant, Lobbyist, Las Vegas Metropolitan Police Department and Nevada Sheriff's & Chief's Association/South
James N. Heird
Leland Sullivan, Chief, Child Support Enforcement, Welfare Division, Department of Human Resources
Jon L. Sasser, Lobbyist, Washoe Legal Services

CHAIRMAN AMODEI:
The hearing is open on Assembly Bill (A.B.) 443.

- **ASSEMBLY BILL 443**: Provides additional penalty for selling or providing certain controlled substances in certain circumstances. (BDR 40-1281)

STAN OLSEN, LIEUTENANT, LOBBYIST, LAS VEGAS METROPOLITAN POLICE DEPARTMENT AND NEVADA SHERIFF'S & CHIEF'S ASSOCIATION/SOUTH:
My intent was to have Detective Todd Raybuck discuss A.B. 443 and the effects of the drugs involved. Detective Raybuck is a narcotics officer with the Las Vegas Metropolitan Police Department, a community educator, and a drug reduction coordinator. He has a significant amount of

knowledge. Unfortunately, because of job commitments, he was unable to attend the hearing. I will read highlights from his prepared written testimony (Exhibit C).

Accompanying me today is James N. Heird, who suffered the loss of his daughter from a drug overdose at a club.

JAMES N. HEIRD:
I reside in Henderson. I will read my written prepared testimony (Exhibit D).

SENATOR CARE:
Your testimony implies there are night establishments in Las Vegas that anticipate the problem as a matter of course and are prepared to handle it. It seems to me the establishment would have a duty to prevent the issue from happening and, when it does, remove people from the premises who might be engaged in that kind of activity. How prevalent is the problem? Are establishments knowledgeable about the activities occurring on their premises?

LIEUTENANT OLSEN:
The establishments have a significant amount of knowledge. I have no information the establishments are involved in the sale or distribution of narcotics, but they are aware of drug use, which is the reason they hire staff to be available to take people to the hospital, transport them to their hotel rooms, or put them on gurneys and leave them in the kitchen. It is an ongoing problem.

Every morning the Las Vegas Metropolitan Police Department (METRO) has an executive staff briefing to discuss a series of ongoing crimes. For a time, every day of the week there were a number of overdoses at clubs. It is not unusual and a number of clubs have closed down, changed hands, and reopened. The METRO has raided these clubs with undercover officers. After moving everybody out of the club, you would be amazed at what is lying on the floor. Drugs are very prevalent.

The big issue is, employees and patrons are aware people are overdosing, but make no effort to do anything about it. In many cases, lives could be saved if the person is helped. If nothing is done, people die. When body temperatures reach 108 degrees, people end up with permanent difficulties. Therefore, the intent of A.B. 443 is to hold people accountable if they do not help a person who overdosed on drugs. Should A.B. 443 pass, the METRO will conduct an education program to make people understand that not helping a person who overdoses on drugs is a criminal event.

MR. HEIRD:
There has been a small effort by clubs in Las Vegas. A club named Drai's places lids on drinks because gamma hydroxybutyrate (GHB) is slipped into soft drinks and juices. Some clubs from the Partnership for a Drug-Free Nevada place posters in lavatories asking whether a person feels sick or has taken something, however, it is a very small effort.

SENATOR CARE:
I will do nothing to disturb the bill. However, I would be interested in knowing whether there is anything in statute that would permit law enforcement to go after clubs if they have knowledge of drug activities, almost as though it is expected. There are forfeiture laws in the State, but I am unsure whether the premises would have to be involved in the underlying act.

LIEUTENANT OLSEN:

We have gone after club licenses, however, in some cases, a hotel dining room will be sublet and made into an after-hours club. It will be leased from the hotel, sublet to somebody else, and may even go down to a third or fourth level on the sublets. Drai's was also a dining room during daytime and dinner hours and later shifted to something else. I do not know whether they are still using the same facility.

SENATOR CARE:
It seems the leaseholder or landlord may have knowledge of the problem and not be doing anything about it. I wonder whether or not an argument can be made that the premises become an instrumentality in the underlying act. Should that be the case, there may be an argument for forfeiture. In regard to "crack houses," there have been cases in which a landlord lost the house through civil forfeiture. I would like to discuss this further at a later date.

SENATOR NOLAN:
In my capacity as a paramedic, I responded to dozens of overdoses where people died. Witnesses hesitate to call because they fear arrest for contributing to the problem. I think some of these people will get what they deserve and what they expect. Sadly, many of them would not know the law exists unless the clubs post the information in prominent areas. In any event, there are still those who would not call 9-1-1 when it is necessary.

CHAIRMAN AMODEI:
The hearing is closed on A.B. 443. What is the pleasure of the committee?

SENATOR NOLAN MOVED TO DO PASS A.B. 443.

SENATOR CARE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

*****

CHAIRMAN AMODEI:
The hearing is open on A.B. 475.

ASSEMBLY BILL 475 (1st Reprint): Makes various changes concerning providing health insurance for child pursuant to court order for support. (BDR 3-1246)

LELAND SULLIVAN, CHIEF, CHILD SUPPORT ENFORCEMENT, WELFARE DIVISION, DEPARTMENT OF HUMAN RESOURCES:
I will read my written prepared testimony (Exhibit E).

CHAIRMAN AMODEI:
The work session is closed on A.B. 475 and open on A.B. 14 and A.B. 118(Exhibit F. Original is on file in the Research Library.).

ASSEMBLY BILL 14 (1st Reprint): Makes various changes to penalty hearing when death penalty is sought and revises mitigating circumstances for murder of first degree. (BDR 14-198)

ASSEMBLY BILL 118: Revises provisions regarding when sentence of death may be imposed. (BDR 14-856)

CHAIRMAN AMODEI:
At the last work session I made specific requests of individuals to provide conceptual help in some areas. I asked the information to be available 5 days ago so it could be digested and responded to in a prepared manner. Apparently the process offended some people and spawned talk of other amendments. I will pull A.B. 14 and A.B. 118 from the work session until Thursday, at which time the committee will vote on the bills with or without amendments. We will see whether there will be four votes for a policy statement.

SENATOR WASHINGTON:
We requested an amendment to A.B. 14 in regard to jury instructions whereby the jury would be informed it may not ask for the death penalty. I do not see the amendment in the work session (Exhibit F).

BRADLEY WILKINSON, COMMITTEE COUNSEL:
That was Senator Titus's proposal and she asked me not to draft any specific language.

SENATOR WASHINGTON:
On behalf of the victim's family, I think it is important to include language instructing the jury it cannot specifically ask for the death penalty.

CHAIRMAN AMODEI:
The work session is closed on A.B. 14 and A.B. 118 and open on A.B. 40.

ASSEMBLY BILL 40 (1st Reprint): Extends period of limitations for commencing civil action after action has been dismissed under certain circumstances. (BDR 2-769)

SENATOR CARE:
Tab C of the Work Session Document (Exhibit F) contains my proposed amendments to A.B. 40. However, since it was proposed, the United States Supreme Court came up with another case on this issue, *Jinks v. Richland County* [123 S.Ct. 1667 (2003)]. Nowhere in the discussion does the court make any reference to the amendments I proposed.

On behalf of the victim's family, I suggest changing 90 days to 30 days, which would be consistent with federal rule. In addition, section 1, subsection 3, paragraph (b), of the proposed amendment to A.B. 40 in the Work Session Document (Exhibit F), says "Any applicable findings of fact or conclusions of law entered by the court that dismissed the action shall be deemed binding in the action that is recommenced." It means should a federal judge make certain determinations as to fact or law, that it become law of the case and the State court would be bound by it in the event the case is recommenced, which would probably happen in any event.

CHAIRMAN AMODEI:
The hearing is closed on A.B. 40. What is the pleasure of the committee?

SENATOR CARE MOVED TO AMEND AND DO PASS A.B. 40.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
The hearing is open on A.B. 117.

- **ASSEMBLY BILL 117**: Makes various changes to provisions governing withholding of income which is ordered to enforce payment of child support. (BDR 3-901)

NICOLAS ANTHONY, COMMITTEE POLICY ANALYST:
Assembly Bill 117 clarifies the circumstances in which a court may find good cause for postponing a mandatory order of an immediate withholding of income for child support. During the hearing, Keith M. Lyons, Jr., from the National Trial Lawyers Association, supported the measure, and Janet Serial, representing herself as a concerned parent, opposed the bill. There were no other additional concerns or amendments offered during testimony on the bill.

CHAIRMAN AMODEI:
The work session is closed on A.B. 117. What is the pleasure of the committee with regard to A.B. 117?

SENATOR CARE MOVED TO DO PASS A.B. 117.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
The work session is open on A.B. 166 (Exhibit F).

- **ASSEMBLY BILL 166 (1st Reprint)**: Makes various changes concerning transfer of right to receive payment pursuant to structured settlements. (BDR 3-231)

SENATOR TITUS:
I request A.B. 166 be moved to the next work session.

CHAIRMAN AMODEI:
That is fine. The work session is closed on A.B. 166 and open on A.B. 250.

ASSEMBLY BILL 250 (2nd Reprint): Makes various changes regarding certain acts relating to terrorism, weapons of mass destruction, biological agents, chemical agents, radioactive agents and other lethal agents, toxins and delivery systems and requires resort hotels to adopt emergency response plans. (BDR 15-49)

CHAIRMAN AMODEI:

Next Thursday it is my intention to amend the Senate majority leader's name on to A.B. 250 and proceed forward with A.B. 250 as the terrorism vehicle. There are four proposed amendments at tab G in the Work Session Document (Exhibit F) by Senator Care, Lucille Lusk, Paul A. Grace, and Richard L. Siegel. Any additional amendments or tune-ups to A.B. 250 must be submitted to Mr. Wilkinson by noon tomorrow so he can identify the concepts for the committee.

SENATOR WASHINGTON:
Would it be possible for the staff to quickly explain the four amendments to A.B. 250?

CHAIRMAN AMODEI:
I had the staff combine all the amendments into one global amendment at tab G of the Work Session Document (Exhibit F) and it deals with the definitional items brought forth in the hearing.

SENATOR NOLAN:
Senator Care and I worked to bring some of the provisions of S.B. 41, requested by homeland security, into A.B. 250. I will speak with the Senate majority leader and the Assembly speaker to ascertain whether or not they would be agreeable to amending those provisions into A.B. 250.

SENATE BILL 41: Revises provisions governing release and use of limited personal information to certain supervisors of personnel involved in security of resort hotels. (BDR 14-110)

CHAIRMAN AMODEI:
The work session is closed on A.B. 250 and open on A.B. 274.

ASSEMBLY BILL 274 (1st Reprint): Increases length of notice before person who is 60 years of age or older or who has disability may be evicted from certain periodic tenancies under certain circumstances. (BDR 3-1128)

SENATOR CARE:
Tab I in the Work Session Document (Exhibit F) contains my amendment in which a 60-year-old person with a periodic tenancy, who gives timely notice and the landlord wants to terminate the tenancy, may still petition the court. However, the court takes the circumstances into account and may grant the extension. If the court does not grant the extension, the senior whose petition was denied has 5 calendar days to move out. I also requested that only in the case where the senior is not in arrearages of the rent, he or she may petition the court. The amendment gives discretion to the court. It is not a "shall," in other words, a person may fall into the circumstances because of age, physical disability, or infirmity, and needs the additional time.

SENATOR TITUS:
Is petitioning the court automatic, or would the person have to go to court in any event?

MR. WILKINSON:
After the person petitions, as long as the court was provided proof of the person's age or disability, the court is required to grant the request.

SENATOR TITUS:
In this case, if it says the court "may," does that make it more complicated to make a case and put more of a burden on the person who already is in a bad situation?

MR. WILKINSON:
Would Senator Care want to address that?

SENATOR CARE:
There may be a case in which a person just wants to remain in the residence for an extra 30 days and his or her age or disability is not the reason. After discussing it with various members of the committee, I thought it was necessary to create an amendment to replace the original language that said if a person can demonstrate his or her age, he or she "shall" be given the extra 30 days. This amendment would put a burden, to some degree, on the petitioning tenant, but it also removes the circumstance in which the extension would be automatic simply by virtue of age or physical disability. It would not be done unless the landlord denies the request for additional time in the first place.

JON L. SASSER, LOBBYIST, WASHOE LEGAL SERVICES:
About 10 minutes ago I showed the amendment to the sponsor of A.B. 274. He indicated approval and e-mailed Chairman Amodei to that effect. In regard to Senator Care's concern about the extension not being granted if the tenant is in arrears on the rent, nothing in the bill changes the fact if a tenant is in arrears, a 5-day notice can be dropped for nonpayment of rent. This provision is only available in a 30-day, no-cause situation. We hope that will take care of the concern.

SENATOR CARE:
Would the chairman entertain a motion?

CHAIRMAN AMODEI:
Yes.

SENATOR CARE:
The motion would be to amend and do pass with the amendment at tab I of the Work Session Document (Exhibit F).

SENATOR CARE MOVED TO AMEND AND DO PASS A.B. 274.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION FAILED. (SENATORS AMODEI, MCGINNIS, NOLAN, AND WASHINGTON VOTED NO.)

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CHAIRMAN AMODEI:
The work session is open on A.B. 288.

- **ASSEMBLY BILL 288 (1st Reprint)**: Provides for judicial approval of certain contracts involving minors. (BDR 11-1116)

MR. ANTHONY:
Assembly Bill 288 relates to judicial approval for contracts for minors in artistic, creative, athletic, or intellectual property services. During the hearing on May 6, 2003, Jared Shafer, the former Clark County public administrator, felt the bill protected the industry rather than the minor. There was no

other opposition to the bill. At the hearing, Assemblyman Oceguera, the sponsor of the bill, offered an oral amendment to remove section 15 of A.B. 288 in its entirety and also place the bill in chapter 609 of *Nevada Revised Statutes* (NRS), as opposed to chapter 129 of NRS. There were no additional comments or concerns.

SENATOR CARE:
If the court revokes the petition, is the contract terminated? Must the parties terminate the contract? Must one of them breach the contract?

MR. WILKINSON:
Section 15 of A.B. 288 says the court could revoke granting of the petition approving the contract, in which case the minor would have the normal existing contract remedies, which would include repudiating the contract when the minor reached the age of majority. The court could also declare the granting of the petition revoked unless the contract was modified.

SENATOR NOLAN:
With respect to the minor who agrees to render artistic and creative services, or participate, would the provisions in section 3 of A.B. 288 preclude the adult in either situation from entering into the contract if the minor did not consent to do those things? Does the minor have standing in law to do that?

MR. WILKINSON:
Is your question: "Could the parent of a minor require the child to perform against the child's will, or enter into a contract without the minor actually agreeing?" I think it is part of what the bill is seeking to prevent. The minor would be required to be present should there be a hearing and the court could inquire into the matter. Therefore, I believe the answer would be no.

SENATOR CARE:
Was there any testimony from the courts or any discussion as to whether or not A.B. 288 puts the court in the position of issuing an advisory opinion as to the validity of the contract itself?

CHAIRMAN AMODEI:
What is the pleasure of the committee with respect to A.B. 288?

SENATOR NOLAN MOVED TO AMEND AND DO PASS A.B. 288.

SENATOR WIENER SECONDED THE MOTION.

CHAIRMAN AMODEI:
Senator Nolan moved to amend and do pass A.B. 288 with the amendment being the deletion of section 15 and placing the bill in chapter 609 of NRS, as opposed to chapter 129 of NRS. The motion was seconded by Senator Wiener. Is there any discussion on the motion?

SENATOR NOLAN:
Nevada is a prominent location and major designated area for filming and more movies involve children. Nevada does not afford children the same protection as California. This bill is an effort to bring parity and protection to performing children. I think it is a good effort.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
The work session is open on A.B. 320 (Exhibit F).

- **ASSEMBLY BILL 320 (1st Reprint)**: Makes various changes regarding malpractice. (BDR 57-868)

CHAIRMAN AMODEI:
Assembly Bill 320 is an exempt bill still being worked by the parties involved; therefore, it will be calendared for the next work session, even though it is still before the deadline, to allow the process to continue.

The work session is closed on A.B. 320 and open on A.B. 337.

- **ASSEMBLY BILL 337 (1st Reprint)**: Makes various changes concerning rights of ex-felons. (BDR 14-63)

MR. ANTHONY:
Assembly Bill 337 is the restoration of civil rights and the measure immediately restores the right to vote and hold office to certain persons. During the hearing, Laurel A. Stadler, on behalf of Mothers Against Drunk Driving-Lyon County Chapter, opposed the measure. Also, Assemblywoman Giunchigliani, sponsor of the bill, submitted an amendment at tab K of the Work Session Document (Exhibit F), which contains three parts. First, a person convicted of a category A felony would not automatically have his or her rights restored. Second, after having served their sentence they should also be allowed to seek office in the future. Third, the intent should be the felony would affect the ability to be licensed and should be related to the occupational license or practice. It would change the language in section 24 of A.B. 337.

Also, during the hearing, Senator Washington expressed concern ex-felons should only have the right to restore their rights once, and should they re-offend, they would not be able to restore their rights.

CHAIRMAN AMODEI:
Therefore, the amendment at tab K of the Work Session Document (Exhibit F) includes proposed amendments by the sponsor of the bill and Lucille Lusk.

MR. ANTHONY:
That is correct. Senator Washington's amendment is an oral amendment and not reflected in tab K of the Work Session Document (Exhibit F).

CHAIRMAN AMODEI:
I suggest the committee consider A.B. 337 next Thursday in order to give the committee members a chance to go through the specific permutations of the bill and proposed amendments. In that event, all members will be familiar with the bill before taking action on it.

SENATOR WIENER:
I would like clarification on the right to restore rights only once. Does it mean automatic restoration only once, and category A felons only get one shot at asking for restoration?

CHAIRMAN AMODEI:
That is a fair question.

SENATOR WASHINGTON:
That is correct.

SENATOR CARE:
Before the next work session I would like the staff to look into the following question. In regard to the language suggested by Lucille Lusk, "fitness to act as." If the felony is embezzlement, it could be argued whether the person is fit to be an accountant where the crime demonstrated lack of veracity. Don King is a convicted felon, which is no secret, yet he is licensed as a promoter in Nevada. The statute of the Nevada Athletic Commission puts the burden on Don King to demonstrate his fitness to act as a promoter in spite of his felony conviction. Is the burden to prove fitness to act on the licensing agency or the applicant?

SENATOR WASHINGTON:
I request the staff put the concept in writing for the next work session. Assemblywoman Giunchigliani stated a person convicted of a category A felony should not have his or her rights automatically restored. It is my understanding those persons would have to go through the normal process of having their rights restored. Is that correct?

MR. WILKINSON:
I would have to go through the bill a little more to ascertain exactly how it would fit. Part of the issue with a category A felony is very few people fall into that category. Most crimes of people released from prison and seeking restoration of their civil rights would have been committed prior to 1995 when felonies were not categorized. Therefore, that issue would have to be addressed as well.

I think they would need to petition. Currently, it is the division and then the court. It appears the proposal would be to petition the sentencing court.

SENATOR WASHINGTON:
Does the bill go back retroactively to give prior felons an opportunity to restore their rights?

MR. WILKINSON:
Currently the bill does not distinguish between or among categories of felonies, therefore, restoration of civil rights would be automatic.

CHAIRMAN AMODEI:
Nonexempt bills will be called up for a motion at the work session next Thursday.

The work session is closed on A.B. 337 and open on A.B. 397.

ASSEMBLY BILL 397 (1st Reprint): Makes various changes concerning proceedings in actions concerning eminent domain. (BDR 3-1082)

MR. ANTHONY:
Assembly Bill 397 relates to actions for eminent domain. During the hearing there were several opponents to the measure. Assemblyman Horne offered an oral amendment to change the word "person" to "party." Also, Senator Care offered an amendment to allow a party to rely on the

appraisal in good faith. In addition, Senator Care suggested expanding the time frame from 10 days to 30 days within which a person may accept an offer of judgment. Senator Wiener raised some concerns on the licensing or certification of appraisers and felt there should be further clarification.

Tab L of the Work Session Document (Exhibit F) is a mock-up prepared by legal counsel incorporating the amendments. It should also be noted, at the work session Senator Washington asked representatives of local government to provide numbers on the fiscal impact of the measure. Those numbers are attached at tab M of the Work Session Document (Exhibit F) from the cities of North Las Vegas, Las Vegas, and Reno. I also received one more fiscal impact statement from the city of Henderson this morning which is also available.

SENATOR CARE:
The amendment stems from the testimony. On the just-compensation argument, there were two states, Alaska and Colorado, that prohibit offers of judgment when it deals with eminent domain. I discussed the amendment with the sponsor of A.B. 397 and I am talking with others. In light of the fiscal notes, and I have not yet seen the one from Henderson, which is the fastest growing city in America, I request the chairman postpone the bill until Thursday.

CHAIRMAN AMODEI:
Senator Care has requested A.B. 397 be moved to the work session next Thursday to allow additional time to discuss potential amendments. Is there any objection from committee members? Seeing none, A.B. 397 will be moved to the work session next Thursday.

SENATOR TITUS:
I have been looking at the fiscal impact figures submitted to the committee. As is so often the case with cost estimates, and State agencies are guilty of this, I do not think the figures mean much. Las Vegas says it could be up to $225,000, North Las Vegas says it is 13 cases at $725,000, and Reno says it is 13 cases at between $3 million and $5 million. Therefore, I do not think anybody can do a good job of estimating the fiscal impact. We should not be persuaded by the numbers and look at it from a policy standpoint as well.

CHAIRMAN AMODEI:
Do you think it boils down to location, location, location?

SENATOR TITUS:
I think it is creativity, creativity, creativity.

CHAIRMAN AMODEI:
The work session is closed on A.B. 397 and open on A.B. 419.

ASSEMBLY BILL 419 (1st Reprint): Provides that landlord of dwelling units intended and operated exclusively for persons 55 years of age and older may not employ person to perform work on premises unless person has work card issued by sheriff. (BDR 10-833)

MR. ANTHONY:
Assembly Bill 419 provides that a landlord of dwelling units intended and operated for persons 55 years of age or older may not employ a person without a work card issued by the sheriff. During the hearing there was no opposition. A written amendment was offered by Assemblywoman Pierce to address concerns raised by Ernest E. Adler and Sergeant Robert E. Roshak. There was discussion

regarding certain felons who would be allowed to work at a building if they were in a work program. The amendment, attached at tab N of the Work Session Document (Exhibit F), has been circulated and approved by all persons involved. Also included is a memorandum dated May 2, 2003, from Sergeant Roshak, which explains certain felons may not be eligible to get a work card from the sheriff.

CHAIRMAN AMODEI:
What is the pleasure of the committee on A.B. 419?

SENATOR NOLAN:
I propose to amend and do pass A.B. 419 with the amendment provided by Assemblywoman Pierce. I do not know whether we need to include an additional amendment in response to Sergeant Roshak's comment. If I am not mistaken, it is already provided for in the law and is just a matter of statement. Is that correct?

MR. ANTHONY:
My understanding of Sergeant Roshak's memorandum is the local sheriff does not issue work cards to the certain persons listed.

SENATOR NOLAN MOVED TO AMEND AND DO PASS A.B. 419.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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SENATOR WASHINGTON:
Is there an update to the resident agents bill or is it still in a holding pattern?

CHAIRMAN AMODEI:
If there has been no action on S.B. 298, then the Assembly Committee on Judiciary and the Senate Committee on Judiciary amended the bill into two measures on the Senate side.

SENATE BILL 298 (1st Reprint): Makes various changes to provisions pertaining to business. (BDR 7-987)

CHAIRMAN AMODEI:
There being no further business to come before the committee, the hearing is adjourned at 9:35 a.m.

RESPECTFULLY SUBMITTED:

_____
Barbara Moss,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chairman

DATE:_____

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-second Session
May 22, 2003

The Senate Committee on Judiciary was called to order by Chairman Mark E. Amodei, at 8:14 a.m., on Thursday, May 22, 2003, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4406, 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 at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark Amodei, Chairman
Senator Maurice E. Washington, Vice Chairman
Senator Mike McGinness
Senator Dennis Nolan
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

GUEST LEGISLATORS PRESENT:

Assemblywoman Sheila Leslie, Assembly District No. 27

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Bradley Wilkinson, Committee Counsel
Lora Nay, Committee Secretary

OTHERS PRESENT:

Michael Pescetta, Attorney
JoNell Thomas, Attorney
Richard L. Siegel Ph.D., Lobbyist, American Civil Liberties Union of Nevada, Human Services Network
Nancy Hart, Lobbyist, Nevada Coalition Against the Death Penalty
Jan Gilbert, Lobbyist, Nevadans for Quality Health Care, and Progressive Leadership Alliance of Nevada
R. Ben Graham, Lobbyist, Clark County District Attorney, and Nevada District Attorneys' Association/Las Vegas
Clark Peterson, Chief Deputy District Attorney, Office of the District Attorney, Clark County
Kristin L. Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney

James F. Nadeau, Lobbyist, Nevada Sheriffs and Chief's Association/North, and Washoe County Sheriff's Office

CHAIRMAN AMODEI:
We will start today's hearing with Assembly Bill (A.B.) 13 and A.B. 16.

ASSEMBLY BILL 13 (1st Reprint): Eliminates panel of judges in certain penalty hearings in which death penalty is sought and requires district attorneys to report certain information concerning certain homicides to Supreme Court. (BDR 14-197)

ASSEMBLY BILL 16 (1st Reprint): Provides for genetic marker analysis of certain evidence related to conviction of certain offenders sentenced to death. (BDR 14-200)

ASSEMBLYWOMAN SHEILA LESLIE ASSEMBLY DISTRICT NO. 27:
These are the last two bills coming before you from the interim study on the death penalty. Assembly Bill 13 concerns the three-judge panel data gathering. In the study we found significant racial discrimination concerns. Forty percent of Nevada's death row population is Black compared to their 8 percent of Nevada's general population. Our subcommittee did consider a number of recommendations to address this concern. We looked at what other states had done in the area of racial justice. Many states have done proportionality reviews and data collection. The subcommittee of the interim study did reach a unanimous agreement to refer the question of proportionality review to the Nevada Supreme Court. We also reached unanimous agreement to require the reporting of statistical information on all death penalty and homicide cases. Currently there is no systematic collection of this data required. Therefore we cannot begin to assess or analyze the issue of racial discrimination until we have some data to review.

The fiscal note for this bill came from the Nevada Supreme Court in the original draft and it was based on provisions that have since been removed that would have required the courts to also gather the data on homicide cases. In the Assembly Committee on Ways and Means, this bill was reviewed and found to have no fiscal note. The district attorneys are now okay with the limited data requirements left in the bill.

On the three-judge panel issue, the subcommittee unanimously agreed that we should eliminate the three-judge panels in hung jury cases. Two weeks after the subcommittee had their work session, the United States Supreme Court decided *Ring v. Arizona* [536 U.S. 584 (2002)], (*Ring*). The *Ring* decision made clear that juries, not judges, must make the decision to sentence someone to death including all the prerequisite decisions that lead toward the death sentence. With the *Ring* decision in mind, the Assembly amended the original bill to eliminate three-judge panels in all death penalty cases, hung juries, and those who plead guiltily to first-degree murder. The Assembly also adopted a default provision that requires the judge to impose a sentence of life without possibility of parole if the jury cannot reach a decision. The vote in the Assembly was split on this issue. As the chairman of the interim study, I am very satisfied with the version the Assembly did pass and is in front of you today.

Assembly Bill 16 is a much simpler bill. This is the deoxyribonucleic acid (DNA) testing bill. One of the main reasons for the interim study was the nationwide concern about the possibility of executing an innocent person. This bill does provide a very important safeguard. The Assembly added a few amendments based upon input from all sides, which clarified the process and improved the bill. The Assembly passed A.B. 16 unanimously.

There were some fiscal concerns submitted by the Department of Corrections, so the bill was reviewed by the Assembly Committee on Ways and Means. It found that very few inmates would be able to take advantage of this new provision and therefore any associated cost would be absorbed by the Department of Corrections' budget. Neither of these bills needs to go to your Senate Committee on Finance, as they have already been reviewed.

I would like to thank the committee for all your hard work on death penalty legislation. I have been very pleased with the response the study and serious review has received. Even the *Las Vegas-Review Journal*, a paper not usually endorsing things I am working on, endorsed every single death penalty reform before you this session. This is indicative that public opinion is changing in our State. I am very proud of our Legislature for taking this issue on and I urge your support for these bills.

MICHAEL PESCETTA, ATTORNEY:
I am an attorney who practices in the area of death penalty and habeas corpus work. I am testifying on behalf of myself and as a member of the Nevada Attorneys for Criminal Justice and not as a representative of the federal public defender.

As Assemblywoman Leslie indicated, there was a great deal of testimony in the course of the interim subcommittee hearings. The fruits of the previous Nevada Supreme Court task force on racial and economic bias in the justice system established what is an incontrovertible statistical disparity in Nevada's death row. We have a 40 percent African-American, death-row population and it has hovered around that figure for almost 20 years. Compared to the general African-American population in the State, this is clearly a statistically significant disparity.

Other disparities have also been consistently demonstrated. For instance, although black men are second only to white men in total number of victims of homicide, out of 85 people on Nevada's death row, there are only 5 who are on death row for homicides against black men. Not coincidentally, all of those defendants are black men also. There is one white person on Nevada's death row for killing a black person. One. Even that overstates the case because that individual was convicted of also killing two white people at the same time.

There is a robust statistical indication that we have problems in the administration of the death penalty. If we are going to retain the death penalty we have an obligation, not just to the State but to the justice system itself, to determine why this is happening. Then we will be able to go to defendants, the justice system, and the public and say we have examined this issue. We will have examined it and we have determined it is operating fairly and the statistical anomalies are simply statistical anomalies.

MR. PESCETTA:
Section 6 of A.B. 13 provides for the reporting of the kind of data that will demonstrate this effect, one way or the other. It requires reporting of all homicide cases that are not involuntary manslaughters. If we do not look at the cases in which the death penalty is not charged at all, we are losing important data about disparities in charging which may or may not be based on bias. For instance, in a fairly famous case in recent years, although there were potentially three or four aggravating factors that could have been charged, the death penalty was never sought against those individuals. If we do not capture that effect we are not capturing all of the points of decision in which these decisions may or may not be affected by bias are occurring.

The reporting requirement does not impose a significant burden on the prosecution. Mr. Peterson or Mr. Graham and I could sit down and generate a form to capture this data. It would take 30 seconds to a minute to fill out. It could be a check mark form. It is generally material already in the prosecutor's file. It is material Mr. Owens of the Clark County district attorney's office generated for a report to the interim from already closed cases. This reporting requirement is prospective only. The court or the prosecutor is not required to go back over 20 years of cases and generate anything.

On the effective date of the legislation, the form could be in place and it could be checked off for all homicide cases without any burden on anyone. To the extent that some of this information may be somewhat more difficult to gather in the course of trial, there is nothing preventing the prosecutor from consulting with the district court and with defense counsel for help in filling out the form.

There is one particular provision in section 6, subsection 2 requiring identification of the decision makers who make the decision about whether or not to charge a defendant with the death penalty, or make the decision whether or not to accept plea negotiations. I understand the district attorney's office would object to this provision. It is absolutely critical that we identify the particular people who are involved in these decisions. As you have heard in previous testimony on other bills, both the Washoe County district attorney and the Clark County district attorney have committees to review whether or not the death penalty should be charged in certain cases. If we do not know who is on those committees, we are not going to know who may individually be affecting the decision in a way which may turn out to be biased. This also includes people inside or outside the district attorney's office with whom the district attorney consults, and that is found in section 6, subsection 2, paragraph (j), subparagraph (4).

MR. PESCETTA:
This is important because when the district attorney's office gets input from people other than members of its own office in making this very discretionary decision, it is important to know who is having input. For instance, it is typical when the district attorney decides to negotiate a plea, they fill out a form that is called a non-trial dispositional memo which typically records that they have consulted with victims or with people from the Las Vegas Metropolitan Police Department (Metro). There is one case we are working on now in which one of the officers who was involved in the capital case, who testified at trial, and whose credibility was an issue, as with all witnesses, was later fired by Metro for an incident in which racial epithets were used by that officer. If that officer was somebody who was consulted in determining whether or not to charge the death penalty, whether or not to accept a negotiated plea, we want to know whether that officer was involved in those kinds of decisions, just as we want to know which individuals in whichever district attorney's office are involved. Partly that is to determine if some people are exercising absolutely color-blind decision-making. That is great and something for which we should recognize and reward those people. But we are not going to know that unless we identify the decision makers.

A question was raised in the Assembly during the hearings on A.B 13 by Assemblyman John C. Carpenter. It concerned the provisions for consulting with victims' family members. We could have mandatory language to ensure those family members do not need to be individually identified. It would satisfy us if we would just identify whether or not family members or victims were consulted. This may seem like a small thing, but we have a case in which two defendants were convicted of murder of a white convenience store clerk and attempted murder of a black customer who was shot but ended up escaping. When it came time to plead, a non-trial dispositional memo recorded they consulted with the white fiancée of the store clerk about whether the codefendant should be allowed

to plead to a non-death disposition, but the black customer was not consulted even though it was the codefendant who had supposedly shot him. That may or may not show a conscious discrimination, but this is something we need to know, whether or not family members were or were not consulted with the disposition. To answer the concern raised in the Assembly, just identifying whether or not those people were consulted without identifying the individuals involved would certainly be adequate. We could provide language if that is the sense of this committee.

SENATOR WIENER:
When you said the fiancée, how far do you extend the definition of family?

MR. PESCETTA:
I do not think we need a definition. This is a question of identifying there was consultation with family members, relatives, or anyone else. The provision currently is written broadly enough to cover anyone they consult. We should not try to limit whom the district attorney does consult, we just want to know that they did.

Sections 1 through 5 of A.B. 13 abolish three-judge panels and provide that if a penalty jury in a capital case cannot reach unanimous decision, the judge will impose a sentence of life without possibility of parole. Something has to be done about the three-judge panel system.

The best solution proposed in the bill is to eliminate these panels altogether. They give rise to extraordinary amounts of litigation concerning the fairness and constitutionality of those panels. Three-judge panels impose death sentences in 75 to 80 percent of the cases in which they are used. A sentencing mechanism producing that result is not a sentencing mechanism that is working to do what the United States Supreme Court says we are supposed to be doing, which is to distinguish rationally those few cases in which the death penalty is imposed from the many cases in which it is not. There is also a question about the selection of the panel members. There is a very low level of diversity in the Nevada district court bench. There are only two African-American judges in the State. There have never been more than two. Because of the workings of the three-judge panel, in the county with the highest African-American population in the State, which is Clark County, if you are not in front of one of those African-American judges you can never get an African-American decision because the other two members of the panel have to be chosen from other judicial districts in the State. Currently, there is no African-American member of the Nevada Supreme Court, which provides a review of the sentence.

MR. PESCETTA:
You have a situation where it is impossible, in most cases, to get a member of the defendant's race, which is disproportionately African-American, as a decision maker in three-judge panel cases. Just parenthetically, if you look at the sentencing patterns where there is an African-American judge on a three-judge panel, it is exactly the reverse of the general statistical picture. Three-judge panels impose death 78 to 80 percent of the time. If a three-judge panel has an African-American member, 80 percent of the time the panel imposes life and not death. That is the concern in terms of the diversity of those panels. The only sensible way to deal with these situations is to get rid of three-judge panels altogether.

The default provision of A.B. 13 states that if a penalty jury cannot reach a unanimous decision, then the sentence of life without possibility of parole is going to be imposed. That is the majority position in states having the death penalty. Twenty-seven states, and the United States government provide for a default provision in non-unanimity cases of a sentence of life. Lest anyone suggest only those

terribly liberal death penalty jurisdictions have those provisions, more conservative states such as Mississippi, Louisiana, North and South Carolina, and Oklahoma are included in the 27. Even Texas, which has a slightly different structure, calls for answering three questions to qualify for the death penalty and if there is non-unanimity on any of those questions, a sentence of life is imposed. This is a provision that would put us in the mainstream of other jurisdictions both before and after the decision in *Ring v. Arizona*.

The district attorney has raised the question about what should happen if this provision is not enacted and has proposed the defendant should be given a choice of having a three-judge panel or a jury at the initial stage where the sentencing mechanism is determined. That is a terrible, terrible idea and really a red herring because I do not know any competent defense lawyer who would rationally tell clients they should go in front of a tribunal that rules against their side 80 percent of the time. Compare this to a civil case. If you told your client you were going in front of an arbitrator or mediator, or some tribunal that rules against you 80 percent of the time, and you would have no influence over the selection of the members, you would not be able to get malpractice insurance. A lawyer who does this in a capital case, having no influence over the selection of the members on a three-judge panels which could include judges who have voted for death every single time, is trusting to luck and not preparation or skill. This is something in every case where such a decision would be made you are going to see an ineffective assistance of counsel claim on that basis.

We would agree to and help provide language for the small amendment to the reporting provision. This bill is a good bill. It is a sensible solution to the problem of the *Ring v. Arizona* decision and for once would decrease the amount of litigation in capital cases.

SENATOR WIENER:
You mentioned Texas was three questions. Could you share those with us?

MR. PESCETTA:
The three questions involve whether the defendant will be dangerous in the future. There is a question about prior history, and the third one I do not remember. The default provision is if they answer the three questions “yes” then the death sentence is imposed and if the jury cannot make a unanimous agreement, then the default is for life.

SENATOR CARE:
Let us start with the scope of the problem. How often do you have a hung jury?

MR. PESCETTA:
It is relatively rare. Only about six cases involving hung juries are currently pending.

SENATOR CARE:
You mentioned 27 jurisdictions now have a default provision where if the impaneled jury in the penalty phase cannot agree on life or death, then the sentence becomes life without the possibility.

MR. PESCETTA:
Or life, as defined under local law. Some have life sentences that can be life without or life with parole. Twenty-seven states have the capital provision from the U.S. Code which has the same default provision that if the penalty jury cannot agree the sentence goes to life.

SENATOR CARE:

Let me ask you this. If you have a hung jury as to the verdict in a criminal case, then that is not the end of it necessarily. The district attorney has the option of then seeking to retry the matter. Is it a faulty argument to suggest maybe that ought to apply also in the penalty phase?

MR. PESCETTA:
In my opinion it is. The context is important. A jury picked in a capital proceeding goes through very extensive voir dire, which is called death qualification. Under United States Supreme Court authority the State can exclude from capital sentencing potential jurors whose views about the death penalty would prevent or substantially impair their ability to impose a death sentence. As soon as prospective jurors say they have a problem with the death penalty and do not think they can impose it, those jurors are off for cause. Typically, during the voir dire, there are more extensive questions about attitudes towards the death penalty and if potential members say they would have a hard time imposing the death penalty, the prosecutors use peremptory challenge for these persons so the result is a jury primed to accept the imposition of the death penalty. Our position is if the prosecution cannot convince that jury the death penalty should be imposed unanimously, then there is enough doubt about the prospective sentence and a default provision to life without parole is the appropriate sentence.

In cases where there is that kind of doubt, the defendant should get the benefit of the doubt and a sentence less than death should be imposed. That sensibility is good enough for Texas, Louisiana, and Mississippi; it shows there is a fairly robust position in favor of mechanisms perfectly appropriate for us as well. Nevada has the highest per-capita, death-row population in the country. Our problem is not that we are not sentencing enough people to death. This default mechanism will honor doubts about whether the death penalty is the appropriate sentence and save significant resources in impaneling new juries in further litigation.

SENATOR CARE:
Was there any discussion on that subject in the other House? It would seem to me, for example you talked about civil cases. You have a civil trial, a tort case, and the jury comes back and awards compensatory damages, but is hung on punitive damages. Then the issue arises, well are we going to have to have a trial to know who, or a trial on the punitive phase? The problem with that is, you have a jury which comes in to just try the punitive phase and is without the benefit of the ambiance of the original trial. I do not know if you had a second panel that would come in; what would they look at? What would be the basis of their making that determination? They had not sat through the trial; they do not know. I do not know how that would work.

I agree, Senator, that is very problematic because as soon as you bring in another jury not having the perspective of the trial jury, that is why it is important that the trial jury be the jury that has that say. If they cannot be unanimous, we should not keep trying for the death penalty because as you say, you bring in a new jury, cold, and you are going to have to retry much of the case, in order to give the penalty phase any context. It is never going to be the same as the original trial. In terms of fairness, and in terms of having a resolution of the case that is for less than death, when there is doubt in the sentence, this proposal serves both those purposes.

SENATOR CARE:
Tell me about the information you want to gather. You could have bias in the street, the cop, maybe bias during the investigation, perhaps bias in the prosecutor's office. A majority of the judges in the Eighth Judicial District are people I knew before they went to the bench. I am loath to suggest there

might be some bias there, but just assuming there is for the moment, what would you do with all of the information that you want to gather? It would ultimately go to the Nevada Supreme Court who would then turn it over to the Legislative Counsel Bureau (LCB). What would you expect the LCB to do with the information after that?

MR. PESCETTA:
For our purposes, it is completely sufficient that it is maintained and that we have access to it. Ultimately, its use is going to depend on litigants or private groups. For instance, before it became defunct due to lack of funding we did have a task force on racial and economic bias in the justice system. Such a group would have been interested in taking data and analyzing it to see if there were patterns suggesting bias or patterns explaining the disparities we perceive.

As a litigant and as an attorney for litigants in capital cases, I would be getting that information and analyzing it myself to see if I had a claim that any particular decision was or could have been motivated by some sort of bias. In order for that kind of claim to be made, we have to identify the individuals who participated in the decision-making. We have to show probable bias played a role in the charging or negotiating decisions. Litigants would employ most of the data. However, The Grant Sawyer Center for Justice Studies might be interested in a project to analyze the data. Other private bodies such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) may also be involved. At least we would have the data. At least we would be able to make a start at determining whether or not something is going on suggesting bias as opposed to having innocent explanations.

JONELL THOMAS, ATTORNEY:
I am an attorney in private practice. I primarily do appellate and post-conviction work although I was counsel in a recent case where there was a hung jury. I concur in everything Mr. Pescetta had to say and he was very thorough. I offer my support in favor of A.B. 13.

RICHARD L. SIEGEL, PH.D., LOBBYIST, AMERICAN CIVIL LIBERTIES UNION OF NEVADA, HUMAN SERVICES NETWORK:
We strongly support A.B. 13 in its present form. I hope we do not get involved in a hang-up over an amendment. The main reason I am here is to talk about the need for a study; I have reviewed studies from Connecticut, Maryland, and Illinois. They had the money and the opportunity to be much more thorough than was our death penalty study. We need a thorough study of the points alluded to by Mr. Pescetta. We do not have on the record the kinds of statements Mr. Pescetta made about the identity of the victims in relationship to the identity of the perpetrators. We do not have on the record the identities of all who were involved in the decision-making process. The federal courts have said we have to have this kind of information in order to properly review death penalty cases. I sincerely hope we have the whole body of the data collection. I do not think of that so much as in terms of litigation issues, but as educational issues. The public, including everybody in this room, needs to be aware that virtually never has a death penalty been given on a case where there was a white perpetrator and a black victim, and a lot of minds would be changed on the death penalty.

I allude also to a point Senator Care made about not knowing any judges who are biased. We know bias is systemic, not individual. We do not go around saying this or that judge is biased. We say the system has institutional bias. From the very youngest ages with black defendants, who on the average do not have the same kind of homes to go back to and are not given the same choices in terms of custodial care that white young people are given, is the kind of bias that proceeds through the system.

There are two profound myths about our judicial and criminal justice systems. One, it is nonpolitical and the other myth is it is nonracial. It is neither nonracial nor is it nonpolitical. We have to recognize the realities of those points.

There is some suggestion from the material we have seen today and from earlier testimony that there are district attorney offices who would like to continue with three-judge panels. I hope that is behind us because it would be a crapshoot for the State of Nevada to proceed with the use of three-judge panels at $2 million when they lose a case. The State of Nevada cannot afford that kind of crapshoot. Just as it was in terms of mental retardation, the U.S. Supreme Court is determined to end the role of judges as they presently exist in terms of death penalties.

Finally, concerning the second jury idea, I remind everybody here we are first in the country in death penalties per capita and people sitting on death row per capita. We do not need a second shot at a death penalty in order to do anything but to intensify that rather ignominious situation.

NANCY HART, LOBBYIST, NEVADA COALITION AGAINST THE DEATH PENALTY:
I am here testifying in my private capacity and not as a deputy attorney general. I am here on behalf of Amnesty International in Nevada and am also representing the Nevada Coalition Against the Death Penalty. We strongly support A.B. 13 as it is written.

Concerns about racial discrimination in Nevada's death penalty must be addressed. This Legislature has not been asked to consider anything enormous like a racial justice act or proportionality review. The provisions in this bill governing data gathering is a small, but very important step toward being able to meaningfully assess the impact of race in our death penalty sentences. In the Assembly hearing, the district attorneys expressed no opposition to the provisions in this part of the bill and there has been no change in the language so, frankly, I am somewhat surprised to see they are now coming forward with proposed amendments. They are proposing amendments at this very late date that go to the core of what data is needed in order to evaluate concerns about racial bias. As far as any burden on the prosecution, they testify in the Assembly that this information was already available in the information they retain in their files and it was not expressed as a concern. Other states have adopted similar provisions so this is not a novel thing to do. It is a small but important step we need to take, if we are going to address concerns about racial bias.

With respect to three-judge panels, none of this concern came up during the study committee on the death penalty, which met for six sessions for a period of 10 months and gave a great deal of consideration to this issue and many others. None of the alternatives being proposed today came up during that study when there was certainly ample time and opportunity to explore alternatives to three-judge panels even though the U.S. Supreme Court had not ruled on that matter at that time.

MS. HART:
The *Ring* decision is fundamentally about a defendant's Sixth Amendment right to a jury trial. The district attorney will be asking you to consider giving the defendants the choice between a new jury or a three-judge panel when the defendant's first sentencing jury cannot reach a decision or hangs or when the defendant pleads guilty. In light of *Ring*, why do the prosecutors want to preserve the three-judge panels at all? Unlike a jury, three-judge panels are not the conscience of the jury, because by definition they come from three different parts of the State. Also, they are elected in three different judicial districts, which adds an element of politics that is simply not present in a jury. The prosecutors will suggest the evidence less emotionally affects judges because they see it or hear it more often and have more experience than a jury in listening to the evidence in some kind of detached

manner. Perhaps they might even be more lenient is the suggestion. But there is no evidence that this detachment is either true or beneficial to defendants. Because judges in Nevada are elected, they are subject to local politics including death-penalty politics and that is just a fact.

Why do the prosecutors want to preserve the three-judge panels at all by offering this choice, a choice the defense part does not support? In no other setting in the criminal justice setting do we give the defendant such a choice. Why here? Because statistically they impose the death penalty more often, 75 to 80 percent of the time, because prosecutors win more in front of three-judge panels, and that is why they want it.

The choice the prosecutors propose is completely illusory. Given the statistics, no defendant would logically choose a three-judge panel yet we know that some will. Such a choice as the default will only lead to more appeals and more litigation. Any proposal to provide the defendant a choice should be rejected. While the vote in the full Assembly was somewhat divided, I can assure you there was broad consensus on the fact that the three-judge panels should be eliminated and the split vote arose because there were concerns about the default provision.

MS. HART:
The prosecutors will say you should change the default provision and make it different. But the default provision before you, A.B. 13, is sound and you should keep it because of fairness, cost-effectiveness, and finality. Regarding fairness, the State should put on its case, give it its best shot to convince the jury regarding the sentence and if all 12 jurors cannot agree, there is certainly some doubt about whether the death penalty is an appropriate sentence. The prosecution should not get a second or third chance at what one might call jury shopping, just because it cannot convince the first jury. The first jury heard the entire guilt and penalty phases and was already death-qualified to exclude any jurors who could not impose a death sentence. The prosecution had the first and the last word in argument at the penalty phase and the jury was as primed as any jury could be to reach a sentencing decision. If, with all of that, the jury cannot reach a decision, the fair thing to do is to have the trial judge impose a sentence of life without eligibility for parole. You should reject any notion that a holdout juror somehow justifies a second chance with a new jury. A jury is a jury, and a jury's decision or indecision should be respected.

Secondly, keeping the default provision is cost-effective. Having the trial judge impose a sentence of life without possibility of parole is cost-effective. Impaneling one or more new juries and litigating the penalty phase over again is extremely expensive. In addition to the costs of impaneling a new jury and litigating the penalty phase itself, which would have costs for counsel, witnesses, experts, and the judges, there would be the added costs of extra appeals and habeas proceedings since each penalty phase would present unique and additional appellate issues.

Finally, using the default process brings finality. There is much said about the never-ending process involved in capital cases. The default-sentencing provision in the bill, as it is now, effectively ends the case without resorting to further proceedings. Although there will be appeals from the trial and the sentence, the default brings a measure of finality to the case without requiring a victim's family members and witnesses to go through the penalty phase over and over again. Please reject any proposals to alter the default sentencing in the bill.

SENATOR WASHINGTON:
My concern would be with all of the expert witnesses and the forensics. Sometimes cases are very technical in nature and jurors who may not be experts in those fields or with dealing with their own

common sense may not understand all the intricate parts that have made up the trial. They may be lost and unable to make a decision. In those cases a three-judge panel may be able to cipher through all of the information, the forensics, and the whole nine yards to come up with a better conclusion. What is your point and what is your position?

MS. HART:
As the bill is written, a hung jury would not go to a three-judge panel, it would go to the default sentence of a life without possibility of parole. With respect to your question, it is an appropriate thing. If a jury for some reason has so much expert testimony and technical difficulties assessing all of the information that it cannot reach a decision, and I do not know if that is why juries cannot reach decisions, certainly the trial judge in that case could make that assessment and would be able to impose a sentence if the jury did hang. I do not believe a three-judge panel is any more able to wade through those complicated issues than the trial judge. The appropriate person is the trial judge who has been hearing all of the information, and who probably is in the best position to either help answer questions the jury might have or if they are so confused they cannot reach a decision, then the trial judge is the appropriate person to impose sentence.

DR. SIEGEL:
In the *Ring* case, the U.S. Supreme Court said the jury must be the tryer of fact. If we move to a situation where the judge becomes the tryer of fact we will have cases systematically overruled by the U.S. Supreme Court.

JAN GILBERT, LOBBYIST, NEVADANS FOR QUALITY HEALTH CARE, AND PROGRESSIVE LEADERSHIP ALLIANCE OF NEVADA:
I am here representing the Progressive Leadership Alliance of Nevada. Our group is a 45-member group. During the interim we followed the interim study and approved of its recommendations and we would like to urge you to support both of the bills before you today.

R. BEN GRAHAM, LOBBYIST, CLARK COUNTY DISTRICT ATTORNEY, AND NEVADA DISTRICT ATTORNEYS' ASSOCIATION/LAS VEGAS:
I am here on behalf of the Nevada District Attorneys' Association. What a beautiful system we have. God, I cannot believe it. We are creating, creating more and more work for us attorneys and god it is beautiful. To have people come up here and say, "Where has the prosecutor been the last 4 or 5 years?" We have been here everyday in 1999, 2001, 2002, and in 2003. Maybe they were not listening.

I am probably the one that says, "Give the poor damned defendant a choice." You get a jury that comes back and hangs your guilt in 30 minutes, what in the heck do you think that jury is going to do with you at the sentencing phase? You get a legislative committee that is going to hang your position in 30 minutes, what are you going to do? Get up there and get run over a few more times? No! We might have visited the other side a little more extensively than we visited the other committee because maybe we are going to have a little more fair hearing with a three-judge panel as an option. It is Ben Graham's option and you do not have to pass it. God only knows if you do not pass it there is going to be an appellate issue. You watch; this is going to be an appellate issue. This has been taken away from the jury. When you have a hanging jury, we would like another option. It is a decision.

Why does the three-judge panel generally come out with the death penalty more than a jury? It is because they get cases that are hung 90 percent of the time or more, 10 or 11 to 1 or 2 for death. So what in the heck are you going to expect? I am not a strong advocate of the death penalty. I respect

my friends on the other side of the court. I respect the concern all of you have given this. Whatever you do it will be the right thing, and if it is not, somebody will be back here in 2005.

SENATOR CARE:
One thing we have not talked about is the amendment on the Assembly side. The provision in section 2 giving the jury the option of imprisonment of a definite term of 50 years is not in the original bill. What does it do to existing law where you do not have a hung jury? Is that something with which we need to concern ourselves?

MR. GRAHAM:
I will defer to Mr. Peterson.

CHAIRMAN AMODEI:
Were you involved in the study committee?

MR. GRAHAM:
We were and we had people testifying.

CHAIRMAN AMODEI:
What came out of the study committee in the original version of A.B. 13 is not what came out of the Judiciary committee. Can you give us any background in terms of how the study committee recommendation evolved in the Assembly Committee on Judiciary?

MR. GRAHAM:
That evolved a little bit more with input all the way around. Assemblyman Jason D. Geddes was here to express support for the original language. I will defer to Mr. Peterson and his presentation.

SENATOR WASHINGTON:
I was in the study during the interim and I know we dealt with the racial issue and the bias of the court in dealing with the death penalty. I am a little remiss or maybe I just forgot but I do not remember the language coming out being this explicit about the reporting requirements and I do not remember any recommendations. Was this language added on the Assembly side or was this actually a part of the bill?

MR. GRAHAM:
Mr. Peterson is here with me and I would like to defer these questions to Mr. Peterson.

CLARK PETERSON, CHIEF DEPUTY DISTRICT ATTORNEY, OFFICE OF THE DISTRICT ATTORNEY, CLARK COUNTY:
Like Mr. Pescetta and Ms. Hart, I can provide some inside the courtroom information to this body to help with some practical issues arising as a part of this legislation. We are generally in support of this legislation. The three-judge panel as it exists now has to change. We are thankful for all of the hard work on in both Houses and all the prior work regarding this topic. Additionally, I am a big fan of the Illinois State study regarding the death penalty. It was excellent. If we are going to impose the most serious punishment, we need to open the windows and let the light in and see how things are really working.

The problem is that you get some sort of a bugaboo statistics that scare people. A greater analysis of the issue is going to lead us to understand some of the statistics people throw around to shape the debate. In general, we do not oppose the keeping of important records to help determine systemic bias, if there is any. The Illinois commission has numbers very similar to ours in Nevada and they found there is no racial prejudice against the defendant regardless of the person's race. They made that specific finding. I submit to this body that we should not expect capital murders to reflect America. To the extent there are differences, it is going to take someone a lot smarter than me to explain why those differences exist. We should not expect the death-row population to mirror the population at large. These are very unique, very individual types of crimes with varying circumstances.

In my last appearance I provided you with U.S. Department of Justice statistics regarding the death penalty. What you will find is one of the greatest correlations concerns people who have prior crimes of violence and people who have committed more than one murder, et cetera. The Illinois study finds the same thing. Those are the guiding principles leading to when someone gets the death penalty as opposed to not getting the death penalty.

It is often cited Nevada has the highest per capita population on death row. I find that to be an interesting statistic. What does that really mean? Does that mean that is somehow bad? I do not quite understand that number. Nearly 50 percent of our death-row inmates are not originally Nevada residents. They came from other states to commit their crimes here. To the extent that number is high does not take into effect the unique transient nature of Las Vegas, in particular, and Nevada, in general, the population and the growth rate of Nevada. I ask the body not to be frightened by that number that is often waved around. When you look beneath the surface you see something different than to what is initially eluded.

MR. PETERSON:
I am going to talk quickly about the three-judge panel procedure, which has to change. I provided, at the Assembly side, my idea, which was choice (Exhibit C). Though Ms. Hart paints it as a sort of evil plan by the prosecutors to get in front of more death-prone bodies, that is not my intention. I am concerned I am going to have to litigate these matters and there are going to be claims in a guilty-plea situation saying, "I wanted to have gone to a three-judge panel."

We hear that *Ring* said judges cannot do sentencing. That is not true. Judges cannot do death-penalty sentencing when a finding of fact needs to be made and after a jury trial. Our Nevada Supreme Court has held, and it is consistent with the United States Supreme Court case law, you can have a three-judge panel after a guilty plea. Why? Because the *Ring* decision is based on the right to trial. When a person pleads guilty they waive that right.

The reason I propose choice is because it is the position of the Clark County district attorney's office that a death case is a death case. To us it does not matter if we try the case in front of a jury or if we try it in front of a three-judge panel. However, if a defendant feels they are going to get a fairer shake in front of one body or another, let them chose, it is fine with us. The reason I propose this is because in the real world we have seen cases where the defendant is in front of a judge he likes because that judge has given him favorable rulings throughout the trial, but the jury comes back in 30 minutes with first degree-murder. I guarantee that defendant is sitting there saying, "Boy, if I could have this judge be involved in my sentencing decision as opposed to that jury, which came back in 30 minutes." That happens. That defendant may want the choice to go to a three-judge panel. It does not matter to me.

If you do not adopt the proposal I outlined about choice, if you whole-heartedly do away with the three-judge panel, that works too. The choice solution is more constitutional and would prevent some types of challenges. If you wholesale do away with the three-judge panel, that is an acceptable solution as well. We are discussing two acceptable solutions; one is my preference. I will leave it to this committee and to the Legislature in general to decide which one is more appropriate. I am not trying to forum shop to maintain three-judge panels. We would see a challenge and time will bear out what happens.

MR. PETERSON:
I do want to talk about the default to life, the life without provision. Mr. Pescetta indicated a large number of death-penalty states have that provision. There is a famous quote, "And now for the rest of the story." Most jurisdictions do not provide the sentencing structures we have in Nevada. Nevada provides, quite liberally, for death, life without, life with the possibility of parole, and a minimum term of years, 50 years with a minimum of 20. For first-degree murder, very few jurisdictions provide anything other than the two choices of death or life without. In that type of a situation, is it uncommon that a default provision would occur to life without? Of course not. Is that default appropriate in the unique Nevada situation?

There are two instances which are going to cause problems with the default provision. Ms. Thomas, who is present in Las Vegas, handled the Dorian Daniel case. The case hung up in penalty and went to a three-judge panel. Even though the record says something different, it always has been Ms. Thomas's contention that a large portion of the penalty jury wanted life with the possibility of parole. If we adopt the default provision proposed in the current legislation and we have a situation like Ms. Thomas's Dorian Daniel case where the penalty jury hangs in favor of life with the possibility and the default provision defaults to life without, all of a sudden she is going to complain she did not get a second shot at a penalty jury to convince them of life with the possibility of parole.

You are hearing defense attorneys line up in favor of it today but they are going to line up in opposition on appeal tomorrow when the default provision is imposed and they say, "Wait a minute, we wanted a shot at life with and no, we did not get that and we think the jury would have given it to us." Similarly, it will occur for the State side. I tried a capital case that hung up 11 to 1 for the death penalty. The Donte Johnson case hung up on 11 to 1 in favor of death. Another recent case in Clark County hung up 11 to 1 and then a compromise decision was reached. The evidence is that the hang was very severe and in favor of death.

I have heard persons say the rogue juror or the one holdout is a myth. As a practitioner who has seen it, nothing could be further from the truth. It does occur. I would request this committee do one of two things. Simply say, as I have proposed, the court shall impanel a new jury pursuant to section 1 of the act to determine the sentence. Sort of like, we can retry a case for guilt and there is no limit. In fact, I have taken a defendant to trial three times. It was not a murder case; it was a sexual assault case. There is no limit on the number of times we can take someone to trial. There is, however, a reasonable limit. I negotiated that case. It got out of control. The discretion of the individuals stepped in and resolved the matter. If we can have a person face a conviction numerous times on retrial, when there is a hung jury for guilt, the same logic applies at the penalty phase.

MR. PETERSON:
If this body does not wish to do that, I would ask you to simply insert the language from the original version of A.B. 13 that was changed in the Assembly Committee on Judiciary. The original version of A.B. 13 said, "If the jury cannot reach a decision, the court shall sentence the defendant to life without

the possibility of parole or impanel a new jury to determine the sentence." This gives discretion to the district court. When will the district court use that discretion? In the Dorian Daniel case with Ms. Thomas, when she says, "Judge, I really think they were considering life with the possible of parole," maybe the judge gives her a new sentencing jury. The Donte Johnson case hung up 11 to 1 in favor of death and the record was reasonably clear a juror changed his or her mind on her or his feeling on the death penalty. In jury selection she or he said they could consider all punishments and then changed their mind and could not consider death in that extreme of a case. This means that juror would have been removed for cause or would have been preemptively challenged by the State and only changed their mind later. In that case, the judge could appropriately grant a new sentencing jury.

I would submit to this body to use either one of my two suggestions, either to simply impanel a new jury at all times or give the discretion to the court to, in most cases, impose life without the possibility of parole. I am not going to squawk at an 11 to 1 case, or a 10 to 2 case if the judge decides, "No Mr. Peterson, I am not going to give you a new sentencing jury, I am going to default to life without the possibility of parole." However, in a Donte Johnson type situation, I believe it is fair. In a Dorian Daniel situation I think it is fair for the defendant as well to be able to request of the court a new sentencing jury in those types of cases.

When I hear comments saying we are improper in our suggestions of the venues we want to go before to get our sentences, I hope this body sees that is not my intent at all. If we are changing statute to cure constitutional problems, I want one that does not simply create another problem. Using the original language is the most constitutional way to do this or the blanket default provision will be challenged.

SENATOR NOLAN:
Under your proposal, if we end up with a second hung jury, what are the current options available and what would you propose those to be?

MR. PETERSON:
I made two proposals, one being that we simply keep re-impaneling or perhaps the second proposal is more up your alley if it answers that concern. I cannot imagine a judge who gives us a second chance considering the sentence being petitioned to do it yet again. As a practical matter, those cases for the most part negotiate. I negotiated a case because I did not want to put the victim's family members through another penalty-phase trial. We used our discretion as prosecutors to negotiate the case. He took life without the possibility of parole, et cetera. Frequently, the State will make an offer after a hung sentence. The reason we go to a three-judge panel or to another body is because the defendant does not want to. Under the first alternative we would impanel a new jury but if you are concerned about this repeating then perhaps the second alternative is more to your liking.

SENATOR NOLAN:
My concern is continually shopping until you get a jury that makes a decision in favor of the prosecution or the death penalty and having the opportunity to continue to do that. We talk about cost and I have always contended that cost really should not be a factor in justice. It is funny when you talk about cost on the prosecution side. They do not have a problem asking us to put more money and resources into prosecution and the defense does not either until cost becomes a factor, not in their favor.

In any case there is a reality. If you are impaneling jury after jury and they are reaching the same conclusion, one where they just cannot come to a solid conclusion, they get hung, what would be the problem if, after a second jury, it does default? If you have impaneled two juries, you have put the defense and the prosecution through this whole process twice and they have reached the same conclusion with two sets of people, why not now say, listen, the chance of having this happen a third time is just very probable, why can we not default at that point?

MR. PETERSON:
I understand that dilemma. In Nevada the problem is we have sentences less than life without the possibility of parole. At what point is a default provision fair? If it did default to life without the possibility of parole, I guarantee you, Ms. Thomas or whoever a defendant's attorney is, would be saying it was unfair not to give another jury. Discretion steps in and we resolve a case one way or the other. While I appreciate your concern, I do not see it as a reality. We dislike having to do second-penalty phases. There is a cost to the victim's family. My concern is, I am the guy who is going to have to write and litigate appeals and I have a personal interest in making sure the provision we pass does not allow situations to result in another appellate issue. To me that is problematic.

SENATOR CARE:
I am having a tough time understanding the sort of jury instruction you give to the second jury. Something like, "Ladies and gentlemen, the defendant here has been judged guilty of the crime of murder therefore you are not to allow any doubts as to his guilt or innocence affect your deliberations." Maybe I am off base, but I do not know how you get a second jury focused on the penalty phase when they have not had the benefit of the testimony and the emotion, et cetera. Could you address this a little bit?

MR. PETERSON:
Let me tell you how it works now in front of the three-judge panel, our current procedure. If we hang at the penalty phase and we would go before the three-judge panel, it would be the same as if we went in front of a new jury. What we generally do is put on a limited version of the case. Neither the initial penalty jury nor a newly impaneled penalty jury can consider what they call lingering doubt, which is not appropriate for any jury at sentencing phase. Even the initial jury has to put aside any thought this might not be the person. Lingering doubt is not allowed in the jury's deliberations. Even the initial jury must presume guilt and the question is penalty.

We normally would get together with the defense and agree on a limited recap of the initial trial. We call the initial detective who talks about the crime scene and any interviews. Usually we craft stipulations and, in all candor, because this summary of the guilt phase is much shorter and in less-impact detail than in initial trial, it works vastly in favor of the defendant because we do not linger as long on gory photos and all of the things that go along with the guilt-phase case. In the guilt phase, it is very persuasive to go day by day, building guilt upon guilt. We, the prosecutor, lose that when we go before a new sentencing jury and summarize the guilt-phase portion of the trial to the three-judge panel or to the new jury. Normally the three-judge panel has read the trial record. In front of the new jury we would do a slightly expanded version of what we do now but that is only to the extent that the guilt phase evidence is relevant to the sentencing procedures. Usually the nature of the crime is something that is useful for the penalty jury to consider when considering what sentence is appropriate. A lot of times we litigate in guilt a number of issues that have nothing to do with the murderer and those issues would be streamlined and not presented to the new penalty jury.

SENATOR CARE:

Jurors do not necessarily pay any attention to, or understand jury instructions, or misapply them. The natural thing for a second jury for a penalty phase only is to ask themselves if the defendant committed the crime. They are going to be told the defendant committed the crime and there has been a conviction but they are still going to wonder if the defendant is guilty; that might linger for a while. Your testimony points out that is this is a fairly complex bill. Since this bill is exempt, I would like to consider it for a while.

MR. PETERSON:
In going back to the three-judge panel point, you have made an excellent point. Having a new penalty jury also favors the defendant because those jurors were not involved personally in the finding of guilt. In addition, because they do not have the same moral investment the first jury did in finding guilt, they may be more likely to consider lingering doubt even though they have been instructed not to do so. Additionally, if a trial has complex expert testimony or if the mitigation evidence at penalty has complex, psychological evidence or evidence of that nature, it may be the defendant's belief that a panel of judges can more appropriately digest evidence than a panel of jurors who may be offended by a defendant's behavior and more likely to impose death. This is why I prefer choice to total abolition.

SENATOR WASHINGTON:
If the trial is so complex and the information is far above the comprehension of the jurors they may have a sense to pronounce judgment or during the penalty to waiver because they cannot decide whether or not they can comprehend the information that has been given to them. You then have a possibility of hanging up the jury and my sense would be the three-judge panel would be able to waiver through or decipher or work through that technical information to determine whether the sentence should be life or death.

You indicated three-judge panels were unconstitutional, but the Nevada Supreme Court found it to be constitutional. The constitutionality question can go either way, but we have had cases tried and sentenced with a three-judge panel.

MR. PETERSON:
There is not doubt if a defendant goes to a jury trial, a jury must consider the fact-finding issues regarding the death penalty. After a jury trial we cannot have a three-judge panel and that is undisputable case law. The issue is when a defendant waives his right to a jury trial, which is what all of these rights are based on, and pleads guilty. Our Nevada Supreme Court in *Colwell v. State* [118 Nev. Adv. Op. No. 80 (2002)], a recent case after *Ring*, considered *Ring* and said, "Well, because he has pled guilty, he has waived his Sixth Amendment right, therefore a three-judge panel is appropriate." The question is whether this body finds there is a use for the three-judge panel in situations where it is constitutional. One way to make it constitutional would be if a defendant chooses it. There is nothing more constitutional than the defendant choosing to do something. In some situations it may be appropriate. I am a huge believer in the jury system and that is why I like to send things to juries. I like juries to make those types of determinations. Jurors can sort through complex information. It does not really matter what I believe, it matters what the defendant believes. That is why I propose choice because if the defendant believes a three-judge panel could better understand his defense than can 12 citizens, let him have it. Whichever way he thinks is fair.

SENATOR WASHINGTON:
In your amendment on choices, was your proposed language to allow the defendant to make the decision or that choice for himself?

MR. PETERSON:
Absolutely, it is our position he should be allowed to make that choice. He does not even have to choose up front. If after he goes to trial, he is convicted by his jury and then wants a three-judge panel, great. If he wants to plead guilty and have a three-judge panel, great. If he wants to plead guilty and have a jury, great. If his case gets remanded on appeal and he was sentenced by a jury and now he wants a three-judge panel, great. It is his decision. We are not here to forum shop. The question is, where does the defendant think he gets a fairer shake? If he thinks three judges are going to return death verdicts more often than not, he is not going to choose it then. However, if he feels he really likes his judge, who he feels has been lenient all throughout his case and the jury returns a verdict in the blink of an eye, he may well want to go in front of a sentencing three-judge panel.

SENATOR WASHINGTON:
Or the other choice would be to impanel a new jury?

MR. PETERSON:
Correct.

SENATOR WASHINGTON:
Or take the chance of having life without the possibility of parole?

MR. PETERSON:
Yes, depending on how this body enacts the default provision.

SENATOR WIENER:
There is language that looks like it was added in section 2 concerning imprisonment for a definite term of 50 years. You mentioned earlier the 20 to 50. Does the added word definite mean it would be 50?

Mr. Peterson:
I noticed that in the reprint as well, and I am not quite sure where it came from. The Assembly Judiciary made that change; I do not recall discussing it. I appeared at the Assembly to discuss this bill and I do not recall us discussing changing a punishment.

This does not really change much. The current language is a definite term of 50 years with parole eligibility beginning after 20 years. This now says imprisonment for a definite 50 years because the minimum cannot be more than 40 percent of the maximum. This still is a 20 to 50 term. I am concerned it would allow the district court to impose something less than that. I cannot tell you the intent behind that change. I find it a strange change and would object to any change that changes 20 to 50 to something else or something less. All this is trying to do is say a definite term of 50 meaning parole eligibility begins after 20. I was not involved in that process and was surprised by that change.

I would like to talk about record keeping. Studying this important and serious aspect of our criminal justice system is very important and I do not necessarily believe cost is a factor. It is certainly not a factor that I discuss and it is something that, while important, needs to be of lesser priority when we are dealing with something as important as the death penalty. My response always when a cost argument is raised regarding the death penalty is, “Well, right now it is expensive to look into things like the death penalty. What if it was cheaper?” Would that all of a sudden justify the death penalty? There are some matters in which the cost has to be considered less important. I am not here to argue

that this record keeping is a burden on the district attorney's office. When I saw the draft of A.B. 13 sometime back, I went to our newly elected district attorney and said, "You know what? Some of this stuff is a really good idea. Whether they pass it or not, we need to start keeping and collecting some of this data. We have an interest in making sure justice is administered fairly and to the extent this data gathering allows us to determine, systemically, if justice is being done fairly, I do not have problem with the collection of it."

Mr. PETERSON:
A lot of this is very appropriate. Looking at the list of the things in section 6, it says we have to report the age, gender, and race of the defendant, great. Age, gender, and race of a codefendant or other person charged or suspected of having participated in the homicide, is generally good, but I will get back to this in a minute as there is a slight problem with it. The problem is the language "charged" or "suspected." Defense attorneys suspect just about everyone of having committed a crime other than their particular client. In particular, "suspected" causes me concern with compliance. Unless a person is arrested or charged, we do not have the data on them. Let us say it is suspected Joey B. may have been involved and that is all we know. I cannot gather that data. I cannot comply in any meaningful way. I propose that we amend it so that that section reads, "or other person charged or arrested for participation in the crime," because that is the only way we are going to able to have meaningful data to gather.

See, the age, gender, and race of the victim of the homicide is great, and data we have to gather. Paragraph (d) of subsection 2 of section 6 is the date of the homicide and any alleged related offence; I support that. The data filing of the information, wonderful. Paragraph (f), the name of each court in which the case was prosecuted, wonderful. Paragraph (g) is whether or not the prosecutor filed a notice of intent to seek death and if so, when the prosecutor filed it, that is great. Paragraph (h) is the final disposition of the case and whether or not it was tried to a jury, great. All of those things need to be gathered.

Before I go on to paragraphs (i) and (j), which are problematic for different reasons, I do want to talk about the limitation of this particular section. Currently, the bill applies to record keeping in all cases where there is a charge of murder or voluntary manslaughter. I propose we keep it in relation to murder cases. Voluntary manslaughter cases are not even close to the death penalty. I understand Mr. Pescetta's argument that non-death cases need to be studied; that is true, but remember there are first-degree murder cases that are capital cases, and first-degree murder cases that are non-capital cases. We should collect data in all of those cases. We should also collect data in all second-degree murder cases or what we call open murder cases. If a case is even remotely murder, we file it as murder. Voluntary manslaughter cases are an entirely different breed of case. I do not see a reason to collect data as to those. For the most part, voluntary manslaughter cases would be excluded from the following provision that says, "not voluntary manslaughter cases that involve motor vehicles." Voluntary manslaughter cases are a different beast entirely than any case that would even be remotely capital-eligible. I would submit there is no need and there is a burden on us to gather this information. I am not going to say it is an impermissible burden. We are happy to do it; I have encouraged our office to start doing it already. However, to gather data on voluntary manslaughter cases does not really inform us in any way on the systemic bias. What we are trying to gather information for are the systemic bias assertions regarding the death penalty.

SENATOR NOLAN:
When we look at the case where the woman caught her husband cheating on her and ran over him with her car, because it was a crime of passion, she was charged with second-degree murder. Even in

many cases when those are charged with manslaughter, do we then lose the opportunity to ever collect that type of information where somebody actually takes a car and the prosecution may not have the case to put forward on a second-degree murder?

MR. PETERSON:
Under the proposed legislation, we would gather data on that case. That defendant was charged with murder. Regardless of the outcome, even if a case resolves to voluntary manslaughter, if the defendant is charged with murder, under this proposal, we would gather the data.

What we would not gather data on would be your very odd, voluntary manslaughter cases. They are generally traffic cases but sometimes they involve injuries to children resulting in death where it clearly was not an intentional act. Those types of cases are way different from what we would consider a capital murder case.

I did want to talk about paragraphs (i) and (j) of the reporting requirements. Paragraph (i) requires the race, ethnicity, and gender of each member of the jury to be recorded and I understand the importance of gathering this information. I can understand why people want information to analyze. My problem with this proposal is it requires me, as the prosecutor, to gather the information. That is a difficult and dangerous idea. Prosecutors are not allowed to use racial information in jury selection. It puts us in a difficult position when we have to gather information on jurors and potential jurors from possibly their self-reported racial information. It is very problematic. I do not have any problem with this body asking the district court to gather that information. That is a neutral body. It is just not proper for prosecutors to be concerned with the race of jurors. That information is not provided on the jury forms when I go to select a jury before a case and as a practical matter, how do I gather that? Do I have to ask the juror, "You know, potential juror, I am not certain what race you would self-report as, could you please tell me?" That is a horrible thing to have to do in jury selection and it is wildly improper, because all of a sudden now that is injected in the jury selection and challenges will be made. If this body feels this information is important to gather, which I agree that it is, ask the district court to collect it after the fact of the trial because jurors should have to, before a trial is heard, disclose this kind of information. It is their privacy right, it is their issue, it is their right to serve on the jury and they are going to feel there is discrimination if they are asked up front regarding this.

SENATOR MCGINNESS:
What about asking for the race, ethnicity, and gender of the judge, the prosecutor, the defendant, and defending attorneys? If we are going to do everybody else, should we not include him or her?

MR. PETERSON:
I notice that was not in here as well. We are really starting to get far afield. I understand why an analyst would want the race of jurors regarding jury decision-making. They will want to find if there is any correlation. When we start asking for other information it becomes a reason why we should not be asking for that information. If this information is to be gathered, it should not be imposed on the prosecutor. Other neutral agencies are more appropriate gatherers of that information.

My other concern is with paragraph (j). If we remember the purpose of this information gathering is to find if there is systemic injustice, paragraph (j) wants me to list the names of prosecutors involved in decision-making. You have heard testimony indicating federal courts need names. What they need names for is for civil rights lawsuits. This provision is to enable persons to file individual civil rights lawsuits. It has nothing to do with collecting systemic data. The question is, does the State do something wrong? Is the system improper? Names of prosecutors allows for nuisance lawsuits and

civil rights actions in federal court. If they feel things are going on that they want to litigate, there are discovery provisions they can follow. Reporting is being required to determine systemic injustice, not to scrutinize individual actions of individual prosecutors.

I ask this body to amend the initial portion of paragraph (6) so it limits it to murder cases and not voluntary manslaughter cases. In paragraph b, persons charged or suspected should be changed to persons charged or arrested since I cannot gather data on suspects. Omit paragraphs (i) and (j), or in the alternative, I request it to be the district court rather than the prosecutor that gathers the information.

SENATOR WASHINGTON:
I looked at paragraph (i) and I appreciate your compromise with having the district court take the information concerning the jurors. From my perspective, as a possible potential juror, you inquired about my race and my ethnicity, I would tell you to take a flying leap because I would not want to be on your panel. I do not think it is pertinent to the case. It is difficult to get anybody to serve on a jury anyway. If you send me a little card and you inquire about my race and gender, I do not want to participate. I am not the only one who thinks like this. I would just delete the whole section.

MR. PETERSON:
Senator, in my very opening comments I was hoping to share with you practical observations. What you just said is exactly why I am here talking to you today, because that is a practical consideration. Paragraph (i) is a big danger. Jurors are offended by those questions. They feel they should not have to provide that information because they are to serve as jurors, not to be questioned about these sorts of things. However, I am trying to see both sides of the fence and I can see why the defense wants to have this information. In some instances, I would not mind having the information.

SENATOR WASHINGTON:
I am not disagreeing with the fact the defense wants the information, I am just looking at it from the practical standpoint as being selected as a juror and you are inquiring of my ethnicity. You are right. I am offended by the question.

SENATOR WIENER:
I am seeing a verb-tense difference. If the case was tried before a jury, this data is gathered after and would not be used in jury selection. I do not see it as part and parcel with what is going on in your dialogue right now.

MR. PETERSON:
The stage we gather information about jurors happens at two points. One, when they fill out their initial response card and two, during jury selection. There is no mechanism to officially poll jurors regarding their race at the end of a case. We do not speak with jurors, the court says, “Thank you for your verdict, you are discharged.” We can speak with them in the jury room, but that does not lead to official recordings and at that point, they are done. If I ask them then, if they were going to tell me to talk a flying leap before trial, they are definitely going to tell me to take a flying leap after trial. I am concerned the information has to be recorded up front because there is no other time to do it. I guess the district could, after a verdict, could poll the jury of how they self-report their race. I see so many problems. It is offensive to jurors, and it is an invasion of their privacy, but I understand why the data needs to be gathered.

SENATOR NOLAN:

Early on in your testimony, you indicated the death penalty, as far as juries are concerned, is weighted heavily by aggravating and mitigating circumstances as well as some predisposition to prior convictions. We are not gathering that information in a case-by-case basis. It seems to be very weighty information, which would be helpful. If you are trying to trend these things and we are going to try to benchmark this study, do you not think we should go back and establish the same type of information in a time period prior to when this is enacted so we can say this is really what the system was and how it looked prior to this being enacted and this is how it looks going forward?

MR. PETERSON:
I agree with you completely regarding aggravators and mitigators and similar things. My internal suggestion to our office is we track not only this information, but what aggravators were charged, what aggravators were found, whether or not there were multiple victims, whether or not mitigators were presented, what mitigators were found et cetera. All of that stuff is very important to record keeping. As far as going back, that is going to be very difficult. I have tried to do it and it is difficult. It could be done, but it is difficult.

KRISTIN L. ERICKSON, CHIEF DEPUTY DISTRICT ATTORNEY, CRIMINAL DIVISION, WASHOE COUNTY DISTRICT ATTORNEY:
On behalf of the Nevada District Attorneys Association and the Washoe County district attorney's office, Mr. Peterson has more than adequately stated our position and I would like to put our support on the record.

CHAIRMAN AMODEI:
Seeing no more testimony we will close the hearing on A.B. 13, and open the hearing on A.B. 16.

MR. PESCETTA:
Assembly Bill 16 is the DNA testing bill. I am in the odd position of supporting a bill that has been both editorialized in favor of by the *Las Vegas Review-Journal* and supported by Mr. Peterson. This provision is limited to capital cases and it is designed to provide a simple procedure for getting DNA testing when there is no other proceeding pending. At trial, or in the course of state or federal habeas proceedings, if there is DNA evidence that has not been subjected to testing, it is tested in the course of those proceedings. This plugs a hole where there is not anything pending. It is a simple petition that can be filed in the district court. The district court reviews whether there is any DNA evidence to be tested. The test is conducted, the results fall whichever way they do.

This is a bill that will be applied very seldom. It is important to have it in place for those cases where for whatever reason, there is not some other legal proceeding pending in which this can be obtained.

Mr. Peterson has submitted an opposition on amendment (Exhibit D), which is also sort of a support and amendment. I have reviewed the amendment, which provides for an appeal provision. The current state of the bill is the court directs the prosecutor to preserve the evidence. As Mr. Peterson points out, frequently evidence with any relevance may have been admitted at trial so it may be in possession of the clerk of the court. It may be in the possession of the police agencies. It may be in the possession of the prosecutor. The provision he suggests is acceptable in terms of identifying who has got what that may be subject to testing. He also proposes, in section 10, an appeal provision and I would support that.

With the amendments suggested by Mr. Peterson, I ask for the bill to be processed.

SENATOR TITUS MOVED TO AMEND AND DO PASS A.B. 16.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
With the discussion on A.B. 13, I will allow the committee members to consider, converse, discuss, whatever with the appropriate parties A.B. 13 as it exists or with the proposed amendments. We will now work session some items beginning with A.B. 475.

ASSEMBLY BILL 475 (1st Reprint): Makes various changes concerning providing health insurance for child pursuant to court order for support. (BDR 3-1246)

NICHOLAS ANTHONY, COMMITTEE POLICY ANALYST:
Assembly Bill 475 was heard on May 13. It was brought forward by the Assembly Committee on Ways and Means on behalf of Mr. Sullivan from the Nevada Child Support Enforcement Program. There was no opposition or amendments offered to the bill. Mr. Sullivan testified this measure was brought forward to bring Nevada law into compliance with federal law and would satisfy Temporary Assistance to Needy Families requirements.

CHAIRMAN AMODEI:
I had an inquiry from a constituent regarding a potential issue that might be germane to this bill.

BRADLEY WILKINSON, COMMITTEE COUNSEL:
Currently, the definition of gross monthly income, which is used in the determination of child support, includes all income received by a person who has an employer. The definition is slightly different for self-employed persons. It is all of the money the person receives. There is no deduction for retirement contributions. With State employees there are two kinds of retirement. There is employer-paid retirement in which the employee receives a lower gross monthly amount, and employee-paid retirement in which the employee receives a higher gross income but pays the contribution. That results in if an employee opts to pay retirement, that employee has a higher monthly gross income and therefore owes a higher obligation for child support. Conversely if the employee chooses the employer-paid retirement and has a lower gross monthly income the employee then pays a lower obligation of support for children.

CHAIRMAN AMODEI:
Is there any appetite for attempting to fashion a change to the definition of gross monthly income in the context of A.B. 475? Hearing none, what is the pleasure of the committee?

SENATOR CARE MOVED TO DO PASS A.B. 475.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
We have some concur, not concurs to go through beginning with S.B. 199 which was Senator McGinness's legislation.

SENATE BILL 199 (3rd Reprint): Makes various changes concerning the sale, disposition, manufacture and possession of weapons. (BDR 15-331)

SENATOR MCGINNESS:
We should concur. They took out some parts that had some concerns by gun dealers and they worked with Mr. Nadeau and Mr. Olsen. Assemblyman Lynn C. Hettrick put in a quirk about switchblade knives because there is a manufacturer who wants to come to Douglas County to make them and with the previous language they would not have been able to do that.

SENATOR MCGINNESS MOVED TO CONCUR WITH AMENDMENT NO. 699 TO S.B. 199.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
Senate Bill 297 was amended by Assembly Amendment No. 626. The date was changed.

SENATE BILL 297 (1st Reprint): Makes various changes relating to personal identifying information. (BDR 15-28)

SENATOR WIENER:
I move we concur. This change moves the date out as to when retailers need to comply. This is the identity theft bill. Retailers need to comply with removing the expiration date and including only up to the last five numbers of the credit card. This is to assist some of the small retailers who need more time to make the transition from their current credit card devices and satisfy the requirement in the law.

SENATOR WIENER MOVED TO CONCUR WITH AMENDMENT NO. 626 TO S.B. 297.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
Next is S.B. 317.

SENATE BILL 317 (2nd Reprint): Makes various changes relating to incarcerated persons. (BDR 34-594)

SENATOR WIENER:
I move we concur. This has had quite a bit of visibility in the media, much of it misunderstood. The Assembly Committee on Judiciary made a joint referral. There are two things that occurred with the bill. Section 8 which dealt with waivers for registration of inmates who would participate in post-secondary education was removed. There is still section 6 enabling the community college or the university system to provide courses, but there is no provision for waivers. If the inmates were to participate they would have to pay for it. At the request of Mr. Nadeau, on behalf of Washoe County, a section was added to deal with the overcrowding of jails and would allow the chief judge in the district court to determine, based on quite a substantial criteria list, who would be released if there is an overcrowding, otherwise consent decrees would be issued and they would lose control of their jail.

SENATOR WIENER MOVED TO CONCUR WITH AMENDMENT NO. 653 TO S.B. 317.

SENATOR CARE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
Next is S.B. 204.

SENATE BILL 204 (2nd Reprint): Makes various changes concerning disclosure of certain information to purchasers, lessees and tenants of real property, manufactured homes, mobile homes and commercial coaches. (BDR3-562)

This bill is from the City of North Las Vegas concerning methamphetamine lab cleanup. The Assembly has added Amendment No. 563 to S.B. 204 and what they have done in the amendment is to expand upon the language talking about manufactured homes. I have checked with the bill sponsors and they have no objections to the amendment and would appreciate if we agree with their recommendation to concur.

SENATOR WASHINGTON MOVED TO CONCUR WITH AMENDMENT NO. 563 TO S.B. 204.

SENATOR NOLAN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
The final bill is S.B. 394, which is a Senate Committee on Judiciary bill.

The Assembly has added Amendment No. 676. The first amendment is at page 30 of the bill, which is the last page. It adds the word "optical" in the context of all those lines. Mr. Wilkinson do you know what safro,e is? Also, it says amend section 29 on page 31 by deleting l)ne 1. As near as I figure, the bill I have in front of me ends on page 30.

SENATE BILL 394 (1st Reprint): Revises various provisions relating to certain criminal statutes. (BDR 15-1026)

MR. WILKINSON:
That sounds like Assemblyman Jason D. Geddes' amendment. I am not a chemist.

CHAIRMAN AMODEI:
Do you recall for whom we did this introduction?

JAMES F. NADEAU, LOBBYIST, NEVADA SHERIFFS AND CHIEF'S ASSOCIATION/NORTH, AND WASHOE COUNTY SHERIFF'S OFFICE:
Mr. Wilkinson is exactly correct. This is Assemblyman Geddes' amendment. He said the optical thing was not needed, just isomers and all the other stuff. He went into a long lecture. He is the chemist and figured it all out.

MS. ERICKSON:
We have no objection to the amendment.

SENATOR MCGINNESS:
Technically, it says amend section 29, page 31 and there is no page 31.

MR. WILKINSON:
The old bill must have had a page 31. The amendment reflects the bill as it existed originally.

CHAIRMAN AMODEI:
We added a word and a subsection and cut down on the length of the bill?

SENATOR WASHINGTON:
We will not deliberate the sense of this bill, and by default will make a motion to concur.

SENATOR WASHINGTON MOVED TO CONCUR WITH AMENDMENT NO. 676 TO S.B. 394.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN AMODEI:
One final item; we have an update on A.B. 40, which was Assemblyman Oceguera's regarding extending the period of limitations concerning a civil action.

ASSEMBLY BILL 40 (2nd Reprint): Extends period of limitations for commencing civil action after action has been dismissed under certain circumstances. (BDR 2-769)

We put on an amendment proposed by Senator Care, which changed 90 days to 30 days in section 1.

SENATOR CARE:
This was the bill where a case was dismissed from federal court for subject matter jurisdiction, then the plaintiff may refile. The amendment shortens the period in which the action must be recommenced from 90 days to 30 days, which would be consistent with the federal rule. The amendment also makes it clear that any findings of fact or law in the federal matter would apply to be law of the case in State court action.

CHAIRMAN AMODEI:
I will not bring this back to the committee for recommendation to recede or not recede. Senator Care may discuss this further with Assemblyman Oceguera. There being no further business to come before the committee, the meeting is adjourned until the call of the chair at floor session throughout the rest of the session.

RESPECTFULLY SUBMITTED:

_____
Lora Nay,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chairman

DATE:_____

Amendment No. 17

Assembly Amendment to Assembly Bill No. 40 (BDR 2-769)
Proposed by: Committee on Judiciary
Amendment Box: **Resolves Conflicts with:** N/A
Amends: Summary: Title: Preamble: Joint Sponsorship:

ASSEMBLY ACTION	Initial and Date	SENATE ACTION	Initial and Date
Adopted Lost		Adopted Lost	
Concurred In Not		Concurred In Not	
Receded Not		Receded Not	

Amend section 1, page 1, by deleting lines 5, 6 and 7 and inserting:

"***within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within:***".

Amend section 1, page 1, line 9 by deleting "***Six months***" and inserting "***Ninety days***".

Amend section 1, page 1, line 13, after "***3.***" by inserting:

"***An action may not be recommenced pursuant to paragraph (b) of subsection 1 more than 5 years after the date on which the original action was commenced.***

4.".

Amend the title of the bill by deleting the third line and inserting:

"dismissed because the court lacked jurisdiction over the subject matter of the action under certain circumstances; and".

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Attorneys for Defendant Barrick Goldstrike Mines, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC., Plaintiff, vs. BARRICK GOLDSTRIKE MINES, INC.; BARRICK GOLD EXPLORATION INC.; ABX FINANCECO INC.; BARRICK GOLD CORPORATION; and DOES 1 through 20, Defendants.	Case No. A-18-785913-B Dept. No. XI Hearing Date: Hearing Time:

REPLY IN SUPPORT OF GOLDSTRIKE'S MOTION FOR SUMMARY JUDGMENT

Defendant Barrick Goldstrike Mines Inc. ("Goldstrike"), through counsel of record Parsons Behle & Latimer, submits this Reply in Support of its Motion for Summary Judgment.

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Goldstrike's Motion is straightforward and based upon the express language of NRS 11.500. It is undisputed that Bullion did not bring its claims against Goldstrike within the applicable four- or six-year statutes of limitation. Those claims are barred as a matter of law unless they can be salvaged by 11.500. Unfortunately for Bullion, Paragraph 3 of that statute is unambiguous, and it similarly is undisputed that Bullion did not bring these claims within five years of the original filing as Paragraph 3 requires. The underlying statutes of limitation have expired, and the requirements of the savings statute are not met. There is nothing left for this Court to do but to find those claims time barred.

Faced with the foregoing, Bullion resorts to a myriad of complaints and arguments regarding the impact of NRS 11.500, all of which are either beyond the purview of this Court, contrary to existing authority, or otherwise insupportable. In purporting to challenge the constitutionality of 11.500, Bullion misconstrues its limited scope and purpose and seeks to deprive the underlying statutes of limitation of any meaning, such that it can bring claims ten years after they accrued, and after years of litigation. The bedrock principles underlying all statutes of limitation are finality and repose. Exceptions are warranted in some circumstances to avoid unjust outcomes, but in Nevada and elsewhere, these exceptions are carefully and narrowly drawn. Contrary to Bullion's implied characterizations, the savings statute merely carves out a narrow exception to otherwise applicable statutes of limitation for certain claims dismissed from Federal Court on procedural grounds. It represents the Nevada Legislature's considered decision about the best way to balance the competing goals of extending statutes of limitation for equitable reasons while upholding the principles of finality and repose embodied in those statutes. There is nothing in the legislative history or the text

of the act that would support a finding of unconstitutionality on any of the grounds urged by Bullion. The savings statute precisely addresses Bullion's circumstances, and it is unambiguous. The Court's role is to apply the statute as written.

Bullion's tolling argument also misses the mark. The Nevada Supreme Court has adopted equitable tolling principles when circumstances beyond the plaintiff's control prevent it from filing its claims. These equitable tolling principles recognize that where a plaintiff did not timely bring claims because it could not discover it had been injured or could not identify the wrongdoer, the claims do not accrue for statute of limitations purposes. What Bullion urges here—the "suspension" of statutes of limitation after a claim accrues—is very different and has never been adopted by the Nevada Supreme Court. Tolling the statutes of limitation in these circumstances, and in the face of an unambiguous legislative enactment covering the same subject matter, not only lacks textual support, it violates core separation-of-power principles. The Nevada Legislature has spoken directly and precisely on the question of when, and under what circumstances, parties may refile their claims after being dismissed from Federal Court on subject-matter jurisdiction grounds. This Court should not accept Bullion's invitation to ignore the will of the Legislature by creating a new judicial tolling doctrine that reverses the result intended by the Legislature.

II.

ARGUMENT

A. Bullion failed to establish ongoing subject-matter jurisdiction in Federal Court, and its attempted refiling in this Court is time barred.

1. Complete diversity is an absolute prerequisite to the Federal Court's jurisdiction in this case.

Bullion's Opposition fails to contend with the fact that the Federal Court could exercise and continue to exercise subject-matter jurisdiction over this case ***only*** if the parties had complete diversity of citizenship. U.S. Const., Art. III, § 2, cl. 1 (providing jurisdiction for controversies

between "citizens of different states."); 28 U.S.C. § 1332 (a)(1) "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States ... "). By engaging in a lengthy historical discussion of Goldstrike's motion to dismiss for lack of subject-matter jurisdiction in the federal case and suggesting that Bullion was not responsible for any delay in determining that jurisdiction was lacking (Opp'n at 5-7, 12-18), Bullion disregards three critical facts: (1) Bullion bore the burden of proof in establishing the existence of diversity jurisdiction throughout those proceedings; (2) Bullion did no discovery on issues related to Goldstrike's citizenship in Federal Court (until 2017); and (3) the Federal Court, in any event, had an independent ongoing obligation to assess its jurisdiction.

Indeed, "[b]ecause the jurisdiction of Federal Courts is limited, there is a presumption against [their] jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (citations omitted); *Deleo v. Rudin*, 328 F. Supp. 2d 1106, 1109 (D. Nev. 2004) (same). Furthermore, "[a] court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking." *Marcus*, 328 F.Supp.2d at 1309 (emphasis in original). This is true regardless of how long the case has been pending. *See Arbaugh v. Y & H. Corp.*, 126 S.Ct. 1235, 1244 (2006). Accordingly, while Bullion may wish to avoid the consequences of its failure to establish ongoing diversity sufficient to confer the Federal Court with jurisdiction, it cannot do so.

2. The applicable statutes of limitations continued to run as Bullion's claims were pending in Federal Court.

In a situation such as this, when a complaint is filed in a Federal Court without subject-matter jurisdiction, the "statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing"—the suit "is treated for statute of

limitations purposes as if it had never been filed." *Lee v. Cook Cty., Ill.*, 635 F.3d 969, 971–72 (7th Cir. 2011) (Easterbrook, C.J.). "[T]he general rule [is] that '[i]n the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him.'" *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. App. 1999) (quoting 51 Am.Jur. *Limitation of Actions* § 311 (1970)).

In *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 121–23, 272 P.3d 134, 135-37 (2012), the Nevada Supreme Court applied this rule to a medical malpractice complaint that lacked a supporting expert affidavit when filed. Even though the plaintiffs filed an errata to the complaint five days after the original complaint, which included the required affidavit, and the defendant waited for three years to challenge the complaint, the Nevada Supreme Court held that the statute of limitations continued to run against the defective complaint in the meantime. *Id.* When the plaintiffs attempted to refile their claims three years later after the initial complaint was dismissed, the Supreme Court held that the claims were untimely under the applicable statutes of limitation. *Id.* at 123, 272 P.3d at 137; *accord Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006). Indeed, the Nevada Supreme Court has "specifically reject[ed the] argument that because [parties] were litigating the same issue" in a related proceeding, "the limitation periods were tolled during the pendency of those [other] proceedings." *Siragusa v. Brown*, 114 Nev. 1384, 1394 n.7, 971 P.2d 801, 808 n.7 (1998).

It was this rule that led many states to adopt different variations of savings statutes, also called "renewal statutes." Like Nevada's savings statute, most savings statutes "provide a conditional, limited extension of time in certain cases and under certain circumstances." *U.S. Fire Ins. Co. v. Swyden*, 53 P.2d 284, 286 (Okla. 1935).

3. Bullion's claims against Goldstrike are time barred and are not salvaged by the savings statute of NRS 11.500.

The Nevada Legislature has enacted a savings statute that provides a conditional, limited extension of time to file claims. But Bullion's claims do not qualify under one of those very clear limits—the five-year repose provision of NRS 11.500(3).

Bullion does not dispute the key facts underlying Goldstrike's motion, that: (1) Bullion's Complaint here contains the very same five claims Bullion alleged in its Amended Complaint in the federal case, based upon the same factual allegations (*e.g., compare generally* Compl. *with* Federal Court Amended Complaint, Ex. 1 to Mark Decl.); (2) the statutes of limitation applicable to Bullion's claims are either four or six years, and began to accrue by at least 2009, when Bullion first filed these claims against Goldstrike in Federal Court; and (3) Bullion did not file its Complaint in this action until December 2018. Accordingly, unless the savings statute applies, it is undisputed that Bullion's claims against Goldstrike are barred pursuant to the applicable statutes of limitation.[1]

Nevada's savings statute, NRS 11.500, does not save Bullion's claims. The statute is clear: "if an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within: (a) [t]he applicable period of limitations; or (b) [n]inety days after the action is dismissed, whichever is later." Bullion's federal action arguably was commenced within the applicable statutes of limitation, and it was dismissed for lack of subject-matter jurisdiction. Because the statutes of limitation had run by the time Bullion filed in this Court, Bullion was required to file this action within 90 days of the dismissal. Bullion did that, but it ran afoul of Paragraph 3, which limits refiling claims under the savings statute to not "more than 5 years after the date on which the original action was commenced." This provision is unequivocal, and it is

[1] Bullion's reliance upon judicial tolling is separate and addressed in Section II.C, below.

undisputed that Bullion first filed against Goldstrike in 2009 and did not file this action until 2018. Bullion's action is time barred, and it is not salvaged by the savings statute.

B. Bullion's constitutional challenges to NRS 11.500(3) lack merit.

Unable to overcome the foregoing, and indeed implicitly conceding that NRS 11.500(3) applied to bar this lawsuit, Bullion resorts to a myriad of arguments regarding the constitutionality of Paragraph 3. Bullion makes this the centerpiece of its argument, characterizing the statute as "slipshod," a "poorly thought-out amendment," and "poorly conceived." (Opp'n at 2, 24, & 25.) But "[s]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). Further, when a statute is challenged on constitutional grounds, it is "to be construed in favor of the legislative power." *Galloway v. Truesdell*, 84 Nev. 13, 20, 422 P.2d 237, 242 (1967).

1. NRS 11.500(3) was the product of a lengthy, deliberative legislative process.

In support of its constitutional arguments, Bullion distorts the legislative history concerning the addition of Paragraph 3 in the 2003 Regular Session's Assembly Bill 40 ("A.B. 40"). It attempts to make the addition of Paragraph 3 appear rushed and ill-founded, but the Legislature's consideration was far more robust than Bullion acknowledges. Like other savings statutes, A.B. 40 was intended to provide a limited safe-harbor period for plaintiffs who found their claims dismissed on jurisdictional grounds. *See* Nevada Assembly Committee on Judiciary Minutes, Seventy-Second Session, February 13, 2003 ("Minutes"), Testimony of Mr. Ebihara. A.B. 40 was intended to reduce court congestion by requiring dual filings in far fewer cases, which was the standard practice at the time. *Id.*

But with this change, the Legislature also recognized the problems defendants faced when expending resources on "prolonged" litigation. Minutes, Testimony of Mr. Adler. Accordingly, the Attorney General was originally prepared to testify against A.B. 40 but agreed to support it with

the introduction of Amendment No. 17, adding the repose provision of Paragraph 3. Minutes, Testimony of Solicitor General Parker. Solicitor General Parker explained the agreed-upon amendment as follows:

> the intent of the amendment [is] to reduce the coverage of the original language in A.B. 40 strictly to cases that were dismissed in the federal court, based on lack of subject matter jurisdiction. ... In addition, Section 3 had new material, which had provided an essence of [a] statute of repose. ... Under that material, there would be a five-year deadline from the original filing to recommence an action.

Minutes, Testimony of Solicitor General Parker. In support of the new material in Paragraph 3, former Nevada State Senator Ernie Adler even used an example of a federal case that was litigated for five years, appealed to the Ninth Circuit, and then refiled in state court afterwards, stressing that "there should be some sympathy for a defendant ... the defendant in the case [Mr. Adler] had referenced had to put his life on hold for five years while his case went through the Ninth Circuit Court, and after all that time, he would still have to revisit the same case in state court for another five years." Minutes, Testimony of Mr. Adler. This is precisely the scenario now facing Goldstrike if the Court were to refuse to apply the plain language of NRS 11.500(3).

Furthermore, while the legislative intent of the act with the amendment was to balance the need to allow some flexibility to plaintiffs in this limited circumstance while avoiding prolonged litigation, the Legislature nonetheless contemplated that there could be other scenarios. If there is a potential for an extended issue with the Federal Court's subject-matter jurisdiction, as there was here, a diligent plaintiff will file a protective claim in state court to avoid forfeiture under NRS 11.500(3).[2] That was exactly the scenario here, as set forth in Goldstrike's affirmative defenses in

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[2] Solicitor General Parker specifically addressed this possibility:

> Assemblyman Carpenter asked if it would be unnecessary to file in both courts. He wondered if a person had filed suit in federal court first, and the suit had been dismissed due to lack of subject matter jurisdiction, that person could still file suit in state court.
>
> Mr. Parker replied ***that there might be some cases that would require a dual filing***, but the intention was that the dual filing would

the federal Answer filed in 2009.

Therefore, far from being the rush job that Bullion portrays in its Opposition, the Nevada Legislature's discussion of NRS 11.500(3) was robust and the final legislation attempted to balance the interests and expectations of both plaintiffs and defendants in lawsuits involving concurrent jurisdiction. Furthermore, when the Nevada Legislature amended the original savings statute in 2005 to address a perceived constitutional issue with the original version, the Legislature left intact the repose provision. *See* Senate Bill 266, Seventy-Third Session, 2005; Nevada Senate Committee on Judiciary Minutes, Seventy-Third Session, April 15, 2005. In fact, it does not appear that anyone to date has raised any legislative concerns about the repose provision.

2. NRS 11.500(3) preserves the separation of powers doctrine.

Statutes of repose are akin to statutes of limitation, which are clearly within the legislature's power to establish. *See* NRS Chapter 11. Bullion's assertion that "[t]he Legislature cannot enact a rule of court procedure" has no bearing on NRS 11.500. (Opp'n at 22.)

Although there are some superficial similarities between this case and *Berkson v. LePone*, *Berkson* addressed a hundred-year-old statute that "provide[d] a plaintiff whose judgment is subsequently reversed on appeal with the right to file a new action within one year after the reversal," even if that reversal was on the merits of the plaintiff's claims. 126 Nev. 492, 494, 245 P.3d 560, 562 (2010). In *Berkson*, the Nevada Supreme Court held that the statute at issue, NRS 11.340, conflicted with the "well established" doctrines of claim and issue preclusion because the refiling permitted under the statute avoided prior merits-based rulings of appellate courts, "act[ing] to prolong previously resolved cases, resulting in unnecessary expenses for adverse parties and the diversion of time and scare judicial resources away from undecided cases." *Id.* at 501, 245 P.3d at 566.

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not be necessary.

Minutes, Testimony of Solicitor General Parker (emphasis added).

Berkson does not stand for the proposition that the legislature may not prescribe any rules that effect judicial procedure. The Nevada Supreme Court has rejected such broad propositions in the past.[3] Moreover, Bullion has failed to identify a pre-existing procedural rule with which NRS 11.500(3) allegedly conflicts. If Bullion's argument is that NRS 11.500(3) conflicts with NRCP 41(e), that is misplaced; if anything, NRS 11.500(3) is consistent with NRCP 41(e)'s mandate that cases be brought to trial within five years. (Opp'n at 22.) Indeed, as opposed to "prolonging" litigation, like the statute at issue in *Berkson*, NRS 11.500(3) helps conserve "scarce judicial resources" by putting a finite time on claims and requiring the dismissal of untimely ones.

If the Court were to adopt Bullion's unprecedented reading of the separation-of-powers doctrine, it would nullify a multitude of statutory procedural rules that do not directly conflict with pre-existing procedural rules, including all statutes of limitation and repose contained in the Nevada Revised Statutes, including all of Chapter 11.

Further, NRS 11.500(3) does not tell courts how quickly they must resolve subject-matter jurisdiction claims. (Opp'n at 22.) It merely creates a five-year period after which plaintiffs can no longer pursue time-barred claims in state court. A court may take as long as it wants to decide the issue—the statute only addresses a plaintiff's right to refile in state court after such a decision. As subject-matter jurisdiction must be affirmatively established by the plaintiff, this rule encourages plaintiffs to establish their basis for proceeding in Federal Court early in the process, which conserves both judicial and party resources. In the event a plaintiff is unwilling or unable to do so, the

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[3] *See Washoe Med. Ctr. v. Second Jud. Dist. Court*, 122 Nev. 1298, 1305 n. 29, 148 P.3d 790, 795 n. 29 (2006) (concluding the medical expert affidavit requirement of NRS 41A.071 did not violate the separation of powers doctrine because did not conflict with a pre-existing procedural rule and therefore did not impair the judiciary's authority to procedurally manage litigation); *Cramer v. Peavy*, 116 Nev. 575, 581-82, 3 P.3d 665, 670 (2000) (concluding NRS 616C.215(10) did not violate separation of powers doctrine by providing for a legislatively-mandated jury instruction in certain workers' compensation cases).

right to proceed in state court can be preserved by filing a parallel action in state court. But what a plaintiff cannot do is sit idly by and presume a jurisdictional basis exists to be in Federal Court, and then attempt to restart the action many years later in state court after it is determined the case never should have been in Federal Court in the first place.

3. NRS 11.500(3) does not violate the Supremacy Clause.

Bullion fails to explain how a state court applying a state-law savings statute to state-law claims implicates the Supremacy Clause. As set forth above, NRS 11.500(3) does not speak to either the state or Federal Court's handling of cases—rather, it dictates the plaintiff's behavior. Bullion's main reliance on *Haywood v. Drown*, 556 U.S. 729 (2009), is inapposite; *Haywood* involved a New York statute that specifically sought to bar the use of New York state courts for civil rights cases under 42 U.S.C. § 1983. Therefore, the statute purported to divest state courts of power to hear civil rights causes of action arising under a federal statute, even though "state courts as well as Federal Courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." *Haywood*, 556 U.S. at 735.

No such situation presents itself here. Nevada has not nullified a specific federal right or cause of action in its creation and use of NRS 11.500(3). Bullion filed its original case in Federal Court based on diversity jurisdiction, not based on any federal right—all of its claims were based on state contract and real property law. Bullion could have proceeded in state court from the outset, but instead it elected the federal forum for strategic reasons and without investigating the facts relating to diversity jurisdiction. The statute does not regulate the behavior of Federal Courts or judges: it encourages plaintiffs to diligently establish a basis for the Federal Court's jurisdiction within five years, while simultaneously enabling a plaintiff to file a protective second action in state court if there is any risk that the plaintiff cannot conclusively establish subject-matter jurisdiction in the five-year period. Therefore, the statute does not implicate the Supremacy Clause.

To the extent Bullion implies that the federal diversity jurisdiction statute preempts NRS 11.500(3), that argument also lacks merit. In *FDIC v. Rhodes*, 130 Nev. 893, 898-901, 336 P.3d 961, 965-66 (2014), cited in Bullion's Opposition, the court concluded that 12 U.S.C. § 1821(d)(14)(a) ***expressly*** preempted Nevada's deficiency judgment statute of limitations. *Id.* The deficiency action filed by the United States Federal Deposit Insurance Corporation, a federal agency, was timely under the federal extender statute, but not under the state statute of limitations. *Id.* The Nevada Supreme Court concluded the district court erred in dismissing the FDIC's deficiency judgment action as untimely because the federal statute (which was longer) controlled and preempted the state statute expressly. *Id.*

Here, the federal diversity jurisdiction statute, which provides that Federal Courts have "jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 ... and is between citizens of different States," does not preempt NRS 11.500(3), either expressly or otherwise. 28 U.S.C. § 1332(a). Bullion has not argued any other type of preemption that would render NRS 11.500(3) nullified under the Supremacy Clause.

4. NRS 11.500(3) does not violate the Federal or Nevada Equal Protection Clauses.

Bullion next argues that NRS 11.500(3) violates the federal and Nevada equal protection constitutional provisions because it lacks a rational basis. Equal protection analysis requires the Court to initially determine whether the statute, either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons based on membership in that group. *Doe v. State ex rel. Legislature of 77th Session*, 133 Nev. ___, ___, 893 P.3d 482, 486 (2017). Then, the court establishes what level of scrutiny the legislation receives before examining the legislation under the appropriate level of scrutiny. *Vickers v. Dzurenda*, 134 Nev. ___, ___, 433 P.3d 306, 309 (Nev. App. 2018).

While not entirely clear, Bullion appears to argue that plaintiffs in a case that has been pending in Federal Court for more than five years are treated differently than plaintiffs in cases that the Federal Courts resolve more quickly. (Opp'n at 28.) This classification is not disparate.[4] Both identified groups may file a state court action prior to the expiration of the five-year period under NRS 11.500(3) to preserve their rights to proceed in state court if they have any questions about a potential jurisdictional defect. Nothing in the Nevada statutory scheme prohibited Bullion from filing a state action before the five-year expiration, and its failure to elect such course of action does not render the statute open to constitutional challenge. The fact that some plaintiffs may file a state action when their federal case resolved within five years does not mean plaintiffs whose cases are not resolved on that timeline are prohibited from doing so. Therefore, this scenario does not present the type of classification that the equal protection doctrine is intended to address. The two groups are treated equally under the statute.

Even assuming for the sake of argument that Bullion could satisfy this threshold inquiry, the legislation survives rational basis review. Legislation that leads to disparate treatment but that does not involve a suspect class or impinge upon a fundamental right is reviewed under rational basis review. *In re Candelaria*, 126 Nev. 408, 417, 245 P.3d 518, 523 (2010). Under such review, legislation is presumed valid and will be sustained "if there is a rational relationship between the disparity of treatment and some legitimate government purpose," and the burden is on the

---

[4] Equal protection does not "forbid classifications"; instead, it "simply keeps government decisionmakers from treating differently persons who are in all relevant aspects alike." *Fournier v. Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013); *see also In re Candelaria*, 126 Nev. at 417, 245 P.3d at 523-24 (concluding the requirement that candidates justices of the peace in urban areas have more experience than those in rural areas because it was a rational way to advance the government interest in attempting to identify individuals likely to succeed under particularly demanding and fast-paced workloads).

challenger to "negate every conceivable basis which might support" the legislation. *Heller v. Doe*, 509 U.S. 319, 320 (1993).

Here, one of the express rationales for NRS 11.500(3) was to promote timely prosecution of claims. Minutes, Testimony of Mr. Adler (testifying that the defendant in the case he cited was required to "put his life on hold" while the case proceeded through the Ninth Circuit Court of Appeals and back to state court); *see also Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 408–09 (9th Cir. 2002) (providing that statutes of repose are concerned with a defendant's peace of mind); *Joslyn v. Chang*, 837 N.E.2d 1107, 1112 (Mass. 2005) (noting that statutes of repose prevent stale claims from springing up and surprising parties when the evidence has been lost). Because NRS 11.500(3) balances a plaintiff's right to bring a claim in a state forum with the recognition that lengthy lawsuits strain judicial and party resources, it more than survives rational basis review.

5. NRS 11.500(3) does not deprive Bullion of due process of law under the Federal or Nevada Constitutions.

Due process is protected under Article 1, Section 8(5) of the Nevada Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution. Federal precedent is instructive in interpreting Nevada's due process clause. *See Malfitano v. County of Storey*, 133 Nev. ___, ___, 396 P.3d 815, 819-20 (2017). The United States Supreme Court has stressed that the Due Process clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). But the Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scare and open-ended." *Id.* at 720. The analysis of substantive due process centers upon whether the government has infringed upon a "fundamental right."

Bullion fails to identify the fundamental right that NRS 11.500(3) allegedly infringes upon. (Opp'n at 25 (stating merely that due process guarantees that no personal shall be deprived of live, liberty, or property for arbitrary reasons, but failing to further expand on the due process argument).) Goldstrike is not inclined to speculate on the right that Bullion is referencing given the one-off mention of the Due Process Clause and given that it is Bullion's burden to establish the constitutional violation. *See Silvar*, 122 Nev. at 292, 129 P.3d at 684 ("Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.").

6. Declaring the savings statute unconstitutional will not save Bullion's claims.

As explained above, the "general rule" is that "in the absence of a 'renewal' or 'saving' statute, the reinstitution of an action during the pendency of which the statute of limitations has run is not permitted." 6 A.L.R.3d 1043. Therefore, if the Court were to rule the savings statute is unconstitutional, as Bullion asks, it would not change the outcome—Bullion's claims would still be untimely.

C. <u>The tolling doctrines that Bullion identifies do not apply to Bullion's claims, and the Court should reject Bullion's invitation to create a new one.</u>

Faced with the unambiguous language of NRS 11.500, Bullion resorts to multiple "tolling" arguments, none of which are of any avail. Bullion failed to establish federal subject-matter jurisdiction, and the statutes of limitation accordingly ran on all of its claims. Nevada law provides a remedy in this situation, but the remedy—the savings statute—is carefully calibrated to balance competing interests, and it does not salvage Bullion's claims in this situation.

1. The Court should reject Bullion's request to rewrite the savings statute by creating a new judicial tolling doctrine.

First, Bullion's assertion that NRS 11.500(3) is not a statute of repose (Opp'n at 20-21) is incorrect. Paragraph 3 is the textbook definition of a repose provision: it "limits the time within which an action may be brought, but is not related to the accrual of the cause of action." 51 Am.

Jur. 2d *Limitation of Actions* § 4 (defining statutes of repose); *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n. 2, 766 P.2d 904, 907 n.2 (1988) ("'Statutes of repose' bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered."); *accord Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391, 46 P.3d 62, 64 (2002). The five-year limit is triggered by the original filing of the claims, even if, as would normally be the case, the claims actually accrued before the date they were filed.

The Nevada Supreme Court has recognized this very distinction between a statute of limitation, which "prohibits a suit after a period of time that follows the accrual of the cause of action," and a statute of repose, which "bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). Statutes of limitation "can be equitably tolled" in certain circumstances, "in contrast" to statutes of repose, which cannot. *Id.*

Relying on case law construing a different statute of repose, Bullion quibbles with the savings statute's drafters, suggesting that Paragraph 3 is not a true statute of repose. Bullion urges this distinction to argue that Paragraph 3 does not apply because Bullion's claims are "equitably tolled" and thus timely under paragraph 1(a). (Opp'n at 20-21.) In so doing, Bullion asks the Court to ignore the Nevada Legislature's carefully crafted balance between the goal of allowing plaintiffs a fair opportunity to present their claims in court and the important societal value of finality upon which statutes of limitation are premised. The Court should decline to create a new tolling doctrine to override the Legislature's intent, as Bullion urges.

"If a common rule can be distilled from [caselaw from across the country], it is this: when a state enacts a savings statute in order to provide relief from a statute of limitations bar, courts are reluctant to deviate from the specific statutory requirements to craft alternative or additional mechanisms for relief." *Laugelle v. Bell Helicopter Textron, Inc.*, No. CV 10C-12-054 PRW, 2014 WL

2699880, at *6 (Del. Super. Ct. June 11, 2014). The Nevada Supreme Court has adhered to this rule when applying the savings statute. In *Wheble*, the plaintiffs had a strong case for tolling—they timely filed the original complaint, corrected the procedural defect in the complaint five days later (and well within the statute of limitations), litigated the case with the defendants for years before the court dismissed the original complaint, and quickly re-filed their claims within 90 days. 128 Nev. at 121–23. In response to a motion to dismiss the new suit, the plaintiffs raised the savings statute. *Id.* at 120–21.

The Nevada Supreme Court noted, however, that the savings statute was "clear on its face" and did not save claims that were dismissed because the complaint lacked a supporting affidavit. *Id.* at 122. The *Wheble* court did not suggest, consider, or even hint that it was appropriate for the court to create a new tolling doctrine in this circumstance, despite the sympathetic appeal of the plaintiffs' argument. *Wheble*'s restraint reflects the Nevada Supreme Court's position that courts "should not supply judicial meaning to a statute that is plain and unambiguous" and should instead "leave th[e] decision to the Legislature if it wants to extend statute-of-limitations periods [for claims that fail] for 'technical' reasons." *Berkson v. LePome*, 126 Nev. 492, 503, 245 P.3d 560, 568 (2010). "Unless there are specific constitutional limitations to the contrary, statutes are to be construed in favor of the legislative power." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). Indeed, the "Nevada Constitution embraces separation of powers to an even greater extent than the United States Constitution." *Berkson*, 126 Nev. at 501. In short, this Court should decline Bullion's invitation to act as a super-legislature, correcting what Bullion perceives to be "slipshod" drafting.[5]

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[5] Bullion's repeated attempts to convince the Court that Paragraph 3 is "slipshod" or "poorly conceived" (Opp'n at 2 & 25) are entirely beyond the purview of this Court and unsupported in any event. Bullion's criticisms are properly raised with the Nevada Legislature, not this Court. Furthermore, the legislative history of NRS 11.500, including Paragraph 3, indicates an express intent to prevent claims from being re-raised potentially a decade after they were originally filed. *See* Nevada Assembly Committee on Judiciary Minutes, Seventy-Second Session, February 13, 2003

Creating a new judicial tolling doctrine to save Bullion's claims would not only be contrary to the savings statute as a whole, it would directly contravene the savings statute's repose provision. Bullion's contention that the Court may nevertheless create a new tolling doctrine to save claims that are expressly barred by Paragraph 3 would "render [Paragraph 3] superfluous or make [the] provision nugatory," contrary to the Nevada Supreme Court's guiding principles of statutory interpretation. *Manuela H. v. Eighth Jud. Dist. Ct.*, 132 Nev. ___, ___, 365 P.3d 497, 501 (2016).

2. Rule 41(e) is not a statute of limitations, and the rule tolling the five-year period under Rule 41(e) for appeals does not apply to statutes of limitation.

The narrow judicially created rule tolling the five-year failure-to-prosecute period under NRCP 41(e) while a case is on appeal does not toll statutes of limitation or otherwise apply outside of Rule 41(e). That Bullion places primary emphasis on this argument is revealing. (Opp'n at 7–10.)

Rule 41(e) is not a statute of limitations. Rather, it is a rule of civil procedure, created by the judicial branch, requiring plaintiffs to bring their claims to trial within five years of filing. As explained above, a statute of limitation "forecloses suit after a fixed period of time following the occurrence or discovery of an injury." *Davenport*, 118 Nev. at 391, 46 P.3d at 64. Rule 41(e), by contrast, addresses a plaintiff's "lack of prosecution" of its claims after they are filed. Bullion offers no reason why a tolling rule created to address the impossibility of prosecuting claims on appeal should be applied to extend the time to file a complaint. Indeed, the Nevada Supreme Court has cautioned against plucking judicially created tolling rules out of context and applying them in marginally similar circumstances. *Siragusa v. Brown*, 114 Nev. 1384, 1394 n.7, 971 P.2d 801, 808 n.7

(noting that under the "new material" in Paragraph 3, "there would be a five-year deadline from the original filing to recommence an action."). The fact that Nevada's Paragraph 3 is uncommon does not change the analysis. (Opp'n at 25, 28.) Bullion cites to no authority for the novel proposition that this Court may decline to enforce a duly enacted legislative provision simply because it is not similar to that of other jurisdictions.

(1998) (noting that "prior cases tolling the statute of limitations" are "limited to their facts.").

Here, there is no basis for applying a tolling rule adopted for the five-year period under Rule 41(e) outside of that narrow context, much less to statutes of limitation. Bullion cannot identify a single judicial decision carving out an "appeal exception" to the general rule that filing a defective complaint does not toll the statute of limitations, nor has Goldstrike located one.

Additionally, given the differences between statutes of limitation and Rule 41(e), the rationale for tolling Rule 41(e) while a case is on appeal is entirely inapposite to statutes of limitation in general and the savings statute in particular. While the language Bullion quotes from *Massey v. Sunrise Hospital*, 102 Nev. 367, 370, 724 P.2d 208, 210 (1986), is admittedly general, the rule announced in *Massey* derives from the Nevada Supreme Court's earlier ruling in *Boren v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 405 (1982), in which the court held that "[a]ny period during which the parties *are prevented from bringing an action to trial* ... shall not be computed in determining the five-year period of Rule 41(e)" (emphasis added). In short, the court recognized that where circumstances make it impossible for a plaintiff to comply with a deadline, it is appropriate to toll that deadline while compliance is impossible.

Here, by contrast, nothing prevented Bullion from filing a complaint in state court and satisfying the statute of limitations. Bullion could have sued in state court at any time, including while its claims were on appeal in Federal Court—after all, Bullion filed its Complaint in this Court while its claims in Federal Court were on appeal. In short, nothing about the earlier appeal in Bullion's Federal Court action "prevented" Bullion from meeting its deadlines.[6]

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6 Bullion argues at length that the Federal Court's ruling on the rule against perpetuities—and Bullion's appeal therefrom—somehow prevented Bullion from filing a complaint in state court. For example, Bullion suggests that the ruling would have had preclusive effect if Bullion did not challenge it on appeal. But without jurisdiction, the district court's rulings were void. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) ("[I]f the district court lacks subject matter jurisdiction, the judgment is rendered void."). Moreover, the Ninth Circuit frequently dismisses

3. There is no basis for equitable tolling.

a. The savings statute represents the equitable considerations the Nevada Legislature decided were appropriate under these circumstances.

By asking it to apply equitable tolling to save its claims, Bullion suggests that this Court overlook the fact that the Legislature already has spoken on this issue, and to create yet another layer of protection. (Opp'n at 11-19.) Savings statutes are "codified equivalents of the equitable tolling doctrine." *Burr v. Trinity Med. Ctr.*, 492 N.W.2d 904, 907 (N.D. 1992). Here, Nevada's Legislature has already spoken on the question of what equitable circumstances permit Bullion to refile its claims. Applying an additional layer of judicial tolling would be contrary to the Legislature's mandate and would override the clear intent of the Legislature. For the reasons stated above, this Court should simply apply the plain and unambiguous language of the savings statute to the facts. *See Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 153, 111 P.3d 1107, 1112 (2005) ("This court ... has never applied the doctrine of equitable tolling to statutory periods that are mandatory and jurisdictional.").

b. Equitable tolling has not been applied in Nevada to suspend statutes of limitations that have started running—only to delay the accrual of claims.

Bullion further misapprehends how the equitable tolling doctrine works. Equitable tolling delays ***the accrual*** of the plaintiff's claims, preventing the statute-of-limitations period from commencing. For that reason, the doctrine focuses on when the plaintiff learns of sufficient information about its claims to assert them in court. "If a reasonable plaintiff would not have known of the

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appeals based on a lack of diversity jurisdiction, which is often discovered during the appeal process. *See, e.g., Fadal Machining Centers, LLC v. Mid-Atl. CNC, Inc.*, 464 Fed. App'x 672, 674 (9th Cir. 2012) ("In the absence of diversity of citizenship of the parties, the district court did not have subject matter jurisdiction and should have dismissed the action. We therefore dismiss the appeal, and remand to the district court with instructions to vacate the judgment and orders and dismiss the case for lack of jurisdiction.") Bullion could have asked the Ninth Circuit to dismiss its case at any time based on the Federal Court's lack of jurisdiction.

existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations ***for filing suit*** until the plaintiff can gather what information he needs." *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011) (internal marks omitted) (emphasis added). The doctrine only tolls the accrual date "until the plaintiff has learned enough information to determine whether a claim exists, not to discover the full extent of his or her claim." *Charles v. City of Henderson*, No. 67125, 2016 WL 2757394, at *1 (Nev. May 10, 2016) (unpublished; attached as Exhibit 1 hereto).

Here, nothing prevented Bullion from learning about its claims or actually filing those claims in court. In fact, Bullion acknowledges that its claims accrued by 2009 (Opp'n at 3, 10), and Bullion did file them in court—just the wrong one. Bullion continued to pursue those claims in the wrong court for the next eight years because it did ***nothing*** to investigate the citizenship of Goldstrike in the meantime.

The doctrine of equitable tolling, assuming its application is not already foreclosed by the savings statute, does not aid Bullion here. The doctrine does not "suspend" statutes of limitation once claims accrue; it prevents them from accruing in the first instance. Once claims are filed—even in the wrong court—they have accrued. At that point, the general rule applies—"the statute of limitations continues running as though the action was never brought." 51 Am. Jur. 2d *Limitation of Actions* § 251.

Bullion cites cases representing "the minority view" of just two states, California and New Jersey. *Peterson v. Hohm*, 607 N.W.2d 8, 13 (S.D. 2000). In *Mojica v. 4311 Wilshire, LLC*, 131 Cal. App. 4th 1069, 1071 (2005), the plaintiff timely filed two complaints in different venues after the "district court clerk initially delayed accepting the complaint for filing." While both complaints were pending, a new law took effect that extended the statute of limitations applicable to the plaintiff's claims. The issue in *Mojica* was whether "the enlarged statute of limitations" applied to the

plaintiff, even though both of her complaints were later dismissed on jurisdictional grounds. *Id.* at 1072. Under these highly unique circumstances, the *Mojica* court ruled that because the plaintiff's "claim was pending in federal court, and thus had not expired, when the new period took effect," the plaintiff was permitted to take advantage of the statutory extension. *Id.* at 1072-73. Here, by contrast, the Court would be thwarting the will of the Legislature to apply equitable tolling to reverse the outcome mandated by the savings statute.

Indeed, in *Galligan v. Westfield Centre Services, Inc.*, the New Jersey Supreme Court felt free to adopt the equitable tolling doctrine precisely because "the New Jersey Legislature has not enacted a saving statute." 412 A.2d 122, 127 (N.J. 1980) (Pollock, J., dissenting). Unlike the years of delay involved here, *Galligan* involved "a mere lapse 22 days," and unlike here, the plaintiff made a protective filing in state court as soon as the Federal Court's jurisdiction was questioned. *Id.* at 190, 193.[7] Thus, while a few states have adopted the "minority view" that equitable tolling is appropriate when a federal case is dismissed on jurisdictional grounds, they have done so under unique circumstances not present here. Moreover, in none of those cases were the courts confronted with an unambiguous savings statute directing them to dismiss the claims before them.

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[7] In *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 429 (1965), the plaintiff "brought an action within the statutory period *in the state court of competent jurisdiction*," but did so merely in the wrong venue. (Emphasis added.) The Supreme Court applied equitable tolling because forty-four states had either transfer statutes or savings statutes that would have saved the plaintiff's claims, but there was no corresponding federal statute. *Id.* at 431. Since the claims at issue derived from a federal act, the Supreme Court believed that a national tolling rule that "applie[d] in all States regardless of whether or not a State has a 'saving' statute" best promoted the "interests of uniformity embodied in" the federal act. Here, the Nevada Legislature has adopted a savings statute that defines when equitable considerations may extend a plaintiff's statute of limitations in these circumstances, and there are no corresponding public policy interests that require the judicial branch to create a new tolling rule to fill a gap.

D. **Even if equitable tolling were permitted, there is no basis for doing so here.**[8]

1. Bullion was not diligent.

On the single most important factor under the equitable tolling doctrine—the plaintiff's diligence—Bullion's brief is silent. Bullion does not dispute that "[e]ven though Goldstrike raised concerns about the Court's subject-matter jurisdiction in its answers to Bullion's various complaints and informed Bullion early in the discovery process that its headquarters were located in Utah, Bullion neglected to seek *any* discovery about the issue." (Mot. at 4.)

a. Bullion's decision to sue Goldstrike in Federal Court was strategic.

Bullion made a strategic decision to sue Goldstrike in Federal Court in order to join it with the existing lawsuit against Newmont. Bullion was concerned that Newmont would assert an "empty chair" defense (Letter from M. Petrogeorge to C. Brust, June 19, 2009, Ex. 3 to Second Mark Decl.), so Bullion decided that adding Goldstrike would help its case against Newmont. When a party makes a risky procedural decision for strategic advantage, there is no basis for tolling the statute of limitations for that party on equitable grounds. *Ross v. Olivarez*, 88 Fed. App'x 233, 234 (9th Cir. 2004) ("[E]quitable tolling is not available to a plaintiff who engages in the procedural tactic of moving the case from one forum to another in the hopes of obtaining more favorable rulings." (citations omitted)).

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[8] While the Court should conclude that equitable tolling is not available to Bullion, if the Court decides that equitable tolling is possible, it is up to this Court—not a jury—to apply the relevant factors to the evidence. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1196 (9th Cir. 2001) ("A court may decide whether or not to use its equitable powers to toll a limitations period ....). Although Bullion suggests that the Court should deny summary judgment if it determines there are questions of fact relating to the equitable-tolling factors, Bullion does not suggest that further discovery will yield any additional evidence on this issue. Therefore, all of the evidence on these issues is before the Court and ripe for a decision. The Supreme Court only reversed the summary judgment in *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 827, 673 P.2d 490, 492 (1983), because the trial court had not considered the equitable-tolling factors at all—not because the jury had to decide those issues.

b. Bullion was on notice of the importance of corporate citizenship in the jurisdictional analysis.

Before Bullion added Goldstrike to its ongoing suit against Newmont in 2009, the Federal Court flagged the importance of corporate citizenship to the court's diversity jurisdiction for Bullion. Indeed, the Federal Court issued a sua sponte order requiring Bullion to provide further information because the court concluded that it could not "determine from the face of the Complaint where either Plaintiff or Defendant have their principal places of business." (Order, Oct. 3, 2008, *Bullion Monarch Mining v. Newmont USA Ltd.*, 3:08-cv-00227, Ex. 4 to Second Mark Decl.)

Notably, the allegations that Bullion highlights from its original Federal Court Complaint against Goldstrike (Opp'n at 14) are ***exactly the same*** as the allegations the Federal Court found were facially inadequate against Newmont. Bullion knew from the outset that those allegations were insufficient, yet it did nothing to determine where Goldstrike's principal place of business was located months later.

That the Federal Court specifically warned Bullion about its defective jurisdictional allegations distinguishes this case from *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 825–26, 673 P.2d 490, 491-92 (1983), and *Nevada Department of Taxation v. Masco Builder Cabinet Group*, 127 Nev. 730, 739, 265 P.3d 666, 672 (2011), in which the relevant government agencies assured the plaintiffs that they had adequately preserved their rights and did not need to do anything else to preserve their claims.

c. Bullion did no discovery regarding Goldstrike's citizenship.

Indeed, Bullion's brief mentions ***just one thing*** that Bullion did to establish Goldstrike's citizenship: it alleged in its Federal Court Complaint in 2009 that Goldstrike was incorporated in Colorado and "did business" in Nevada. (Opp'n at 14.)

And while Bullion focuses on Goldstrike's responses to these allegations in 2009, which Bullion misrepresents, *see* Section II.D.2, what the parties did or said before the United States

Supreme Court clarified the standard for corporate citizenship in early 2010, effectively changing the law in the Ninth Circuit, is largely irrelevant. The question is what Bullion did to determine whether diversity jurisdiction existed *after* the standard changed in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).[9] The answer is Bullion did *literally nothing*.

In *Hertz*, the United States Supreme Court "conclude[d] that 'principal place of business' [under the diversity statute] ... should normally be the place where the corporation maintains its headquarters." *Id.* at 92–93. Three months later, Goldstrike's Rule 30(b)(6) witness gave the following testimony:

> Q. How many people does Barrick keep here in the Salt Lake City office, just approximately?
>
> A. There are about ninety people here in Salt Lake City.
>
> ...
>
> Q. Is the office here in Salt Lake City the administrative office for Barrick North America, its North American operation?
>
> A. Yes. ***It's the headquarters*** of Barrick North America.
>
> Q. And are there any other offices in the U.S. similar to the Salt Lake office?
>
> A. No.

(Rich Haddock Depo., May 10, 2010, p. 16-17, Ex. 2-B to Bullion's Ex. 10 (emphasis added).) Bullion never followed up on this testimony—either in a deposition or in a written discovery request. The next time Bullion made any inquiry into Goldstrike's citizenship was seven years later.

Although a party "may not [be] completely aware of all the steps necessary to pursue a lawsuit" at the outset, equitable tolling is not appropriate where the party "had more than sufficient time to research subsequent procedures during the [many] years between the initial complaint's submission ... and its dismissal." *Martinez v. Nevada Dep't of Corrs.*, No. 216CV1675, 2017 WL

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[9] Insofar as Bullion argues that it should not be held responsible for knowing that the United States Supreme Court changed the relevant legal standard in February 2010, "ignorance of the law does not equitably toll the statute of limitations." *Pruett v. Hooligan*, No. 307-CV-00217, 2008 WL 2954750, at *7 (D. Nev. July 29, 2008) (applying Nevada law).

2294078, at *4 (D. Nev. May 24, 2017) (applying *Copeland* factors). Here, Bullion was represented by competent counsel throughout the proceedings but did nothing—literally nothing—to ensure that it had filed its claims in the correct court within the five years permitted by the savings statute. *Peterson v. Hohm*, 607 N.W.2d 8, 13 (S.D. 2000) ("To allow equitable tolling here ... would reward poor legal research.").

d. Bullion could have filed a suit in state court at any time during the statutory period.

All that Bullion had to do to comply with the statutes of limitations and savings statute was to file a copy of its complaint in state court, which it could have done at any time, including when its claims were on appeal in Federal Court. When a plaintiff cannot provide "any explanation as to why [it] did not pursue [its] state causes of action during the pendency of" other federal proceedings, other than a general "concern[] with judicial economy," the plaintiff has not "diligently pursued [its] state law" claims for equitable tolling purposes. *E.E.O.C. v. Caesars Entm't*, No. 02:05CV00427, 2006 WL 1168840, at *4-5 (D. Nev. Apr. 25, 2006) (applying *Copeland* factors under Nevada law). A "desire to refrain from filing successive lawsuits" is not a valid excuse for failing to pursue "the diligent course of action" of filing protective claims. *Porter v. S. Nevada Adult Mental Health Servs.*, No. 16-CV-02949-APG-PAL, 2017 WL 6379525, at *7 (D. Nev. Dec. 13, 2017) (denying equitable tolling under Nevada law).

e. The evidence on Goldstrike's citizenship was not unclear, as the Federal Court held, and Bullion was not timely in gathering that evidence in any event.

Bullion refers the Court to deposition testimony and documents that it obtained in 2018—nine years after it filed in Federal Court—to suggest that it is "unclear" where Goldstrike's headquarters were located in 2009. (Opp'n at 15–16.) The Federal Court, however, did not believe the evidence was equivocal—or even very close. In light of the overarching importance of the location of the corporation's officers in the *Hertz* analysis, 559 U.S. at 92–93 (focusing on "where a

corporation's officers direct ... the corporation's activities"), the Federal Court had no trouble concluding, based on "unrebutted evidence that the majority of [Goldstrike's] corporate officers and executives lived and worked out of offices ... in Salt Lake City in 2009," that Goldstrike's "nerve center was in Salt Lake City at the time." (Order at 5, Bullion's Ex. 21.) As the Federal Court concluded, "*all* of [Goldstrike's] witnesses deposed during jurisdictional discovery ... offered *unrebutted* testimony that [Goldstrike's] corporate headquarters were in Salt Lake City at the time." (*Id.* (emphasis added).)[10]

If Bullion had been diligent in gathering this evidence during the original discovery period in 2010, it would have readily understood that there was a serious question about whether Goldstrike's headquarters were in Utah. At that point, Bullion could have taken action—including simply filing a copy of its complaint in state court. But Bullion did nothing to discover this information until 2018. "[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect." *Pruett v. Hooligan*, No. 307-CV-00217, 2008 WL 2954750, at *7 (D. Nev. July 29, 2008) (applying *Copeland* factors) (internal marks omitted).

2. Goldstrike told Bullion in its Answer in Federal Court that diversity jurisdiction was an issue that Bullion needed to resolve.

While it is true that Goldstrike admitted that it was incorporated in Colorado and "did business" in Nevada (Opp'n at 14), those facts are not relevant to the question of Goldstrike's principal place of business and by no means "misled" Bullion.[11] Bullion already knew that this very

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[10] Bullion points out that Goldstrike identified certain Nevada-based witnesses in its initial disclosures in the federal case. (Opp'n at 15.) But since Goldstrike did not identify any of those witnesses as having information relating to jurisdictional issues, that evidence is irrelevant. Likewise, the mere fact that one of Goldstrike's witnesses, Rich Haddock, also testified that another Barrick-related entity (Barrick Gold Company) did not have any connections to Nevada for personal jurisdiction purposes is not a reasonable basis for Bullion to conclude that Goldstrike's headquarters were in Nevada.

[11] That Bullion would continue to suggest that its allegation that Goldstrike "did business" in Nevada is somehow relevant to the Federal Court's jurisdiction demonstrates that Bullion has never

allegation did not properly establish Goldstrike's citizenship because, as discussed above, the Federal Court specifically warned Bullion that this allegation was patently defective.

But even more clear was Goldstrike's response in its Answer to Bullion's specific assertion of diversity jurisdiction (which Goldstrike repeated in its answers to all subsequent amended complaints) that "Bullion and Goldstrike are both citizens of the same state and ... this Court therefore lacks subject matter jurisdiction over this dispute." (Goldstrike's Answer ¶ 10 (p. 4), Bullion's Ex. 6.) And if Bullion happened to overlook that statement, Goldstrike's *First* Affirmative Defense in its Answer stated: "This Court lacks subject matter jurisdiction over this matter because Bullion and Goldstrike are ... both citizens of the same state." (*Id.* at 11.) It is difficult to conceive of more clear statements alerting Bullion about problems with the court's jurisdiction than these.

3. Goldstrike has been, and will be, prejudiced from Bullion's continued claims.

The Nevada Supreme Court has squarely held that "application of the [equitable tolling] doctrine is appropriate only when the danger of prejudice to the defendant is absent." *Masco*, 127 Nev. at 738 (internal marks omitted). But permitting Bullion's claims to continue ten years after they were first filed has prejudiced and will continue to prejudice Goldstrike.

First, as Bullion's counsel acknowledged at the first hearing in this case, "several of the witnesses have passed away." (Minutes, April 22, 2019.) That alone is substantial prejudice to Goldstrike. *See Jones v. Holmes*, No. 311CV00047, 2015 WL 9273444, at *5 (D. Nev. Sept. 3, 2015) (holding that because "four and a half years have passed since the complaint was filed," "[w]itnesses have almost certainly moved on to other locations or may not be able to be located at all," and that, as a result, "[d]efendants have most certainly been prejudiced by [p]laintiff's delay

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seriously addressed the question. The statutory standard for determining a corporation's citizenship is based on its "principal place of business"—it has never been merely where a corporation "does business," so Bullion's allegation about where Goldstrike "did business" is wholly irrelevant to the question. 28 U.S.C. § 1332(c)(1).

in prosecuting this action."); *Galligan*, 412 A.2d 122, 124 (N.J. 1980) ("Once memories fade, witnesses become unavailable, and evidence is lost, courts no longer possess the capacity to distinguish valid claims from those which are frivolous or vexatious.").

Second, Bullion's delay in bringing its claims to trial has prejudiced Goldstrike's ability move forward with business decisions and structure its legal affairs in accordance with Bullion's purported rights. For a decade, the risk of Bullion's claims have loomed over the companies, preventing them from making business decisions with a full understanding of the legal consequences of those decisions. For example, in its discovery requests, Bullion has suggested that Goldstrike faces additional exposure in this case as a result of a major transaction it undertook with several other companies just one month ago. Had Bullion reduced its purported claims to judgment in a timely fashion, Goldstrike may have made other business decisions or structured its decisions differently. As the Federal Court ruled in finding that Newmont was prejudiced by Bullion's delay, Goldstrike has also [redacted] over the course of the last decade, but Goldstrike [redacted]—had Bullion timely reduced its purported claims to judgment in a reasonable amount of time. (Order at 19, September 15, 2010, *Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 3:08-CV-227, ECF 306 (Sealed) (D. Nev), Ex. 5 to Second Mark Decl).

Regardless of how the Court decides this factor, mere lack of prejudice to the defendant "is insufficient, by itself, to warrant equitably tolling the statute of limitations." *Caesars Entm't*, 2006 WL 1168840, at *5 (applying Nevada law).

E. Bullion's filing of its original complaint against Goldstrike caused all of its claims to accrue at that time.

Bullion incorrectly asserts that even if the statutes of limitations apply to its claims, and even if no tolling is permitted, it should be permitted to recover for future royalties under a "continuing breach" theory. (Opp'n at 29.) It is blackletter law that "[i]n the event a plaintiff elects to sue upon the anticipatory breach [of a contract] and not the promisor's actual nonperformance, the accrual date of the cause of action is accelerated from time of performance to the date of such election." *Schwartz v. Wasserburger*, 117 Nev. 703, 707, 30 P.3d 1114, 1116 (2001).

Before Bullion filed suit against Goldstrike, Goldstrike told Bullion that it was "clear that Newmont assumed any and all liability for any royalty obligations that may be owed to Bullion Monarch ... and that Barrick is not therefore a proper party in the pending lawsuit." (Email from M. Petrogeorge to C. Brust, June 19, 2009, Ex. 6 to Second Mark Decl.) This "is a classic example of an anticipatory breach." *Finnell v. Bromberg*, 79 Nev. 211, 225, 381 P.2d 221, 228 (1963). Three days later, Bullion elected to sue Goldstrike for prospective declaratory relief to resolve the "parties' dispute as to whether Bullion is entitled to royalties" under the 1979 Agreement. (Bullion's First Am. Compl. ¶ 15, Ex. 1 to Mark Decl.) All of Bullion's claims against Goldstrike, including for purported future breaches of the 1979 Agreement, accelerated and accrued at that time. *Schwartz*, 117 Nev. at 707. Accordingly, the "continuing breach" theory does nothing to assist Bullion.

Clayton v. Gardner, upon which Bullion's argument depends, merely stands for the rule that when a party breaches an installment contract requiring regular payments of a specific amount, of which the 1979 Agreement is not one, the non-breaching party may either elect to accelerate the future obligations of the contract by "fil[ing] suit immediately" or "allow borrowers a chance to cure" by waiting to file suit. 107 Nev. 468, 471 n.3, 813 P.2d 997, 999 n.3 (1991). If the non-breaching party elects to wait, then the statute of limitations only runs as to each installment

payment when due—the reward for not filing suit. Here, however, Bullion elected to sue immediately, which accelerated all of its claims under *Schwartz*. As the Federal Court ruled in response to Bullion's identical argument against Newmont, [redacted] (Minute Ruling, Jan. 13, 2011, *Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 3:08-CV-227, ECF 334 (Sealed), Ex. 5 to Second Mark Decl).

F. Waiting for the Ninth Circuit's decision will not change the outcome here.

The Ninth Circuit Court of Appeals' decision on Bullion's appeal, regardless of the outcome, will not alter the analysis here. If Bullion prevails before the Ninth Circuit, then its claims will not have been "dismissed because the court lacked jurisdiction over the subject matter of the action." NRS 11.500. In that situation, Nevada's savings statute would not apply to save Bullion's claims, and the statutes of limitations that began running on Bullion's claims when they first accrued would now bar those claims in this Court. While Bullion would be permitted to continue pursuing its claims in Federal Court in those circumstances, its claims in this Court are untimely regardless of the outcome in Federal Court.

III.

CONCLUSION

Because the savings statute firmly precludes Bullion's refiled claims against Goldstrike, the Court should dismiss all claims against Goldstrike pursuant to NRS 11.500(3).

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///

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding document does not contain the personal information of any person as defined in NRS 603A.040.

DATED: August 14, 2019.

PARSONS BEHLE & LATIMER

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Attorneys for Barrick Gold Goldstrike, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Parsons Behle & Latimer and that on the 14th day of August 2019, I filed a true and correct copy of the foregoing **GOLDSTRIKE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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/s/ Tracy L. Brown
Employee of Parsons Behle & Latimer

EXHIBIT 1

EXHIBIT 1

2016 WL 2757394
Unpublished Disposition
Only the Westlaw citation is currently available.
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

Jeffrey CHARLES, Appellant,
v.
CITY OF HENDERSON, A Political Subdivision of the State of Nevada; Sgt. Hampton, individually and in his Capacity as a Police Officer of the City of Henderson; and William Purdue, Individually and in his Capacity as a Police Officer of the City of Henderson, Respondents.

No. 67125.
|
May 10, 2016.

Attorneys and Law Firms

Jeffrey Charles

Henderson City Attorney

ORDER OF AFFIRMANCE

*1 This is a pro se appeal from a district court order of dismissal in a tort action. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Having reviewed the parties' briefs and appendices, we perceive no error in the district court's order dismissing appellant's complaint on the basis that it is barred by the three-year statute of limitations under NRS 11.190(3)(c). [1] *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008) (holding that this court reviews de novo an order granting an NRCP 12(b)(5) motion to dismiss, accepting all factual allegations in the complaint as true, and drawing all inferences in the plaintiff's favor); *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 253, 277 P.3d 458, 463 (2012) (recognizing that when the facts are uncontroverted, the "appropriate accrual date for the statute of limitations is a question of law" (quoting *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996))).

1 Although the district court's order also refers to NRS 41.036(2) as a basis for dismissal of appellant's complaint, we do not need to reach that issue.

The record shows that appellant had knowledge of his claims against respondents no later than December 9, 2010, when he filed a motion in his justice court criminal case seeking the return of property seized under a search warrant. *See City of N. Las Vegas v. State, EMRB*, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011) (holding that equitable tolling will extend a statute of limitations if a reasonable plaintiff would not have known of the existence of their claim within the limitations period); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (concluding that the statute of limitations for conversion is discovery based). And appellant's claim began to accrue when he entered his guilty plea in the criminal case on January 5, 2011, as this is the date on which respondents' right to claim lawful possession of appellant's property ceased and he was entitled to its return. *See Gates v. Towery*, 435 F.Supp.2d 794, 800–01 (N.D.Ill.2006) (holding that conversion and replevin claims for the return of property seized in a criminal investigation accrue on the date on which the plaintiff was first able to demand the return of his property); *see also* NRS 179.105 (requiring police officers to retain all property taken based on a warrant subject

to court order). Though appellant argues that the statute of limitations was tolled because he did not discover the full extent of what the Police seized until after he saw photographs from the seizure, equitable tolling is only available until the plaintiff has learned enough information to determine whether a claim exists, not to discover the full extent of his or her claim. *See City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077; *Ruso v. Morrison*, 695 F.Supp.2d 33, 46 (S.D.N.Y.2010) ("The law does not permit equitable tolling when a party simply did not realize the 'extent' of his claim."). Because appellant did not file the underlying complaint until January 30, 2014, more than three years after the date when his claims accrued, the district court properly concluded that appellant's claims are barred. NRS 11.190(3)(c) (providing that "[a]n action for taking, detaining or injuring personal property, including actions for specific recovery thereof" are subject to a three-year statute of limitations); *Winn*, 128 Nev. at 253, 277 P.3d at 463. Accordingly, we

*2 ORDER the judgment of the district court AFFIRMED.

All Citations

Slip Copy, 2016 WL 2757394 (Table)

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Attorneys for Barrick Goldstrike Mines Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC., Plaintiff, vs. BARRICK GOLDSTRIKE MINES INC.; BARRICK GOLD EXPLORATION INC.; ABX FINANCECO INC.; BARRICK GOLD CORPORATION; and DOES 1 through 20, Defendants.	Case No. A-18-785913-B Dept. No. XI

SECOND DECLARATION OF BRANDON MARK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Brandon J. Mark, hereby declare as follows:

1. I am counsel of record to Barrick Goldstrike Mines Inc. ("Goldstrike") in these proceedings and have knowledge of the facts of this declaration.

2. Attached as Exhibit 3 to this declaration is a copy of a letter dated June 19, 2009, from Goldstrike's counsel, Michael Petrogeorge, to Bullion's counsel, Clayton Brust.

3. Attached as Exhibit 4 to this declaration is a copy of the court's Order dated October 3, 2008, in Bullion Monarch Mining, Inc.'s ("Bullion") case against Newmont USA Ltd. (*Bullion Monarch Mining Inc. v. Newmont USA Ltd.*, United States Court for the District of Nevada, 08-cv-00227).

4. Attached as Exhibit 5 to this declaration is a copy of the court's sealed Order dated September 15, 2010, in *Bullion Monarch Mining Inc. v. Newmont USA Ltd.*

5. Attached as Exhibit 6 to this declaration is a copy of an email dated June 19, 2009, from Goldstrike's counsel, Michael Petrogeorge, to Bullion's counsel, Clayton Brust.

6. Attached as Exhibit 7 to this declaration is a copy of the court's sealed Order dated January 13, 2011, in *Bullion Monarch Mining Inc. v. Newmont USA Ltd.*

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct

DATED this 14th day of August 2019.

/s/ Brandon J. Mark
Brandon J. Mark

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Parsons Behle & Latimer and that on the 14th day of August 2019, I filed a true and correct copy of the foregoing **SECOND DECLARATION OF BRANDON MARK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

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EXHIBIT 3

EXHIBIT 3

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LAW CORPORATION

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Michael P. Petrogeorge

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June 19, 2009

VIA EMAIL AND U.S. MAIL

Clayton P. Brust
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Matthew Hippler
Holland & Hart, LLP
5441 Kietzke Lane, 2nd Floor
Reno, Nevada 89511

Re: ***Bullion Monarch Mining, Inc. v. Newmont USA Limited, et al.,***
Case No. 3:08-CV-00227-ECR-VPC

Dear Gentlemen:

As you know, this firm has been retained to represent Barrick Gold North America, Inc. and Barrick Goldstrike Mines, Inc. with respect to a subpoena issued to Barrick Gold in the above captioned matter by Bullion Monarch Mining, Inc., and any claims that might be asserted against Barrick Goldstrike in the pending lawsuit.

On June 3, 2009, Bullion and the defendants, Newmont USA Limited and Newmont Mining Corporation, entered into a Stipulation for Leave to File Amended Complaint; Order pursuant to which Newmont stipulated to Bullion filing a proposed amended complaint adding Barrick Goldstrike as a defendant in the pending action. That stipulation was approved by the Court on June 4, 2009, and grants Bullion until June 24, 2009 to file an amended complaint

Barrick Gold was served with the subpoena on May 26, 2009. Bullion granted Barrick Gold several extensions, and the documents are currently due to be produced by July 7, 2009.

Mr. Brust has indicated that there is some question whether Bullion has a claim against Barrick Goldstrike and that he needs to review the documents that will be produced by Barrick Gold to determine whether a claim exists. He is also looking for certain

assurances from Newmont that it will not assert an "empty chair" defense against Barrick in the event Barrick is not sued.

Based on our understanding of the facts, Barrick Goldstrike should not be a party to your lawsuit. We therefore urge Bullion and Newmont to amend the previously entered stipulation, and to further extend Bullion's deadline for filing any amended complaint until after Bullion's counsel has had an opportunity to review the documents produced by Barrick Gold. More specifically, we propose a revised stipulation and order which allows Bullion at least ten (10) days after the date it receives documents from Barrick Gold to file an amended complaint.

We hope that you and your clients will seriously consider our request and recommendation. Please call with any questions, or wish to discuss this matter further.

Sincerely,

Parsons Behle & Latimer

Michael P. Petrogeorge

MPP

cc: Ted Grandy (via email)
Fran Wikstrom (via email)
Stephen Hull (via email)

EXHIBIT 4

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

BULLION MONARCH MINING, INC., a Utah Corporation,

Plaintiff,

vs.

NEWMONT USA LIMITED, a Delaware corporation, d/b./a NEWMONT MINING CORPORATION and DOES I-X, inclusive,

Defendant.

3:08-CV-227-ECR-VPC

MINUTES OF THE COURT

DATE: October 3, 2008

PRESENT: EDWARD C. REED, JR. U. S. DISTRICT JUDGE

Deputy Clerk: COLLEEN LARSEN Reporter: NONE APPEARING

Counsel for Plaintiff(s) NONE APPEARING

Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

Now pending before the Court is Defendant Newmont USA Limited's Motion for Judgment on the Pleadings (#11). However, before addressing the merits of this motion, we must verify that we have jurisdiction over the case.

This case is brought under this Court's diversity jurisdiction. The Complaint alleges in conclusory form that plaintiff and Newmont are "citizens of different states." (Complaint ¶ 10 (#1).) It alleges that Bullion Monarch Mining is a Utah corporation, and that Newmont USA Limited is a Delaware corporation. (Id. at ¶¶ 1-2.) Also alleged, however, is that both Plaintiff and Defendant have been "doing business in the State of Nevada at all times relevant hereto." (Id.)

Under the diversity jurisdiction statute, a corporation "shall be deemed to be a citizen of any state by which it has been incorporated *and* of the State where it has its principal place of business." 28 U.S.C. § 1332 (emphasis added.) We cannot determine from the face of the Complaint where either Plaintiff or Defendant have their principal places of business. It

appears possible, from the face of the complaint, that both parties have their principal place of business in Nevada.

The parties shall have fifteen (15) days to file contemporaneous briefs limited to the question of this Court's jurisdiction over this case. The parties shall have a further fifteen (15) days to respond to the opposing party's brief.

LANCE S. WILSON, CLERK
By /s/
Deputy Clerk

EXHIBIT 5

EXHIBIT 5

FILED UNDER SEAL

EXHIBIT 6

EXHIBIT 6

Brandon J. Mark

From: Petrogeorge, Michael P.
Sent: Friday, June 19, 2009 11:04 AM
To: cbrust@rbslattys.com
Cc: Bowles, Didi
Subject: Bullion Monarch v. Newmont, Case No. CV-N-08-00227-ECR-VPC
Attachments: Barrick - Asset Exchange Agreement.pdf; Barrick - Venture Termination and Liquidation Agreement.pdf; Barrick - Participating Interest Termination Agreement.pdf; Barrick - Cooperative Operations Agreement.pdf; Barrick - Amendment to Betze-Post.pdf; Barrick - First Amendment to Settlement Agreement.pdf; Barrick - Stockpile Agreement.pdf; Barrick - Agreement Regarding Stockpiled Ore.pdf

CAUTION - CONFIDENTIAL

This electronic mail message and any attachment is confidential and may also contain privileged attorney-client information or work product. The message is intended only for the use of the addressee. If you are not the intended recipient, or the person responsible to deliver it to the intended recipient, you may not use, disseminate, distribute or copy this communication. If you have received the message in error, please immediately notify us by reply electronic mail or by telephone (801) 532-1234, and delete this original message. Thank you.

Mr. Brust,

This email confirms that you have agreed to extend Barrick Gold North America, Inc.s' time for responding to the Subpoena in a Civil Case served upon it in the above referenced matter until ***Tuesday, July 7.*** Thank you again for your accommodation on this matter.

As discussed in our telephone conversation earlier this week, the following documents are attached:

1. 1. Asset Exchange Agreement
   2. Venture Termination and Liquidation Agreement for Newmont/Barrick HD Venture
3. 3. Participating Interest Termination Agreement
4. 4. Cooperative Operations Agreement
5. 5. Amendment to Betze-Post Mine Operating and Bioleaching Agreement
6. 6. First Amendment to Settlement Agreement
7. 7. Stockpile Agreement
8. 8. Agreement Regarding Stockpiled Ore

These documents have been marked as "Confidential," and are produced pursuant to the Revised Stipulated Protective Order entered by the Court on May 21, 2009. Each of these documents come from the closing binders for the 1999 asset exchange between Newmont and Barrick. These documents are being produced at this time at your specific request, and in an effort to allow Bullion Monarch to better determine whether it has any basis to proceed with the filing of the proposed amended complaint adding Barrick as a party in the pending

lawsuit. Bates stamped copies of these documents, along with the remainder of the closing binders, and other documents deemed responsive to the Subpoena, will be produced on or before July 7.

I would like to draw your specific attention to Sections 2.2(c), 2.5(b)(iv), 2.5(d), and 7.2(e) of the Asset Exchange Agreement. We believe that these provisions make it clear that Newmont assumed any and all liability for any royalty obligations that may be owed to Bullion Monarch as a result of the High Desert operations, and that Barrick is not therefore a proper party in the pending lawsuit.

Please call if you have any questions or concerns, or if you wish to discuss the terms of the Asset Exchange Agreement or any of these other documents in further detail.

Thanks,

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EXHIBIT 7

EXHIBIT 7

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

BULLION MONARCH MINING, INC.,	.	
	.	
Plaintiff,	.	CASE NO. A-18-785913-B
	.	
vs.	.	
	.	DEPT. NO. XI
BARRICK GOLDSTRIKE MINES INC., et al	.	
	.	
	.	
Defendants.	.	**Transcript of Proceedings**
. . . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

TRANSCRIPT RE:
NOTICE OF MOTION AND GOLDSTRIKE'S MOTION FOR SUMMARY JUDGMENT

MONDAY, AUGUST 19, 2019

APPEARANCES:

FOR THE PLAINTIFF:	CLAYTON P. BRUST, ESQ. DANIEL F. POLSENBERG, ESQ. ABRAHAM G. SMITH, ESQ.
FOR DEFENDANTS BARRICK GOLDSTRIKE MINES, INC., BARRICK GOLD CORPORATION, BARRICK GOLD EXPLORATION, INC., ABX FINANCECO, INC.:	KRISTINE JOHNSON, ESQ. BRANDON J. MARK, ESQ. ASHLEY C. NIKKEL, ESQ.

COURT RECORDER:	TRANSCRIPTION BY:
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LAS VEGAS, NEVADA, WEDNESDAY, AUGUST 19, 2019, 10:09 A.M.

* * * * *

THE COURT: Bullion versus Barrick. A very interesting discussion on subject matter jurisdiction and statutes of limitation, but not statutes of repose because I know what a statute of repose is and this ain't it.

MR. POLSENBERG: Oh, Judge, you took my opening line.

THE COURT: I'm sorry, Mr. Polsenberg. I know you've been on your toes and ready to go with that the entire time.

MS. JOHNSON: Good morning, Your Honor. Kristine Johnson for Barrick Goldstrike.

THE COURT: Good morning.

MS. JOHNSON: Your Honor, I understand the briefing on this matter is very lengthy, but this is really quite a straightforward issue, I think. We've prepared some paper slides that hopefully will simplify things and track our argument. Your Honor, may I approach?

THE COURT: Sure. Did you give a copy to opposing counsel?

MS. JOHNSON: Yes.

MR. POLSENBERG: Thank you.

THE COURT: Why do you guys always wait until after you're up here to give stuff out?

MS. JOHNSON: Thank you, Your Honor.

THE COURT: Court's Exhibit 1, please.

MS. JOHNSON: Your Honor, as the Court knows, whether Bullion's claims against Goldstrike are time barred is governed by NRS 11.500. That is because those claims are barred by the underlying statues of limitation that apply to them. So the only way that they can survive here is if they're salvaged by 11.500. So I'd like to start with that statute if I could, and I'm referring right now to the second page of the handout.

So, 11.500, sub paren 3, it's clear. So if an action is commenced within the applicable statute of limitations, it's dimissed because the Court lacks jurisdiction over the subject matter. You can recommence within the applicable statute in the appropriate court -- that's pretty simple -- or 90 days after the action is dismissed. But there's a caveat there. The 90-day provision doesn't work if it's recommenced more than five years after the date on which the original action was commenced.

Your Honor, there's no dispute that this provision applies here. The claim was dismissed by the federal court on subject matter grounds.

THE COURT: And is on appeal to the Ninth Circuit.

MS. JOHNSON: That's correct, Your Honor. And the underlying --

THE COURT: Have they finished briefing?

MS. JOHNSON: I'm sorry, Your Honor?

THE COURT: Has the briefing --

MR. POLSENBERG: We haven't started, Your Honor.

MS. JOHNSON: No, we have not yet started, Your Honor. I believe that their opening brief is due in September. Counsel will correct me if I'm wrong on that.

THE COURT: So you'll be done briefing in May?

MS. JOHNSON: Hopefully not that long. But Your Honor is correct, it's being briefed.

There's no dispute that the underlying statutes of limitation, four and six year statutes have run, so they have got to somehow fit themselves within 11.500. And those statutes, by the way, it's undisputed that they accrued at least by 2009, if not before, so they're out of luck there.

The provision, Your Honor, is clear and unambiguous. No dispute that it applies here. So why are we before you? Why are we in front of you today? If you'll refer to the next page, it's page 3, Bullion has advanced multiple tolling arguments trying to get around 11.500. The problem is this is just not a tolling case. This is not a case where tolling can apply. There are a number of reasons for that. The first reason is that NRS 11.500 provides relief if it's available. The problem is Bullion doesn't fit within the parameters of that provision. It just does not work for them here.

Second, then Bullion argued, well, what about tolling during the first appeal, the appeal on the rule against perpetuity issue. The problem is there's no automatic tolling during appeal. The Massey case that Bullion relies on pertains to Rule 41(e), which as the Court is aware, that's a procedural rule requiring cases to be brought to trial within five years. It does not apply to the situation that Bullion sees themselves faced with here.

Finally, as I mentioned a minute ago, it's undisputed that Bullion's claims accrued in 2009. Those claims cannot be tolled. The Court needs to look no further than the City of Las Vegas case we cited in the briefing at 261 P. 3d 1071. The equitable tolling doctrine does not suspend statutes of limitation once the claims accrue, it prevents them from accruing in the first instance. If you don't know about your claims and they haven't accrued, perhaps equitable tolling can help you. Bullion knew about their claims at least by 2009 and they accrued in 2009. It just doesn't -- the doctrine that they're trying to rely on, it just doesn't help them here.

And, Your Honor, perhaps even more importantly, and I'm referring now to page 4 of the handout, tolling here would contravene and contradict the very purpose of 11.500. And this is perhaps the most fundamental problem with Bullion's position. That statute is a saving statute. It's intended

to ameliorate the effect of what could be perceived as a potentially harsh outcome if the statute runs when a case is dismissed for jurisdiction. It essentially is tolling. And we direct the Court to the Burr v. Trinity case, again cited in the briefs. Saving statutes are codified equivalents of the equitable tolling doctrine. They already have a tolling provision here. They just don't need it.

Adding a judicial tolling here, which is essentially what they're requesting, would be contrary to the legislature's mandate in enacting 11.500. Courts have rejected similar arguments in similar situations. The Wheble case, which we cited as well, the saving statute didn't salvage claims that were dismissed after years just because of a procedural defect in the complaint.

I'd also direct the Court to the Bell Helicopter case. When a state enacts a saving statute -- that's what 11.500 is -- to provide relief from a statute of limitations, courts are reluctant to deviate from the specific statutory requirements to craft alternative or additional mechanisms for relief. That's just what Bullion is asking you to do. They're asking you essentially to impose tolling on top of tolling. To make it very simple, they do not get the saving statute and tolling. The saving statute is their relief. It applies or it doesn't apply.

Your Honor, on the constitutional arguments that

they've made with respect to subsection (3), I'll be very brief on that. And again, this is addressed at page 5 of the handout. There's no basis for a finding by this Court that that provision is unconstitutional. That provision represents the effort by the legislature to balance equity and fairness to plaintiffs with the need for finality and the avoidance of unending litigation; fairness to defendants.

Subsection (3), it appropriately limites subsection (1), which would otherwise be somewhat open-ended and allow claims to be brought many, many, many years after the statutes have run. The drafters specifically referred to that in enacting subsection (3). There's no disparate treatment. There's no protected class. There's no equal protection argument here, Your Honor. And there's no fundamental right at issue so there are no due process considerations for the Court to be concerned about. It's frankly a bit of a red herring.

Your Honor, lastly, and I'm referring to the last page of the handout, even if Bullion could somehow convince the Court that tolling could be recognized in this circumstance, which they should not be allowed to do, there's no factual basis here for a recognition of equitable tolling. The factual circumstances would not allow that. There's no question that Bullion as the plaintiff had the burden to establish jurisdiction, both in the initial instance and

because we're talking about federal subject matter jurisdiction on an ongoing basis. As the Court is aware, the federal court can dismiss claims for lack of subject matter jurisdiction at any point.

THE COURT: Sometimes they wait for five or six years before they make a decision on those kind of motions, huh?

MS. JOHNSON: Sometimes they do. And sometimes the federal court raises the issue sua sponte, which they're entitled to. Not what happened here.

THE COURT: And sometimes they're wrong.

MS. JOHNSON: And sometimes they are. Sometimes they are, Your Honor.

THE COURT: That would be a summary of the opposition.

MS. JOHNSON: I think the opposition, though, Your Honor, is really, again, failing to contend with the fact that 11.500 is clear and unambiguous. And it intended to address the very situation we have, dismissal on subject matter grounds. That's what happened here. It allows essentially an enlargement of the statute of limitations. It's not required for any reason, but that's what the legislature thought was appropriate in fairness to plaintiffs. But the legislature also thought it was appropriate not to let that be open-ended, not to let that enlargement extend for years and years and

years. So the legislature's considered decision was five years, five years from initial filing of the underlying complaint. No question that that has expired here.

Your Honor, on the equitable issues I would also note that the evidentiary prejudice to Barrick here, to Goldstrike, would be acute. We're talking about claims that have accrued, as the Court is aware, decades ago now. We already have evidentiary issues. Allowing this to go on in the essentially open-ended manner that Bullion suggests is contrary to the very purpose of the underlying principles for equitable tolling.

Bullion added Goldstrike to the federal suit back in 2010 for a strategic benefit. They took a risk in doing so. They already knew that there were potential questions, subject matter jurisdiction questions on the same claims against Newmont. They were certainly on notice that those questions could be raised with respect to Goldstrike. They elected not to do any sort of jurisdictional discovery until much later. That was their choice. But the reality is it's Bullion that bears that burden, not Goldstrike. They failed to comply with that burden within the applicable period of time, failed to perhaps file a companion case in state court, which they were not precluded from doing. They just didn't do so.

THE COURT: Thank you, counsel.

MS. JOHNSON: Thank you, Your Honor.

THE COURT: Mr. Polsenberg.

MR. POLSENBERG: Thank you, Your Honor. Let me get my clock going.

This motion should be denied just on the face of the motion. They come in here and say that 11.500 is a statute of repose. It's not a statute of repose. They said the Alsenz case to explain what a statute of repose is and the Nevada Supreme Court got that right in Alsenz, but that was 17 years ago and they were talking about 11.202, which is a statute of repose. The statute of repose says you have a certain amount of time after an event to bring a cause of action or you are not allowed to bring a cause of action.

THE COURT: Even if you don't know about it?

MR. POLSENBERG: Even if you don't know about it.

THE COURT: Yep.

MR. POLSENBERG: And that's what Alsenz explains. And 11.202 is a statute of repose. We don't have a product statue of repose, we have a medical malpractice statute of repose, and I can make an argument that we have a legal malpractice statute of repose. But 11.500 is a savings clause. And they come in here and say it bars anything where you don't file within five -- where another litigation has been going on for five years. No, it doesn't say that. Subsection 1(a) even says you can file within an applicable

statute of repose.

You could deny this motion without even looking at 11.500. I could have brought this case last year and I would be entitled to because what we're talking about is their monthly obligation to pay royalties until 2078 on the area of interest in the Carlin trench. So -- and we're talking about hundreds of millions of dollars. And so what would happen here is we could go backward six years under 11.190 and the McKellar v. McKellar case. And we would have to go forward and bring subsequent actions as they continue to breach in the future.

So there still is a cause of action in front of you. They cite the Schwartz case. First of all, just for my record, I think Schwartz is wrong. But you don't have to say Schwartz is wrong because what Schwartz was talking about is a circumstance where there were established installment payments, they brought an action where all the payments were due in the future, they brought an action under the concept of anticipatory breach. This isn't an anticipatory breach case. We didn't bring it that way. We have no set installment payments. You would have to look at it each month as it goes by and we would have to look at that in the future.

But I still win under 11.500. 11.500 says if you've got ongoing litigation --

THE COURT: So why didn't you tell the A.G. you were

challenging the constitutionality of 11.500? Because I just looked at your certificate of service again.

MR. POLSENBERG: Yes.

THE COURT: Because you know -- you know.

MR. POLSENBERG: We did not.

THE COURT: Okay.

MR. POLSENBERG: And I'd be happy to do that and there are cases that say if you fail to do that the proper relief is to let the Attorney General know.

THE COURT: Absolutely.

MR. POLSENBERG: Right. But I'm talking about --

THE COURT: But I'm not doing it.

MR. POLSENBERG: You don't have to do it.

THE COURT: Okay.

MR. POLSENBERG: But what I'm really looking at is it's unconstitutional to apply it in this case, although I am also making a facial challenge. I can't figure out why the Solicitor General then made this argument for the stupid amendment to the savings statute. It makes no sense to say you don't get the savings provision if the litigation had been going on for five years. What that's doing is it's taking our state rule 41(e) and applying it to federal court.

THE COURT: That doesn't have such a rule.

MR. POLSENBERG: Which doesn't have such a rule.

THE COURT: And aborts those kind of rules if we

were to try and get them to do stuff quickly.

MR. POLSENBERG: Which is why we raised supremacy clause and separation of powers.

THE COURT: Okay.

MR. POLSENBERG: And look at this case. We were on appeal for more five years. We went to the Ninth Circuit. They certified the question to the Nevada Supreme Court. I don't think -- under the suspension rule I don't think any of that time should apply. Under tolling provisions they come in and say, oh, well, we should have done jurisdictional discovery earlier. They admitted that we had subject matter jurisdiction.

And so we -- you know, equitable tolling does not mean that your opponent has kept you from figuring out you have a cause of action. Equitable tolling is the opponent has kept you from filing the case. And here they did by leading us to believe that their principal place of business was in a particular place, by saying repeatedly that there's subject matter jurisdiction. It was only when we were at the verge of trial that they, as they said, recognized, I say discovered that they had an argument that there's no subject matter jurisdiction.

So I think the tolling arguments apply to the statute of limitations. I think they also apply to the application of 11.500. But, yes, if you would like I will

let the Attorney General know I am challenging subsection (3) of 11.500. It has no rational basis. Why would you -- why would a party that is allowed to stall the litigation for nearly a decade be able to come in here and say, okay, since the litigation in federal court took so long, you have no cause of action?

Final -- well, let me go back to that point. You know, we have these principles for when there's delay. They can come in here and argue and say we've delayed in bringing the litigation so they were not able to figure things out. We were in litigation that whole time. This wasn't a delay. This isn't where they were prejudiced. They were in litigation finding out all those facts.

Finally, there's so many questions of fact here you could never grant the motion. Thank you, Your Honor.

THE COURT: Thank you. Equitable tolling and NRS 11.500 are not mutually exclusive. If you want to address the facial constitutionality of portions of 11.500, you must give notice to the Attorney General's Office so that that can be fully addressed.

Given the allegation of continuing breaches, the motion is denied. After the Ninth Circuit rules there may be certain other factual issues related to earlier breaches that you want to raise by motion for summary judgment, but on the way the motion has been presented it's denied.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: All right.

(PROCEEDINGS CONCLUDED AT 10:26 A.M.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia, Transcriber
LGM Transcription Service

REGISTER OF ACTIONS

CASE NO. A-18-785913-B

Bullion Monarch Mining Inc, Plaintiff(s) vs. Barrick Goldstrike Mines Inc, Defendant(s)	Case Type:	**Purchase/Sale of Stock, Assets, or Real Estate**
	Date Filed:	**12/12/2018**
	Location:	**Department 11**
	Cross-Reference Case Number:	**A785913**

PARTY INFORMATION

		Lead Attorneys
Defendant	**ABX Financeco Inc**	**Michael R. Kealy** *Retained*
Defendant	**Barrick Gold Corporation**	**Brandon J. Mark** *Retained* 801-532-1234(W)
Defendant	**Barrick Gold Exploration Inc**	**Michael R. Kealy** *Retained*
Defendant	**Barrick Goldstrike Mines Inc**	**Michael R. Kealy** *Retained*
Plaintiff	**Bullion Monarch Mining Inc**	**Clayton P. Brust** *Retained* 7028821996(W)

EVENTS & ORDERS OF THE COURT

08/19/2019 **Motion for Summary Judgment** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Notice of Motion and Goldstrike's Motion for Summary Judgment

Minutes
08/19/2019 9:00 AM
- Ms. Johnson provided slides in support of the motion for summary judgment. COURT ORDERED, slides MARKED as Court's Exhibit 1 collectively. (See worksheet.) Following arguments by Ms. Johnson and Mr. Polsenberg, COURT ORDERED, equitable tolling and NRS 11.500 are not mutually exclusive. If counsel wishes to address the facial constitutionality of portions of NRS 11.500, the Attorney General's office must be given notice so that can be fully addressed. Given the allegation of continuing breaches, the motion is DENIED. After the 9th Circuit rules there may be certain other factual issues related to earlier breaches that can be raised by a motion for summary judgment, but by the way it has been presented, it is DENIED. 8-30-19 CHAMBERS MOTION TO SEAL BULLION'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON SAVINGS STATUTE (NRS 11.500) AND ACCOMPANYING APPENDIX VOLUMES (DEPT XI - Gonzalez) 9-16-19 9:00 AM MOTION TO SEAL AND REDACT PORTIONS OF GOLDSTRIKE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND SUPPORTING DECLARATION OF BRANDON MARK (DEPT XI - Gonzalez) 11-21-19 9:00 AM STATUS CHECK: RESUMPTION OF SETTLEMENT CONFERENCE (DEPT XIII - Denton) 1-13-20 9:00 AM STATUS CHECK (DEPT XI - Gonzalez) 3-26-20 9:30 AM PRE TRIAL CONFERENCE (DEPT XI - Gonzalez) 4-14-20 9:30 AM CALENDAR CALL (DEPT XI - Gonzalez) 4-20-20 1:30 PM JURY TRIAL (DEPT XI - Gonzalez)

Parties Present
Return to Register of Actions

DISTRICT COURT
CLARK COUNTY, NEVADA

Purchase/Sale of Stock, Assets, or Real Estate	**COURT MINUTES**	**August 30, 2019**

A-18-785913-B Bullion Monarch Mining Inc, Plaintiff(s)
vs.
Barrick Goldstrike Mines Inc, Defendant(s)

August 30, 2019 **3:00 AM** **Motion to Seal Bullion's Opposition to Motion for Summary Judgment on Savings Statute (NRS 11.500) and Accompanying Appendix Volumes**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** Chambers

COURT CLERK: Dulce Romea

PARTIES PRESENT: None. Minute order only – no hearing held.

JOURNAL ENTRIES

- Upon review of the papers and pleadings on file in this Matter, as proper service has been provided, this Court notes no opposition has been filed. Accordingly, pursuant to EDCR 2.20(e) the Motion to Seal the Opposition to the Motion for Summary Judgment on Savings Statute (NRS 11.500) and Accompanying Appendix Volumes is deemed unopposed. As the proposed redaction is narrowly tailored to protect sensitive commercial information, good cause appearing, COURT ORDERED, motion is GRANTED. Moving Counsel is to prepare and submit an order within ten (10) days and distribute a filed copy to all parties involved in this matter.

9-20-19 CHAMBERS MOTION TO SEAL AND REDACT PORTIONS OF GOLDSTRIKE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND SUPPORTING DECLARATION OF BRANDON MARK (DEPT XI - Gonzalez)

11-21-19 9:00 AM STATUS CHECK: RESUMPTION OF SETTLEMENT CONFERENCE (DEPT XIII - Denton)

1-13-20 9:00 AM STATUS CHECK (DEPT XI - Gonzalez)

3-26-20	9:30 AM	PRE TRIAL CONFERENCE	(DEPT XI - Gonzalez)
4-14-20	9:30 AM	CALENDAR CALL	(DEPT XI - Gonzalez)
4-20-20	1:30 PM	JURY TRIAL	(DEPT XI - Gonzalez)

CLERK'S NOTE: A copy of this minute order was distributed via Odyssey File and Serve. / dr 9-3-19

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 04 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BULLION MONARCH MINING, INC.,

Plaintiff - Appellant,

v.

BARRICK GOLDSTRIKE MINES, INC.,

Defendant - Appellee.

No. 18-17246

D.C. No. 3:09-cv-00612-MMD-WGC
U.S. District Court for Nevada, Reno

ORDER

Appellant's motion (Docket Entry No. 17) for an extension of time to file the opening brief is granted. The appellant's opening brief is due October 9, 2019; appellee's answering brief is due November 8, 2019; and the optional reply brief is due within 21 days after service of the answering brief.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Grace Santos
Deputy Clerk
Ninth Circuit Rule 27-7

Electronically Filed
9/9/2019 8:15 AM
Steven D. Grierson
CLERK OF THE COURT

SCHTO

DISTRICT COURT
CLARK COUNTY, NEVADA

BULLION MONARCH MINING, INC., Plaintiff, vs BARRICK GOLDSTRIKE MINES, INC., ET AL, Defendant(s),	**Case No.** 18 A 785913 **Dept. No.** XI **Date of Hearing:** N/A **Time of Hearing:** N/A

1st AMENDED BUSINESS COURT SCHEDULING ORDER AND ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL CONFERENCE AND CALENDAR CALL

This 1st AMENDED SCHEDULING ORDER AND TRIAL SETTING ORDER is entered following the telephone conference conducted on 09/05/19. This Order may be amended or modified by the Court upon good cause shown.

IT IS HEREBY ORDERED that the parties will comply with the following deadlines:

Initial Expert Disclosures are due	**01/06/20**
Rebuttal Expert Disclosures are due	**02/17/20**
Close of Discovery	**05/11/20**
Dispositive Motions & Motions in Limine are to be filed by ***(Omnibus Motions in Limine are not allowed)***	**06/29/20**

IT IS HEREBY FURTHER ORDERED THAT:

A. The above entitled case is set to be tried to a Jury on a **Five week stack** to begin, **September 8, 2020 at 1:30p.m.**

B. A calendar call will be held on **September 1, 2020 at 9:30a.m.** Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;
(2) List of depositions;

RECEIVED
SEP 09 2019
CLERK OF THE COURT

Case Number: A-18-785913-B

(3) List of equipment needed for trial, including audiovisual equipment;[1] and
(4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

C. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on **August 13, 2020 at 9:15a.m.**

D. Parties are to appear on **May 18, 2020 at 9:00a.m.** for a Status Check on the matter.

E. The Pre-Trial Memorandum must be filed no later than **August 7, 2020**, with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

F. All motions in limine, **Omnibus Motions in Limine are not allowed**, must be in writing and filed no later than **June 29, 2020. Orders shortening time will not be signed except in extreme emergencies**.

G. No documents may be submitted to the Court under seal based solely upon the existence of a protective order.

Any sealing or redaction of information must be done by motion.

All motions to seal and/or redact and the potentially protected information must be filed at the clerk's office front counter during regular business hours 9 am to 4 pm.

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[1] If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the AV Dept at 671-3300 or via E-Mail at CourtHelpDesk@clarkcountycourts.us

In accordance with, Administrative Order 19-03, the motion to seal must contain the language "Hearing Requested" on the front page of the motion under the Department number.

Pursuant to SRCR Rule 3(5)(b), redaction is preferred and sealing will be permitted only under the most unusual of circumstances.

If a motion to seal and/or redact is filed with the potentially protected information, the proposed redacted version of the document with a slip-sheet for any exhibit entitled "Exhibit ** Confidential Filed Under Seal" must be attached as an Exhibit.

The potentially protected information in unredacted and unsealed form must be filed at the same time and a hearing on the motion to seal set. While the motion to seal is pending, the potentially protected information will not be accessible to the public.

If the motion to seal is noncompliant, the motion to seal may be stricken and the potentially protected information unsealed.

H. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior to publication.

I. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

J. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to be included in the Jury Notebook. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to items to be included in the Jury Notebook.

K. In accordance with EDCR 2.67, counsel shall meet and discuss pre-instructions to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side shall provide the Court, at the final Pre-Trial Conference, an agreed set of jury instructions and proposed form of verdict along with any additional proposed jury instructions with an electronic copy in Word format.

L. In accordance with EDCR 7.70, counsel shall file and serve by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference voir dire proposed to be conducted pursuant to conducted pursuant to EDCR 2.68.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.

DATED this 6th day of September, 2019.

Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on the date filed, a copy of the foregoing 1st Amended Business Court Scheduling Order and Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call, was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

If indicated below, a copy of the foregoing Scheduling Order was also:

☐ Placed in the Attorney(s) Folder on the 1st Floor of the RJC for;

☐ Mailed by United States Postal Service, Postage prepaid, to the proper parties listed below at their last known address(es):

Dan Kutinac