MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
June 3, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 9:08 a.m. on Friday, June 3, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bryan Fernley-Gonzalez, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Elliott A. Sattler, Deputy District Attorney, Washoe County District Attorney's Office

CHAIR WIENER:
This morning, we have some amendments from the Assembly to consider. We will start with Senate Bill (S.B.) 24.

SENATE BILL 24 (2nd Reprint): Revises provisions concerning writs of execution in justice courts. (BDR 6-321)

LINDA J. EISSMANN (Policy Analyst):
This bill authorizes the clerk of a justice court to issue or renew a writ of execution. Amendment No. 731 allows the clerk to do this only under the direct supervision of the justice.

CHAIR WIENER:
We have a request from the court to concur with this amendment.

SENATOR ROBERSON MOVED TO CONCUR WITH AMENDMENT NO. 731 TO S.B. 24.

SENATOR GUSTAVSON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
Next is S.B. 30.

SENATE BILL 30 (2nd Reprint): Makes various changes relating to common-interest communities. (BDR 10-477)

MS. EISSMANN:
Amendment No. 626 from the Assembly requires a homeowners' association (HOA) executive board to provide copies of budgets, financial statements and reserve studies in electronic form at no charge or, if the board cannot provide the information electronically, on paper at a cost not to exceed 25 cents per page for the first ten pages and 10 cents per page thereafter.

CHAIR WIENER:
That seems to be consistent with provisions in other bills that we passed.

SENATOR GUSTAVSON MOVED TO CONCUR WITH AMENDMENT NO. 626 TO S.B. 30.

SENATOR BREEDEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
Next is S.B. 55.

SENATE BILL 55 (1st Reprint): Revises provisions governing crimes against older persons. (BDR 18-204)

MS. EISSMANN:
Amendment No. 625 adds only the following crimes to the list of crimes subject to an additional civil penalty when committed against a person who is 60 years of age or older: embezzlement of money or property of a value of $250 or more; obtaining money or property of a value of $250 or more by false pretenses; and taking money or property from the person of another.

CHAIR WIENER:
The Office of the Attorney General informs me that the Office supports the amendment.

SENATOR McGINNESS MOVED TO CONCUR WITH AMENDMENT NO. 625 TO S.B. 55.

SENATOR GUSTAVSON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
Next is S.B. 57.

SENATE BILL 57 (2nd Reprint): Establishes procedures for the Children's Advocate or his or her designee to obtain certain warrants. (BDR 38-289)

MS. EISSMANN:
Amendment No. 735 amends the bill as a whole and adds a new section to *Nevada Revised Statutes* (NRS) 432 as follows: If, during an investigation of a

missing child, it appears probable cause exists to believe a child in Nevada has been abducted and the act was not committed to protect the child from abuse or neglect or to protect the person who abducted the child from domestic violence, the Children's Advocate or his or her designee may apply to the court for a warrant to take physical custody. The application must include the information specified in the amendment, including a statement made under oath and penalty of perjury that every representation is true and correct to the knowledge of the applicant.

The court may supplement the application with the sworn testimony of the applicant at a hearing before the court. If the court determines no exigent circumstances exist, the court may issue a warrant to take physical custody after a hearing. If the court determines exigent circumstances exist, the court may issue a warrant after an ex parte hearing. If the court issues the warrant after an ex parte hearing, it must give the person alleged to have abducted the child or having possession of the child an opportunity to be heard at the earliest possible time and within 48 hours if possible. The warrant must meet the requirements specified in the amendment.

The Children's Advocate must inform the court of the execution of the warrant as soon as practicable and not later than 24 hours after the execution. If the court finds, by a preponderance of the evidence at a hearing, that the act of abduction was committed for the protection of the child or the person who abducted the child, the court must assume temporary emergency jurisdiction, issue a temporary emergency custody order and specify a time period within which the person seeking the order may obtain a child custody determination from a court having jurisdiction.

There may be no filing fee for the application under this section, and the court must expedite the application. Finally, in filing the application, the Children's Advocate or his or her designee acts on behalf the court and not a party.

CHAIR WIENER:
As you have just heard, the amendment proposes extensive changes in this measure. I have spoken with the Office of the Attorney General (AG), and the Office is supportive of the changes. The AG feels the amendment improves the measure and gives the Office the tools needed to accomplish the goal the AG was seeking to accomplish with the original bill.

SENATOR GUSTAVSON:
What did the original bill do? I would like to see what we are losing.

CHAIR WIENER:
The summary was that it expanded the circumstances pursuant to which a court is authorized to issue certain warrants.

MS. EISSMANN:
Most of the testimony on S.B. 57 came from William O. Voy, District Judge, Department A, Eighth Judicial District, who offered a substantive amendment. I do not know if that helps you recall the bill.

SENATOR GUSTAVSON:
I just want to know what we are losing by gutting the bill.

CHAIR WIENER:
We will come back to this measure at a later time.

Next is S.B. 204.

SENATE BILL 204 (2nd Reprint): Enacts certain Amendments to the Uniform Common-Interest Ownership Act. (BDR 10-298)

MS. EISSMANN:
Amendment No. 744 authorizes a person holding an interest in a common-interest community (CIC), rather than an interested person, to commence an action in district court to terminate the CIC after a catastrophic event. It makes the definitions of words and terms in NRS 116 applicable to the bylaws and declarations of an HOA. It makes applicable to HOAs containing more than six units the following: (1) the requirement to give notice of changes in the governing document to unit owners; (2) the requirement for the HOA to indemnify a member of the board named as the respondent or sued for actions undertaken as a member of the board; and (3) provisions requiring equal space or time for candidates' opposing views and representatives of ballot questions in HOA publications and closed-circuit television statements.

The amendment provides that no amendment to a declaration may change the uses to which any unit is restricted without the unanimous consent of the affected unit owners. It removes the requirement for a residential planned

community containing not more 12 units to have an executive board. It prohibits an executive board from amending a declaration. It requires the right to assess and collect a construction penalty to be set forth in the declaration, a recorded document or a contract between a unit owner and the HOA. It requires notice of the scheduled construction penalties to be part of any public offering statement or resale package. It sets the minimum amount of required crime insurance at three months of aggregate assessments plus reserve funds or $5 million, whichever is less. It deletes the provisions related to enforcement of liens except for the authority of a court to appoint a receiver to collect rents and other income from a unit. It provides that records available in electronic format must be provided at no charge, that charges for paper copies after the first ten pages must not exceed 10 cents per page, and that an HOA board that fails to provide records within 21 days when required must pay a $25 penalty for each day. It also makes other minor changes.

CHAIR WIENER:
Substantial work has been done on this in the Assembly Committee on Judiciary. Can you give us a brief overview of the input provided for these changes, Senator Copening?

SENATOR COPENING:
This is the Uniform Common Ownership Act as presented by the Uniform Law Commissioners. The Assembly Committee on Judiciary takes all HOA bills to a subcommittee to be thoroughly vetted, and S.B. 204 was discussed by that subcommittee for four hours. I was there for those meetings, and the Commissioners and I all agreed with the changes in this amendment.

> SENATOR COPENING MOVED TO CONCUR WITH AMENDMENT NO. 744 TO S.B. 204.
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> SENATOR BREEDEN SECONDED THE MOTION.
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> THE MOTION PASSED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

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CHAIR WIENER:
Next is S.B. 254.

SENATE BILL 254 (2nd Reprint): Revises provisions relating to common-interest communities. (BDR 10-264)

MS. EISSMANN:
This is another CIC bill that has to do with mediation, arbitration and alternative dispute resolution. Amendment No. 742 makes the following changes: It changes certain deadlines in the mediation process from five days to five business days. It allows for selection or appointment of a mediator from outside the geographic area when it would be more reasonable to do so. It limits the maximum charge for costs and fees of mediation to $500. It makes the party who fails to participate in mediation in good faith liable for all costs and fees. It authorizes sanctions against a person who in bad faith either files an appeal from a final order of a hearing panel appointed by the Commission for Common-Interest Communities and Condominium Hotels or files a response to a claim filed with the Commission. It provides that a claim may be deemed substantiated if the person on whom a copy of the claim was served fails to file a written response unless good cause is shown.

Amendment No. 742 prohibits an HOA from foreclosing on a lien during the pendency of any mediation or arbitration if the issue in dispute is the basis for the foreclosure. Finally, it authorizes the Real Estate Division, Department of Business and Industry, to adopt regulations covering arbitration fees, procedures and reasonable limitations; limits the fees for an arbitrator to $1,000 unless a greater fee is authorized for good cause shown; and requires each party to an arbitration to pay an equal percentage of the fees for the arbitrator, except when the Division provides for payments from the account for common-interest communities and condominium hotels.

SENATOR COPENING:
This bill was also vetted by the HOA subcommittee of the Assembly Committee on Judiciary, and language was added by some of the parties who were at that meeting. The amendment says mediation is either free or capped at low cost, and arbitration is capped, both the hourly rate and the amount that can be charged, which is $1,000 split between two parties. Any homeowner who has a problem, either with another homeowner or with the HOA, should never be charged more than $500 if it has to go to arbitration unless it is a complex case, and then the arbitrator will have to get special permission to charge more. This is a good homeowner protection bill.

CHAIR WIENER:
I see that the cost of mediation is not to exceed $500. Is that for arbitration as well?

SENATOR COPENING:
That is the cap for both of those. The first step in the process is mediation. If the parties cannot work out a solution, it goes to low-cost arbitration.

CHAIR WIENER:
Were those caps added to make the process more consumer-friendly?

SENATOR COPENING:
That is correct.

SENATOR COPENING MOVED TO CONCUR WITH AMENDMENT NO. 742 TO S.B. 254.

SENATOR BREEDEN SECONDED THE MOTION.

THE MOTION PASSED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

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CHAIR WIENER:
Finally, we have S.B. 307.

SENATE BILL 307 (2nd Reprint): Revises provisions relating to the exercise of the power of sale under a deed of trust concerning owner-occupied property. (BDR 9-958)

MS. EISSMANN:
Amendment No. 741 deletes the following provisions: requiring the beneficiary of a deed of trust to send the borrower a loan modification application at least 30 days before the recording of the notice of default; requiring the beneficiary to forward any application received within 30 days to the person responsible for loss mitigation analysis; and requiring the loss mitigation analysis to be completed before mediation begins if the borrower elects mediation.

The amendment also adds a new section 1.5 that modifies the notice requirements related to foreclosure on a deed of trust concerning owner-occupied housing, emphasizing that the borrower may have the right to participate in the Foreclosure Mediation Program.

SENATOR COPENING:
If you recall, the representative of the Nevada Supreme Court was here to talk about problems that the original version of S.B. 307 might have caused in the banking industry. I have agreed to this amendment. It makes the noticing provisions stronger for those in default on their loans. It lets them know that they have the right to participate in mediation. It also includes the telephone number of the Foreclosure Mediation Program.

CHAIR WIENER:
We have done a lot of work on this bill. The intention was to create clear, more consumer-friendly notice provisions so we can give people greater access to the Foreclosure Mediation Program through knowledge. The amendment looks like a lot of strikes and deletions, but it changes the bill to a notice statute.

> SENATOR COPENING MOVED TO CONCUR WITH AMENDMENT NO. 741 TO S.B. 307.
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> SENATOR BREEDEN SECONDED THE MOTION.
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> THE MOTION PASSED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

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CHAIR WIENER:
I will open the work session on Assembly Bill (A.B.) 259.

ASSEMBLY BILL 259 (2nd Reprint): Requires a portion of certain existing fees to be used for certain programs for legal services. (BDR 2-817)

MS. EISSMANN:
I have a work session document on this bill (Exhibit C). No amendment was proposed.

SENATOR KIHUEN MOVED TO DO PASS A.B. 259.

SENATOR BREEDEN SECONDED THE MOTION.

THE MOTION PASSED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

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CHAIR WIENER:
I will open the work session on A.B. 300.

ASSEMBLY BILL 300 (1st Reprint): Revises provisions governing foreclosures on property. (BDR 9-668)

MS. EISSMANN:
I have a work session document for this bill (Exhibit D). Two amendments were proposed at the Committee's hearing on this bill, one by Kristin Schuler-Hintz and one by Nicole Cannizzaro. Both are included in Exhibit D.

SENATOR COPENING:
I spoke with the sponsor of this bill this morning. We have heard testimony about some potential problems with the bill. I know we are on a tight deadline, and I do not know if you want to bring any bills back for further discussion, but I believe there is room for some more compromise, and the sponsor believes it as well. If you would be willing to postpone a vote on A.B. 300, I will work with the parties to see if we can come to a better agreement.

CHAIR WIENER:
We will bring this up at another time rather than taking action now. I will close the work session on A.B. 300 and open the work session on A.B. 552.

ASSEMBLY BILL 552 (3rd Reprint): Revises provisions related to the collection of biological specimens for genetic marker analysis. (BDR 14-539)

MS. EISSMANN:
I have a work session document on this bill (Exhibit E). Two amendments were proposed at the hearing, one from Assemblywoman Debbie Smith and one from Tonja Brown and Florence Jones, and we have also received a third proposed

amendment from Janine Hansen. All three are included in Exhibit E, which states in error that there would be an amendment from Alfredo Alonso. In addition, we have a conceptual amendment.

BRYAN FERNLEY-GONZALEZ (Counsel):
The conceptual amendment would provide that before the DNA sample is taken, the law enforcement agency must notify the person of the circumstances under which the DNA can be expunged from the record. When the person is released from custody, the law enforcement agency must either provide him or her with a form to request expungement when the requirements are met or make its best effort to provide such a form. The conceptual amendment would also reduce the processing time for the Central Repository for Nevada Records of Criminal History to forward a request and document for expungement to the Combined DNA Index System (CODIS) maintained by the Federal Bureau of Investigation from 90 days to 6 weeks. The conceptual amendment would also provide that a sample would not need to be taken if a person was arrested for a Category E felony that was not a sexual offense or a violent offense.

CHAIR WIENER:
We have also received a last-minute amendment offered by Richard Boulware of the National Association for the Advancement of Colored People (NAACP) (Exhibit F). Since this was handed to us minutes before the start of this meeting, I have not had an opportunity to review it.

SENATOR KIHUEN:
Is there anyone from the NAACP present who can explain this amendment? From a quick reading, it seems reasonable to me.

CHAIR WIENER:
There does not seem to be.

SENATOR BREEDEN:
Mr. Fernley-Gonzalez, you indicated that under the conceptual amendment, law enforcement agencies would make their best effort to provide the expungement form. What does that mean?

MR. FERNLEY-GONZALEZ:
The form would be provided, but if for some reason the agency could not find the person or something like that, the agency would make an effort to get the form to the person.

SENATOR BREEDEN:
This seems to say that it is not an automatic expungement; it is up to the person who was arrested to submit the form to request expungement. Is that correct? Also, this clears the local records, but what about the national database?

MR. FERNLEY-GONZALEZ:
Those who were arrested must fill out the form to request expungement, yes. They would get notice, fill in the form and send it to the Central Repository.

SENATOR BREEDEN:
If the agency can find them.

MR. FERNLEY-GONZALEZ:
Yes. The intent was that when the arrestee is released, the law enforcement agency would provide the necessary forms. If there were some reason agency officials could not get the forms to the arrested persons, they would make their best effort to do so.

CHAIR WIENER:
There may be some difficulty because of the ten-year provision in the measure and the many different possible scenarios. Mr. Fernley-Gonzalez, could you explain this?

MR. FERNLEY-GONZALEZ:
There are many different circumstances under which a person would be eligible to request expungement, and it would be difficult to cover all of those circumstances in the bill. One provision states that the record can be expunged if the donor of the DNA sample accrues no further felony charges in the ensuing ten years after the sample was taken. By that time, the person could be in another state and might not have had a reason to come to the attention of law enforcement. In that situation, law enforcement would have to make its best effort to reach that person and provide the form.

CHAIR WIENER:
The bill also requires that notice of the expungement process would be given at the time the DNA sample was taken. My thought would be that the notice would have a date on it so the person would know when that requirement for expungement was met.

SENATOR BREEDEN:
I agree with parts of the bill, and I do not agree with other parts of the bill. This is one part I do not agree with. Can we hold this bill so we can straighten out some of these issues?

SENATOR ROBERSON:
This is an example of some of the problems with this bill. Section 3, subsection 12 talks about when the DNA sample may be expunged. Paragraph (a) says it may be automatically expunged if the conviction has been reversed, or the case has been dismissed, or the arrest which led to the specimen being taken has resulted in either a felony or sexual offense charge that has been resolved by a dismissal, or the arrest has not resulted in additional criminal charges for a felony or sexual offense for ten years. I read that to mean the sample can be kept for up to ten years if the person has been convicted and that conviction has not been reversed. But that seems inconsistent with section 3, subsection 15, which says:

> The forensic laboratory shall not expunge a person's biological specimen and genetic marker analysis if the forensic laboratory is notified by a law enforcement agency that the person has a prior felony or sexual offense conviction, a new felony or sexual offense arrest or a pending felony or sexual offense charge for which collection of a biological specimen is authorized pursuant to this section.

Those two sections are inconsistent.

MR. FERNLEY-GONZALEZ:
I do not believe they are inconsistent. Subsection 12 sets forth the circumstances under which the Central Repository can expunge its records. Subsection 14 talks about the forensic lab that has the physical specimen. I read paragraphs (a) and (b) and subparagraphs (1) and (2) as just repeating the circumstances in subsection 12. The lab with the specimen would have to purge the record if the circumstances in subsection 12 were met.

SENATOR ROBERSON:
I am referring to subsection 15. If you look at the specific language, subsection 12 says if the person is not charged with a felony or sexual offense for the ensuing ten years, the record may be expunged. Subsection 15, however, clearly says the record shall not be expunged if the lab has been notified by law enforcement that the person has a prior felony or sexual offense. At what point are we talking about a prior felony or sexual offense? We could be talking about the same conviction that brought us to subsection 12 in the first place. The language is not clear, and that is my point. I think I understand what the drafters of the bill were after, but it is not drafted very precisely. There is a lot of vagueness in this bill, and it opens up some real concerns that civil liberties are going to be trampled on.

MR. FERNLEY-GONZALEZ:
What subsection 15 is saying is that if there is a conviction, the DNA record is going to stay in the database. Subsection 12 says if there has never been a conviction, there has not been a conviction, it has been dismissed, there has been an acquittal—

SENATOR ROBERSON:
Or in subsection 12, subparagraph (2), not resulted in any additional criminal charges.

MR. FERNLEY-GONZALEZ:
Yes. Effectively, there has to be a charge in order to get the sample. The sample will be taken either when people are arrested with a warrant or when they are arrested and a judicial officer has made a probable cause determination. Subparagraph (2) is saying if that charge is dropped, there is no conviction resulting from it and there is no additional charge for ten years on that particular arrest, it would be expunged.

SENATOR ROBERSON:
I agree with part of that, and I disagree with part of it. These are not "ands," these are "ors" in subsection 12. However, that is not really my point. My point is subsection 12, paragraph (b), subparagraph (2), reading the plain words, is inconsistent with subsection 15 below. Subsection 15 says you shall not expunge a person's biological specimen and genetic marker analysis if the lab has been notified by law enforcement that the person has a prior felony or sexual conviction. But when you read subsection 12, you could argue that

person could be convicted and incarcerated for more than ten years, and that record would qualify for expungement because there has been no additional criminal charge for a felony within ten years.

MR. FERNLEY-GONZALEZ:
Under subsections 12 and 15 together, if the person was convicted on one occasion and then arrested on a later occasion, a sample is not going to be taken on the later occasion because there is already a sample in the database. Under subsection 15, because that conviction is there, the person would not be able to have the sample resulting from that conviction expunged. A sample would not be taken for the arrest because there is already a sample in the database.

SENATOR ROBERSON:
I understand your analysis of subsection 15, but it does not square with subsection 12, paragraph (b), subparagraph (2). I do not want to belabor this, but there is a problem here.

CHAIR WIENER:
We will give it more time and look for clarification. We will bring this bill back for tomorrow's Committee meeting, and in the meantime we will see if we can find someone to present the NAACP amendment. There are a lot of things we do not know that we need to know before we make a decision on this bill.

SENATOR MCGINNESS:
Do we have a written copy of the conceptual amendment? I have some concerns about the times.

CHAIR WIENER:
We will by tomorrow's meeting.

I will close the work session on A.B. 552. Is there any public comment?

ELLIOTT A. SATTLER (Deputy District Attorney, Washoe County District Attorney's Office):
I can address some of Senator Roberson's concerns. These are two different things we are talking about. The first one, under subsection 15, is talking specifically about the forensic laboratories as opposed to CODIS. Subsection 15 says if the person has a prior felony conviction, we will not purge that

information. Subsection 12 is dealing with CODIS and the federal system. They are two entirely different locations and actions that are being taken.

SENATOR ROBERSON:
I will take another look at it.

CHAIR WIENER:
Is there any further business to come before this Committee? Hearing none, we are adjourned at 9:56 a.m.

RESPECTFULLY SUBMITTED:

_____
Lynn Hendricks,
Committee Secretary

APPROVED BY:

_____
Senator Valerie Wiener, Chair

DATE: _____

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
A.B. 259	C	Linda Eissmann	Work session document
A.B. 300	D	Linda Eissmann	Work session document
A.B. 552	E	Linda Eissmann	Work session document
A.B. 552	F	Richard Boulware	Proposed Amendment to AB 552