MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
February 9, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:02 a.m. on Wednesday, February 9, 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
Bradley A. Wilkinson, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Keith Munro, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General
Heather D. Procter, Deputy Attorney General, Bureau of Criminal Justice, Special Prosecutions Unit
Tammy M. Riggs
Stephen Weil
Carol Ortiz
Orrin Johnson, Washoe County Public Defender's Office
Tierra Jones, Office of the Clark County Public Defender
Gary Winkle

Laurel Stadler, Rural Coordinator, Northern Nevada DUI Task Force
Greg Cox, Acting Director, Department of Corrections
Jeffrey Mohlenkamp, Deputy Director, Support Services, Department of Corrections
Bernie Curtis, Chief, Division of Parole and Probation, Department of Public Safety
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Alicia L. Lerud, Deputy Attorney General, Bureau of Criminal Justice, Special Prosecution Unit
Victor-Hugo Schulze II, Senior Deputy Attorney General, Office of the Attorney General
Rebecca Gasca, Legislative and Policy Director, American Civil Liberties Union of Nevada

CHAIR WIENER:
We will open the hearing on Senate Bill (S.B.) 72.

SENATE BILL 72: Revises provisions governing the assignment of certain criminal offenders to residential confinement. (BDR 16-120)

KEITH MUNRO (First Assistant Attorney General and Legislative Liaison, Office of the Attorney General):
This bill is here today because a question has arisen as to what the Legislature intended when it passed a statute regarding driving under the influence (DUI) several years ago. We are here today to find out what you meant. I have a letter stating our position on this bill from Catherine Cortez Masto, Attorney General (Exhibit C).

This bill addresses the issue of how long a person who was sentenced to prison for inflicting serious bodily injury or death while driving while intoxicated must serve time in prison. The statutory language is clear. Section 430, chapter 484C of *Nevada Revised Statutes* (NRS) states that a person driving under the influence who "causes the death of, or substantial bodily harm to, another person, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years ... ."

We received some early news of the Legislature's view from Assemblyman William Horne, who stated, "The Department of Corrections (DOC) needs to be notified about the proper application of the law and the legislative intent. When

we said mandatory prison, it did not mean house arrest." Assemblyman Horne stated it was time for lawmakers to review the issue to see if there was a way to force the DOC to follow the law as outlined by the Nevada Supreme Court. Retired Supreme Court Justice Bob Rose and Brent Adams, District Judge, Department 6, Second Judicial District, agreed with Assemblyman Horne's interpretation of the statute.

How did these questions arise? There was an error in the interpretation of the statute. As a result, a number of offenders were released by the DOC to the residential confinement program, also known as house arrest. This mistake has since been corrected, and the DOC is now applying the statute correctly. However, because of this mistake, there is litigation pending in the Nevada Supreme Court to determine what the Legislature intended with respect to mandatory prison terms for these offenders (Exhibit D). Rather than merely guessing, our office felt it might be prudent to let this body answer the question so the Nevada Supreme Court will know your intent for sure.

HEATHER D. PROCTER (Deputy Attorney General, Bureau of Criminal Justice, Special Prosecutions Unit):

The purpose of S.B. 72 is to clarify that a person convicted of a DUI causing substantial bodily harm or death must serve the minimum mandatory sentence in a State prison before being considered for release to residential confinement. Section 1 of the bill amends NRS 209.392, which sets out the minimum standards for eligibility of an offender to residential confinement. The bill prohibits the director of the DOC from assigning an offender convicted of DUI causing substantial bodily harm or death to residential confinement until the offender has served the minimum mandatory two-year sentence in a prison.

Section 2 of S.B. 72 amends NRS 209.429, which currently requires the director of the DOC to assign offenders to a residential confinement program once the offender has met certain criteria. First, section 2 replaces the mandatory assignment provision with a provision that allows rather than requires the director to assign offenders to these programs. Second, the amendment prohibits the assignment of an offender convicted of DUI causing death or substantial bodily harm to a residential treatment program until the offender has served the minimum mandatory term of imprisonment in a State prison.

This bill clarifies that an offender convicted of DUI causing death or substantial bodily harm must serve the minimum mandatory two-year sentence in prison before being considered for any residential confinement or residential treatment program, as provided by the clear language of NRS 484C.430 and the intent of the Legislature in imposing the mandatory minimum sentence.

SENATOR GUSTAVSON:
Will those required to serve the minimum sentence of two years in prison be given credit for time served in county jail?

MR. MUNRO:
Two years in prison means two years in prison.

SENATOR GUSTAVSON:
Is that on top of any time they have already served in the county jail?

MR. MUNRO:
Yes.

SENATOR BREEDEN:
Can you define "substantial bodily harm"?

MR. MUNRO:
I do not have the statute in front of me. "Substantial bodily harm" would be serious injury in which the person is damaged enough to be sent to the hospital—broken bones, for example. You could take that to a jury and have citizens make the determination as to whether it was substantial bodily harm.

CHAIR WIENER:
You stated you wanted to clarify that the legislative intent was that the minimum sentence of two years was to be served in the State prison before other options are exercised. Did you go back through the record to determine this intent from the discussions of the original bill?

MR. MUNRO:
Our reading of the Legislature and Assemblyman Horne's comments was that you meant two years in prison.

TAMMY M. RIGGS:
We represent Jessica Winkle in *Winkle v. Warden* (Case No. 56828), which is the case before the Nevada Supreme Court referred to earlier. We are opposed to S.B. 72. We are asking the Supreme Court to enforce the law as written and release Ms. Winkle to the 305 Program of the Department of Public Safety's Intensive Supervision Unit, which is described in NRS 209.425, 209.427 and 209.429.

This bill has two fiscal notes, one from the DOC and one from the Department of Public Safety. The fiscal note from the DOC states, "If the Supreme Court denies the plaintiff's request, the bill will not have a fiscal impact ... ." That is inaccurate. Regardless of the outcome of the case before the Nevada Supreme Court, amending NRS 209.429 to require DUI offenders to stay incarcerated for the full two years before being eligible for residential confinement will add $1.07 million to the budget for the DOC in the first two years. Those are the numbers in the DOC's fiscal note. In each biennium thereafter, we will be adding $1.3 million. This is because in the 2009-2011 budget, the cost of reincarcerating people for that last year was not included. Therefore, that cost will have to be added back in.

With regard to NRS 209.392, which would be amended by section 1 of S.B. 72, that statute has nothing to do with DUI offenders. It refers to the residential confinement program, which was instituted in 1995 to provide residential confinement for other than DUI offenders. Section 1 of the bill specifically excludes the provisions of NRS 209.429. This is the program that applies to residential confinement for DUI offenders. Anything related to DUI offenders and residential confinement is included in NRS 209.429 and is not provided in NRS 209.392. Therefore, amendment to that statute is unnecessary. It has nothing to do with DUI offenses, and in fact it was modeled four years after the promulgation of NRS 209.429. It was put into place to allow residential confinement after the great success of the program described in NRS 209.429.

Returning to Senator Breeden's question, "substantial bodily harm" is defined in NRS 0.060 as "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ ... ." While that can be submitted to a jury, it is defined in statute.

With regard to NRS 209.429, that is one of the three statutes that are part of the successful 305 Program, which was implemented by the Legislature in 1991. Those three statutes must be read together to make sense. The impetus of the 305 Program was former Governor Bob Miller's study on prison overcrowding, and its original purpose was to save money and lessen overcrowding in Nevada prisons. The 305 Program requires the DOC to create a program of substance abuse treatment and assign qualified offenders for that program to treatment and residential confinement in their last year of incarceration. The residential confinement component transfers the cost from taxpayers to the offender for that last year. In 1991, Governor Miller's prison study predicted a savings of $219,000 in 1992 and $267,000 in 1993 from this transfer of costs to DUI offenders. As noted in the DOC's fiscal note, that amount has increased to $374,000 for 2112 and $696,000 for every year thereafter. If S.B. 72 is passed, that amount will have to be added back into the DOC's budget.

As it now stands, the residential confinement program is self-sustaining. All costs—including supervision fees, monitoring costs, costs of treatment and costs of drug testing—are borne by the offenders. In addition, a small amount of income is generated by the program because the Division of Parole and Probation collects approximately 25 percent of any wages the offender earns. In order to participate in the 305 Program, offenders must either be employed or in school or agree to pay restitution to the victims of their crimes.

In addition to the fiscal savings, the program has been extremely successful at reducing recidivism in DUI offenders. This is an important element for Nevada taxpayers and anyone else who drives on our roads. In testimony before the Assembly Judiciary Committee in 1995, the Bureau of Alcohol and Drug Abuse reported a recidivism rate of 2 percent among the 1,000 people treated by the program.

The 305 Program has been so successful that the Legislature liberalized it to allow more offenders to enter, changing the residential confinement component from discretionary to mandatory in 1995 and removing several conditions for entry in 2007. The Legislature's clear purpose was to allow more people into the program due to its success in both lowering costs and preventing recidivism.

The amendment adding the two-year minimum requirement before release to the residential confinement program defeats the purpose of the fiscal savings of the

305 Program. In addition, the amendment is unnecessary. Under Nevada law, imprisonment is not solely defined as incarceration in the State prison facility. Residential confinement is imprisonment under NRS 209.429, section 4, paragraphs (a) and (b); NRS 208.075 defines "prison" as "any place designated by law for the keeping of persons held in custody under process of law ... ." Therefore, residential confinement is consistent with the two-year minimum required by NRS 484C.430. There is no inconsistency in the law; therefore, there is no need to amend the law.

You have been completely clear in the legislative history about your intent. There is no confusion. This program has been in place and worked successfully for almost 20 years, from 1991 until March 2010 when the DOC changed their policy pursuant to advice from counsel. This is not a situation in which we just started implementing the program and suddenly discovered a problem.

The amendments proposed in S.B. 72 achieve no fiscal or criminal punishment purpose except to further demonize DUI offenders causing substantial bodily harm. These offenders are almost all decent people who, in one moment of their lives, made the worst and most deadly mistake and will suffer for the remainder of their lives knowing they caused someone's death or serious injury. Nevada taxpayers should not be required to spend millions of dollars to demonize or further penalize these people without any other punitive purpose. Nor should taxpayers be deprived of a program that keeps DUI drivers from reoffending.

I urge you to reject S.B. 72.

CHAIR WIENER:
You cited statistics from 1995. Do you have more current statistics? I would like to know the number of people in the current DOC population who have been convicted of this offense and how many would qualify for this program.

MS. RIGGS:
The only figures I have are those provided by the DOC. They estimate an average of 28 people a year are eligible for the program.

CHAIR WIENER:
Is that throughout the entire system?

MS. RIGGS:
Yes.

CHAIR WIENER:
I will request Linda J. Eissmann, Policy Analyst, to check with the DOC to see if they have any additional information that could assist us.

STEPHEN WEIL:
I am speaking today in opposition to S.B. 72 on behalf of a friend who is an inmate at the DOC's Stewart Conservation Camp facility. I have written testimony describing his situation (Exhibit E). His was one of those bad decisions people make that have a significant impact in their lives. The vaso-vagal reaction described in Exhibit E is a reaction to anxiety and/or pain in which the person loses consciousness without warning. It is the 250-pound Marine who passes out when he gets a vaccination. I should point out that I am currently renting my friend's house and taking care of his dog while he is in prison.

CAROL ORTIZ:
I am here to speak in opposition to S.B. 72. I have written testimony describing the situation of my daughter Jessica Winkle, who is serving time at the Jean Conservation Camp facility for a felony DUI (Exhibit F). She had been allowed to move to house arrest last year, during which time she attended the University of Nevada, Reno (UNR), and worked with adults with mental disabilities, autism and fetal alcohol syndrome. She was so good at this work that she was made the caseworker for one of the patients. She did everything the 305 Program asked of her and was serving her time. She lived in fear that she would not hear the phone ring when she was called for the twice daily breathalyzer check. House arrest is imprisonment.

Please do not pass S.B. 72. Keep the program as it was before it was hastily changed in response to sensational newspaper articles and upcoming elections. The program was working. Why change it? Can the State truly afford to pay for something that can be better accomplished with the residential confinement program and paid for by the inmates?

ORRIN JOHNSON (Washoe County Public Defender's Office):
We are here in opposition to S.B. 72. I would commend to you the testimony of Ms. Riggs and the briefs in the litigation pending before the Nevada Supreme

Court in *Winkle v. Warden*, which are available on the Supreme Court's Website. If you read those briefs, you will agree with her legal position; they are quite convincing.

If S.B. 72 is implemented, two things will happen. First, we will spend hundreds of thousands of dollars more than we need to every year. Second, we will increase the recidivism rate by reducing treatment options. Why would we spend more money to get a worse result? We respectfully ask that we save that money and put it toward better things, and at the same time keep these programs in place to stop these people from offending again. It is indeed a tragedy, and I do not want to downplay the individual choice that was made to become intoxicated and put others' lives at risk. At the same time, let us not compound the tragic results of that decision by making it less likely that these people will get the help they need, with the result that they will offend again and put someone else's life at risk years later. Meanwhile, we will be spending hundreds of thousands of dollars to increase that risk.

You asked about the legislative history. This penalty was set in 1987, and the residential confinement program was set up in 1991 by A.B. No. 305 of the 66th Session, which is why it is called the 305 Program. It was revisited in 1995. There is a summation of this legislative history in the initial petitioner's brief in *Winkle v. Warden*. The testimony in 1991 was that it would save hundreds of thousands of dollars, and the testimony in 1995 was that the program had indeed worked and should be expanded. It continued to work for 20 years. If this bill is passed, it will disincentivize people from going through the rehabilitation program because there will be no carrot, no incentive for them to get out of the program early and do well while they are under house arrest and under constant threat of being returned to prison.

I want to make a correction. There was a question about credit for time served. Offenders are generally granted credit for time served in county jail. In fact, if they are indigent, it is mandatory under the statute that they be given credit for time served. That is an issue I have had to research from time to time.

We respectfully ask that we keep these programs in place.

CHAIR WIENER:
Our data on recidivism is old. We could use any information out there on recidivism rates for those who go through the penal system with and without these programs, and perhaps the same from neighboring states as well.

MR. JOHNSON:
I will see what I can find.

SENATOR ROBERSON:
You allege that the recidivism rates will go up if S.B. 72 passes. Do you have data to back that up, comparing recidivism rates of those who go through the program to those who serve their time in prison?

MR. JOHNSON:
I have the data Ms. Riggs mentioned earlier. It would be more accurate to say that I suspect recidivism rates will go up. Obviously, no one can predict the future. I know that in Nevada, rehabilitation programs ordered through the court have significant success rates. Based on my experience and the experience of attorneys in my office and around the State, these kinds of programs are extremely successful for the people coming out of them. It just makes common sense. If people are not going through any kind of treatment program at all, it is less likely that they will remain clean and sober.

TIERRA JONES (Office of the Clark County Public Defender):
We oppose this bill and agree with the comments made by Ms. Riggs and Mr. Johnson.

GARY WINKLE:
I am the father of Jessica Winkle and am opposed to this bill. The 305 Program was successful before the *Reno Gazette-Journal* (RGJ) published its series of articles about it. This bill was presented because of sensationalist journalism and for political gain. Unless you have had a family member in a DUI incident like this, you do not understand the impact it can have. Everyone thinks of the DUI offender as someone coming out of a bar, drinking every night, who goes the wrong way on the freeway and kills a family. My daughter was a fun-loving, typical 19-year-old teenager at Galena High School. She was a cheerleader at UNR prior to her injury and was an A-B student studying psychology. Think about when you were 19 years old. I am sure the majority of the people in this room probably did something they regretted, including drinking, and thought

they would never get caught. Even today, many students drink, and most of them will never get caught. She just happened to be unlucky that night. She was just slightly over the limit. It was a tragic accident.

I am proud of how my daughter has handled this. She has been a model inmate and a poster child for the house arrest program. She volunteered to be in the RGJ article because she thought it would be helpful to explain her side of the story and help others think twice before driving while intoxicated. Instead, the article was used to demonize her and put her in with the hardcore, repeat DUI offenders. She was wrongfully sent back to prison, and even so she is a perfect inmate. She has outstanding respect from the warden, her counselor and her fellow inmates. A couple of visits ago, she told me that if the family of the young man who was killed feels this is what they need her to do, she will do it.

You cannot look at every DUI case the same. You have to take them on a case-by-case basis. She was just a young girl who made a mistake. Whether this bill passes or not, she will be coming home some time this year, depending on the Supreme Court's decision. She will move on with her life and pursue her degree in psychology, and she will pass on her experiences to others in the future. If you could see her, if she were able to represent herself here today, you would understand this better. Even at her sentencing, the prosecuting attorney, the judge and the family members all agreed she should get the minimum sentence.

LAUREL STADLER (Rural Coordinator, Northern Nevada DUI Task Force):
I support S.B. 72. When the 305 Program was initially put into law in 1991, there were two phases in the program. In Phase 1, the DUI offender had to complete a treatment program, after which they were allowed to go on to Phase 2, which was preparation to come out of prison and go into the residential confinement program. The prison also had policies and guidelines about eligibility; for example, the offender had to be within one year of their parole date in order to be eligible for the program. As the years proceeded, the policies changed within the prison system. To my knowledge, there is no longer a Phase 1 or a Phase 2. There is no treatment in the prison system prior to the release of these offenders, particularly the ones who go through the revolving door, those who have a minimum two-year sentence and who are released within a few months of entering the system. It therefore becomes a revolving door, in which an offender goes in and comes out under residential confinement.

Even though residential confinement is defined as imprisonment for all purposes, the main reason for it is that the offender can be recalled to prison without a lot of paperwork. If you are in prison, behind bars, not able to go out into the community, that is prison. When you are at home in residential confinement, you have the option, with your schedule, to do daily activities and be in the community. How hurtful is it for parents of deceased victims to see those offenders living their lives in the community, to run into them at the grocery store?

We have not talked much about the victims of DUI crashes this morning. In the case of Jessica Winkle, a young man was killed. You were all asked to think of young people in your lives and how you would not want to see those young people in prison, to see them tagged with a felony offense. Would you rather see them in a grave? That is the reality of DUI crashes. It is so very offensive to those of us in the safety community to hear DUI called a mistake. This legislative body has defined DUI as a criminal offense. There is a big difference between a mistake and a crime. Driving under the influence of alcohol, legal drugs or illegal drugs is a criminal offense in Nevada. When people indulge in the crime of DUI, innocent victims are injured and many times killed.

I urge you to think of the victims of the crime of DUI. Think of their families. Their parents are not here to tell how their son, daughter or family member is still alive and in prison serving a term for a criminal offense. Those families are grieving for their deceased children. They are visiting graveyards to remember the lives of their young people, lives that were taken. They will not be able to continue their college education when they get out. They will not be able to have families. They are dead. Dead is dead—is gone—is final.

Since we have been focusing on the Winkle case this morning, I would like to point out that she was a 19-year-old DUI offender. That means the first crime committed in this case was underage drinking, which has also been defined as a criminal offense by this body. The first crime of underage drinking was then followed by the second crime of DUI, which resulted in the death of an innocent victim. That is the reality. That is what those of us on the side of public safety deal with on an ongoing basis: the families of the innocent victims of DUI crashes. My group will be going out to Fallon this evening for a victim impact panel, where speakers will include a mother who lost her 22-year-old daughter in a DUI crash, a mother who lost her son in an alleged marijuana-involved crash and others who have lost children in DUI crashes. This is not a mistake. It is not

a bad decision. It is not a case of, "Oops, I'm sorry, I did it." It is a criminal activity. There is not one licensed driver in Nevada who does not know that DUI is a crime. It is on all the testing and in the handbook from the Department of Motor Vehicles. It is in the news, and yes, there are a lot of high-profile offenders, like the publisher of the RGJ. In his letter of apology to the public, he said he made a mistake. He did not. He committed a crime. It does not matter if the offender is a good guy or a bad guy. The victims are just as dead.

With regard to Mr. Weil's friend, apparently he was under the influence of marijuana when he drove up to Spooner Lake before he even had his DUI accident. He did not start his day innocently. There is more to these cases than meets the eye, and there are a lot of innocent victims of drunk driving in Nevada. I would hope this Committee would support this legislation to get a definitive statement in the law that these DUI offenders have earned the opportunity to do their two years in prison behind bars. Perhaps the language needs to be clarified to say that in this case, "in prison" means behind bars.

CHAIR WIENER:
I will ask staff to provide us with the history of the 305 Program. We have heard several references to it this morning, and it would be helpful to be able to study it in its entirety.

GREG COX (Acting Director, Department of Corrections):
We concur with the review of this bill by the Office of the Attorney General. Historical data indicates we will have an increase in our population of 28 inmates, as indicated by the DOC's Offender Management Division.

JEFF MOHLENKAMP (Deputy Director, Support Services, Department of Corrections):
We submitted our fiscal note for S.B. 72 early in the process before we knew what other bills we might see. We are now revising our fiscal note downward significantly. Initially, we looked at the full cost of housing an inmate, which includes staffing and the other costs of adding staff to house prisoners. At this point, we are only looking at the incremental costs of food, clothing and medical care that would be necessary to sustain an inmate. We already have the staff and the capacity to absorb these additional 28 inmates if necessary. With that in mind, we estimate the fiscal impact to be $63,093 in 2012, $70,199 in 2013, and $140,014 in future biennia. We will submit a revised fiscal note with those numbers.

SENATOR MCGINNESS:
Is this cost for S.B. 72 alone?

MR. MOHLENKAMP:
Yes. That number breaks down to about $6.69 per inmate per day in the first year and $6.85 per inmate per day in the second year.

BERNIE CURTIS (Chief, Division of Parole and Probation, Department of Public Safety):
We are in support of S.B. 72.

CHAIR WIENER:
I will close the hearing on S.B. 72 and open the hearing on S.B. 47.

SENATE BILL 47: Clarifies the definition of "minor" for the purposes of certain criminal statutes. (BDR 15-121)

BRETT KANDT (Special Deputy Attorney General, Office of the Attorney General):
We are here in support of S.B. 47. I have a letter from the Attorney General explaining our position on this bill (Exhibit G). This bill would clarify the definition of the term "minor" as used in Title 15 of the NRS, which specifies crimes and punishments. We are asking you to consider the creation of a general definition of the term "minor" to mean a person who is under 18 years of age, which would apply except as otherwise defined in a specific statute.

ALICIA L. LERUD (Deputy Attorney General, Bureau of Criminal Justice, Special Prosecution Unit):
The NRS contains numerous statutes intended to protect Nevada's children from sexual exploitation and other harmful conduct. Often, these statutes define the term "minor" as being an individual under a certain age. However, there are several statutes that fail to define the term in terms of a specific age. In 2009, we had a case in Elko County that found NRS 200.710, which involves child pornography, to be unconstitutionally vague because it failed to define "minor" as being an individual either under the age of 18 or under the age of 16 (Exhibit H).

This bill seeks to clarify that unless otherwise defined, "minor" refers to an individual under the age of 18 years. There are about a dozen statutes that will be affected by this change (Exhibit I). This will help to protect children by

eliminating any future confusion in those criminal statutes in which "minor" has not been clearly defined.

CHAIR WIENER:
In paragraph 3 of Exhibit G, there is an example of that vagueness in *State v. Hughes*. Is this a case that dealt with pornography?

MS. LERUD:
Yes. That is the case out of Elko County to which I referred. Our statute on child pornography is a major statute to be declared unconstitutionally vague.

CHAIR WIENER:
Exhibit G also references the statutes regarding the sale of tobacco, which defines a minor as being under the age of 18, and the sale of alcohol, which defines a minor as under the age of 21.

MS. LERUD:
That is correct. Throughout Title 15, you will see "child" and "minor" defined as being various ages. This bill seeks to clarify that where it is not defined, our default definition is going to be under the age of 18.

SENATOR GUSTAVSON MOVED TO DO PASS S.B. 47.

SENATOR BREEDEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
I will open the hearing on S.B. 57.

SENATE BILL 57: Expands the circumstances pursuant to which a court is authorized to issue certain warrants. (BDR 11-289)

MR. KANDT:
I have a letter from the Attorney General explaining our position on this bill (Exhibit J). The purpose of this bill is to increase child safety in Nevada by strengthening the process for enforcement of court orders for recovery of

abducted children and protecting police agencies from liability for enforcement of these orders. We also have proposed amendments for your consideration (Exhibit K). Based on conversations we have had with the Division of Child and Family Services, Department of Health and Human Services, we believe these amendments will make this a better bill.

VICTOR-HUGO SCHULZE II (Senior Deputy Attorney General, Office of the Attorney General):
I serve as the Director and Children's Advocate for the Nevada Missing Children Clearinghouse and Crime Prevention Unit. Our job is child safety. My duties include the location and recovery of missing, abducted and kidnapped children and reuniting these missing children with their families. I perform these duties with the assistance of police and sheriff's agencies in Nevada, police departments and missing children's clearinghouses across the Nation, and police and government officials in foreign countries, including Canada, Australia, Israel and Germany. We work hand in hand with local nonprofit agencies such as Nevada Child Seekers, as well as the National Center for Missing and Exploited Children in Washington, D.C., the U.S. Department of State, the U.S. Department of Homeland Security, and U.S. Immigration and Customs Enforcement.

I will add to the Attorney General's comments in Exhibit J. This bill seeks to ensure the pick-up order process meets constitutional standards under due process and the Fourth Amendment to the U.S. Constitution. It grew out of the work of a committee in Clark County set up to create a process of implementation for the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). This committee is made up of family court judges, the Children's Advocate and the Director of the Clark County Family Law Self-Help Center. The bill draws from existing law in NRS 125A, which concerns the enforcement of out-of-state custody orders. It provides a consistent, uniform and constitutional process to enforce both in-state and out-of-state custody rights.

Currently, NRS 125.470 contains two provisions: one for pick-up orders that do not envision police intervention and one for those that do. This bill does not change the provisions pertaining to orders without police involvement. The thrust of this bill is to amend the provisions of NRS 125.470, section 2, which allows a family court judge to seek the intervention of the police in enforcing a pick-up order. A great deal of what family court judges do in the custody and recovery arena has a constitutional dimension due to the U.S. Supreme Court's

repeated holdings relating to a parent's fundamental right to the care, control and upbringing of his or her child.

In general, when a noncustodial but possessory parent sues the police for an alleged unlawful recovery, the theories relied upon are substantive due process, procedural due process, and Fourth Amendment search and seizure violations. This bill addresses these concerns by providing a regular process that a family court judge must follow in issuing a pick-up order that contemplates the involvement of the police. In these cases, in order to meet due process standards, the process provides for a noticed predeprivation hearing and an opportunity for the wrongfully possessory parent against whom the petition has been filed to appear and argue, unless there is evidence of a genuine risk of flight and reabduction. The bill also provides for a postdeprivation hearing similar to the provisions in NRS 432B. In such cases, due process hearings can occur postdeprivation in light of the existing exigencies. The allowance of a postdeprivation hearing must be based on additional fact-finding by the court that the exigency actually exists.

While S.B. 57 would expand the use of pick-up orders designated as warrants, as they are referred to in NRS 125A, the bill does not expand the authority of family court judges to issue pick-up orders beyond the parameters of current law. It also provides additional constitutional protections to benefit the targets of the orders from the police who enforce these orders. It accomplishes these goals in a manner less intrusive than resorting to filing criminal charges to recover missing children. In some cases, criminal charges and warrants for the arrest of abducting suspects are appropriate. However, the bill seeks a less intrusive civil remedy for those cases where the more intrusive remedies are not appropriate, and it reduces the reliance of the Children's Advocate, the Clearinghouse and the entire missing child recovery system on more intrusive methods. Cost savings are substantial when we utilize less intrusive methods to recover kidnapped children.

In discussing the bill with various stakeholders in the child safety arena, several changes to the bill's language were requested, as detailed in Exhibit K. We agree that these changes will strengthen the bill. We request the Committee approve S.B. 57 to increase child safety in Nevada.

CHAIR WIENER:
You mentioned bringing us more in conformance with Fourth Amendment standards, replacing the standard of "the best interests of the child" with the Fourth Amendment standard of probable cause. Could you explain the distinction between the two and the benefit to the process this bill offers?

MR. SCHULZE:
"Best interests of the child" is the standard that is generally applicable to the initial custody determination made in a Nevada custody hearing under NRS 125 and in abuse and neglect cases brought under NRS 432B. The pick-up order process does not establish custody rights. Under NRS 125.480, the controlling standard is the best interest of the child, as it is in NRS 432B. Pick-up orders are an enforcement mechanism for a preexisting custody right. They are not a process by which custody rights are established.

The reason we are writing in the Fourth Amendment standard is our review of the case law, specifically from the Ninth Circuit, the Fifth Circuit and the Second Circuit, in which the target parent of a constitutionally insufficient pick-up order has sued the police and district attorney. Pick-up orders are akin to search warrants. Search warrants refer to items that are evidence of a crime. Because we are dealing here with human beings, we need an analogous process that operates for the pick-up of a child using Fourth Amendment language on issues on search and seizure. For example, the warrant has to specify the child to be picked up and the location where the child is going to be picked up. We do not currently have those protections. By adding those protections, we are looking to reduce the liability of police officers when they pick up these children pursuant to the warrants.

CHAIR WIENER:
Could you go through the amendments in Exhibit K and explain what you hope to accomplish?

MR. SCHULZE:
The most substantial changes are in amendments 4 and 5 on Exhibit K. We originally wrote this as a safe haven bill, in which the judge issuing the pick-up order could order the child to be placed with a Child Protective Services (CPS) agency. We did this because in some cases the parent assuming custody might be in St. Louis, New Orleans or Denver, and they may not be able to get to Nevada immediately. When we pick up a child, the general practice is not to

inform the other parent of the recovery until the child is in protective custody. In some cases, those parents will need some travel time to get to Nevada. In the original form of the bill, we put in a provision that if the parent is not immediately available to take the child, the child will be placed with a CPS agency. The Department of Family Services in Clark County and the Department of Child and Family Services had a problem with this, and on reconsideration I believe they are right. They have a preexisting structure to provide a safe haven for those children under NRS 432B; we do not need to rewrite that statute. I asked my investigator if she had ever had a case in which the parents could not get here in 24 hours, and she said no. Based on that, we are writing the NRS 432B agencies out of the bill in their entirety. The language we have added comes directly from the UCCJEA in NRS 125A.

Amendments 3 and 7 are related to the changes in amendments 4 and 5.

Amendments 1 and 2 in Exhibit K are at the request of one of the partnering agencies to our UCCJEA implementation committee. One of the family court judges in Clark County wanted flexibility on how the notice is to be served to interested parties. The amended language allows service either by the court or by the petitioner. That reflects existing law in NRS 125A.

Amendment 6 is a protective device. We investigate approximately 125 reports of missing children annually in conjunction with police agencies. Of those, some 20 percent to 25 percent are false reports in which the child was not abducted and the complaining party has omitted facts in their statement. For that reason, our investigations include determining whether an abduction has in fact taken place. Amendment 6 requires the petition be served on the office of the Children's Advocate. That provides a fail-safe on the system. In the vast majority of these cases, we are already investigating them. If we have information that differs substantially from the information in the request for the warrant, we have the ability to make an amicus curiae appearance in family court to inform the court of the facts.

REBECCA GASCA (Legislative and Policy Director, American Civil Liberties Union of Nevada):
We are currently taking a neutral position on this bill. We are reviewing the bill in its entirety. We appreciate the efforts of the Office of the Attorney General to bring these standards to constitutional levels. I note that the bill removes liability

for law enforcement officers, though there are some additional due process considerations put in place.

CHAIR WIENER:
Is there any further business or public comment to come before the Committee? Hearing none, I will adjourn the meeting at 9:37 a.m.

RESPECTFULLY SUBMITTED:

_____
Lynn Hendricks,
Committee Secretary

APPROVED BY:

_____
Senator Valerie Wiener, Chair

DATE:_____

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 9, 2011 Time of Meeting: 8:00 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 72	C	Keith Munro	Letter from Catherine Cortez Masto, Attorney General
S.B. 72	D	Keith Munro	"Response to Petition for Writ of Mandamus re: *Winkle v. Warden* (56828)"
S.B. 72	E	Stephen Weil	Written testimony
S.B. 72	F	Carol Ortiz	Written testimony
S.B. 47	G	Brett Kandt	Letter from Catherine Cortez Masto, Attorney General
S.B. 47	H	Alicia Lerud	"Order Granting Defendant's Motion to Dismiss"
S.B. 47	I	Alicia Lerud	"Criminal Statutes Involving Minors (Chapters 193-207)"
S.B. 57	J	Brett Kandt	Letter from Catherine Cortez Masto, Attorney General
S.B. 57	K	Brett Kandt	"Proposed Amendments to SB 57"