

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Eighth Session
March 3, 2015**

The Senate Committee on Judiciary was called to order by Vice Chair Becky Harris at 1:04 p.m. on Tuesday, March 3, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Aaron D. Ford

COMMITTEE MEMBERS ABSENT:

Senator Tick Segerblom (Excused)

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Vanessa Spinazola, American Civil Liberties Union of Nevada
Sean Sullivan, Public Defender's Office, Washoe County
Steve Yeager, Office of the Public Defender, Clark County; Nevada Attorneys
for Criminal Justice
Janine Hansen, Nevada Families for Freedom
Robert Fellner, Nevada Policy Research Institute
John T. Jones, Jr., Nevada District Attorneys Association

Senator Harris:

I will open the hearing on Senate Bill (S.B.) 191.

SENATE BILL 191: Revises provisions relating to the return of seized property.
(BDR 14-204)

Senator Greg Brower (Senatorial District No. 15):

This bill is intended to fill a gap in our State rules of criminal procedure. As those who practice in the criminal arena know, we do not have a body of criminal procedure rules as we do in the federal system. Rather, we have a number of *Nevada Revised Statutes* (NRS) that deal with various aspects of criminal procedure. The issue in S.B. 191 has to do with NRS 179.085.

Let me give you a scenario to illustrate the gap I mentioned. Imagine Senator Kihuen has a business, and State law enforcement officers obtain a search warrant to search his business. When they do so, they seize all his files, computers and other items. Senator Kihuen will be given a copy of the search warrant at the conclusion of the search, but he may not know what is behind the search or what the investigation is about. All he knows is that when the officers leave, he no longer has his files, computers and so on—everything is gone. His dilemma is how to get his property back to run his business.

Under NRS 179.085, Senator Kihuen could file a motion for the return of the seized property if he argued the search was illegal. However, Senator Kihuen would usually not have enough information at that point in the investigation for his lawyer to make a reasonable argument that the search was illegal. If he simply wants his property back, NRS 179.085 does not cover that situation.

Senate Bill 191 would change the language of the statute to add a second option for the subject of a search and seizure to make a motion that regardless of the legality of the search, the government is not holding the property reasonably and should give it back. This bill takes language from a comparable federal rule, Federal Rule of Criminal Procedure (FRCP) 41 ([Exhibit C](#)), and inserts it into NRS 179.085. Two scenarios are covered by FRCP 41. In the first situation, the party challenges the legality of the search and argues that the government should return the person's property for that reason. In the second situation, which is covered by FRCP 41(g) on page 6, the party does not challenge the legality of the search but argues that the property should be returned for some other reason: the wrong property was taken, the

property is needed to run a business, the property has been held for too long a time, etc. Our existing statute does not have that second option. It seems to me and many practitioners around the State that the statute could be improved by including that second option. That is what S.B. 191 provides.

Senator Ford:

I wondered why you added, "or the deprivation of property" to section 1, subsection 1 of S.B. 191, but I see that language in FRCP 41(g). As I understand you, this bill means the party does not necessarily argue that the search was unlawful; rather, the party argues simply that the government has not returned the seized property. Is that right?

Senator Brower:

Yes, and I would like to elaborate on that. In the hypothetical scenario I proposed, Senator Kihuen has a business of some sort. His business information is stored on several computers. The government takes them all, which happens routinely in criminal investigations. Ideally, the government then quickly copies the data from the hard drives of those computers, thereby gathering the information that may contain evidence of criminal wrongdoing, and then returns the computers to Senator Kihuen so he can carry on his business.

It often happens that the government is slow in returning those computers, and the business is left with no computers to run the business. In my scenario, Senator Kihuen is not necessarily arguing that the search was illegal; he is simply saying that he needs his property back. This bill would give him a vehicle to make a motion with the judge and articulate that argument.

Senator Ford:

I believe the bill contains an inadvertent use of two different words to mean the same thing. Section 1, subsection 1 and section 1, subsection 2 of S.B. 191 refer to the "return" of property, whereas section 1, subsection 6 refers to property being "restored." Our practice in writing legislation is to ensure that different words have different meanings, and I do not believe you intended for those words to have different meanings in this regard. Should subsection 6 also say "returned," as FRCP 41(g) has it?

Senator Brower:

That is a good point. I will have to check with Counsel on that.

Senator Ford:

I want to confirm that you do not mean something different when you said "restored" versus "return."

Senator Brower:

I do not. That is a drafting issue; a better choice of consistent words could be used. I will follow up with staff on that.

This may be obvious to the Committee, but I would like to talk about situations where the seized property is contraband. This can include everything from illegal drugs to illegal firearms to child pornography. Senate Bill 191 does not cover the return of contraband, which the government can hold on to through the investigation, the trial and indeed forever until the property is destroyed. If Senator Kihuen makes a motion for return of the property and the government believes the seized property is contraband or cannot be returned for some other reason, it is incumbent upon the government to make that argument in response to the motion.

There is nothing about S.B. 191 that would preclude the judge from agreeing with the government and deciding the property cannot be returned. It does not change in any way the burden of proving to the court that the property should be returned. It simply provides a vehicle for a motion for the return of property when the legality of the search is not being questioned.

Senator Kihuen:

How long does it usually take for people to put in a request to get their seized property back? Are we talking about weeks, months, years?

Senator Brower:

It varies. When federal law enforcement agents seek a search warrant from the federal magistrate judge, the federal magistrate judge will frequently issue the warrant but also require a hearing within 30 days. This gives the subject of the search an opportunity to tell the judge that the government is taking too long to return the materials. The government also has an opportunity at that hearing to explain why it needs more time. That opportunity is lacking from our State system.

The amount of time it takes to get property returned depends on a number of factors. If, in the search of your business, one computer is seized, the

government should not have reason to hold that computer to copy it for longer than about a week. If 100 computers full of data were seized, the government will need more time to copy those computers. This is a factual determination the court must make. This bill allows for a motion to tee up the issue for the judge, who can hear from the defendant that the return is taking too long and from the prosecutor that more time is needed. The motion brings the issue to a head so the judge can exert control over the situation.

Senator Kihuen:

If S.B. 191 is enacted, will it help speed up the process for the person who feels his or her property should not have been taken?

Senator Brower:

Potentially, but of course the government will have the right to argue that it needs more time. The bill would make it less likely that the government will be able to simply ignore the party and return the property when it feels like it. This gives the party a way to get into court and tell the judge that the government is taking an unreasonably long time and the property should be returned.

Senator Harris:

What is the process now? How long are people waiting to receive their property back when it has been seized by the government?

Senator Brower:

It is hard to say. In practice, it often happens that a motion is made under NRS 179.085 for the return of property, but it is technically an improper motion because that statute only contemplates an argument that the search was illegal. In effect, practitioners file the motion pursuant to NRS 179.085, but make it clear to the judge in the motion that the real issue is not the legality of the search but that the government has had the property for too long. The real issue is understood by everybody, including the court. With the change in S.B. 191 to adopt FRCP 41(g), it will be much clearer that this type of motion can be made under NRS 179.085.

Vanessa Spinazola (American Civil Liberties Union of Nevada):

We support S.B. 191. Every year, property is seized from citizens, and there is no clear process to get it back. Many of those who have had property seized do not have the money to fight for it, and we think this bill is a great idea.

Sean Sullivan (Public Defender's Office, Washoe County):

We fully support S.B. 191 and also think it is a great idea. I have often received calls from clients after the close of a case wanting their property back, including backpacks, passports and computers. It is often difficult for the practitioner to find a legal avenue to get that property returned, and this bill creates that legal avenue. I particularly applaud the language in section 1, subsection 3 making it clear that the judge's decision is based on the totality of the circumstances. The judge is the final arbiter. The State will have its say, and the matter can be fully briefed and litigated before the court, but the practitioner has a legal avenue for exploring the issue and getting the property that should no longer be retained back to the defendant in the matter.

Steve Yeager (Office of the Public Defender, Clark County; Nevada Attorneys for Criminal Justice):

We support S.B. 191.

Janine Hansen (Nevada Families for Freedom):

We support S.B. 191. We are always interested in improving protections for individual citizens with regard to their constitutional liberties. I have a personal experience in this area. A federal agency invaded my brother's office with what was ultimately found to be an illegal warrant. The agency took over 20 boxes of files. Before the matter could be resolved, my brother was killed in a truck accident on Golconda Summit. It was a traumatic circumstance. Since then, I have always been concerned to make sure the rights of individual citizens are protected from potential abuses by law enforcement. This bill is one more way we can do that.

Robert Fellner (Nevada Policy Research Institute):

We strongly support S.B. 191 for many of the reasons already articulated. One additional reason is a matter of principle. Without this bill, the statute treats property rights as separate from personal rights. We strongly feel they are one and the same. A person's right to free speech, for instance, means nothing if he or she does not have property rights to his or her home. We think this is a fantastic bill that will address that gap and expand the protections we all enjoy to our property as well.

John T. Jones, Jr. (Nevada District Attorneys Association):

We are neutral on S.B. 191. I have spoken with Senator Brower prior to this hearing, and we can appreciate the reasoning behind this bill.

I have expressed some concern regarding some of the language in the bill, and he has agreed to address some of those issues, including the matter of contraband. Computers used in a forgery lab are another example of seized property that is contraband. Forgery labs often use computers and other items that are innocuous in themselves, but given the crime, we do not want to return those items to the defendants. They were used for forgery, and if we give them back, they could potentially be used for forgery again.

There have been instances in Clark County in which a motion was made to return property under NRS 179.085 even though the search was not improper. Judges have sometimes ordered the Las Vegas Metropolitan Police Department to scrub the defendant's hard drive and then return the computer. We are trying to make sure this bill does not exacerbate those instances.

We are looking forward to working with Senator Brower on our concerns.

Senator Brower:

I have spoken with Mr. Jones regarding his concerns and some potential language changes to satisfy them. We will continue to have those conversations and hopefully bring the bill back to the Committee quickly.

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Senator Harris:

The meeting is adjourned at 1:26 p.m.

RESPECTFULLY SUBMITTED:

Lynn Hendricks,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit		Witness or Agency	Description
	A	1		Agenda
	B	2		Attendance Roster
S.B. 191	C	6	Senator Greg Brower	Federal Rule of Criminal Procedure 41