ASSEMBLY COMMITTEE ON JUDICIARY - 56th Session, 1971

HEARING FEBRUARY 9, 1971

Hearing commenced at 3:07 p.m. Members present: Miss Foote, Messrs. Fry, Lowman, May, Dreyer, Olsen, Kean, McKissick and Torvinen. None absent.

AB 27: Prohibits illegal use of credit and identification cards, and AB 194: Adopts credit card crime act.
ASSEMBLYMAN NORMAN HILBRECHT stated:

Articles in the Credit Men's Association Journal state that this bill (27) is the best of the enactments in practice. While there are provisions in NRS that purport to deal with credit card fraud, they are found to be inadequate by prosecution authorities in the state, and we have to have a credit card law if we are to continue providing credit by this means to the consumer in the State of Nevada. I don't know if this deals with the identification cards. Representatives of the Southern and Northern Nevada Credit Men's Association would like to appear on the bill. I think AB 27 is the bill they prefer but either that or AB 194 has to be adopted so there is some protection offered. AB 27 would protect the interest of the issuer and the merchant. The people supplying credit will be forced by Federal law to comply with some more stringent standards than in the past and we should protect them in one of these enactments.

Mr. Fry asked how many other states have similar legislation. A representative of the Nevada Check Investigators' Association and American Express Association stated there were about 40 states.

Testimony from SGT. ABE FEROAH, RENO POLICE DEPARTMENT:
I have read over both these bills and they both look good to me but I don't see anything in 194 that says it would make unauthorized use of a credit card a forgery. I would also like to see the use of the credit card for two or more charges totalling more than $100 made a felony. Senate Bill 11 also deals with credit cards and we should have you look over all three of the bills together.

Mr. Torvinen: Section 17.2 in AB 194 says that a felony can be charged for more than $100. I would like to have an opportunity to compare these bills section by section and make some comments to the committee.

Testimony from ROBERT LIST, NEVADA ATTORNEY GENERAL:
He stated he has sent a copy of a letter setting forth an objection to AB 27. Sections 15 and 16 of the bill would purport to give the district attorney discretion whether to prosecute under the statute as a felony or a misdemeanor for the same act. Such a provision in law has been held unconstitutional. The Lapinski case, 84 Nev. 611 concerned a similar statute allowing the district attorney to prosecute as a felony or a gross misdemeanor, and the court held that the district attorney had to decide how to prosecute. That is one flaw in the bill. Also, on page 4, line 7 regarding value of items being in excess of $100, and on line 25 regarding value in excess of

$100, we felt there should be a provision in there similar to the forgery statute that sets a time limit. The bad check law allows a 90 day period.

Mr. Torvinen: AB 194 sets a limit of six months on credit card charges.

Mr. List: Section 19, page 4, line 34 is a difficult statute to prosecute under. What is reasonable inquiry? It is like possession of stolen property, which has been held by the Supreme Court not to constitute a crime unless you know it is stolen. There is some doubt in my mind whether the statute is workable with the language in there.

Mr. Lowman: You would like to see that out?

Mr. List: Probably. I don't see how you can get around a reasonable inquiry.

Mr. Kean: Wouldn't there be some case in law in Washington if this is a Washington law?

Mr. McKissick: It would be interesting to see if Washington has some case law.

Mr. Fry: I'll find out.

Mr. List: You have to clear up the two penalty provisions and put in the time provisions.

Mr. McKissick: Have you studied the difference between 27 and 194?

Mr. List: No.

Mr. McKissick: Would you write us a memo comparing the two when you've studied them together?

Mr. List: I will.

AB 242: Increases penalty for issuance of wage check without sufficient funds.

Mr. Torvinen: This amends the bad check law to specifically say by a separate section in Chapter 205 that the issuance of a check for wages by an employer or officer of a corporation, of $50 or more, when the person issuing the check has knowledge of insufficient funds, is a felony. The district attorneys throughout the state have taken the position that any check issued to pay a pre-existing debt is not a crime.

Sgt. Feroah: There should be this protection for the working man. This would put pressure on the issuer of the payroll check.

Mr. Torvinen: Have you had trouble getting district attorneys to prosecute under the present law?

Sgt. Feroah: Since 1955 they haven't touched the pre-existing debt, as far as prosecution for checks goes.

Mr. Fry: Last session we had the same bill and one of the problems was if a secretary makes out a check, should the secretary be held liable in the situation, when she was only acting on orders from company executives?

Sgt. Feroah: NRS 205.130 says officers or persons authorized to make out checks. The person who signs the check is responsible.

Mr. Fry: The problem then is with the treasurer who is directed by the president to make out the checks. That is an important item on the bill that should be cleared up.

Mr. Kean: Can the labor commissioner collect the wages?

Mr. Torvinen: He has authority to sue on behalf of the workman, but if the company files bankruptcy and there are no assets there is no way to collect.

AB 28: Prohibits concealment, removal, sale or encumbrance of certain kinds of secured property without a written notice and consent.

MR. HILBRECHT: Most documents executed upon purchase of a motor vehicle have a provision that the purchaser cannot remove the car outside the state without the consent of the secured party, and if the purchaser does so, it is a breach of contract. This is intended to provide for a criminal penalty for removing secured property out of the jurisdiction for a protracted period of time and would prohibit a person purchasing a car from removing the vehicle for any length of time without a waiver from the financing company. This bill ought to be limited to motor vehicles. The reason for the bill is that under extradition compacts between the states, extraditions are limited to felonies. At the present time, a person can purchase an automobile in Nevada, take it to California and hide it, and the only recourse the finance company has is a replevin action to try to recover the car.

Mr. Torvinen: Should this be amended to say that personal property of a value less than $100 should be exempt?

Mr. Hilbrecht: If that is not covered I am not sure it is also an installment contract under NRS 97.105 and the customary valuation of $100 should be on it. I have no objections to that limitation.

ROBERT LIST, RE AB 28: I have some reservations about the whole subject matter of this bill. There is already a criminal provision about removing mortgaged property from the state and the district attorney usually finds out that the person complaining is really

interested in collecting the money, and it provides a way for the creditor to collect a civil debt. The district attorneys will be swamped with requests to get the property back and prosecute the offender. I feel it will add an additional workload to the district attorneys' offices. Roy Woofter opposes it too. I wonder whether it isn't better left to the civil courts.

Mr. McKissick: Is the law now conditional sales contracts?

Mr. List: Now it is a security agreement. The old law was almost unworkable, so much so that the district attorneys would refuse to issue a warrant.

AB 105: Requires issue of penalty for capital offense to be tried separately.

Mr. McKissick: The bill may need some clearing up on the italicized wording but the theory behind it is good. It is patterned after a California law. This is a very important issue, dealing in life and death. The bifurcated hearing is not provided for anything less than first degree murder or first degree kidnapping. I've heard objections that this would extend the time of trial, but I think it would shorten the time of trial because the juries are going to look only at the facts of guilt or innocence. The Supreme Court is heading this way in cases of this type. I think it's a good bill.

Mr. Torvinen: What things need to be cleared up?

Mr. McKissick: In the proceeding on the issue of penalty, it says evidence may be presented of circumstances surrounding the commission of the crime. Most of that has already come out in the trial, so it may not be needed at the penalty hearing.

Mr. Fry: How about Section 5 on the last page?

Mr. McKissick: That is the aggravated rape case which has the death penalty. In all life and death cases there should be a penalty hearing.

Mr. Fry: It forces the Supreme Court into a bad position.

Mr. McKissick: If you are going to make a separate penalty hearing on life and death cases, you have to have one on an aggravated rape too.

Mr. List: This bill was discussed by the District Attorneys' Association. I have had occasion to discuss it with other law enforcement people. I think it is a fair representation to say that generally they would oppose the passage of this measure. The feeling is that it creates additional expenses for the reason that the trial goes additional days and requires additional witnesses.

Mr. McKissick: In life or death of a man does it make that much difference?

Mr. List: We are all concerned with the bogging down that the criminal judicial system has experienced.

Mr. McKissick: It would shorten a trial. You won't have to dismiss a jury and send them out.

Mr. List: In California it lengthens the trial. Because of the workload on the courts and prosecutors it would be the opinion of law enforcement to extend it out would be unnecessary and costly in terms of economy of time involved, if not money.

Mr. Fry: What is your feeling as to what the United States Supreme Court is going to do with cases pending on this point? I mean the question of whether or not it is unconstitutional and a deprivation of due process for a defendant in a death penalty action to have a separate hearing on punishment?

Mr. List: The consensus is that it is constitutional and that the court will uphold the present unified procedure. I would at least hope so. A jury is going to know as much about a criminal case when they go into a jury room about what is fair and just and decent penalty as they are ever going to know and to drag it out with an additional procedure is an unnecessary burden.

Mr. Lowman: I assume the district attorneys are concerned with the matter of justice and they are weighing that against the question of additional costs. They have come up with the conclusion that we should not have that?

Mr. List: You have to strike some kind of a balance between what is justice for a defendant and what is justice and efficiency in a court system. A district attorney is more than a prosecutor. He has to determine in the beginning whether a man should be prosecuted, and for every offense that is prosecuted there are many that are not. Roy Woofter of Clark County feels it would be a waste of time to go through the additional step, and probably there are more murder cases in Clark County than in any other; but they haven't had a capital punishment imposed for years.

Mr. Kean: Are the judges down there lenient as to admitting the extraneous matters?

Mr. List: I don't know. The judges in the north have been fairly reasonable about it.

Mr. Kean: That takes time, doesn't it?

Mr. List: Yes. Many defense counsel would feel that to extend it out one further step would not necessarily add anything. There is a kind of cooling off period for a jury between the two phases of a trial, but I don't see any evidence we have a problem of impassioned juries at the present time.

Mr. McKissick: When you have got a death penalty the supreme court will work harder to find a procedural error than if it had gone through a penalty hearing.

Mr. List: Law enforcement people feel that this adds one further step which isn't there presently and would require that much more time, preparation and work in already overworked offices.

Mr. Fry: Does a bifurcated trial encourage plea bargaining?

Mr. List: I don't think so.

Mr. Fry: Are you representing any of the district attorneys too?

Mr. List: We have distributed your letter about the hearing to the district attorneys in the state and it was somewhat short notice, but through an agreed arrangement our office serves as a clearing house and spokesman in these matters.

ATTORNEY NOEL MANOUKIAN Re. AB 105: All this adds is the right to prove background and history of a defendant regarding a trial on the merits. Many district attorneys do permit history and background unless it becomes too remote in scope and time. NRS 200.170 provides that the killing of the deceased being proved, the burden of proving circumstances of mitigation will devolve on the accused. Why doesn't this committee wait for an expression of a competent court requiring a birfurcated hearing for a defendant? The extra penalty hearing would add 20% cost to the trial and that is one of my chief concerns.

ROBERT LIST Re. AB 79: Provides for search of public school lockers. : It would be a mistake if this bill were passed. Under the common law the school district officials have the right to search the lockers. There is no question but what school authorities have the right and duty to search. If the bill is passed you are establishing an authority setting forth just those instances where searches are permitted. This would open to court review the whole question of reasonable cause to search a locker.

Mr. Lowman: Are there any states in which it is not allowed?

Mr. List: None. It is permitted in every state by administrative procedure. If this legislature were to establish this kind of a guideline, it would subject every single search to the possibility of a court test.

Mr. Fry: This isn't well couched in search and seizure language, is it?

Mr. List: No, it isn't.

AB 39: Doubles penalty for use of firearms or deadly weapon in commission of crime.

ROBERT LIST: This is a much clearer bill than AB 38. It isn't limited to guns or firearms and it shouldn't be limited to those crimes committed with firearms. It would be a simple matter to prosecute and enforce and if there is any deterrent effect on additional penalties, a simple measure. Saying the penalties are double when you are carrying a gun is easily understood by potential violators.

Mr. Fry: Case law is pretty broad in definition of a deadly weapon.

Mr. Torvinen: Under certain circumstances a tire chain can be a deadly weapon. When you commit a crime with your automobile, say hit and run, and there is a tire chain in the car, are you violating this statute? I don't like the term "other deadly weapons."

Mr. List: This kind of provision may be necessary to avoid double jeopardy. That's why it is in there.

Mr. Fry announced that there were some problems with AB 149 which was on today's agenda, and the committee would postpone hearing for today on that bill.

There being no further testimony, the hearing adjourned at 4:45 p.m.

sg

ASSEMBLY

AGENDA FOR COMMITTEE ON JUDICIARY

Date: February 9 Time: p.m. adjournment Room 240

HEARINGS PENDING

AB 27 - Prohibits illegal use of credit and identification cards.

AB 28 - Prohibits the removal, concealment, sale, or encumbrance of certain kinds of secured property without written notice and consent.

AB 38 - Imposes additional criminal liability when firearm is used in commission of violent crime.

AB 39 - Doubles penalty for use of firearms or deadly weapon in commission of crime.

AB 105 - Requires issue of penalty for capital offense to be tried separately.

AB 79 - Provides for search of public school lockers.

AB 149 - Eliminates defenses of holder in due course in consumer credit transactions.

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
CARSON CITY 89701

ROBERT LIST
ATTORNEY GENERAL

January 11, 1971

OPINION NO. 1

Schools - Search of School Lockers - Based upon their relationship with students and their concurrent ownership of school lockers, school authorities have an inherent right, and, under certain circumstances, a duty, to open and inspect all school lockers with or without the consent of the student, and with or without a validly executed search warrant; this authority exists in order that school officials may maintain discipline, prevent school property from being used for illegal or illicit purposes, prevent undesirable and dangerous matter from being introduced into the school, protect and promote the safety and welfare of the student body, and assure compliance with reasonable health and sanitary standards.

Mr. Robert L. Petroni
Legal Counsel
Clark County School District
2832 E. Flamingo Road
Las Vegas, Nevada 89109

Dear Mr. Petroni:

This office has reviewed Attorney General's Opinion No. 643 issued February 20, 1970. That opinion was written in response to an inquiry from you concerning whether school authorities may search students' lockers, without their consent, for contraband, narcotics, and offensive and obscene materials, when in their opinion there is reason to believe that certain lockers contain such material. We have concluded that said opinion was legally unsound.

Analysis:

In approaching the specific legal problem of searching school lockers,

two things must be kept in mind. First, as stated in U. S. v. St. Clair, 240 Fed. Supp. 338 (1965 S. D., N. Y.):

> "The essential aim of the Fourth Amendment is to protect the rights of privacy in one's home and effects against arbitrary and unlawful invasion. Only unreasonable search and seizure is condemned, reasonable search is not."

Second, under NRS 392.460, members of every board of trustees of a school district, superintendents of schools, principals and teachers have concurrent power of peace officers for the protection of children in school, on their way to and from school and for the enforcement of order and discipline among such children. Thus the legislature has seen fit to recognize the fact that school officials and teachers are in a position of in loco parentis to the children they teach during school hours.

In Moore v. Student Affairs Committee, 284 Fed. Supp. 725, (1968 M. D., Ala.), the only case referred to in Opinion 643, the Court in footnote 10 stated:

> "While there are obviously functional differences between the disciplinary requirements of high school and college students, no distinction can be drawn between the fundamental duties of educators at both levels to maintain appropriate campus discipline..A reasonable rate of inspection of the school property and premises -- even though it may have been set aside for the exclusive use of the particular student -- is necessary to carry out that duty."

The Court then stated:

> "The student is subject only to reasonable rules and regulations but his rights must yield to the extent that they would interfere with the institution's fundamental duty to operate the school as an educational institution. A reasonable right of inspection is necessary to the institution's performance of that duty even though it may infringe on the outer boundaries of a dormitory student's Fourth Amendment rights." (Court's emphasis.)

The Court then went on to hold as follows:

> "It is settled law that the Fourth Amendment does not prohibit reasonable searches when a search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security."

Thus, while it appears that there is sufficient authority within the Moore case itself to permit school officials to search student lockers, there are several other cases which have dealt directly with this problem although the factual situations surrounding the authority for the searches are varied somewhat.

In State v. Stein, 456 P. 2d 1 (1969 - Sup. Ct. Kansas), U. S. cert. den. 397 U. S. 943, the defendant and the school authority consented to a search of a locker which revealed stolen property and the school official testified that he opened the locker "on his own judgment" although at the request of a law enforcement official and without objection from the student. The Court noted that the status in the law of a school locker is somewhat anomalous and that although the student may have control of his locker as against his fellow students, his possession is not exclusive against the school officials. The Court held as follows:

> "We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved."

In People v. Overton, 229 N. E. 2nd 596 (1967 - N. Y. Ct. of App.) U. S. reh. den. 393 U. S. 992, Dr. Panitz, a vice-principal of the school, gave his consent to police officers to search a locker. At trial, the prosecution admitted the search warrant which the police officers were using as authority to conduct the search was invalid, and the Court noted that even without a valid warrant, the school official had a right to consent, stating:

> "The power of Dr. Panitz to give his consent to the search arises out of the distinct relationship between school authorities and students. The school authorities

> have an obligation to maintain discipline over the students . . . Indeed it is doubtful if a school would be properly discharging its duty of supervision over the students if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the locker. This interest, together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers."

In the case of In re Donaldson, 75 Cal. Rptr. 220 (1969), a principal, after having reason to believe that a student was selling narcotics on the school premises, searched the student's locker and found marijuana. The search was conducted without the student's consent or a search warrant being obtained. The Court first noted that this search was conducted by a private individual. It was not a joint operation by a private individual and law enforcement officials which may have been "tainted" with state action of such a degree as to infringe upon Fourth Amendment rights. The Court held as follows:

> "The conduct of a person not acting under the authority of a state is not proscribed by the Fourth or Fourteenth Amendments of the federal Constitution. There are no state standards for search and seizure by a private citizen who is not acting as an agent of the state or other governmental unit. Therefore, acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable . . . We find the vice-principal of the high school not to be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition against unreasonable searches and seizures. Such school official is one of the school authorities with an obligation to maintain discipline in the interest of a proper and orderly school operation, and the primary purpose of the school officials search was not to obtain convictions, but to secure evidence of student misconduct. That evidence of the crime is uncovered and prosecution results therefrom should not of itself make the search and seizure unreasonable."

In conclusion, the Court stated:

> "The school stands in loco parentis and shares, in matters of school discipline, a parent's right to use moderate force to obtain obedience, and that right extends to the search of appellant's (the students) locker under the factual situation herein related."

Summarizing the above cases, it appears obvious that, due to the special relationship existing between students and school authorities, the concurrent ownership of the lockers in question by both taxpayers and school authorities, and the necessity for school authorities to maintain order and discipline on school premises, the law clearly permits school authorities to search student lockers. It may be done at any time under any circumstances, provided:

(1) it is done pursuant to reasonable rules and regulations;

(2) it is done to maintain discipline and protect the students from the introduction into the school of offensive and undesirable materials; or

(3) it is done because the school authorities have reason to believe that a student may be engaged in illegal activity or using the school property in the form of a locker for illegal purposes or to sequester material which it is illegal to possess.

The school authorities should consider it their duty to seize any deleterious substances or material found in a student's locker, and, if possession of such material is clearly illegal, they have an obligation to turn this material over to the proper law enforcement agencies.

We share the opinion that the right of inspection of school lockers is inherent in the authority vested in school administrators and that this authority must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student body preserved.

Conclusion:

Based upon their relationship with students and their concurrent

ownership of school lockers, school authorities have an inherent right, and, under certain circumstances, a duty, to open and inspect all school lockers with or without the consent of the student, and with or without a validly executed search warrant; this authority exists in order that school officials may maintain discipline, prevent school property from being used for illegal or illicit purposes, prevent undesirable and dangerous matter from being introduced into the school, protect and promote the safety and welfare of the student body, and assure compliance with reasonable health and sanitary standards.

Accordingly, Attorney General's Opinion No. 643 issued February 20, 1970, is hereby superseded.

Respectfully submitted,

ROBERT LIST
Attorney General