

Members Present:

Chairman Hayes
Vice Chairman Stewart
Mr. Banner
Mr. Brady
Mr. Coulter
Mr. Fielding
Mr. Horn
Mr. Malone
Mr. Polish
Mr. Prengaman
Mr. Sena

Guests Present:

Mr. David Small	Carson City District Attorney
Mr. Tom Hickey	Assemblyman
Capt. Chas. Williams	Reno Police Department
Mr. Mike Malloy	Washoe County Dist. Attorney
Mr. Rick Ahlswede	Clark Co. Public Defender
Dr. Larry L. Kitzenburger	Las Vegas Metro Police Dept.
Dr. Don Olson	Prof., Nevada Medical School
Mr. Fred Hillerby	Nevada Hospital Association
Mr. Steve Parson	Clark County Dist. Attorney
Senator Mel Close	Chairman Senate Judiciary

Chairman Hayes called the meeting to order at 8:10 a.m.

ASSEMBLY BILL 378:

Permits district attorney to certify photographs of certain property held as evidence and return property to owner before trial.

Mr. Tom Hickey, as sponsor, stated that there had been some lengthy discussion regarding this bill and some proposed amendments which had been suggested by Mr. Larry Kitzenburger of LVMPD. He further stated that he felt those amendments added to the bill would make the bill very acceptable. (Amendment attached as Exhibit "A")

Chaptain Chas. Williams stated that the custodial problems with evidence is growing greater and greater. He stated that between 1972 and 1976 his department filled one evidentiary ledger and in the next two years following, they filled one more and that it currently looks as though they will be filling a complete ledger or more each year. He stated that each ledger held some 15,000 entries. He said that they are filling available space faster than they can find room to expand. He stated his department was strongly in favor of altering the property holding procedures as provided for in this bill.

David Small, Carson City District Attorney, stated that he felt the amendments proposed by Mr. Kitzenburger would deal sufficiently with the problem their office had had with the bill not

dealing with the defense in this decision of returning the property. He pointed out that this bill would give the police departments the ability to dispose of property under certain circumstances, even when the rightful owner cannot be identified and/or has not applied for the return of the property. He also added that he supported the wording in the amendment, page 1, line 27, "clearly sufficient" as being approved by his office. A brief discussion followed on how the description of the release evidence should be recorded.

Mr. Small told the committee that provisions for disposing of unclaimed evidence is already in NRS 179.165, and that, after publication in the newspaper, the evidence would be sold at public auction and then the proceeds would go to the county treasury.

In answer to a question from Mr. Horn, Mr. Small stated that the defendant, or his counsel, would have ten days to object to the return of the property to the owner, after being duly notified, and if they objected to the return then there would be a court hearing held to find out whether or not the court would allow the property to be returned and substituted with photographs and descriptions.

Mr. Mike Malloy, stated that his office was in favor of AB 378 and agreed with the comments of Mr. Small regarding the bill and the proposed amendments to it. He stated that, as originally written, the bill could have been construed as unconstitutional because it had not included the defendant in the process. He said he also supported the provision in the bill which left it discretionary as to whether or not the property should be actually physically taken to trial. He pointed out that he was in sympathy with the police departments who were being faced with this expanding problem of custodial care of evidence.

In answer to a question from Mr. Stewart, Mr. Malloy stated that the decision of the District Attorney as to whether or not they would allow the property to be returned would have to be made prior to the time the petition for use of photographs would be approved (that they would not be able to release it and then reconfiscate it, so they would have to be careful in this regard).

Mr. Rick Ahlswede of the Clark County Public Defenders Office was next to speak and spoke in opposition to the bill. He stated that he had not had much of an opportunity to go over the amendments but that they still felt there were points which were not in the best interests of justice. He stated that he felt there were already procedures available for people to regain their property and that people simply weren't using those avenues available to them. His second point was that this bill goes against the separation of powers idea, inasmuch as it puts judicial powers into the hands of executive members of the system. He said that this would be putting into the District Attorneys office the re-

sponsibility of determining whether or not something was actually stolen property, by giving an opinion on the allegations of the petition for return of the property.

He stated that he felt the bill would be in violation of the Sixth Amendment because it denied the defendant the ability to confront his accusers, but he noted the amendments would take care of some of his concerns in this area. He also felt that the bill as originally written would possibly violate the Fifth Amendment because it would be imposing a presumption of guilt.

He then explained to the committee that the jury quite often is greatly influenced by the presentation of the actual evidence, rather than photographs thereof. And, the jury would tend to feel in some cases that if the District Attorney has already given back the "stolen property" that the person accused of that theft is already assumed to be guilty; that is a very hard obstacle to overcome. He further pointed out that, with the current rise in crime, people are starting to show more of an inclination to pre-condemning people accused of crimes. He cited as recent case in Henderson (Walter Riley Clark, Case No. 42613, decided 10/26/78) in which property was given back to the owner, without notifying the defense on the case, and it was therefore dismissed.

Mr. Ahlswede pointed out to the committee that the sections which currently deal with this area of evidentiary control are NRS 58.385 (the section directly dealt with in this bill), NRS 179.175 and 179.125. He told the committee that many police departments currently have not been adhering to the law and that they had developed department policies regarding returning of property (as was the case in the Clark case cited earlier). The committee then discussed with Mr. Ahlswede the various types of evidence which normally are kept by the departments and which are usually released back to the owners.

Mr. Stewart asked Mr. Ahlswede if many people, due to the way the law is written currently and the complexities of getting to court, simply don't give up trying to recover their property and if, at times, people didn't drop charges against an accused because they felt their property would be retained too long a time waiting trial. Mr. Ahlswede answered by stating that as he had said before, there are currently provisions for recovering property prior to trial and he felt that the discretion for allowing the owner to regain possession of that property should remain with the courts, not with the district attorney's office.

Mr. Mallory came back to testify regarding some of the points which were brought up after he testified. He stated that he would get together with Larry Kitzenburger and with Mr. Ahlswede and discuss revising the amendments which had been given to the committee and submit a draft which would bring the bill more in line with their concerns.

Larry Kitzenburger was next to speak and stated that the concerns of his department were primarily the same as those of the Reno Police Department. He showed the committee pictures of a new building with a 16 foot-high ceiling which is being built to accommodate the ever increasing evidentiary custody problem facing the Metropolitan Police Department. He pointed out that ultimately the taxpayers are carrying the brunt of the cost of the problem and that in addition to the length of time the owners have to do without their property they are also faced with the problem of deterioration, loss and damage when the property is stored by the department.

He said that he knows of many cases where the owner of the property, as had been mentioned before, has actually dropped the charges because the law, as it is presently constructed, did not afford the owner a simple and speedy recovery of his property. He also pointed up the fact that out of the 555 criminal cases filed in 1977, only 55 ultimately went to trial and in almost all the other cases, the evidence was still tied up for a long period of time.

In answer to a question from Mrs. Hayes, Mr. Kitzenburger stated that currently unclaimed evidence is kept 90 days after conclusion of the trial and then is sold at public auction, except for drugs and they are destroyed.

Mr. Kitzenburger gave to the committee a copy of the California Penal Code reference which deals with this same type of evidentiary retention, except by a custodial officer. He stated that he did not know if their statute (which is attached as Exhibit "B") has been tested constitutionally.

SENATE BILL 5:

Adopts Uniform Brain Death Act.

Dr. Don Olson, Professor at Nevada Medical School, testified in support of this bill stating that he strongly favored passage because it is something that doctors, such as himself, have to face regularly. He said that he felt everyone had been exposed to the type of situation brought out in the movie and book "COMA" and this was the type of thing that they are addressing in this bill: when the brain becomes functionless and the body is kept active only by the use of sophisticated technology in the form of life support equipment. He stated that they currently use a type of testing called the "Harvard" criteria and the Brain Stem test, and those types of testing reflect whether or not there are reflex actions, respiratory functioning and other brain functions which indicate the brain is still "alive". He stated that they additionally run EEG's (electroencephalograms) 24 hours apart, to see how the brain is functioning before they would pronounce the final decision of "Brain Death". In response to a question from Mr. Malone, Dr. Olson stated that he felt the language in the

bill on line six would provide that the doctors follow approved medical practices and procedures in order to pronounce someone dead.

In answer to a question posed by Mr. Coulter regarding the bill presented to the committee last session regarding "death with dignity", Dr. Olson stated that this bill was not the same thing inasmuch as this bill provides criteria under which a decision is made regarding a state wherein there are no indications that the brain is still functioning.

In response to a question from Mrs. Hayes, Dr. Olson stated that he did not know exactly how many states had adopted this act, but that this is the nationally accepted criteria among neurosurgeons as to when death occurs.

Dr. Olson was asked if the following cases would have been considered, under this law, to have been "dead": the MaryAnn Quinlan case, the Reno Sleeping Beauty Case, and an unborn fetus. Dr. Olson stated that this bill would not apply to any of those cases as there was still brain activity in the Quinlan and Sleeping Beauty Case and that, in the case of a fetus, there is still brain activity even though the fetus is in primary formation stages.

Mr. Stewart asked Dr. Olson if he had ever known of any "brain death" case wherein the patient had recovered after being pronounced dead. Dr. Olson stated that he had never known of such a case.

Fred Hillerby, Nevada Hospital Association, stated that he would urge the committee to pass this bill. He stated that he had recently been personally involved in a case of this type where the patient was only being kept "alive" by mechanical means and he felt that this was an extremely difficult situation for especially the family of the patient.

AB 378: Mr. Steve Parson, Chief Deputy of the Clark County District Attorney's Office, apologized for coming to the meeting late but stated that he felt this bill was very important inasmuch as it provides for the victim's right to their own property. He referred to the new building which is being necessitated by the growing problem of custody of evidence and to the pictures that had been supplied to the committee showing this construction. He stated also that though he didn't have any constitutional problems with the original draft of the bill that he would not object to working out some revised amendments with the others involved. His main point was that he felt it a great travesty of justice to allow some of these people to go free because the victim did not want to have the evidence tied up for a long period of time. He also stated that the bill still leaves the ultimate decision up to the court if the defense objects to the evidence being returned to the owner.

Chairman Hayes stated there would be a brief recess while Senator

Close was called to testify on Senate Bill 111. The recess was from 9:25 to 9:40.

SENATE BILL 111:

Reinstates provision for one change of judge upon filing of affidavit alleging bias.

Senator Close stated that this was a companion bill to SB 102. He said that this bill simply changes this part of NRS back to the way it was before the changes which were enacted in the 1977 Session. Those changes made in the 1977 Session were declared to be unconstitutional by the Nevada courts, and, therefore, in order to change NRS back to the way it was prior, this bill was necessary.

Senator Close said that if this bill and SB 102 were passed that then Mr. Daykin would issue a conflict notice and then the two bills would be merged into NRS to correct the problem

This closed testimony in this hearing.

COMMITTEE ACTION:

SB 111: Mr. Malone moved to DO PASS this bill, Mr. Banner seconded the motion and it carried unanimously, except that Mrs. Hayes abstained.

AB 378: Chairman Hayes stated that the committee would postpone action on this bill until the revised amendments had been worked up and returned to the committee.

Chairman Hayes also announced that there would be joint hearings on gaming bills with the Senate on Wednesday and Thursday in room 131 at 9:00 a.m.

There being no further business to come before the committee, Chairman Hayes moved to adjourn the meeting, Mr. Stewart seconded the motion and it carried. Chairman Hayes adjourned the meeting at 10:52 a.m.

Respectfully submitted,

Linda D. Chandler
Linda D. Chandler
Acting Secretary

Note: Also included in these minutes is a letter from the Neurosurgical Society of Nevada, Inc., in support of SB 5. It is attached and marked Exhibit "C".

EXHIBIT "A"

1 A.B. 378 - Amendments

2 AN ACT relating to evidence; providing for certification by
3 the district attorney of photographs of certain property held as
4 evidence and for the disposal or return of the property to its
5 owner before trial; and providing other matters properly relating
6 thereto.

7 THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN

8 SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

9 SECTION 1. NRS 52.385 is hereby amended to read as follows:

10 52.385 1. At any time after property [which is alleged to
11 have been stolen or embezzled] of any person other than the one
12 accused of the crime of which the property is evidence comes into
13 the custody of a peace officer, the rightful owner thereof may
14 [, with the prior approval of the prosecuting attorney, petition]
15 request the district [court in] attorney of the county where the
16 property is located [for the return of such property. The peti-
17 tion shall] to return the property to him. The request must
18 allege that:

19 (a) The [petitioner] requester is the rightful owner
20 of the property;

21 (b) The only relevance of [such] the property as
22 evidence in the trial [of the person accused of stealing or em-
23 bezzling such property] is for visual identification; and

24 (c) [A photograph] Photographs of [such] the
25 property, accompanied by [a detailed measurement] appropriate
26 descriptions and measurements of [such] the property, [is] are
27 clearly sufficient for [the] effective visual identification of
28 [such property] it in trial.

29 2. In the absence of a request from the owner, the peace
30 officer may initiate a similar request whenever the storage of
31 the property presents a burden. If the owner is unknown, the
32 peace officer must describe the steps taken in an effort to

1 determine ownership, including notice by publication in a news-
2 paper of general circulation on at least two occasions.

3 [2.] 3. Upon receiving a [petition] request [as provided in
4 subsection 1], the district [court shall conduct a hearing to]
5 attorney shall determine the truth of the allegations contained in
6 the [petition. The petitioner, the person accused of stealing or
7 embezzling the property and any other witness designated by the
8 petitioner or the defendant may be present with counsel and
9 testify at the hearing.] request.

10 [3.] 4. If, [after the hearing and after] having [personally]
11 examined and compared the [photograph] photographs, the descrip-
12 tions, the measurements and the property, the district [court]
13 attorney determines that all allegations in the [petition] request
14 are in fact true, [the district court] he shall certify the
15 [photograph] photographs, descriptions and measurements and [shall]
16 notify counsel for the accused in writing of his intention to
17 substitute them in evidence in trial. Counsel may examine the
18 materials and object through a petition to the district court.
19 Absent a petition filed and served within 10 days after receipt
20 of notice the district attorney may order them remanded to the
21 peace officer and the property returned to the [petitioner]
22 owner or, if unknown, delivered to the county treasurer for dis-
23 posal as provided for stolen or embezzled property in NRS 179.165.

24 5. If the perpetrator of the crime is unknown, the district
25 attorney must petition the district court for leave to substitute
26 evidence and return or dispose of the property.

27 6. Upon a petition, the court shall examine the materials,
28 consider the matter at hearing if an objection has been filed and
29 issue appropriate orders.

30 [4.] 7. Any photographs, descriptions and measurements
31 certified under the provisions of this section are admissible in
32 evidence in lieu of the property which is the subject of [such]

1 the photographs, descriptions and measurements. [against a defen-
2 dant who had an opportunity to appear with counsel and testify
3 in the hearing provided for in subsection 2.]

4 [5.] 8. Any property subject to the provisions of this
5 section which is not disposed of under the provisions of [subsec-
6 tion 3 shall] this section must be disposed of as provided in
7 NRS 179.125 to 179.175, inclusive.

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Division 2 of Title 3 of the Government Code for the sale of surplus personal property. If the county officer determines that any such property transferred to him for sale is needed for a public use, such property may be retained by the county and need not be sold. The magistrate or other officer having the property in custody may, however, provide for the sale of such property in the manner provided for the sale of unclaimed property which has been held for at least three months pursuant to Section 2080.4 of the Civil Code.

(Enacted 1872. Amended by Stats.1967, c. 951, § 2; Stats. 1969, c. 857, § 4; Stats.1972, c. 526, § 2; Stats.1976, c. 369, § 1; Stats.1978, c. 121, § 1.)

Cross References

Disposition of property taken under search warrant, see § 1536.

§ 1412. Money or property taken from defendant on arrest; duplicate receipts; filing or delivery of receipts

Receipt by officers for money, etc., taken from a person arrested for a public offense. When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the Clerk of the Court to which the depositions and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the Clerk or other person in charge of the police office in such city or town. (Enacted 1872.)

Cross References

Disposition of property taken under search warrant, see § 1536.

§ 1413. Person in charge of property section; record of property allegedly stolen or embezzled; delivery to owner; review by magistrate; liability

(a) The clerk or person having charge of the property section for any police department in any incorporated city or town, or for any sheriff's department in any county, shall enter in a suitable book a description of every article of property alleged to be stolen or embezzled, and brought into the office or taken from the person of a prisoner, and shall attach

a number to each article, and make a corresponding entry thereof. He may engrave or imbed an identification number in property described in Section 537e for the purposes thereof.

(b) The clerk or person in charge of the property section may, upon satisfactory proof of the ownership of property held pursuant to Section 1407, and upon presentation of proper personal identification, deliver it to the owner. Such delivery shall be without prejudice to the state or to the person from whom custody of the property was taken or to any other person who may have a claim against the property. Prior to such delivery such clerk or person in charge of the property section shall make and retain a complete photographic record of such property. The person to whom property is delivered shall sign, under penalty of perjury, a declaration of ownership, which shall be retained by the clerk or person in charge of the property section. This subdivision shall not apply to any property subject to forfeiture under any provision of law. This subdivision shall not apply unless the clerk or person in charge of the property section has served upon the person from whom custody of the property was taken a notice of a claim of ownership and a copy of the satisfactory proof of ownership tendered and has allowed such person reasonable opportunity to be heard as to why such property should not be delivered to the person claiming ownership.

(c) The magistrate before whom the complaint is laid, or who examines the charge against the person accused of stealing or embezzling the property, or the court before which a trial is had for stealing or embezzling it, shall upon application by the person from whom custody of the property was taken, review the determination of the clerk or person in charge of the property section, and may order the property taken into the custody of the court upon a finding that the person to whom the property was delivered is not entitled thereto. Such court shall make its determination in the same manner as a determination is made when the matter is before the court pursuant to Sections 1408 to 1410, inclusive.

(e) The clerk or person in charge of the property section shall not be liable in damages for any official action performed hereunder in good faith.

(Enacted 1872. Amended by Stats.1975, c. 774, § 2.)

Cross References

Disposition of property taken under search warrant, see § 1536.

Neurosurgical Society of Nevada, Inc.

633 NO. ARLINGTON • SUITE 250
RENO, NEVADA 89503

January 31, 1979

Senator Mel Close
Senator "Spike" Wilson
Nevada State Senate
Carson City, Nevada

Dear Senators Close and McGowan:

Please convey to the Nevada Senate and the Nevada Assembly that the Neurosurgical Society of Nevada has met in December of 1978 and have unanimously passed a request for a state law recognizing the entity of brain death. We believe in adhering to the Uniform Brain Death Act. "For legal and medical purposes, a person who has sustained irreversible cessation of all functioning of the brain, including the brain stem, is dead". A determination under this section must be made in accordance with reasonable medical standards.

We heartily support Senate Bill Five. We will be glad to serve as an authoratative source for determination of reasonable medical standards should this issue ever arise. We have several criteria of reasonable medical standards, however, due to the rapid advancement of medicine in this area it is advised not to include specific criteria in this general legislation as the criteria rapidly become outmoded. For this reason we will be glad to provide additional information at any time you request, as what we feel current reasonable medical standards should be.

Sincerely,


LON L. HAMMARGREN, Secretary
Neurosurgical Society of Nevada

copies...Vance MacDonald, M. D.
Richard Lewin, M. D.
Robert Williams, M. D.
Franco Erculei, M. D.
Donald Olson, M. D.
Joseph Walker, M. D.
Robert Morelli, M. D.
Charles Fleming, M. D.
Adolf Rosenauer, M. D.
Louis Levy, M. D.
Ernest Mack, M. D.