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M E M O R A N D U M

SUBJECT: Testimony regarding update on Sex Offender Registration Law

FROM: Kimberly A. Buchanan, Senior Deputy Attorney General

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For the record, my name is Kimberly Buchanan, Senior Deputy Attorney General for the Nevada Attorney General's Office. I represent the Department of Public Safety, and the Nevada Sex Offender Registry. I was requested to present an update regarding the sex offender registration law and the litigation surrounding such. I would also like to clear up a few misconceptions concerning Assembly Bill 579, Nevada's adoption of the Adam Walsh Act.

EXHIBIT C Senate Committee on Judiciary
Date: 3-19-2015 Total pages: 9
Exhibit begins with: C1 thru: C9

OVERVIEW OF A.B. 579

In 2006, the United States Congress passed legislation providing for new registration requirements for convicted sex offenders; the common name of those enactments is the Adam Walsh Act (“AWA”). 42 U.S.C.A. § 16901 et. seq. The stated purpose of the AWA is to “protect the public from sex offenders and offenders against children, and in response to attacks by

violent predators. . .” 42 U.S.C.A. § 16901.

As part of that legislation, Congress encouraged state governments, United States territories and federally recognized Indian tribes to adopt a standardized sex offender registration and notification system.

In response to this federal legislation, Nevada passed Assembly Bill 579 to strengthen its existing registration and notification requirements and to make them consistent with the federal requirements. A.B. 579 passed unanimously in both the Nevada State Assembly and the Nevada State Senate in the 2007 legislative session.

The law replaced Nevada's existing registration requirements. The central innovation of the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act referred to as “SORNA”) and A.B. 579 is a classification system for sex offenders that place them into one of three risk tiers based solely on their crime of conviction. Registration and notification requirements are then keyed to an offender's tier classification.

In addition to the change in how sex offenders are tiered, A.B. 579 also:

1. Expands the time period during which sex offenders are subject to registration requirements;
2. Provides for in-person verification instead of mail-in registrations. This in-person check allows local law enforcement to collect current fingerprints, take a current picture, and update information on the car registration, driver’s license and employment of the offender;

3. Expands information listed on the public website; and
4. Requires that law enforcement actively provide notice of the status of certain registrants.

It is important to note that the sex offender laws have essentially remained the same with respect to duties to register. It is the tiering and length of registration requirements that have changed. Offenders who were required to register under existing law will still be required to register under the new laws, except that their tiering status may change as well as the length of time they may have to register. The offenses requiring registration are almost identical between the existing and new laws.

Under A.B 579, Tier I offenders must register for 15 years but may petition for early release after 10 consecutive years without a conviction for a new felony or sexual offense, and successful completion of any probationary or parole terms and a certified sex offender treatment program.

Tier II offenders are required to appear in person every 180 days and must register for 25 years.

Tier III offenders must appear in person every 90 days and are required to register for life but may petition for relief from registration after a period of 25 consecutive years without a conviction for a new felony or sexual offense, and successful completion of any probationary or parole terms and a certified sex offender treatment program.

A sex offender's information is available on the website. NRS 179B.250. Any member of the public may perform a search by name, alias, or zip code, yielding the following information about registered sex offenders: name and aliases; physical description; current photograph; year of birth; residence; school and employer address; license plate number and description of any vehicle owned or operated by the sex offender; name of, and citation to, the specific statute violated; court convicted in; name convicted under; name and location of every penal institution, hospital school, mental facility or other institution committed to; location of offense committed and assigned tier level. The website does not contain information regarding Tier 1 offenders unless they have been convicted of a sexual offense against a child or a crime against a child. NRS 179B.250(7)(b).

The public is prohibited from using information obtained from the community notification website for any purpose related to insurance; loans; credit; employment; education, scholarships, or fellowships; housing or accommodations or benefits, privileges or serves from any business, except as allowed by statute. NRS 179B.270. The registration information may also not be used to unlawfully injure, harass or commit a crime against a person named in the registry or residing or working at any reported address. NRS 179B.280 Misuse of information obtained from the website can result in civil and criminal penalties.

LEGAL CHALLENGES TO A.B. 579

The new sex offender registry requirements were set to go into effect on

July 1, 2008. On the eve of implementation, on June 24, 2008, the American Civil Liberties Union filed a federal lawsuit challenging the constitutionality of A.B. 579 and sought a preliminary injunction barring implementation of the unanimously adopted law. On October 7, 2008, the federal district court entered an order granting a permanent injunction declaring A.B. 579 unconstitutional and enjoining its enforcement.

In state court, a flurry of litigation also ensued. Plaintiffs in the lead case of *D.P. v Department of Public Safety*, Case No. A564966, filed a motion challenging the constitutionality of A.B. 579 and requesting a preliminary injunction. A preliminary injunction was issued barring enforcement of A.B. 579 as to the named plaintiffs and all others similarly situated. The state court case was stayed pending the decision from the Ninth Circuit on the appeal of the federal injunction.

On February 10, 2013, the Ninth Circuit issued its decision reversing the injunction as to A.B. 579 and holding A.B. 579 to be constitutional in its entirety. The federal court challenge was a comprehensive challenge to the implementation of A.B. 579. See *ACLU of Nev. v. Masto et al*., 670 F.3d 1046 (9th Cir. 2012). I have provided a copy of the Ninth Circuit decision that contains extensive constitutional analysis for this Committee's reference as Exhibit A.

Our Nevada Supreme Court considered the constitutionality of A.B 579 in the context of juveniles. On July 25, 2013, the Nevada Supreme Court, in an en banc ruling, held that A.B. 579 was constitutional as applied to juvenile sex offenders. The Court found that A.B. 579 was rationally related

to protect the public from juvenile sex offenders, did not violate procedural due process, was not constitutionally vague, and did not violate the Ex Post Facto Clauses of the United States or Nevada Constitutions. That case was entitled *State v Eighth Judicial Dist. Court (In re Logan D.)*, 306 P.3d 369 (2013). Attached for this Committee's review is a copy of that decision marked as Exhibit B.

Thereafter, the preliminary injunction was lifted in *D.P. v. Department of Public Safety*, case No. A564966, and the twenty-six consolidated cases. Two of the consolidated cases were appealed to the Nevada Supreme Court, *M.W.*, Case No. A565790; and *S.M.*, Case No. A566001. On February 6, 2015, the Nevada Supreme Court issued an order affirming the judgment of the district court in the matter of *S.M*. I have attached a copy for your reference as Exhibit C.

On January 16, 2014, Plaintiffs, filed the case entitled *Does 1-24 v. DPS*, case no. 64890, again challenging the constitutionality of A.B. 579. The district court ruled that Plaintiffs did not have a reasonable probability of success on the merits and, accordingly, denied their application for a temporary restraining order. After all of this litigation, the State was set to implement the will of this body. Plaintiff filed a writ with the Nevada Supreme Court and on January 30, 2014, the Court stayed implementation of AB 579. This stay remains in effect. As you can see, Ms. McLetchie and I have battled many cases for many years concerning the constitutionality of A.B. 579. Counsel and I agreed to postpone oral argument in the matter of *Does1-24* until after this legislative session in deference to this body.

In summary, the State has won every single legal challenge to the constitutionality of A.B. 579. The State prevailed in the extensive constitutional challenge raised in federal court and finally decided by the Ninth Circuit Court of Appeals. The State prevailed in the Nevada Supreme Court in the context of juvenile offenders, which is a more difficult burden to carry than in the adult context. The State recently prevailed in the Supreme Court again in an adult context. All of these cases and the ultimate judicial findings have upheld the constitutionality of Assembly Bill 579, a bill that was passed by this legislature unanimously. I am confident that the State will prevail in its last legal hurtle and be permitted to implement A.B. in the near future.

MISCONCEPTIONS:

I would like to clear up a few misconceptions on Nevada's adoption of the Adam Walsh Act. While many have challenged this law due its retroactivity to 1956, it is important to remember that current law [NRS 179D.400] provides for registration for sexual offenses going back to 1956 and thus AB 579 does not change this.

Another misconception about this law is that it will require registration for consensual relationships between teenagers, Romeo and Juliet scenarios. However A.B. 579 specifically exempts both “Romeo” and “Juliet” from having to register. NRS 179D.097(2) provides that the term sexual offense does not include an offense involving consensual sexual conduct if one party was at least 13 years of age and the other was not more than 4 years older at the time of the act. Also exempted from the definition of sexual act

is consensual sexual conduct between adults unless one adult was under the custodial authority of the other at the time of the act.

In addition, some have argued that A.B. 579 creates a needle in a haystack problem because the tier levels of many offenders will increase as a result of the implementation of AB 579 and the public will not understand how to identify the serious offenders. That argument underestimates the ability of Nevadans to process the information they receive concerning sex offenders in a manner to better protect themselves and their children. A.B. 579 does increase the tier levels of many offenders and provides the public with more information about more sex offenders that previously wasn't available to the public. However, the average Mom or Dad does not look statewide at all of Nevada's sex offenders. They look at who is in their neighborhood before allowing their children to play at a neighbor's house. A.B. 579 makes more sex offenders public through the website ensuring Mom and Dad have more information to keep their children safe in whatever manner they sit fit.

Lastly, it is important to remember that the purpose of sex offender registration is public safety. Prior to the passage of A.B. 579, the Nevada Supreme Court reviewed Nevada's registration and notification requirements and held, "our review of the statutes themselves and the legislative history of the sex offender registration and notifications statutes indicates that they were not intended to impose a penal consequence but were instead implemented to protect the community and assist law enforcement in solving crimes."

Thank you for allowing me to appear here today. That concludes my testimony. I am happy to answer any questions.