

ARIZONA HOUSE OF REPRESENTATIVES
Forty-ninth Legislature – Second Regular Session

COMMITTEE ON JUDICIARY

Minutes of Meeting
Thursday, April 1, 2010
House Hearing Room 4 -- 10:00 a.m.

Chairman Driggs called the meeting to order at 10:10 a.m. and attendance was noted by the secretary.

Members Present

Mrs. Barto
Mr. Konopnicki
Mr. Miranda B

Mr. Montenegro
Ms. Sinema
Mrs. Tovar

Mr. Ash, Vice-Chairman
Mr. Driggs, Chairman

Members Absent

None

Committee Action

SB1024 – DPA (5-0-3-0)	SCR1009 – HELD
SB1071 – DP (6-1-0-1)	SCR1013 – HELD
SB1266 – DISCUSSED AND HELD	SCR1043 – HELD

CONSIDERATION OF BILLS:

SCR1013 – lieutenant governor; secretary of state – HELD

Chairman Driggs announced that SCR1013 will be held.

SB1024 – presidential ballot; president; vice-president – DO PASS AMENDED

Vice-Chairman Ash moved that SB1024 do pass.

Blake Edwards, Majority Intern, advised that SB1024 replaces the names of the presidential electors with the names of the Presidential and Vice-Presidential candidates on nomination petitions and official ballots (Attachment 1).

Vice-Chairman Ash moved that the Driggs five-line amendment dated 3/31/10 to SB1024 be adopted (Attachment 2).

Mr. Edwards explained that the amendment requires the surnames of the presidential electors to be printed on the ballot in addition to the names of the Presidential and Vice-Presidential candidates (Attachment 2).

Question was called on the motion that the Driggs five-line amendment dated 3/31/10 to SB1024 be adopted (Attachment 2). The motion carried.

Vice-Chairman Ash moved that SB1024 as amended do pass.

Senator Jack Harper, sponsor, expressed support of the amendment. He advised that the only opposition raised in the Senate was because the names of the presidential electors were taken off to save ballot space. It was called to his attention that Arizona is one of only two states that do not have the name of the Vice-Presidential running mate on the ballot. He opined that this is a good idea and something that Arizona should consider. He asked Members to support the bill.

Ms. Sinema noted that the amendment does not remove the names of the President and Vice-President; it just includes them in addition to the names of the electors. Senator Harper clarified that the bill puts the name of the Vice-Presidential running mate on the ballot with the Presidential nominee; the amendment puts the electors back on, so it will be the Presidential nominee, Vice-Presidential running mate, and the electors following.

Chairman Driggs announced the names of those who signed up in support of SB1024 but did not speak:

Jen Sweeney, Government Affairs Director, Arizona Association of Counties

Question was called on the motion that SB1024 as amended do pass. The motion carried by a roll call vote of 5-0-3-0 (Attachment 3).

SB1071 – involuntary civil commitment; privileged communications – DO PASS

Vice-Chairman Ash moved that SB1071 do pass.

Stacy Weltsch, Majority Research Analyst, explained that SB1071 allows a husband or wife to testify about physical acts and behaviors made by one to the other in an involuntary civil commitment hearing without the consent of the other (Attachment 4).

Jen Sweeney, Government Affairs Director, Arizona Association of Counties, in support of SB1071, revealed that this proposal came to the Association from all of the 15 county attorneys and addresses SB1152 passed last year which allowed communications to be testified to. This legislation adds testimony about physical acts and behaviors that the court should be aware of in civil commitment hearings.

Vice-Chairman Ash asked whether it is a privilege to be held by the spouse rather than an option exercised by the county attorney. Ms. Sweeney said the reason for the exception is that these are cases where it is not advantageous to get that permission. The privilege is always granted to the spouse being testified against. She said this proposal applies to cases involving involuntary civil commitment.

Vice-Chairman Ash raised the case of a spouse not wanting to testify against the spouse and asked whether testimony can be required by the prosecutor. Ms. Sweeney said she believes testimony can be compelled the same as in any other civil action. Vice-Chairman Ash said he is not sure he likes the idea of the state requiring the spouse to testify. He said he believes it should be a privilege held by the testifying spouse whether to participate or not, and stated he has concerns if this statute takes away that privilege.

Mr. Miranda queried whether this is a national trend. Ms. Weltsch said she can look into that.

Kathleen Mayer, Deputy Pima County Attorney, Pima County Attorney's Office, testified in support of SB1071. She said she does not know the answer to Mr. Miranda's question. In response to Vice-Chairman Ash's concerns, she stated that under current law, there are certain exceptions to the spousal privilege. The privilege is owned by the defendant, not the person who testifies against that spouse. Prosecutors can already compel testimony of any witness that is subpoenaed. In a civil proceeding, a domestic violence situation or a divorce proceeding, either side can issue a subpoena to the spouse who does not hold the privilege because the privilege is waived in those situations. If the spouse does not wish to testify against an individual for whom an involuntary commitment is sought, it is up to the court to decide whether that witness can be compelled to testify.

Chairman Driggs announced the names of those who signed up in support of SB1071 but did not speak:

Rebecca Baker, Deputy County Attorney, Maricopa County Attorney's Office

Question was called on the motion that SB1071 do pass. The motion carried by a roll call vote of 6-1-0-1 (Attachment 5).

SB1266 – juveniles; communication devices; sexual material – DISCUSSED AND HELD

Vice-Chairman Ash moved that SB1266 do pass.

Stacy Weltsch, Majority Research Analyst, explained that SB1266 establishes as a Class 2 misdemeanor the offense of using an electronic communication device to transmit, display or possess visual depictions of minors that depict explicit sexual material (Attachment 6). The bill exempts a juvenile from the crime of possessing an explicit sexual depiction if the juvenile did not solicit the visual depiction, took reasonable steps to destroy or eliminate the visual depiction and did not provide the visual depiction to another person. The bill defines *explicit sexual material*.

Paul Ahler, Executive Director, Arizona Prosecuting Attorneys' Advisory Council, spoke in support of SB1266. He advised that the bill is designed to deal with "sexting" which is the sending of sexually-explicit photographs via a telecommunication device, typically a cell phone or computer. He related that this offense is currently against the law under the child pornography statute and is a Class 2 felony; if the minor is under 15 years of age, it is a crime against children with a mandatory prison sentence and requires sex offender registration for life. This bill will give prosecutors the means to deal with the problem as it relates to juveniles. Prosecutors do not want to use child pornography statutes to deal with juveniles sending sexually explicit material to other juveniles. He related that one consequence of the problem is that when

juveniles send these photos via their cell phones or the internet, the photos can last forever in cyberspace. One disastrous consequence is of a young girl who sent a picture of herself to a boyfriend that was later distributed to other people and she subsequently killed herself. In addition, he pointed out that photos of juveniles on the internet are accessible to pedophiles.

Mr. Ahler stated that this bill is crafted very narrowly and very specifically to apply only to minors. It applies to minors either possessing or transmitting data to another minor, and must be visual depictions of minors. Under this legislation, these offenses are classified as a Class 2 misdemeanor and could be eligible for diversion if the county attorney elects to have a diversion program. He said this is a reasonable and balanced approach to a very serious problem. He expressed hope that the Committee will support this legislation.

Vice-Chairman Ash queried whether juveniles will have a misdemeanor charge on their record if they go through the diversion program.

Susan Crawford, Deputy County Attorney, representing self, testified that county attorneys have full discretion over the offenses that are eligible for diversion. She said the majority of misdemeanor offenses are eligible for diversion prior to being submitted to the county attorney's office. Upon completion of a diversion program, the juvenile does not have a Class 2 misdemeanor conviction on his record. She related that a diversion program may include education classes for alcohol and drug abuse and anger management counseling. The Pinal County program is supervised by Juvenile Court Services.

In response to Vice-Chairman Ash's questions, Ms. Crawford said fines can be a possibility if deemed appropriate. In Pinal County, parents are usually required to participate in anger management and other education programs, if it is appropriate.

Vice-Chairman Ash asked whether any juveniles have been prosecuted for a Class 2 felony under the child pornography law. Ms. Crawford answered that in Pinal County, several cases have been submitted to the County Attorney's Office but that Office chose to file the offense as a Class 4, not a Class 2 felony.

In response to Ms. Sinema's query, Ms. Crawford advised that nudity is included in this statute as a Class 2 misdemeanor.

Vice-Chairman Ash noted that even with this proposal, a juvenile could be charged with a felony. Ms. Crawford concurred, stating that it depends on the behavior and if the behavior is repetitive.

Chairman Driggs asked whether a minor can be charged as an adult under the current statute. Ms. Crawford answered that is a possibility, depending on the circumstances, such as age and content of the material.

Vice-Chairman Ash noted that if a juvenile does not delete transmitted material, the juvenile could be culpable. Additionally, if the minor transmits the material, he could be charged under this legislation.

Vice-Chairman Ash queried whether computers are included within the definition of electronic devices. Ms. Crawford replied in the affirmative.

Mr. Ahler revealed that he is not aware of any prosecutor who has filed a Class 2 felony for a sexting case.

Vice-Chairman Ash asked whether this bill also covers a juvenile who downloads child pornography and sends it to others. Mr. Ahler said it does cover pornography, specifically involving a minor, not an adult. Depending on the severity of the circumstances, a prosecutor will have the option of whether to charge under this legislation or under the child pornography statute if it is an especially egregious situation.

Ms. Tovar asked whether the educational component of the bill includes advising teens about this legislation. Mr. Ahler replied that it will be the responsibility of each county to develop its own diversion program. He said he believes all of the counties will be doing a diversion program.

In reply to Mr. Miranda, Mr. Ahler advised that in the majority of cases, the juvenile does not realize the consequences of what they are doing. This is a tool that gives a lesser sanction to deal with the problem. He reiterated that prosecutors do not want to use a Class 2 felony to deal specifically with the problem of juveniles transmitting sexually-explicit material.

Ms. Sinema asked whether other options are available to protect teens from exploitation and let them know that this behavior is not appropriate. Mr. Ahler disclosed that other options were looked at. He anticipates a majority of these offenses will be handled through diversion.

Mr. Miranda queried whether diversion will be available in every county. Mr. Ahler noted that each county attorney has the discretion to decide whether the juvenile is diversion-eligible. Mr. Miranda said he is not comfortable with leaving it to the discretion of county attorneys.

Christina Phillis, Maricopa County Juvenile Public Defender, in opposition to SB1266, revealed her concern that there are no exceptions under this legislation. She gave examples of juveniles who would be subject to this statute. Transmitting a nude picture that is considered to be art would subject a minor to be guilty of a Class 2 misdemeanor. If a teenager receives a sexually-explicit picture and shows it to someone, she would also be guilty under this statute. She said this is not only trying to discourage teenagers from taking sexual or nude pictures of themselves and sending them to others; it has broader implications. She commented that prosecutors want to penalize juveniles with a Class 2 misdemeanor to prevent them from becoming victims of a pedophile or someone interested in child pornography and said she is confused as to how that works.

Ms. Phillis shared Mr. Miranda's concern about giving county attorneys the discretion on whether the juvenile is diversion-eligible.

Ms. Phillis related that national statistics show that 20 percent of teenagers are sexting. If they are all put into the juvenile court system and end up on probation, it will dilute the services for those who have a real need for services. She contended that making this action illegal will not change a juvenile's behavior. She pointed out that sexting is only a crime if a juvenile does it; if

an adult does it, it is not a crime. She believes there is a need to rely on parents to teach their children how to appropriately use cell phones and computers. She asked Members not to pass SB1266.

Chairman Driggs stated that this is a serious problem and by definition, these images can fall under the child pornography statutes. He asked Ms. Phillis what her concerns are about prosecuting this as a Class 2 felony. Ms. Phillis answered she has not seen a prosecution yet of a Class 2 offense. She claimed that if a law is going to be passed, it should be an incorrigible rather than a criminal offense. Chairman Driggs commented that if this is happening in other states, it is incumbent on the Legislature to deal with these potential issues.

Vice-Chairman Ash asked whether there is concern about prosecutorial discretion in these cases. Ms. Phillis replied that there is concern because not all counties use the same philosophy in handling juvenile cases.

Vice-Chairman Ash wondered about placing the burden on parents. Ms. Phillis advised that parents can be held responsible and can be fined as well as the child in juvenile cases.

Ms. Sinema said she wants to address this growing problem of inappropriately sharing sexually explicit material but said she does not believe this legislation provides the right balance to address the issue. She asked whether changing this to an incorrigible offense addresses the problem. Ms. Phillis stated that she believes moving this to an incorrigible offense might be the best way to handle this problem.

Ms. Tovar queried whether it should be mandatory for all counties to use the same educational material. Ms. Phillis said she hopes diversion programs will include an educational component.

Vice-Chairman Ash announced the names of those who signed up in support of SB1266 but did not speak:

Kathleen Mayer, Deputy Pima County Attorney, Pima County Attorney's Office
Jen Sweeney, Government Affairs Director, Arizona Association of Counties
Mary Marshall, Public Information Officer/Legislative Liaison, Arizona Criminal Justice Commission

Vice-Chairman Ash announced the names of those who signed up as neutral on SB1266 but did not speak:

Beth Rosenberg, Lobbyist, Children's Action Alliance

Chairman Driggs announced that SB1071 will be held for further work.

Vice-Chairman Ash withdrew his motion that SB1071 do pass.

SCR1009 – publicly financed elections; prohibition – HELD

Chairman Driggs announced that SCR1009 will be held.

SCR1043 – clean elections act; repeal(now: clean elections; funds; transfer) – HELD

Chairman Driggs announced that SCR1043 will be held.

Without objection, the meeting adjourned at 11:25 a.m.

Joanne Bell, Committee Secretary
April 9, 2010

(Original minutes, attachments and audio on file in the Chief Clerk's Office; video archives available at <http://www.azleg.gov>)