MINUTES OF THE
ADVISORY COMMISSION ON THE
ADMINISTRATION OF JUSTICE'S
SUBCOMMITTEE TO REVIEW PRESENTENCE
INVESTIGATION REPORT PROCESS

April 9, 2012

The meeting of the Advisory Commission on the Administration of Justice's Subcommittee to Review Presentence Investigation Report Process (NRS 176.0123) was called to order by Mr. Phil Kohn, Chair, at 1:30 p.m. on April 9, 2012, at the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada, and via simultaneous video conference at the Legislative Building, Room 3137, South Carson Street, Carson City, Nevada. The Agenda is included as Exhibit A and the Attendance Roster is included as Exhibit B. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT (LAS VEGAS):

Phil Kohn, Chair, Clark County Public Defender
Judge David Barker
Kim Madris, Acting Commissioner, Department of Parole and Probation

SUBCOMMITTEE MEMBERS PRESENT (CARSON CITY):

Connie Bisbee, State Board of Parole Commissioners
Mark Jackson, Douglas County District Attorney

STAFF MEMBERS PRESENT:

Nicolas C. Anthony, Senior Principal Deputy Legislative Counsel
Melissa Mundy, Deputy Legislative Counsel
Karen Bondi, Project Specialist, Legal Division, Legislative Counsel Bureau
Angela Hartzler, Deputy Administrator, Legal Division, Legislative Counsel Bureau
Olivia Lodato, Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

Ben Graham, Administrative Office of the Courts

Chair Kohn opened the Subcommittee to Review Presentence Investigation Report Process at 1:28 p.m. on April 9, 2012. He requested a roll call of members present.

Ms. Bondi called the roll. All the members of the Subcommittee were present.

Chair Kohn asked if there was any public comment at this time. There was no comment in Carson City or Las Vegas. Chair Kohn said the Subcommittee was a result of a Nevada Supreme Court case, *Stockmeier v. Nevada*. It was a civil case, but the Court stated its primary question was to decide whether under Nevada law, a prisoner may seek to amend his Presentence Investigation Report (PSI) after he was sentenced. He said *Stockmeier* was sentenced for a sexual abuse case. There was discussion as to whether there were threatening acts, and Stockmeier objected at the time of his sentencing. The Court did nothing about his objections. He was denied in 1990, and when he was denied by the Parole Board in 2006, he filed a civil case. The Court asked the question: could one seek to amend, and answered the question by saying Nevada law did not provide any administrative or judicial scheme for amending a PSI after sentencing. Chair Kohn asked if that was okay, and if not, how could it be improved. If a material, factual error in the probation report was present, how could it be fixed? He said when he was practicing, he did not understand the import of the probation report and how much it was used by the Nevada Department of Corrections (NDOC) in the placement of prisoners. He said it was used by the Parole Department when they decided to parole someone. Chair Kohn said approximately two years ago Ms. Bisbee and Director Skolnik of the NDOC put on a continuing legal education class for all the district court judges. They discussed how important the probation report was for determining procedures. He said if changes were made in court, and they were not incorporated into the original PSI, the changes never got to the NDOC or to the Parole Board.

Ms. Bisbee said Chair Kohn was correct. As a result of the class, they encouraged judges to send their corrections to the Parole Board. She said they had not received any such reports. She said they did receive some judgment of conviction things that were creative, but she had not seen any of the handwritten notes on any of the PSIs.

Chair Kohn said a death penalty trial in 1994 he worked on had a Parole and Probation report showing his client guilty of murder in the first degree and a use of deadly weapon. He said everyone in the court room heard the jury verdict which said he was not guilty of a deadly weapons charge. He said it was changed but the information was never sent to the Parole Board. He asked when a mistake was made after the fact, how could it be brought to the Court's attention and a change made to a probation report after the time of sentencing. He asked when it should occur and how could changes be made in an orderly fashion.

Mr. Jackson disagreed with the way Chair Kohn framed the issue. He believed Justice Hardesty in *Stockmeier v. Nevada* was critical that there was no set procedure in the State for dealing with factual inaccuracy at the time of sentencing. He said there were 20

separate states that had decided the issue. Mr. Jackson said no state or the federal government allowed factual changes by a court or anybody else after a sentencing. He said changes were made at the time of sentencing. Nevada did not have a procedure set for making the changes. He said in the Supreme Court opinion, Exhibit C, Justice Hardesty discussed what would happen if someone was allowed to challenge a factual inaccuracy. He quoted Justice Hardesty on page 10, line 3 of Exhibit C, referring to opening the courts to a flood of litigation from prisoners seeking amendments to their PSIs long afterwards. Mr. Jackson said at the time of sentencing, the prosecutor and defense attorney knew the case best. He said he would prefer looking at the procedures for a sentencing judge before discussion of a factual change. He said no state allowed changes in a factual inaccuracy.

Chair Kohn asked Mr. Jackson's opinion of a hypothetical question concerning someone who had a number of priors in the probation report, and it was learned later the priors did not exist and a mistake had been made. He asked if there was a way to resolve something of that nature.

Mr. Jackson said the issue had arisen in numerous states. He said some defendants, attorneys and judges did not know the effect of certain things contained within a PSI report and how it affected the status of the prisoner for parole and even housing. He said the issue needed to be raised at the time of sentencing.

Chair Kohn referred to footnote 5 in Exhibit C, *Stockmeier v. Nevada*. He proposed to make two changes. If the first idea of giving a judge the opportunity to fix things at a later date was not appropriate, the Court in footnote 5 of the exhibit referred to the federal system. Chair Kohn said based on that, he proposed NRS 176.156, Exhibit D. The proposed changes looked at the federal requirements and gave more time to make changes to the PSI. He said he agreed with Mr. Jackson that the right time to make the changes was in court the first time. He said he recommended turning to the proposed changes in NRS 176.156. The Nevada Supreme Court had used footnotes to foreshadow future cases, future rulings and future issues brought before the Court. He said *Stockmeier* was a civil case, and he did not want to open the State to liability every time someone found a mistake in the probation report. Chair Kohn said the right way to do it was to have more information and a more careful screening of the PSI at the original sentencing. He asked if there were comments about the proposed new statute to NRS 176.156.

Mr. Jackson said the proposed change tended to follow the federal court and the West Virginia case. It was more detailed because it had steps and appeared to have more definitions. He said all the others he studied ended by saying if the party failed to challenge the accuracy of the PSI at the time of sentencing, the matter was considered waived. He said the proposed new statute appeared to omit the last statements. He said the federal guidelines discussed the 14 days before the sentencing hearing and NRS 176.156, paragraph 1 needed to end with the statement; "the Division shall afford an

opportunity to each party to object to factual errors in any such report and to comment on any recommendations." Mr. Jackson said it was not about the Division but presenting in front of a judge. He said it needed clarification; they were discussing a sentencing judge and not the Division. He said it gave the opportunity for a party to provide information to the Division they may have overlooked. He was concerned about the length of time. He said under the federal system it started within 14 days before the sentencing hearing, and the parties must state in writing any alleged inaccuracies in the PSI. He recommended added definition of when the PSI went to the defendant and the defense and prosecuting attorneys. He asked Chair Kohn how he arrived at 35 days in reference to the 14-day receipt of the PSI.

Chair Kohn said the numbers were from the federal statute. He said it was open for discussion or negotiations.

Judge Barker said from the bench's perspective, they all agreed the issue needed to be an accurate representation of facts and it needed to be done efficiently so a just determination and sentencing could be made. Defense attorneys were receiving PSI reports a few days before an actual sentencing hearing. He said being able to have a conversation with an in-custody client was problematic. Parole and Probation was extremely busy and had many responsibilities in getting information out to all the interested parties. He said setting up a structure of 35 days was a great concept, but he was concerned about application and how it could happen with the time frame outlined. He said there used to be a representative of Parole and Probation in every sentencing hearing he could rely on for insight.

Chair Kohn said he put the other proposal first because the second proposal was needed to arrive at compromise. He said Parole and Probation took more and more cuts. The Public Defender's office also took cuts in staff personnel. He said even if the PSI was received within 72 hours, it still took 24 or more hours to get it to the lawyer. There was not enough time without the 14 days. He said he was open to discussion or change regarding the 35 days and that he was not set on a particular time. Chair Kohn said there was an important mistake in the proposed statute NRS 176.156 in paragraph 2 (b)(i) which mentioned sentencing guideline ranges. He said Nevada did not have guidelines. He requested the phrase be struck from the proposed language. He reiterated he did not have a specific time number. He said it was important that the reports come in earlier so everyone had an opportunity to review and work with them. He said it was important to get the Legislature to understand the Department of Parole and Probation had to be funded in a manner consistent with the ability to make some type of time requirements, especially in Clark and Washoe Counties.

Ms. Madris reviewed the materials and they understood the importance of the PSI and what an important tool it was to the NDOC and the Parole Board. She said accuracy was one of their concerns. She said if a time limit was put into place, it would impact the Division. She said the way the proposed statute was written it put an emphasis on court

service writers attending court in the Las Vegas area again. She said they attended in the other parts of the State. She said her Division no longer had writers in court, but they also did not have a backlog of 700 PSI reports. They needed more staff in order to attend court and get the monthly PSI reports out in a timely manner. She was concerned that if there were corrections to a PSI, would it be appropriate to do a letter form, or would they need to do an amended PSI. She asked what type of report was required to address the inconsistencies. She asked what impact it had on the courts, did it add an extra layer in the sentencing process. She asked if it added more jail time to individuals in custody pending their sentencing. Overall, she was willing to adhere to whatever guidelines were set. She said they were working under a compromise that if something was noted as inaccurate at the sentencing and was noted in the court minutes, they honored that it should be reviewed by the Division. They were in favor of anything that could help the system, the NDOC and the Parole Board in getting a more accurate document.

Chair Kohn said he thought perhaps the ACLU would be against the proposal because of a longer period between the entry of plea and sentencing. He suspected that by adding two or three weeks to the procedure, a number of people would be detained in custody for a longer length of time. He was concerned, but was also aware of what could go wrong by having mistakes in the probation report. He did not attribute fault to anyone. He said he suspected if there was fault it was with the defense bar. He said it meant the most to them and the victims. He said it was important they do a better job of reviewing the reports. He did not think enough time was spent going through the reports. He said a lot of information came from National Crime Information Center (NCIC), and there may not be judgments of conviction behind it. The Department of Parole and Probation used NCIC, and time was needed to check on some of the priors for accuracy. Chair Kohn asked Judge Barker how many sentencings he did daily.

Judge Barker replied that he did 10 to 15 sentencings a day. He said he had attended the conference led by Ms. Bisbee and Mr. Skolnik. He said he tried to change the way he operated by making sure specific and direct findings he directed were included in the minutes and the Judgments of Conviction.

Ms. Bisbee said the disappointment was, Parole and Probation did not receive the handwritten changes and adjustments to what the judges accepted on the PSI reports. She said the positive was that the Judgment of Convictions was being sent to them. She said she permanently attached the information to the front of the file so it was not missed.

Judge Barker said he understood there was an inability to communicate information if it was handwritten by a judge on their copy of PSI to Parole and Probation because they used the information maintained at P&P. He said he thought it was one of the factual disconnects or frustrations everyone was having.

Ms. Bisbee said Ms. Madris had commented on how they reported the changes. She said the judge may make a decision or say in open court there was an error needing correction in the PSI. She said the comment did not go into the PSI report.

Chair Kohn met with the Department of Parole and Probation about six months ago and the district court in the Eighth Judicial and the judges were great about giving them time if there was an error. He said they went to P&P and the errors in the PSI were rapidly corrected and changed the body of the report to reflect the changes agreed on in court. He did not know if that was happening statewide. He added if handwritten changes were not seen in Clark County it was because they were doing a better job. He asked for the Subcommittee because there was not enough time to catch enough of the errors made. He referenced the two U.S. Supreme Court cases from last month, *Missouri v. Frye*, Exhibit E and *Lafler v. Cooper*, Exhibit F. He said the two cases put the onus back on defense attorneys to explain the plea properly so the defendant could make a knowing and intelligent decision. He said in *Missouri v. Fry*, Justice Kennedy pointed out in federal cases 95 percent of all cases were plea bargained. He said in state cases, the number was 97 percent. He said the plea situation and the sentencing hearings were the important matters. The Supreme Court legitimized plea bargaining and discussed how important it was to get it right. He suspected there were many more Post Conviction Relief (PCR) requests in the near future. He said he was not locked into any time dates.

Ms. Bisbee commented on the prior conversation. She said from the Parole Board's perspective, there did not seem to be gross errors in PSIs. She said it was rare when someone said their PSI was wrong, and it was a relatively small problem. She said sometimes it was just human error. The second proposal had many good points. She said even though she had some frustration with the process, she did not think it was a huge problem. They wanted the best product they could produce. She suggested the Subcommittee might want to add how the Division was expected to report the changes.

Judge Barker said from the bench's perspective in regards to presentence context, with information or an amendment to information, they could go anyway as long as it met the requirements of NRS 176. He said it was more of an issue of form over substance, by way of a letter or other more formal ways. The goal was accurate information provided in a timely way so that a just decision can be made based upon the merits. He expressed concern that the actions be done as soon as possible. He said if they created a statutory structure by which decisions needed to be made and disputed factual statements clarified, he would trade time in front for accuracy every time. He said there needed to be finality. He saw an enormous amount of PCR work and time, money, effort and energy directed to the PCR work.

Ms. Madris did a sampling in the Las Vegas area and there were 20 requests in the last three months for changes in the PSI. She said 90 percent of the requests were based off information they received either through Metro's Gang Net or criminal history discrepancies. They did approximately 1,700 cases in the last three months and only had

20 requests. She hoped sweeping changes did not cause her Division a great deal of hardship regarding staffing and finances.

Mr. Jackson said he did not think the 35 days was bad; he was concerned about the delay in sentencing. He was okay with the federal law, but he liked the West Virginia law better. He said 14 days were also included within the 35 days which was approximately a five-week period. Sentencing was typically 6 to 8 weeks out, and that would extend to 11 to 13 weeks. He said it could cause a concern from the ACLU. He said to maintain consistency with NRS 176, under the proposed version in 2(a), the minimum required notice began with the probation officer. He said everywhere else in NRS 176 it started with the Division. He wanted consistency throughout the proposed revisions. He said the reference was to the author of the PSI report. He was interested in a discussion concerning waiving the minimum period. He said he was unsure what happened if they waived the time. Timing would increase the activities of the Division. He said staffing levels in the two largest counties should be reviewed. The timing should be driven by the two largest counties, Clark and Washoe. He said the majority of discussion he saw in court was missing information in report. He recommended setting out the procedures under 2(e) in Exhibit D. He said it needed to be expanded. There would still be material factual disputes about the report. He said it was important that a judge made a determination as to which factual argument or statement the court relied upon in rendering a sentence. The record needed to be in writing and attached to the PSI.

Chair Kohn said Mr. Jackson's points were well taken. He said throughout the *Stockmeier* opinion, Justice Hardesty led toward more appeals. The issues needed to be resolved early on, rather than years later. Mr. Kohn asked Judge Barker to take the proposed changes to NRS 176.156 to his judicial peers. He requested Mr. Jackson take the proposal to the District Attorneys Association. He said let P&P study the proposal and arrive at an approximate cost for the changes. He said he was not locked into the proposed days; they were recommendations. He was concerned that not all the problems with the PSIs were being recognized. He recommended using the proposal as a framework for discussion. He said he would report to the Commission that they had a successful discussion. He asked Mr. Jackson for help with the proposals. He opened the meeting for public comment.

Mr. Jackson said he had no objections. He said the District Attorneys Association was meeting soon. He was concerned about communication among all the participants.

Chair Kohn asked Mr. Anthony what was required to get the information and any changes out to the Committee of the Whole.

Mr. Anthony said Mr. Kohn had discussed all the different areas in the meeting that were of concern. He said if they sent their ideas to him he would put them into one document and make sure continuity was maintained in the wording of the document. He said

Chair Kohn could report to the full Commission on April 17, 2012 or at future subcommittee.

Chair Kohn thanked Mr. Anthony for his assistance and appreciated any future help he could provide. He asked if there was any public comment.

Mr. Ben Graham said there was a concern from the counties on the new proposals. He said the energy expended was to get the prisoners off the county money. He said try to remember the counties were always aware of the money issues.

Chair Kohn asked if there was any further comment. As there was none, he accepted a motion to adjourn.

MS. BISBEE MOVED TO ADJOURN.

MR. JACKSON SECONDED THE MOTION.

THE MOTION CARRIED.

*****

Chair Kohn adjourned the meeting at 2:30 p.m.

RESPECTFULLY SUBMITTED:

_____
Olivia Lodato, Interim Secretary

APPROVED BY:

_____
Phil Kohn, Chair

DATE: _____

EXHIBITS

Committee Name: ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE'S SUBCOMMITTEE TO REVIEW PRESENTENCE INVESTIGATION REPORT PROCESS

Date: April 9, 2012 **Time of Meeting: 1:30 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
	C	Chair Kohn	*Stockmeier v. State of Nevada*
	D	Chair Kohn	Proposed new NRS changes
	E	Chair Kohn	*Missouri v. Frye*
	F	Chair Kohn	*Lafler v. Cooper*