

MINUTES OF THE 2017-2018 INTERIM NEVADA SENTENCING COMMISSION

November 27, 2017

The meeting of the Advisory Commission on the Administration of Justice was called to order by Nicolas Anthony at 9:15 a.m. at the Legislative Building, 401 South Carson Street, Room 3138, Carson City, Nevada, and via videoconference at the Grant Sawyer Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada.

Exhibit A is the Agenda, and Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT (CARSON CITY):

Justice James W. Hardesty, Nevada Supreme Court; Chair
Connie Bisbee, Chairman, Board of Parole Commissioners; Vice Chair
Assemblywoman Jill Tolles, Assembly District No. 25
Senator Ben Kieckhefer, Senatorial District No. 16
Dennis Cameron, Representative, State Bar of Nevada
Judge Scott Freeman, Second Judicial District Court
Chris Hicks, Washoe County District Attorney
Karen Kreizenbeck, State Public Defender
Keith Logan, Sheriff, Eureka County
John McCormick, Assistant Court Administrator
Elizabeth Neighbors, Ph.D., State-wide Forensic Mental Health Program Director,
Division of Public and Behavioral Health
Holly Welborn, Policy Director, ACLU of Nevada, Inmate Advocate

COMMITTEE MEMBERS PRESENT (LAS VEGAS):

Assemblyman Ozzie Fumo, Assembly District No. 21
Senator Nicole Cannizzaro, Senatorial District No. 6
Scott Burton, Professor of Criminal Justice, CSN
Chuck Callaway, Police Director, Las Vegas Metro
James Dzurenda, Director, Department of Corrections
Jon Ponder, Representative, Offender Reentry
Jeff Segal, Bureau Chief, Attorney General's Office
Donald Soderberg, Director, Employment, Training and Rehabilitation
Judge Jennifer Togliatti, Eighth Judicial District Court

COMMITTEE MEMBERS PRESENT (TELECONFERENCE):

Tegan Machnich, Chief Deputy Public Defender, Clark County

COMMITTEE MEMBERS ABSENT:

Adam Laxalt, Attorney General

STAFF MEMBERS

Nicolas Anthony, Commission Counsel, Senior Principal Deputy Legislative Counsel,
Legal Division, Legislative Counsel Bureau

Victoria Gonzalez, Deputy Legislative Counsel, Legal Division, Legislative Counsel
Bureau

Angela Hartzler, Secretary, Legal Division, Legislative Counsel Bureau

Jordan Haas, Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

Kelly Mitchell, Executive Director, Robina Institute of Criminal Law and Criminal Justice

**Nicolas Anthony (Commission Counsel, Senior Principal Deputy Legislative
Counsel, Legal Division, Legislative Counsel Bureau):**

I will now open the first meeting of 2017-2018 Interim's Nevada Sentencing
Commission, the body formed by Senate Bill (S.B.) 451 of the 2017 Session.

SENATE BILL 451: Makes various changes relating to criminal justice. (BDR 14-1007)

I am an attorney with the Legislative Counsel Bureau (LCB), the nonpartisan staff to the
Commission. Since there's officially no chair elected yet and this is a brand-new body, I
will be presiding until the appropriate time.

I will open with agenda item III, public comment. Seeing none, I will close agenda item
III.

I will now open agenda item IV, election of the chair and vice chair.

SENATOR KIECKHEFER NOMINATED JUSTICE HARDESTY AS CHAIR.

COMMISSIONER BISBEE SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Justice James W. Hardesty (Nevada Supreme Court; Chair):

Thank you all for the opportunity to serve on this newly created Commission. We need to also elect a vice chair. I would suggest that the Commission consider Ms. Bisbee. Her role has been substantial in the State involving the sentencing issues, and I think she'd make a great contribution to the Sentencing Commission.

SENATOR KIECKHEFER NOMINATED CONNIE BISBEE AS VICE CHAIR.

JUDGE FREEMAN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Thank you, Ms. Bisbee, for serving as vice chair. I think this is a Commission, as you have probably observed from reviewing the legislation, that was created by the Legislature in the last session following a unanimous recommendation by the Advisory Commission on the Administration of Justice, that such a commission be formed and that this Commission study various aspects of sentencing in our State. I had the opportunity to visit with Mr. Anthony before the Commission started its work, and I suggested to him a number of agenda topics that would provide, I think, an educational base for the Commission to get a sense of what this is all about, where it comes from, what other states are doing and the like.

Before we do this, though, there are two unique aspects in the legislation that I want to thank the Legislature for. First, we are required by statute to meet no less than every 3 months. There is a lot of work that this Commission faces. We will be spending a lot of time together on a challenging set of topics. Second, the Legislature extended to this Commission, which is very unusual, a bill draft request (BDR). It affords to the Commission an opportunity to essentially put forward its thoughts and recommendations that the Legislature would consider in 2019. I think that it was a very unique decision by the Legislature. They are very guarded with respect to BDRs, as anybody associated with the legislative process knows, and I'm grateful to the Legislature for doing that.

I also recognize that the Commission has a lot of what may be new faces to various people, and I think it would be extremely helpful, since we're going to be collaborating and conferring with one another, if each of the members of the Commission would provide a brief introduction of themselves to the other members of the Commission so we know who we're working with and what the background is. I know, having worked with all of you, that this is an extremely talented and very bright group of folks with a lot of background in this area. So, if we may, I'd like to go through the list of Commission

members and ask you if you could briefly introduce yourself and tell us a little bit about your background. The legislation, as you know, required an appointment from a certain stakeholder segment, if you will, of the criminal justice area or from the Legislature, so maybe you could also identify which seat you're being appointed to or which area you're also representing.

Scott Burton (Professor of Criminal Justice, CSN):

I was recently appointed by the Governor. I'm retired from a 25-year federal law enforcement career, combined with the federal prison system. I finished out the latter half of my career with the federal courts as a U.S. probation officer dealing, of course, with the federal sentencing guidelines. Currently, I'm a tenured professor at the College of Southern Nevada (CSN) in the Criminal Justice Department.

Assemblyman Ozzie Fumo (Assembly District No. 21):

I've been practicing criminal defense in Las Vegas for the last 22 years, and I teach trial advocacy at Boyd Law School.

Judge Jennifer Togliatti (Eighth Judicial District Court):

I've been a judge in the Eighth Judicial District Court since 2002, handling a criminal and civil docket. I was previously a justice of the peace and a prosecutor with the Clark County District Attorney's office. I've handled criminal cases for all of my legal career.

Jeff Segal (Bureau Chief, Attorney General's Office):

I have been with the Attorney General's office for the last 7 1/2 years as a criminal prosecutor. I currently serve as the Bureau Chief of the Bureau of Criminal Justice. I practiced law for 27 years and have been doing criminal work during most of that time.

Donald Soderberg (Director, Employment, Training and Rehabilitation):

Through our Employment Security Division, we deal with a number of workforce issues, including how to get formerly incarcerated individuals back to work. We feel that those formerly incarcerated people are a very under-tapped segment of the workforce, and I'm happy to say that we actually recruit from that segment of the workforce and hire people who have done their time for their past actions.

Chuck Callaway (Police Director, Las Vegas Metro):

I'm the Director of Intergovernmental Services for the Las Vegas Metropolitan Police Department. I've been a police officer with Metro for a little over 28 years, with about 32 years of law enforcement experience. I spent the majority of my career out on the street on patrol and community policing, and as a patrol supervisor. For about the past 9

years, I've been doing the Department's government affairs work, so I get the pleasure of going up and working with the State Legislature and also our local government and federal government.

James Dzurenda (Director, Department of Corrections):

I spent 31 years serving with the Department of Corrections, starting in Connecticut. I left there as the commissioner running all the jails and prisons in Connecticut and also served on the Sentencing Commission for the State of Connecticut. From there, I took over in New York City to operate and run all the jails in the Five Burroughs, Rikers Island and the district courthouses in New York City, before I took this role in the Nevada Department of Corrections.

Chair Hardesty:

For all of the Commission members, you should know that Director Dzurenda played a significant role during the Advisory Commission's deliberations, sharing his experiences from Connecticut and the significant impact Connecticut's adoption and implementation of the Sentencing Commission had on not only their prison population, but also the improvement of public safety and the leveling out of sentences among various offenders.

Jon Ponder (Representative, Offender Reentry):

I'm the founder and CEO of Hope for Prisoners, which provides reentry services to men, women and young adults who are exiting different areas of the judicial system to help them get successfully acclimated back into their home, the workplace and the community. I've been doing this since 2009. I am a former offender myself.

Senator Nicole Cannizzaro (Senatorial District No. 6):

I was elected in November of 2016, and during the 2017 Session I was the vice chair of the Senate Committee on Judiciary. In my day job, for a little over 6 years now, I have been working as a prosecutor in Clark County as well.

Holly Welborn (Policy Director, ACLU of Nevada, Inmate Advocate):

I do legislative lobbying work and I also lobby at the municipal level. For my background, I worked for Bristlecone Family Resources Adult Drug Court programs prior to working for the ACLU. I also have experience with juvenile drug court and working with inmates. I serve as the inmate advocate on this Commission.

John McCormick (Assistant Court Administrator):

I'm the Assistant Court Administrator at the Administrative Office of the Courts of the Nevada Supreme Court, appointed by the Chief Justice. I've been with the Administrative Office of the Courts for approximately 11 1/2 years. During that time, I have provided staff support and staff support supervision for a number of the court reform committees and commissions.

Keith Logan (Sheriff, Eureka County):

I represent the Nevada Sheriffs and Chiefs Association. I'm in my 31st year of law enforcement here in Nevada. I'm also married to a retired prosecutor. I also have a son who was an offender here in Nevada, and I'm working on the different parts of trying to get him reacclimated.

Chris Hicks (Washoe County District Attorney):

I was elected in 2014. Prior to that, I served as a prosecutor, both as a chief and a deputy district attorney in Reno and in Carson City over the course of 12 years. I'm currently the president of the Nevada District Attorneys Association until January, and that's the entity that voted me onto this Commission.

Karen Kreizenbeck (State Public Defender):

I'm the Nevada State Public Defender. I joined the State Public Defender's Office as a deputy in 1998 and slowly moved up through the ranks. I was appointed by Governor Sandoval to be the Nevada State Public Defender in 2013, so I've been there 20 years this May. My work is very involved with the offenders, and the sentences have great impacts on their families and lives.

Judge Scott Freeman (Second Judicial District Court):

I'm currently the Chief Judge in the Second Judicial District Court. I just most recently became elected to that position. I've been on the bench for 6 years. I was nominated by the Second Judicial District to be on this Commission. I'm currently on the bench and was a criminal defense lawyer in our State for 27 years.

Dennis Cameron (Representative, State Bar of Nevada):

I was appointed to this Commission by the Nevada State Bar as their private practice attorney representative. I have spent the last 23 years as a criminal defense attorney. Prior to that, I was with the United States Department of Justice for 23 years, with assignments ranging from the Drug Enforcement Administration to the Special Assistant United States Attorney.

Elizabeth Neighbors, Ph.D. (State-wide Forensic Mental Health Program Director, Division of Public and Behavioral Health):

I was appointed to this position by the Department of Health and Human Services, Division of Public and Behavioral Health. I'm presently in a newly created position with the Department, the State-wide Forensic Mental Health Program Director. Prior to that, I served for 15 years as the agency director at Lake's Crossing Center, which largely deals with the restoration of competency of mentally disordered offenders. Now that we have two facilities and are expanding our system state-wide, this position was created to work with folks to develop the policy for that system.

Connie Bisbee (Chairman, Board of Parole Commissioners; Vice Chair):

I have 31 years of experience in the criminal justice system. I've been with the Board of Parole Commissioners for 15 years. Prior to that, I was an associate warden with the Department of Corrections. Prior to that, I was a director of probation for many years. This Commission is something we've been talking about for years.

Senator Ben Kieckhefer (Senatorial District No. 16):

I'm here representing the Nevada Republican Senate Caucus. I'm sure I have probably the least experience of everybody on the Commission in the criminal justice arena, but most of my experience relates to fiscal issues. I primarily work in the fiscal and tax policy arena of the State Legislature, so budgetary issues are of significant importance to me. I appreciate learning from all of you.

Assemblywoman Jill Tolles (Assembly District No. 25):

I came into the legislative process in part because of my work on the Taskforce for Child Sexual Abuse Prevention. I served on the Judiciary Committee and the Corrections, Parole and Probation Committee for my freshmen session in the 2017 Session. In my day job, I teach at the University of Nevada in communication studies, and I also teach collaborative decision making at the National Judicial College.

Chair Hardesty:

We'll need a lot of collaboration. There are some differing viewpoints on this subject, I think. Mr. Anthony, would you introduce yourself and the other staff members who support the Commission please?

Mr. Anthony:

I'm an attorney with the Legal Division of the LCB, the nonpartisan staff to the Legislature. I've been with the LCB since 1999. This will be my first time staffing the Nevada Sentencing Commission, as it's a brand-new body, but throughout the past

several interims, I've had the pleasure of staffing the Advisory Commission on the Administration of Justice, as well as the Senate Judiciary and Assembly Judiciary Committees. This interim, we're very pleased to also have Victoria Gonzalez from our office assisting. She's a deputy attorney with our office and has been with us for about 3 years. We also have Angela Hartzler returning. We appreciate her help. She'll send out emails and reminders. Any correspondence that needs to come to other members will go through Ms. Hartzler as our Commission secretary.

Chair Hardesty:

I think one of the best ways to get started is for Mr. Anthony to provide us with an overview of S.B. 451 and what the Legislature provided in the statute ([Agenda Item V](#)). From that description, we've invited Kelly Mitchell, who is the executive director of the Robina Institute of Criminal Law and Justice from the University of Minnesota Law School. She has graciously come to Las Vegas to provide to us a description of sentencing commissions, their concepts and their objectives, and just to acquaint you with the subject matter, which I think will be very valuable.

Mr. Anthony:

Just by way of background, the State has somewhat come full circle in establishing this Nevada Sentencing Commission. Rather, it's something not entirely new. In the 1980s, the State had the Commission to Establish Adjusted Sentences for Felons. That was in the 1980s. It lay dormant until about 1995. At that point, the Legislature made a dramatic shift to truth in sentencing legislation, which we'll talk about a little bit more later. During that 1995 Session, they also established a sentencing commission. That sentencing commission also laid dormant for a period of time. Then, in 2007, the Legislature recognized that need and took the existing sentencing commission and created a new Advisory Commission on the Administration of Justice, which Justice Hardesty chaired this past interim.

Then, in 2017, the Legislature again felt the need to place an emphasis on sentencing and pulled the sentencing portions out of the Advisory Commission of Justice and created this new, 25-member Commission. The Commission has all various types on it. The idea is to draw experiences from all fields of criminal law. The legislation, S.B. 451, that passed in 2017, as Justice Hardesty indicated, was a recommendation from the Advisory Commission modeled after the Connecticut Sentencing Commission, which was then tweaked and tailored to Nevada's standards, and additional members were added as needed. The goal behind the legislation is really laid out in the legislative declaration of public policy that you'll see at the beginning of S.B. 451. Those principles are embodied in fairness, consistency, proportionality and opportunity. The goal is to be data driven in the State sentencing decisions and, again, to utilize all expertise. As I said, there are members from the legislative branch, the executive branch, the judicial branch and the private sector as well. We have judges, prosecutors, defense attorneys, legislators, laypersons, victims' advocates and inmate advocates. It's really quite the

broad spectrum. Each member is appointed and will serve for a 2-year term. Traditionally, terms begin after a legislative session. The body will meet in the fall and continue meeting almost right up until the next legislative session.

There are a couple deadlines that are important to note. First, as Justice Hardesty indicated, the Commission is allocated one BDR this legislative session. That BDR needs to be submitted to the legislative counsel of our office by September 1 with sufficient detail, so next September 1 of 2018 is when the BDR will need to be submitted. Also, this Commission is tasked with, among other responsibilities, preparing a report. This Commission focuses as an advisory body to the Legislature and makes recommendations. Our office will prepare such a report after your final meeting when you vote on recommendations at a work session. That will occur sometime next fall of 2018, and that report will be drafted and submitted to the LCB and the Legislature by January 1 of 2019.

Other duties are spelled out in the bill, which I'm sure you all are familiar with. Those duties are basically to advise and make recommendations relating to sentencing. They are to evaluate the fiscal impact and effectiveness, recommend any changes in the structure of sentencing, and facilitate and develop the maintenance of a state-wide sentencing database. Over the years, I believe the Advisory Commission has wrestled with the issue of how to make data-driven decisions without proper data. So, who's in charge of collecting that data and where does it get reported? I believe the idea of the legislation was that that data would come to this body. The Sentencing Commission is also tasked with providing training regarding sentencing, looking at pre-trial and post-release supervision, meaning parole and probation. Another duty is identifying sentencing disparities on the basis of race, gender and economic status, and perhaps proposing statutory sentencing guidelines as a recommendation to the Legislature, if this Commission were to propose sentencing guidelines, were that those guidelines should be mandatory or advisory, which you all will be hearing about more as the day and the meetings go on. That said, I've already introduced our staff. We're pleased to be at your service. If you have any questions, please don't hesitate to reach out to us.

Chair Hardesty:

Are there any questions of Mr. Anthony at this point? I've asked him to make a further, detailed presentation as part of the agenda concerning the transition that Nevada has been through in its various sentencing approaches. If I may, I'd like to add a few comments with regard to the legislation, as well as a little bit of history for those who are new to the Advisory Commission or the Sentencing Commission. If you could turn to page 2 of S.B. 451, you'll notice the first 7 subsections or subparagraphs of section 3, which list the various policies that the Legislature enacted that provide guidance for sentencing decisions ([Agenda Item V](#)). One might ask, "Why did the Legislature do that? Where did it come from? What was the point in adopting policies associated with the sentencing decisions?" I am prepared to be corrected, of course, by any previous

member of the Advisory Commission if I misstate, but let me summarize a couple of points for you.

Over the past three sessions of the Advisory Commission, which I've had the privilege to serve on, we identified that, for much of Nevada's history, certainly since truth in sentencing, very little attention was given or debate provided by the Legislature for any penalty that would be imposed with respect to a decision to make certain conduct a crime. As a result, there was quite a bit of uncertainty about why a particular crime was being placed in a particular category. As Mr. Anthony will lay out in a little bit, the truth in sentencing policies created five categories, but unfortunately, those categories and their original purposes seemed to get lost over the ensuing 20-plus years as to how sentencings were to be established. The net effect of this is that, if the Legislature really didn't debate sentencing lengths, they made decisions about whether behavior should be criminalized, but the punishment was sort of a default position. So, we ended up with a number of crimes that would be placed into, for example, Category B or Category C, and no one would really explain why that crime was in that particular category or what its objective or purpose was. This had a fiscal impact, because the net effect was to add quite a few days of incarceration to sentence lengths. As I'm sure Mr. Dzurenda and others can comment about, it's those sentencing days, those additional lengths of terms, that add a lot of cost to the prison system, and they also increase the cost to the taxpayers of various issues involving parole as well. It also places a lot of pressure on the parole system, because they're dealing with quite a pressure to get folks out who otherwise probably wouldn't have been there for as long as the sentence lengths occur, in any event.

The other thing that we discovered in a study done by Dr. James Austin, who advises the Legislature about sentencing and also assists the Department of Corrections and other criminal justice State agencies on budget projections, was that we did a study of the sentencing practices of the district court judges in the State for 2010 and 2011, or maybe 2011 and 2012. What we discovered was that all of the district court judges then sitting were quite a bit all over the map in terms of their sentencing practices. So, you would take a crime type, and it might have a sentencing range of 1-15, and you'd have a judge in one part of the State sentencing someone that seemed to have the same or similar criminal history and other background and crime offense to incarceration at a rate of two-thirds of the time, where another judge in the State was sentencing these individuals to prison one-third of the time. This would create an imbalance and fairness issue with regard to how we were handling defendants that were involved in like crimes with like backgrounds. Now unfortunately, that study and that data have not been updated since that 2010 or 2011 time period. That may be something, by the way, that this Commission would like to learn more about, and I think it's probably something we should be taking into account as we look at sentencing guidelines.

I offer that additional information because what the Legislature has now adopted is a set of policies that came from the National Council of State Governments. This wasn't something that was just created out of whole cloth. The Advisory Commission received

extensive presentations that included the National Council of State Governments and their sentencing policies. In effect, the Advisory Commission recommended and the Legislature adopted these seven policies to be considered with respect to sentencing decisions going forward. I think they provide a direction, if you will, for this Commission's work. These policies should be kept in mind, it seems to me, when one looks at alternative methods for sentencing.

With that overlay, I'd like to ask Ms. Mitchell to begin her presentation with regard to sentencing commissions and guidelines. Quite frankly, it's an expanded presentation from what the Advisory Commission received. I'm very grateful that she would take the time to come here and be available to present to the Commission. Before you start, would you mind adding a little bit about your background for the benefit of the Commission members? How did you get into this?

Kelly Mitchell (Executive Director, Robina Institute of Criminal Law and Criminal Justice):

Prior to joining the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota, I was the executive director for the Minnesota Sentencing Guidelines Commission. Prior to that, I worked for the Minnesota judicial branch. I just recently ended my term as president of the National Association of Sentencing Commissions. The road to getting involved in sentencing guidelines is longer than you want to hear. I used to be staff for the Minnesota judicial branch, and while there, I served as the liaison to all of the other agencies within that state. Sentencing became one of the more interesting issues that I had the pleasure of dealing with, so that's how I ended up going over to the Commission and ultimately to the Robina Institute. I should mention that two of my colleagues are Professor Richard Frase and Professor Kevin Reitz at the University of Minnesota Law School. Together at the institute we run, I just want to let you know that we're actually the only institute in the nation that focuses its research on sentencing guidelines and what sentencing commissions do. So, I hope I can help you along your journey as you start down this road. I just want to let you know that I'm incredibly honored to have been asked to attend this meeting today, because this is a historic moment for the State of Nevada. Even though you had a couple of false starts in the past, I'm really excited to be here today and I'm interested to see what this Commission is all about and the work that you begin to do.

Chair Hardesty:

Ms. Mitchell, I hope you don't mind, but I'd like to extend an invitation to the Commission members to interrupt your presentation with questions as they may have them. Commissioners, please get engaged and ask questions as we go along. There's a lot of material that Ms. Mitchell will present. If you've got any questions, let's ask them.

Ms. Mitchell:

I'm going to work through three main goals with my presentation today ([Agenda Item VI A-1](#)). The first is to tell you a little bit about what sentencing commissions are and how they function. The second is to talk about what sentencing guidelines are and how they work. Along the way, I'd like to try to tie that to the statute that created this Commission so you can see how these goals could be carried out by your Commission.

There are essentially two main types of sentencing commissions ([Agenda Item VI A-1](#)). The first type is formed and established to develop and monitor sentencing guidelines. The second type is formed to look more broadly at the criminal justice system and to make policy recommendations about pretty much any topic within the criminal justice system. It appears that the Nevada Sentencing Commission has been tasked with both developing guidelines and that broader goal of providing recommendations about other issues within the criminal justice system. What other commissions do is dependent a little bit on when they were formed. For instance, the Minnesota Sentencing Guidelines Commission was one of the first commissions. It was created in the era when sentencing guidelines were first developed, so that is their primary goal. They mostly just monitor the guidelines and provide changes and recommendations related to the guidelines. They don't really get into other areas within the system unless the Legislature specifically asks them to. But there are other commissions, like the Pennsylvania Sentencing Guidelines Commission, which is tasked more generally with looking at broad issues. The Pennsylvania Commission actually runs the gamut from sentencing through to parole and reentry. So, they do all of those various issues. Just to give you a sense of your place, here are all of the other commissions that exist in the U.S. ([Agenda Item VI A-1](#)). There are currently 24 jurisdictions that have a sentencing commission, including the federal government and the District of Columbia. Nevada brings that number up to 25. On this particular slide, the commissions that are responsible for developing guidelines are indicated in dark blue. The commissions that have general criminal justice functions but don't have a mandate to develop guidelines are in light blue.

So, what are some of the functions of sentencing commissions ([Agenda Item VI A-1](#))? These are some of the more common functions. Just like your Commission, what a commission is designed to do is laid out in statute across the country. Some of the main functions they have are to develop sentencing guidelines and revise them as needed, to model their compliance with the guidelines, to collect and analyze data to identify sentencing trends, patterns and sources of disparity, to forecast correctional populations based on current practices and to develop physical or racial impact analyses of proposed legislation or policy changes. In parentheses, I put a couple sections from the statute that created this Commission, which shows that some of those main functions that other commissions have been tasked with doing, this Commission has also been tasked with carrying out.

One that I really would like to go into is the data collection piece. The most active and effective commissions are ones that serve as a central collection point for sentencing data and that begin to develop a database. This allows the commission to actually be a nonpartisan source of expertise so that the state and the commission can make data-driven policy decisions. It is really important to have that independent, nonpartisan voice that can take the overview of what's actually occurring within the state to provide an objective source of information. I'm going to show you a couple examples of what you can do if you actually do become that data collection source. Some of them are Minnesota-centric because I had very easy access to that data, having been the director there. Here is a graph that shows Minnesota's prison population growth since the guidelines began in 1981 ([Agenda Item VI A-1](#)). In the early days when the Commission began collecting data, the sentencing judges literally sent a paper copy of every sentence to the Commission and the Commission had folks who did data entry to create that database. Today, the Commission has data-integration with the courts and they receive a monthly download of sentences. One of the things that collecting this data over time has allowed the Commission to do is show and demonstrate the real impact of policy choices that the state has made. If we look at this graph, which just shows how many felony convictions occurred in each year, you'll see that, from about 2001 to 2006, there's a steep incline. Because the Commission tracked data through that period, they know why that incline occurred. In our state, the reason that incline occurred was because that was the meth epidemic. There was an increase in drug crime. It was also the period when the state enacted a felony version of the driving while intoxicated (DWI) law. That increased the convictions by a pretty big percentage. It was also the era when the state enacted several enhancements for felony domestic violence cases to bring some domestic violence cases up to felonies if offenders repeated that behavior. So, the Legislature had a choice, "Do we want to keep going in this direction, or do we want to do something to change it?" The point is that they were able to make informed decisions about the direction they wanted to go. When you see the drop-off, a big part of that actually occurred when the Legislature enacted a law to put pseudoephedrine, one of the meth precursors, behind the counter. When they did that, the meth cases actually dropped off dramatically in the state. I'm just showing you this to demonstrate what you can learn about your system by having really good data collection over time.

Here's another example of what you can learn about your system. This graph shows the racial makeup of those felony convictions I just showed you from 1981 forward ([Agenda Item VI A-1](#)). The blue section is white offenders and the red section indicates black offenders. You can see that the proportion of black offenders within the felony conviction population has grown over time. That is a concern for the Commission, and it causes them to want to investigate that increase and figure out what is driving that disparity. In reality, a lot of that disparity was driven by the war on drugs, and so drug convictions actually caused a greater racial disparity in our felony population than anything else. In 2016, the Commission actually made a significant overhaul of recommendations to how drug crimes are sentenced within the state, and then that touched off an additional change in the Legislature on what the maximum penalties for

these crimes would be. So, it gives you the power to affect disparity if you choose to do that, if that's how you choose to use the information.

Commissioner Callaway:

I think data is critically important, and having served on the Advisory Commission for three terms, we constantly get a lot of numbers thrown at us. But one of the concerns that I've had in the past, and I worked with Dr. Austin on this when he did a study inside of our jail, is that we typically get cursory numbers. For example, you have x number of offenders for Category B felonies sitting in prison. But what we don't get often are the underlying factors. How many of those cases were something more serious? Maybe a robbery that was plea-bargained down to a burglary? How many of those individuals have multiple run-ins with the law before they finally end up in the prison system? I think when we talk about data, we need to see the whole picture. So in Minnesota, for example, is the data that's being collected strictly numbers, such as having x numbers of folks sitting in prison on a category B felony, or does that data dig deeper to look at criminal history? Like Justice Hardesty said, with the judge, is it a conservative judge or a liberal judge? What are the factors that played into that versus "here's the number"?

Ms. Mitchell:

I could actually bury you in data. We do have the data in a lot of different ways. For every sentence that is issued, we collect the conviction offense and the conditions that were ordered. If it's a prison term, we collect how long it was, and if it's probation, what the conditions of probation were. We collect race demographics and all of that information. The judge who issued the sentence is captured and the county where the sentence was pronounced is captured. Over time, we've also been able to look at disparities by judge and by county. The one piece of information that we don't have, because the Commission had to make a choice at the beginning about which data to collect, is any bargaining of charges that might have occurred along the way. We don't know what the original charge was. We only know what the charge of the conviction was. When I was at the Commission, that was actually a discussion that we were engaged in with the court, to talk about getting that downloaded as well, because now, with the direct integration, there's no technical reason why the Commission could not receive that. As long as the statute is written to allow the Commission to get whatever information it needs from the courts or other agencies, then you can get that. So, it's really a matter of thinking ahead about what are the questions that you have and making sure that you collect the data that will answer those questions, and collecting it over time so that it's cumulative, not just a snapshot in time.

Chair Hardesty:

Some who've served with me before know that I like to give people homework, so here's a homework assignment for everybody on the Commission: Be thinking about the kinds of data we need to collect. I think it's critical for us to have an understanding of the

kind of data we need. Mr. Callaway touched on this. It was an excellent question. I think we need to have it expanded. Ms. Mitchell, one of the things, while we're at this point in your presentation, is that I'd like to try to get a data breakdown, something we can look at that shows the data breakdown you just referred to for Mr. Callaway.

Ms. Mitchell:

Sure. I'll go through the last two data points. I think the point has been made that data is important. I'm not sure how your prison projections occur here in this State, but the commissions in most other states play a role in that. Since they know what the sentences are and have been in the past, they can predict what a change to practice might produce in terms of the impact on prison populations, so they are usually helpful in creating the models that the commission or department of corrections can use to project its prison capacity. Additionally, here's an example of an Illinois fiscal impact note that the Illinois Commission has created. Whenever policy is composed at the Legislature, the Commission, because it understands how sentencing works and what those practices have been, can usually project the impact on the system of a change in that policy. I should say that you can not only typically project the financial impact, but also the racial impact. If you collect race data, you'll be able to tell what that will do to the population's racial composition as well.

Chair Hardesty:

Are these fiscal impacts presented to the Minnesota Legislature during the course of their session? You don't always know what bills are going to be introduced or how the bills are going to be massaged, I would imagine, during the course of the session. I assume that these are made available to the Legislature from the Sentencing Commission. Could you comment a little bit more about that practice and then extend that, if you know, to other states that might have shorter legislative sessions like Nevada?

Ms. Mitchell:

Several commissions play this role. Actually, I think most of them do. This is a process that occurs during the session. In Minnesota, the way it works is that if a bill is coming up for a hearing—not all of them do, so it's got to be a bill that's actually going to be heard, not one that's been introduced and hasn't been scheduled. If it's coming up for a hearing, then it's sent over to the Commission for a fiscal impact note. The Commission has a 2 to 3-day turnaround. Sometimes they have less time depending on where we are at in the session. Then, the Commission will run its projections. Then, we actually share this process with the department of corrections, because the Commission doesn't know how much beds cost. That changes from time to time, so the Commission projects the number of beds that the change will engender, sends it over to the Department of Corrections, they add in the cost to that and then it gets sent back over to the Legislature. In Minnesota, any system that's affected by a particular policy is asked to

complete a fiscal impact note at the same time. At the same time that the commission might be doing that, the judiciary might be projecting the impact on them, the Bureau of Criminal Apprehension might be projecting their impact, and it goes around.

I'd say that this does occur in other states with shorter sessions. Minnesota meets every year. We have about 30 to 40 days per year when we do meet. Basically, what I can say is that every director I've known from another sentencing commission pretty much is nonresponsive for a couple of months when the legislature is in session, because during those months, responding to the legislature's needs is the top priority of the commission. That really sets the work for that commission during that time. It's generally a staff-driven process. It's not something that the formal body gets involved in. There is a director that's been hired by the commission in most of these other states, so the director has the final signoff on the content that gets sent over to the legislature.

Chair Hardesty:

I notice the example you provided here in this particular house bill was a decision concerning the effect of extending 90 days of sentence credits to a prisoner ([Agenda Item VI A-1](#)). I wondered if you, or the folks there, generate additional fiscal impact, say, from a decision to criminalize certain behaviors? So, someone decides to propose a statute that would, for example, sentence a certain behavior, and now they're trying to decide on the sentencing length. When that debate is going to take place, are fiscal impacts associated with that as well?

Ms. Mitchell:

Yes, we do make those projections as well. One example during the last legislative session in Minnesota was that the Legislature wanted to criminalize the possession of certain types of ammunition. That's a crime that didn't exist on the books and we didn't have anything like it before. So, what the staff does in that case is they take some cues from the parameters set by the Legislature. When a crime is defined, the Legislature usually sets the maximum sentence for that crime, so that tells the staff a little bit about, in relation to other crimes, how serious this one is so they can predict where the Commission would place it on the sentencing guidelines grid in relation to other offenses, with that maximum sentence being one clue. Maybe there's a choice between two severity levels, and I'll explain what those are in a minute, but the staff can make a good guess as to where they think the Commission would rank that crime. Because the guidelines have sentences associated with each seriousness level of the crime, they can use that to project what the likely sentences are that would be issued by the courts.

We also have information about the criminal histories of past offenders. We know roughly what proportion come in as first-time offenders or second or third-time offenders, so we can use that to roughly determine how far along the grid a person might be sentenced. Maybe 40 percent of these new crimes would be committed by first-time offenders, a few more by repeat offenders. Using that information, we can put

together a pretty good estimate of how much we think that new crime will impact the system.

Commissioner Bisbee:

My question is about the frequency, because you probably heard at the beginning of this that we are to meet at least every 3 months. But it sounds to me like you have commissions that are essentially full-time commissions?

Ms. Mitchell:

That does vary across the country. I would say that most commissions may meet once a month, but other commissions might meet a little less frequently. In Minnesota, the Commission is scheduled to meet every month, but then there are a few times a year that they can predict that they probably won't need to meet, so they usually end up canceling a few of those meetings each year.

Commissioner Bisbee:

So, you're talking about, essentially, support staff being essential to these commissions?

Ms. Mitchell:

Yes, I would say that is absolutely true, especially if the commission decides to take on that data-collection task. The support staff is really essential to building that database, tracking down information that maybe wasn't supplied the first time, or missing information, writing data reports, writing information and then doing this fiscal impact function during the legislative session.

I'm happy to answer any other questions that this Commission has about how other commissions work, but I was also asked to tell you about sentencing guidelines. I'm going to switch to that topic now, and if you have more questions about commissions in general, please feel free to ask them at any point.

Commissioner Burton:

Regarding the impact the data collection has on the Department of Corrections' operation, what do you see from that viewpoint, because Director Dzurenda will have potentially a lot of pressure to get that data provided to us?

Ms. Mitchell:

I would actually say the pressure will be on the courts to provide the data to you, because you really need information that's a little more front-end to effectively track

sentencing practices. Of course, Director Dzurenda can start you off, but I think you'll ultimately need to set up a feed from the courts to the Commission for information.

Commissioner Burton:

So, you're talking about the front-load end of it, a lot of pressure on staff from the courts to push information out?

Ms. Mitchell:

I don't know that it's a lot of pressure. Commissions that were formed in the 80s created a form that they needed the court to fill out when each sentence was announced, and that provided all the data they needed in order to track sentencing decisions in the state. They really thought carefully about the load on the courts and what it would take to get the information they needed versus not putting additional pressure on the staff, so a lot of it is information that the court is already collecting. That's what you'd have to think about. I don't know what the technological capabilities are here in Nevada, but this may be something that's already collected in the case-management system for the courts. You might just be able to work with them to develop a download into a database that this Commission ultimately controls.

Chair Hardesty:

On the issue of data collection, as some of us know from hearings in various committees and commissions, we do have this collection process. We also have some problems with it, and one of the issues I intend to have the Commission address is that whole process. Ms. Butler will be here for one of our presentations to get into this in depth, because we all know that there are weaknesses in the current collection process. I think the Legislature in the past couple sessions has also been dealing with a backlog with respect to that issue and, in a number of instances, problems with courts getting their data—at least the current data that's being collected—to the Criminal History Repository. For those of you who are new to the Commission, and just for your background, the Legislature created a separate subcommittee of the Advisory Commission to specifically study this issue and ask other criminal history collection processes in the State to meet, confer and develop some coordination of that effort, and I think our Commission would want to watch that process very carefully. I forgot the Legislation number, but we'll get that for all of you. Ms. Butler from the Criminal History Repository, Tiburon from Washoe County and SCOPE (Shared Computer Operations for Protection and Enforcement) from Las Vegas are all supposed to participate in this subcommittee to see how these systems can better coordinate the data collection, and I believe there are also court representatives on that as well. We're taking a look at the whole picture, hopefully, through these various committees and commissions.

Ms. Mitchell:

Switching over to the topic of sentencing guidelines, I know that I heard from the introductions that a couple of you, Mr. Burton and maybe Mr. Segal, have worked in the federal system in the past. As I talk about sentencing guidelines, if you know about the federal system, forget the federal system, because state systems are very different. They're much simpler and they're built to provide a little more room for judicial discretion to take place. The federal guidelines are very prescriptive in a way that none of the other states have replicated. So, put that out of your mind as I describe these systems.

With our sentencing guidelines, they are a set of standards that are generally put in place to establish rational and consistent sentencing practices within a particular jurisdiction ([Agenda Item VI A-1](#)). They can be one mechanism used to implement determinate sentencing, so many states abolished parole at the same time as they created sentencing guidelines. But seven states have combined the sentencing guidelines and have retained parole, so you actually can set the model up either way. Most often, the statutes that looked for the creation of sentencing guidelines also put a purpose in: "Why do we want sentencing guidelines within the state?" These five points serve as the main reasons why sentencing guidelines are enacted within states: to foster proportionality, secure public safety, reduce disparity, manage correctional capacity and achieve certainty in sentencing ([Agenda Item VI A-1](#)). All of these actually appear in the bill that created this Commission as well.

Here's where fostering proportionality shows up ([Agenda Item VI A-1](#)). This is in the "principles of sentencing" section of the bill, I believe. Proportionality really takes on two characteristics. The first one is that, as the seriousness of a crime goes up and as the defender's criminal history score increases, the sentence should also increase proportionally. The second is that, if you take two offenders who have committed the same crime with similar criminal histories, they should receive similar sentences. So, there is proportionality in terms of offending and seriousness of the crime, and proportionality between offenders.

Here are a couple places where public safety comes up ([Agenda Item VI A-1](#)). Public safety really takes on a broad definition—actually, it's not that it's a broad definition, but one thing to think about is that public safety can be brought about in multiple ways. Public safety certainly is brought about when you put an offender in prison. They're not committing crimes while they're there. But we also know that if you put a low-risk offender in prison with high-risk offenders, then you're likely to create an offender who is going to commit a crime more frequently than if you had kept them in the community. You've got some principles stated in your statute that talk about locking up violent offenders and also having alternative sentences for low-level offenders. Those concepts of public safety, in both directions, are also in your statute.

I should have included another bullet point for managing correctional capacity. The Legislature has given you some hints about using prison for violent offenders. In

paragraph 4 of section 3, I should have also included that up here, but that part of your statute says that sentencing and corrections policies should be resource-sensitive. One of the purposes of this Commission is to help the State manage those correctional capacities and to help identify where offenders should be placed to hold them accountable, provide punishment and provide rehabilitation as needed. Should that be prison, should that be jail or should that be community supervision? That's part of the role of the Commission.

For reducing disparity, the Legislature here has stated that in terms of making sure that the sentences are not given for factors such as race, gender or economic status, so that is a good principle. As I mentioned before, by tracking data and seeing how sentences are actually meted out and providing that information back to the field, you can also raise awareness about where disparity might be occurring and start to tackle ways to reduce that disparity.

I'm going to leave off the certainty in sentencing principle, I'll talk about that in a minute.

So, what are sentencing guidelines? Let's get into a little bit more detail. Sentencing guidelines can provide guidance to judges in three specific ways. First, the guidelines can help the judges make the prison in/out decision. Is this an offense that should be sentenced to prison, or is it an offense that should be sentenced to community supervision? The guidelines usually specify that piece. If this is an offense that should be sentenced to prison, the guidelines usually tell the judge how long that prison term should be. If it's a sentence that should be probation, there's actually some variation across the country in how much information the guidelines provide. In a few jurisdictions, they will actually state how long the probation term should be. In a few jurisdictions, the guidelines will state how long the jail term should be if jail is a condition of probation. In a few states, the guidelines will also specify other intermediate punishments or alternative punishments. But, it can be as simple as just stating, "Probation" and leaving it to the court to decide the rest of those factors.

Here's an example of a Minnesota grid, and I'll show you those three things on the Minnesota grid ([Agenda Item VI A-1](#)). For this particular grid, if you're sentenced in the white zone, that's the prison zone. Anyone who falls into one of the cells that is white should be sentenced to prison. If the person falls into the gray zone, that's a probation sentence. So, that's the prison in/out decision that's shown on this graph. The dark solid line between the two, we call that the dispositional line, because that's where you switch dispositions from probation to prison. I should say that on the left side, the axis indicates the severity level of the offense, and across the top, that axis indicates the criminal history of the offender. You find the intersection of those two points to determine what the appropriate sentence is. This grid shows in/out and it shows prison. Within each prison box, it shows the duration. The number on the top is the sentence the judge should pronounce. The range beneath that is 15 percent lower and 20 percent higher. The judge can sentence anywhere within that range and still have a valid guideline sentence. In the shaded area, there is time indicated there, and that is time that the

court could pronounce if they decide to stay execution of the sentence. But that's all this particular grid tells you. There's nothing else that the Minnesota guidelines tell the court.

If we look at the Oregon grid in contrast, there are a couple of other pieces of information that are provided on that grid ([Agenda Item VI A-1](#)). Like Minnesota, this grid shows the in/out decision and the prison length. Prison is in the yellow section. This grid also shows a couple of different things. The green, blue and pink are community supervision sentences, various forms of those sentences. I actually don't remember what they correspond to, but they're further signals to the court as to what kind of sentence the person should be under. The numbers that are in there are jail dates. If they're ordering jail along with community supervision, that guidance is given to the court. This grid also sets the probation terms. In Oregon, the Legislature has to set a maximum number, such as, "Probation can't be longer than x." The Commission went through and figured out, "Okay, for each kind of offense, how long will that probation term be?" Then, they put it on the grid. This one also sets maximum departure lengths. I'll talk about what those are in a moment, but that is really where the sentence is different from what the guidelines say it should be at those lower levels. The Commission has set guidelines. For example, "You can't go beyond this if you're going to depart." Then, oddly enough—this is the only grid, I think, that does this—they actually include post-prison supervision lengths on the grid as well. So, these are terms that the judge has to pronounce at the time of sentencing. In Oregon, that's the way it works there.

The reason I show you these two grids is just to show you that you can get as complicated as you want. You can add a lot of detail if you want, or you can have sentencing guidelines that are much more streamlined and simple, and leave more discretion to the court for some of those other detailed decisions.

Senator Kieckhefer:

So, within each of these states' statutes, are they similar to Nevada's, where we have Category A through E felonies, whatever it may be, or do their statutory provisions align with the severity ranks within the criminal offenses within their sentencing grids?

Ms. Mitchell:

That actually varies from state to state. Some other guideline states do have categories the way that Nevada does, and some have just a general felony definition and they leave those maximum sentences to each crime definition. The definition of battery is where you will find out what the maximum sentence for that crime could be. What's similar is that all commissions are working within maximum punishments that the legislature establishes.

Chair Hardesty:

One thing I wanted to mention on that point, and one of the issues that the Advisory Commission struggled with in the last session, was this simple question: Tell me the definition of Categories A, B, C, D and E in Nevada. What do they stand for? What is the distinction to be drawn? Then, match that up with the crime types that we'll get to later in our presentation. I think one of the things that this Commission needs to consider is whether you're going to use categories, or maybe you're better off looking at severity of offenses and adopting that as a statutory construct.

Commissioner Callaway:

To elaborate on that point a little bit, one of the discussions we've had in the past, like when it comes to Category B offenses or whether a particular crime should be in this category or that category, is that you often have the staircase of examples, like petty larceny, grand larceny and larceny from a person. If you tamper with one of those, now it's a domino effect. If you lower the penalty for this, now you have to lower the penalty for all the others, or if you raise the penalty. So, my question is, in these states where these guidelines exist, if, for example, I'm a legislator and I bring a potential law forward, do I have the ability to say, "I want this to be a Category B offense in Nevada," or is that power taken away from the Legislature and put into the hands of the Sentencing Commission, where they just pass the law and the Sentencing Commission plugs it into that hierarchy of laws so it fits within that domino effect?

Ms. Mitchell:

What I would say is yes, the Legislature would still have the ability to set the category. If you chose to have a system where you retained those categories but you also have sentencing guidelines, then the severity levels would work with the categories. You would have to look at all the crimes, and as a Commission you would determine where you would rank them against each other in terms of seriousness. Where the categories come into play is that they set your maximums, so you can't put a crime on a row where the maximum is going to be exceeded by the sentence that might build on that particular row. That may be a technical response, but you basically have to keep those categories in mind as you rank offenses against each other. Your exercise would really be to say, "Where do I think that grand larceny fits against assault?" That's really your goal, to rank all of these sentences against each other. I can think of a specific instance in Minnesota where we have an offense that the Legislature—the other thing that can happen is that the Legislature can tell you where to put an offense on the severity ranking. Sometimes that happens. Usually they stay out of it, but that could happen. What if they tell you to put an offense at a pretty high ranking, and to put it there, the maximum sentence would be exceeded before a person moves all the way across the grid? That's happened before, and the guidelines have to be careful and call it out and explain that this is an aberrant offense. I may have gotten too far in the weeds with my answer, but the short answer is that the two can be designed to work together and to make some corrections.

I know that in this State, some of your concerns are between Category C or D offenses, or maybe you feel like they're not in the right place between Category B and C. You can make some corrections and maybe push some Ds above Cs or push some Cs down below Ds on the severity level, as long as you're always keeping the maximum sentence in mind and not breaking that rule when you create the grid.

Commissioner Segal:

As much as I tried to forget my experience dealing with the federal sentencing guidelines, one of the things I know that exists, and I think that is helpful in meeting the goals of proportionality and fairness, specifically referring to theft or money-related crimes, is a grid where the severity of the offense is increased based upon the amount of money that is involved in the crime. I looked at the Minnesota guidelines you have here, and it says, "Theft crimes over \$5,000." Well, it seems like there's a big difference between someone who might steal \$5,000 and someone who might steal \$100,000 or \$1,000,000. So, do these state sentencing guidelines include a grid whereby there are enhanced punishments based upon the amount of money involved in a crime?

Ms. Mitchell:

They can. It really depends on how the Commission chooses to approach those offenses that are defined very broadly by the Legislature. In Minnesota, when you're looking at the theft crimes, there are actually separate paragraphs within that crime, within that statute, that increase the penalty already based on the amount of the offense. When the Commission went to rank that crime, they were able to put one amount at that one ranking level and another amount at a different ranking level. But in Massachusetts, where they have offenses like assault, one crime is assault with a weapon, and the weapon could be a broken beer bottle or it could be a gun, and those are very different crimes. I think most people would see the seriousness levels of those as different. So in Massachusetts, the Commission has taken it upon itself to use weapon type to actually further differentiate the rankings of some of the crimes. So those are different methods that a commission can use to try to differentiate between crimes and make the sentences match the behavior a little more closely.

Senator Cannizzaro:

I actually have a follow-up question, because you talked about what I think is an important aspect in terms of severity of crimes. When you're talking about, for example, assault with the use of a weapon, the difference between the broken beer bottle in your example and a gun, does Massachusetts law categorize those as two separate crimes, or would they be the same crime, but for the severity level, there's a differentiation based on the actual weapon?

Ms. Mitchell:

In that case, there are degrees of the crimes, like first, second or third-degree assault. One of those two degrees is assault with a weapon. The Legislature has done some differentiation, but then when you go within assault with a weapon, that's where the Commission saw a lot of variation in sentencing and they tried to use weapon type to further differentiate the sentences within that group.

Commissioner Burton:

To make sure I'm hearing you correctly, when you're talking about the weapon, for example, possession of a weapon in a crime would be different from discharge of a weapon in a crime? That's where you're talking about the states making those differentiations, right?

Ms. Mitchell:

Yes, I have seen that differentiation. I'd say Massachusetts is the only one that does it that way, where the differentiation's not already in the statute. So, most other states use the way that the elements of the crime are defined in the statute to differentiate crimes. If you've got assault, and paragraphs A, B and C within assault, and each one has different elements, then A, B or C might be ranked differently depending on what the elements of the offense are.

Commissioner Segal:

Do the state guidelines also include downward departures in sentences based upon things like early acceptance of responsibility or material cooperation, which are other factors that are considered in the federal guidelines and can sometimes facilitate negotiations to resolve cases?

Ms. Mitchell:

I'll get to departures a little bit more later. But to answer your question, yes. Every guidelines system has the ability for the judge to depart, and that means that they can issue a sentence that's more serious or less serious than the guidelines call for. It varies by state, but many states directly state what those factors are that would justify a downward departure or upward departure within the guidelines, and then usually you have a catch-all provision for the court to be creative with a new reason. What's different about state systems from federal systems is that, in the federal system, you can actually move up and down offense severity levels. You can't do that in any state system. Once you've determined which offense severity level you're at, you stay there. The mitigating or aggravating sentence really just moves you inside or outside of that box.

So, one point that I would make, when developing sentencing guidelines, it's really important to keep in mind that the sentences that are within the guidelines are appropriate for the typical cases. You have to think about what your average burglary is, what your average assault is, etc. That's the case that the guidelines were designed to cover. Departures are designed to cover cases that are atypical, a more serious offense than the usual type or a less serious offense than the usual type, or something about the offender that's more serious or less serious than usual. Those are atypical, and when guidelines were first created, it was thought that there would at least be 10 percent of the cases that would fall under this departure zone. In Minnesota, that number is about 25 percent that falls into the departure zone. That number varies from state to state, but there should always be some percentage of cases that fit that departure model, because it's just impossible to create guidelines that take into account every scenario and every manner in which a crime might be committed. You need to leave some discretion to the court to deal with those atypical cases.

Commissioner Hicks:

This is kind of a broader question, but it's something that's got me thinking as you talk. Nevada, for example. Very different counties, very different cities. A diverse state. I struggle with the thought of a sentence necessarily being the same in different counties. Here's what I mean by that, in a simple example: A residential burglary of a foreclosed home, or something where nobody's home, in Reno, Nevada. The sentence that a judge might customarily give there could be very different than a residential burglary in Fallon, Nevada, which is a small, rural town where people keep their doors unlocked during the day, where someone was home. Those might seem like typical burglaries, but in Reno, that might be a 12 to 36-month probationary sentence, whereas in Fallon, that might be 2 to 5 years in prison because that's what that community demands, differently than maybe what my community does. So, is that something that has reared its head in these studies you've done, and how do you compensate for that?

Ms. Mitchell:

That certainly does come up. It's actually quite common for there to be differences in the sentencing guidelines between rural and urban jurisdictions. Part of that being, in rural jurisdictions, it's a smaller community, and you tend to know people. The stakes feel a little bit higher. That's something that the commissions grapple with. What other commissions have typically done is that they've studied how sentences work in different jurisdictions. You collect data to see what the sentences have typically been for a snapshot in time, and then you have a decision to make. Do you set up your guidelines to allow sentences to continue in that manner going forward, using a historical practice as your guide? Do you create ranges that would accommodate the way sentences are already being given out? Or, do you decide to become a little more prescriptive and say, "You know, maybe that difference in the Reno sentence versus the smaller-town sentence isn't appropriate. Maybe we want to bring that a little closer together." So, you could decide to set a range that maybe is a little bit narrower. Like in Washington D.C.,

when they created their guidelines, they had a huge range of sentences for every category of crime. The decision that they made was to look at every crime and choose the middle 50 percent. They created a range that would encompass the middle 50 percent of sentences. It got rid of the outliers on the low end as well as the outliers on the top end, and that's where they set their guidelines. Those are decisions that you'll have to make moving forward, and you have that choice: historical practice versus prescriptive practice going forward.

Commissioner Hicks:

You mentioned departures, whether you're going up or down. Have some of these commissions created an ability for a court to depart based on what their constituents might demand? Along those same lines, can that be a consideration in the departures, from what you've seen? Alternatively, in departures, that necessarily requires some kind of review. So if a court departs, does that then go to appellate courts for review?

Ms. Mitchell:

I have a couple of slides on this later. I actually found this fascinating. For the states that have departure standards, a standard that you measure your departure against, there are only two in the whole country. There are only two different departure standards that have ever been used. One is that there are substantial and compelling circumstances that warrant this departure. The other standard is that there are mitigating or aggravating factors that warrant this departure. So, no, the sentence that the community demands has not been used as a departure in other jurisdictions. You're right that the appellate review is the mechanism that can be in place to ensure that the departure reasons that are used by the court meet that standard. I'll get into that in just a couple minutes, but states have varied as to whether or not they actually permit that appellate review. Not all do. The ones that are more mandatory permit that appellate review.

There's a difference between a departure standard and departure reasons. The standard is that benchmark that you measure the departure against. Was it a substantial and compelling reason? The reason would be like the list within the guidelines or, if you choose not to, the list that the Commission decides are the reasons that a court could depart. One of those might be amenability to treatment. That would be a mitigating factor. Maybe they're supposed to go to prison, and you determine that they have a substance abuse disorder. They will get better treatment if they remain in the community. That can be a reason to mitigate and depart and give probation instead. Another typical aggravating factor is if a person is participating in organized crime, like a drug ring or that sort of thing. If they have participated in an organized drug ring, that's been an aggravating factor in a number of places. So, you really can make those reasons fit. You can set those reasons based on what you've typically seen in your jurisdiction, or you can choose to not list any reasons at all and let the court develop those reasons over time and let the appellate court decide if they're valid reasons or they choose to recommend appeals for these sentences.

I wanted to tell you the two major factors for guidelines: typically, offense severity and criminal history. We've talked a lot about offense severity already, but generally you look at what the elements of the crime are, the types of harm to the victim and the maximum sentences that the legislature has established, and you use those to create a ranking system for crimes within your jurisdiction. The federal government has about 49 severity levels. Most states have 10 to 15, so they have much broader categories. One thing that's sort of happening in the states now is they're starting to break some crimes out onto separate grids. They might have a joint grid, a sex offender grid, so that they can rank the crimes a little differently and set the ranges for sentences a little differently than they do for other crimes. Some states still have it all on one grid though.

The criminal history dimension is the thing we haven't really talked about. We've talked about offense severity, but not criminal history. Typically, criminal history is a composite of multiple measures. Almost every system looks at prior felonies, misdemeanors, gross misdemeanors and prior juvenile adjudications, and then systems sort of go off from there and they might look at other factors. One factor that used to be relatively common was custody status, whether you were already under supervision when you committed the new crime. This covers the offenses that might occur in prison and offenses that might occur while you're on probation. There are two ways that you can set up criminal history. One is point-based, where you assign values to each of the factors that make up the criminal history score, add them all together and that creates your point scale. The other method is categorical, where you're really setting categories based on the number of prior offenses and the types of prior offenses. I've given you Kansas' categories across the bottom of this particular slide ([Agenda Item VI A-1](#)), and you'll see that in Category I, which is all the way on the right, that's where your no-record people, the people who come in as first-time offenders, are. As you move across the grid, you can't get into those higher criminal history categories until you start committing person felonies, like assault, manslaughter, those sorts of things. When we look at these two approaches, point-based criminal history scores are kind of nice in that you move across the grid in a gradual fashion, but if you have a long criminal history score, eventually you're going to cross that dispositional line. You're going to get into the prison zone even if you are always a low-level offender. That's just a decision to make, whether that's a setup that you want. Categorical is kind of nice, because it keeps those low-level offenders out of the longer prison sentences, because they haven't committed person crimes—but on the other hand, you can move across this grid really erratically depending on what you commit. The first time you might come in at Category I all the way to the right. If that first offense you committed was a person felony, then if you come back, you're going to flip all the way across to Category D, which is more than halfway across the grid in one offense. That's the upside and the downside to that approach. Both approaches have pros and cons, and the more common approach is the point-based approach. Only three jurisdictions use the categorical approach. Within both systems, prior offenses are typically weighted so that more serious crimes get more criminal history points or a higher criminal history category than less serious crimes. You can set your scale however you want. Basically, you might say that a property offense is worth a point, and a person offense, such as assault, might be worth

two points or three points. How you set that scale is going to move a person across the grid at different rates based on the seriousness of those prior offenses.

Commissioner Ponder:

When we're talking about the criminal history, in the federal system, is it 15 years going back? How far back are we talking about going back in the criminal history?

Ms. Mitchell:

That is a policy decision for the Commission. About half of the systems across the country have a policy to not look back forever. So, you have a choice. Do you want to look for criminal history, do you want that criminal history to count forever, or is there some point where prior criminal history is less important than what they've done today? Because the longer you count it, the more criminal history is going to contribute to the overall length of the person's sentence. In some systems, what they have is called a "decay policy." They go back in time, they look at when that offense was committed, and they set a number of years, with 5, 10 or 15 years being the most common. If you're beyond that time, the offense decays and it no longer counts in the criminal history. In a few other systems, they require crime-free periods. They give credit to the offender if the offender has managed to stay crime-free for any amount of time. Usually those crime-free periods are 5 or 10 years, and if the person has remained crime free for 5 to 10 years before the current crime, then anything beyond that 5 or 10 years would not be counted in the criminal history score.

Judge Togliatti:

The jurisdictions that have either the crime-free period or the decay cutoff, do any of those jurisdictions take into account the nature of the conviction? For example, if you have a 20-year-old murder case that was reduced to a manslaughter, and either the lapse of time that you were in prison, the entire time, or just the nature of the conviction itself—so, those two things would be my question and concern for the decay, because judges' positions, of course, are usually going to be, "I want more information, not less." So from a judge's perspective, if someone has a 20-year-old voluntary manslaughter conviction, depending on a lot of factors, maybe it matters, and maybe for the offense before us today, it doesn't. But those jurisdictions, how do they handle something like that?

Ms. Mitchell:

That's an astute question, because you've hit on two other aspects of that policy, if this Commission chooses to go down that road. One is that nearly in every jurisdiction that has a decay or gap policy, there are a few crimes that are off the table. For instance, I can't think of anybody who would decay a murder conviction. How far they go really varies. Arkansas would be an example of a state where there are a lot of crimes that

don't decay. Minnesota and the federal government would be examples of jurisdictions where nearly every crime can decay.

The second question is when does the clock start for that 5, 10 or 15-year period? In some jurisdictions, the clock starts when the person is discharged from the prior sentence. In any time, prison wouldn't be counted within that time period. In some jurisdictions, there's a differentiation between prison and probation. For prison sentences, the clock starts when they get out. For probation, the clock starts around sentencing. The federal system is one that does this sort of differentiation because they can't always tell when they're looking at a state system when a person was discharged from that sentence, so they tend to use the date of sentencing as the period when the clock starts in the federal system.

Judge Togliatti:

So, the impact of this presumably is that the information provided to the judge for sentencing, when you say "decay," doesn't exist? It's not presented to the judge in those jurisdictions?

Ms. Mitchell:

That can really vary. It depends on the system that the jurisdiction has set up to provide information to the judge. In a couple of jurisdictions, the probation department actually does a sentencing worksheet for the judge that would calculate the sentencing score. When they do that, they usually have a place to indicate that there was a crime and it was decayed. In other systems, it kind of depends on whether or not the judge is being given a rap sheet alongside a worksheet that calculates the score.

When misdemeanors, gross misdemeanors and juvenile adjudications are included in criminal history, it always takes many more of them to equate to a point or a category than it takes felony offenses ([Agenda Item VI A-1](#)). That's another form of weighting that occurs between crime seriousnesses. There's usually a cap on how much these types of crimes can contribute to the score or the category, as opposed to felonies. Usually there's no cap for felonies, but there's often a cap for misdemeanors.

Here are a whole bunch of other policy questions that can be wrapped up in a criminal history score. I just talked about decay. For juvenile crimes, the question again is should juvenile crimes count forever? Should they decay at some point? I'm not sure exactly how your juvenile system works, but in many states the juvenile system is set up for rehabilitation, and so dispositions occur much more quickly and with less due process than in the federal system. That's one of the reasons why they're treated differently in the guidelines than felony crimes are. They're given less weight and usually count for less time, so they might drop off the record by the time the person is 22 or 23 because, by that point, the adult record is more important to the court than the juvenile record.

There are other questions as well. If multiple offenses are sentenced on the same day, should they all count towards criminal history in the future, or should only the most serious one count? What about the sentencing on that day? In some jurisdictions, as the first crime is sentenced, it's added to the criminal history score for the second one that's sentenced. Do you want to do that, or do you want to put a limit on the ability of the court to do that? Another question that always comes up is when do the guidelines become effective? If you're being sentenced today for a crime, and you have another crime that was actually committed after this one today, should that count for your criminal history score? Or should it not count, because theoretically it's just a matter of when it got to sentencing, but you would have known about it if the two crimes had been sentenced in the order in which they were committed? Those are just all policy decisions that the Commission could wade into and that could affect how criminal history is counted for any particular crime.

This is the last purpose of a sentencing commission that I didn't talk about earlier, achieving certainty in sentencing ([Agenda Item VI A-1](#)). For this one, because Nevada is currently a parole release state, this would be a little bit more challenging for the Commission to deal with. This particular mandate within your statute calls for transparency in sentence length. That can really depend on a lot of different factors. What is the sentence that the court is issuing today? What information does the Parole Board give on first-eligibility appeals? How often does that occur? When is the second eligibility if the person is not released? But it's not impossible to work sentencing guidelines in conjunction with parole, and as I mentioned before, some jurisdictions do that. In those jurisdictions where they're working in conjunction with a parole system, the guidelines typically set either the minimum sentence or the maximum, but not usually the full range. When they set the minimum term, then that sets the first-level eligibility for the release. When they set the maximum term, that sets the maximum that the parole board is looking within. There are other rules within the state that function to set the minimums and maximums around those.

The other question that this Commission was asked to respond to is, if you decide to develop guidelines, should they be advisory or mandatory? I'm here to tell you that whether the guidelines are advisory or mandatory is a continuum. It kind of doesn't matter what you call yourselves, whether you call the guidelines advisory or mandatory on your own, because it's really how the guidelines function that set them on this continuum of mandatory to advisory. The guidelines that are on the mandatory end are ones that subject the sentences to appellate review and where departure reasons are required. The guidelines that are on the advisory end are ones where there's very limited or no appellate review, or where there's full judicial discretion in sentencing, meaning that departure reasons aren't necessary. It's not even necessary to say if you're following the guidelines.

Chair Hardesty:

Could you return to the slide where you had the interaction with parole showing minimum and maximum terms? One of the issues identified by the Advisory Commission in the last few sessions is a concern in Nevada about the ability of prosecutors and defense counsel to communicate with the defendant and with victims of crime as to what the sentence actually is and how long the defendant will actually serve. Then we also have on top of that this complicated set of credits that are difficult to calculate, and frankly from the previous sessions, I've heard a lot of testimony here that not only are they challenging to calculate, but it's very difficult for anybody, including the judge, to clearly understand what this person's going to be doing. One of the perceived advantages in looking at the sentencing commission approach was to take that uncertainty out, to actually return—maybe I shouldn't use the term "truth in sentencing"—but to actually have a true sentence that everybody can point to and rely on. So, when you're talking about minimums and maximums under the guidelines, that's the time that the defendant is actually going to serve under the sentencing guidelines approach. Is that right?

Ms. Mitchell:

When the guidelines set the minimum term, then really all that establishes is that that time will be served by the defendant. There's usually a range, just as you already have today, so the guidelines would be setting a minimum. State law determines what the maximum is. I think here it has to be no more than 40 percent above that minimum, and then the parole board works within that range. It doesn't change that piece too much. When the guidelines set the maximum term, again, in parole states, it's usually the maximum of that range. The court is again setting the minimum and the maximum, but the parole board can go beyond that. They could release the individual sooner based on the rules about first eligibility for release.

Chair Hardesty:

So as part of our study of this subject, I would assume that you would agree that the Commission needs to evaluate its credit practice and statutes?

Ms. Mitchell:

Yes. If you want to affect how much time the individual actually serves and if you want to try to make that a more transparent number, then those other statutes that affect the credits that the person receives, how often they come up for eligibility, those would need to be addressed as well.

I mentioned before that departures are just a sentence that differs from the guidelines' recommendation. There are two types. A dispositional departure occurs when the guidelines recommend either prison or probation and the judge does the opposite. A

durational departure occurs when the judge issues a sentence that calls for a longer or shorter prison term. In some jurisdictions, jail terms are also regulated by the guidelines, so you could also have durational departures from jail, if that's how you choose to set them up. Those are the two types, and then the two dimensions that we mentioned earlier are mitigated or aggravated, so either going below the guidelines' recommendation or above it.

I mentioned that departures are actually very intentionally included within the guidelines to address those atypical cases. But that said, some systems have some checks in place to ensure that departures don't happen all the time. Because you could have departures creep into cases where they're not really warranted. One method is to have that departure standard that I mentioned earlier, either substantial and compelling reasons exist, or maybe aggravating factors exist. Another method is to require that the departure reason be stated on the record or written down, so either orally or in writing on the record, and then to have the commission track those departure reasons. There are a couple of reasons why you'd want to track the departures. The first is that you want to establish the rate of compliance with the guidelines. If your point is to bring greater uniformity and proportionality in sentencing, then you can only achieve that by actually tracking the sentences and the deviations from those sentences so you can see what's going on in the field.

The second reason is to serve as a feedback loop for the commission and state legislature. If you're seeing really high departure rates in a particular area, that's a signal to the commission that the sentences you've put out there may not be right, or there's something about the statute that might be making the system uncomfortable, or it could be a combination of the two. For instance, I told you that we had some drug law changes in Minnesota recently. That was a case where we had over a 50 percent departure rate for certain offenses, and that's because of the way our statute was set up. Possession and sale were the same sentences, and it was mostly possession for first-time offenders, and the system was uncomfortable sending those individuals to prison the first time around. We had really high departure rates, so after studying over time, the Commission decided to move where that offense was ranked so that the first offense would not be a prison-bound sentence. That's the case where the Commission separated out possession and sale. It was something the Legislature had not differentiated in the sentences. That in turn caused the Legislature to go in and differentiate the sentences in the statute. That can be a feedback loop, and it can work both ways within the system to bring about corrections when you have evidence that there's just something that's making the system uncomfortable. I should also say that for systems that are more advisory, tracking departures and publishing those rates can actually work as a peer pressure unit and cause judicial systems to actually follow the guidelines more closely, even though they're considered to be advisory.

Appeals are another way that you can bolster the strength of sentencing guidelines, and there are generally two types of appeals. The first type is appeals of sentences that are within the guidelines. You've found your box, and the court has sentenced the person to

the sentence that's within the guidelines. Why would you appeal that sentence? The defendant might actually dispute the calculation of the criminal history score. Maybe there's something that they think shouldn't count, or was counted incorrectly. This could happen probably more frequently with out-of-state offenses that you're trying to fit into your rubric. Or there might be a provision in the guidelines that had been written that is unclear and it needs interpretation. To make sure that provision is applied consistently, the appellate law might need to develop. That's why you might have appeals within guidelines. It's really an error-correction mechanism in those cases. Appeals of departures are the second type that you could have. This often is a review on those departure standards. For the reason that the court gave the departure, is there evidence in the record to support that reason? If it's a reason that's never been used before, is it a reason that the appellate courts will accept and add to the list of reasons that might be acceptable for departures, or is it a reason that the appellate courts are going to reject and say, "No, I don't think the court should be using that one and establishing the precedent that that particular reason could be used in the future."

Commissioner Cameron:

I'm curious whether or not there's ever been any statistical data regarding the increase in criminal sentencing appeals based on implementation of the guidelines. My experience with the Ninth Circuit has been that the vast majority of criminal appeals there are not your traditional criminal appeals, but application of the guidelines appeals. Do you have any data on that?

Ms. Mitchell:

I don't have it with me today, but I'm sure I could provide it to you in the future. In Minnesota, there certainly was an increase initially in the percentage of cases that went up on appeal. Over time, that leveled off, and it's still down in the single-digit percentages. Alabama is the state that has most recently moved to mandatory guidelines, and they used to have presumptive guidelines. When they moved to mandatory, they had to add in the appeal layer, because it's a necessary element of mandatory guidelines. They were scared that they would have a huge increase in appeals, and they found that they actually didn't. There were a couple single-digit increases in their appellate rate, but not a lot. Some of those issues will obviously hit right away when the guidelines are initially approved, but it tends to level off over time. I haven't seen a jurisdiction that's been overwhelmed by those appeals. The federal system is a little different because there are so many detailed decisions that could be questioned, and I think that's why appellate rates at that level might be a little higher than in the states.

Chair Hardesty:

In the appeal of departures, those states that allow for that appeal process extend to the state as well as to the defendant, correct?

Ms. Mitchell:

That is a decision to be made in putting that statute into place. I have seen it done both ways. But yes, probably the systems that are more mandatory and actually a little more effective have that appellate right for both the state and the defendant, because there are valid reasons that both might need to appeal under the guidelines.

What's the relationship between departures and appeals? We have found that all of the jurisdictions that would label themselves as mandatory permit appeals of departure sentences, and a lot of them permit within-guidelines appeals as well. All of them articulate a departure standard that gives the reviewing court something to measure that appeal by to govern the appeal. For jurisdictions that end up on the advisory end of this spectrum, several might articulate a standard for departures. But with no right of appeals to enforce that, the requirement is kind of meaningless. There's no one to say it did or didn't meet the standard of review.

This table puts the systems on the advisory to mandatory continuum ([Agenda Item VI A-1](#)). The very first column next to the jurisdiction's name is how the system describes itself. You'll see that the majority of systems describe themselves as advisory, and only Kansas, Minnesota, North Carolina, Oregon and Washington describe themselves as mandatory. But then if you go to the far-right column, that's how we at the Robina Institute actually describe these systems. At the very top, the ones that are purely advisory are ones that don't have any appellate rights and also don't have any parameters on departures. In the middle there, with the District of Columbia, Delaware and Massachusetts, they have no rights of appeal, but they do articulate departure standards. Those are mandatory elements, but they still are in the advisory category because there's no appeal to enforce those standards. Then you get down to Michigan and Pennsylvania, where they allow appeals and they start to articulate departure standards. They call themselves advisory, but they actually lean towards mandatory and they're more enforceable in those states. Then at the very bottom, all of the rights are in place. Departure standards and error appeals are there, and those systems are fully mandatory.

Chair Hardesty:

I very much appreciate your presentation here. I hope you'll be available to answer additional questions and provide some supplemental information that was raised during the course of your presentation.

Assemblyman Fumo:

Thank you very much for your presentation, I thought it was excellent. The question I have is about the mandatory versus advisory states. After *Booker* and *Apprendi*, are there any constitutional or supreme court challenges based on how mandatory the guidelines are?

Ms. Mitchell:

Yes, there are. There are challenges in two directions that the procedures have needed to be developed to redress. The first challenge is how you aggravate a sentence. The case that Assemblyman Fumo is referring to, originally it was *Blakely*. That's the case that applied to the states, and then *Booker* applied to the federal guidelines. What *Blakely* said is that any fact other than the fact of a prior conviction cannot be used to aggravate a sentence. The thing about how sentencing guidelines work, departure reasons are facts other than prior convictions that are used to aggravate a sentence. What happens in sentencing guidelines systems that are mandatory is that any of those facts that the court might use to aggravate have to be proved to a jury. The prosecutor has to provide notice up front that they intend to seek an aggravated sentence, then depending on how the system works, there might be a bifurcated trial to first prove guilt and then if additional facts are needed to prove that aggravated sentence, then there might be a second phase to that trial. Often what I've seen in the way this plays out is that the jury trials are waived and most of this is tried to the bench, in any case. Very rarely do jury trials actually enter into the sentencing decision. If those additional facts are proven, then the court is free to go ahead and do an aggravated sentence. In systems that are advisory, none of the procedures have to take place because the guidelines function as advice to the court rather than as sentences that need to be put in place. It's actually something I find it difficult to get my head around. If you say that you're advisory, then you don't have to follow any procedure. That's one challenge that has occurred and been overcome. I will tell you that Alabama actually moved to mandatory guidelines after *Blakely* and they were really trepidatious about bringing this additional layer of procedure into their system, but they went ahead and did it anyway. They actually found that it helped control their prison population by quite a bit. They're one of the states that the federal government is working with to reduce their prison population. It hasn't been an insurmountable challenge.

The other case that comes into play, a subsequent case after *Blakely*, was *Alleyne*, and they talked about using facts other than prior convictions to set minimum sentences. Those only impact states that use parole systems and set a minimum and a maximum sentence. In Pennsylvania, they were affected, and Michigan was affected. The impact in Michigan is that they were a system that used to be mandatory. Their guidelines had really complex rules for determining what characteristics of the offender would set the minimum sentence. They had to excise a big portion of their rules in order to comply with *Alleyne*, and the Supreme Court there decided to excise the mandatory requirement for their guidelines. Now, they are advisory, and that system is still in flux because they haven't quite found the place of equilibrium with *Alleyne* being a more recent case. In Pennsylvania, *Alleyne* really impacted mandatory minimum sentences, and all of those were removed from their statutes. I think, other than mandatory minimum sentences in Pennsylvania, they didn't use any other facts to set that minimum, so there wasn't any further impact on their sentencing procedure.

Chair Hardesty:

Thank you again, Ms. Mitchell, for your availability and your enormous contribution to the Commission's work, and we will hopefully be able to call upon you as our work progresses for assistance and guidance. I hope that's okay.

Ms. Mitchell:

I'm actually happy to work with the Commission to whatever degree you need our help. I also have a couple of colleagues back in Minnesota who are also interested in helping out if that would be of service to you. Thank you again for inviting me here today and I'm looking forward to seeing what you do next.

Chair Hardesty:

We have a little bit of a time constraint on our meeting because of a meeting that follows this, the Advisory Commission. If I might, I'd like to ask Director Dzurenda if he would proceed with his presentation under agenda item VIII. Then, in the remaining time, we can ask Mr. Anthony to get into some of the historical issues that lead up to where we are today. Director Dzurenda, I think a snapshot of where we are in our State today with the prisons is very helpful. Maybe you could also, if you don't mind, share a couple of observations with the Commission about your experience in Connecticut with respect to the sentencing guidelines approaches in that state.

Commissioner Dzurenda:

First, I just wanted to go over a quick couple data points that I think are important just to look at. We broke down the primary offense categories that we have in the corrections system. These are the sentences, not the arresting offenses. The primary offenses that you can see are primarily drugs, sex and property crimes ([Agenda Item VIII](#)). I tried to break it down a little more, because I think it's going to be important with some of the decisions that we make to look at the severity and risk of the offenses with the lengths of sentencing. I also put down all the sentences we had and tried to break it down into the right category, from those that are less than 1 year to those that are greater than 20 years. You'll see that a little more than 50 percent of our offenders that are sentenced in the Department of Corrections in Nevada are serving less than 20 years. I just want to make it clear that those are offenders who are going home, which is why we really have to look at how we deal with sentencing and discharge of offenders, to reduce not only crime, but to reduce victimization. The other thing I think is going to be important to look at down the road is juveniles that are sentenced into the adult prisons. Currently there are 16 in the State, and down the road, I can explain how we treat juveniles and how we house them and where they're located.

The other thing I think is important, which was already mentioned today, is the ethnicity of our offenders. You can see how it's broken down here ([Agenda Item VIII](#)). That's

going to be important later on with the way we look at our sentences as well. On the second page I've provided, I tried to do an overall breakdown of things that might be of interest. This will spell out success, which comes to not only the financial aspect, and also reduce the victimization. You'll see on this that it breaks it down a little more regarding how much it costs for the different levels of our inmates. The more severe or the higher-risk offenders cost more, obviously, with the number of programs or the amount of security. Age is going to play a factor down the road as well. The amount of parole-eligible inmates and those that are out on parole is also going to play a factor down the road when we start talking about certain sentences.

What I thought was going to be more important to look at,—last week, Connecticut put out an article in the paper of the results of the Sentencing Commission from 6 years ago and what happened in Connecticut. The results of the Sentencing Commission in Connecticut resulted in \$300,000,000 in savings. It spells out a reduction of the prison population of over 6,000 from the changes in the Sentencing Commission, but what's important to look at with that is the reduction in victimization in the community that went along with it. If you do this correctly, when you change lengths of sentences or you add on alternatives to incarceration, then it's not called credits, but it's called earned credits. Should you hold an offender in prison based upon safety in the community because you're trying to reduce the risk in a community, or is it more important to get some of these offenders with a lower risk out into the community with wrap-around services? In the sentencing commission, Connecticut looked at the violent, high-risk inmates to determine how to make those inmates serve more of their original sentences. For the low-risk offenders, how are they going to benefit the community, because they are going home eventually, and how do you do that in the sentence so it makes sense to reduce crime in the community?

If we do make changes in sentencing or sentencing recommendations, I'd urge us to follow one of Connecticut's examples. When you start seeing the cost savings of these changes, you can't move that money to supplement deficit budgets, that savings cost has to go to justice reinvestment. The reason that's important is because, when you start looking at parole and alternatives to incarceration, that's where those cost savings go. Those cost savings in Connecticut, all \$300,000,000, were separated into where that money was going to be distributed. The money gets distributed into wrap-around services in the community, addiction services, victims' funds, and the most important thing I saw was a special education service for those in the lower-level elementary schools, because you have to start there. If we have effectiveness, we really need to start looking at longer-term effects that are going to play out in our community. The other aspect of where that \$300,000,000 ended up going was mental health treatment in the community, which is going to be important to us here in this State as well. When you start seeing these changes in the sentences, how we start releasing offenders systematically and with a methodology, you can't release an offender with less time without those wrap-around services without something that's an alternative to the prison sentence. Just giving fewer sentences, just letting inmates go out into the community, is not going to reduce crime. When you start saving prison money, moving that saved

money into those wrap-around services is going to be the whole key with reducing victimization in the long term.

The other thing I think that's going to be important is where the wrap-around services will go. Connecticut didn't abolish parole, but they looked at ways of not only limiting but abolishing those coming back to prison on technical violations. In Connecticut, you do not return an inmate on a technical violation. What happens is the parole plan has to change. What you're doing with the offenders obviously may not be working, so you change the plan around. But you need to have that alternative plan, and that's where the money goes back into changing the type of alternative wrap-around services, whether it's the different type of addiction service programming, mental health treatment, where they're receiving mental health treatment, where those job centers are located, housing or all of the above. Money has to be a justice reinvestment so that we can make these offenders more successful. When Connecticut was looking at trying to really sell the recommended changes to the Legislature, the point wasn't, "What is going to make an offender more successful," it was, "What is going to make the community safer and what's going to make long term benefits to protect our families down the road" and that's reducing victimization. There is a distinction, which is easier to understand when you start seeing the results.

You saw the large number of sex offenses in the State of Nevada. What Connecticut did, which I thought was important, was distinguish between what is called a sex predator and sex crimes. When you start looking at sex offenses around the country, those that are just sex offenses actually have the least amount of recidivism out of any other crime that's been reported in the Department of Corrections' sentences. Those that are predators have a high rate of return. So, you have to start really looking at what the difference is and where you want to make sure that what you're doing is most effective for public safety. That was something that Connecticut looked at. I don't know if it's something we want to look at down the road, but you did see the large number of sentences that are classified as sex offenses in the State of Nevada.

The other thing I know we can start utilizing a lot more in the State of Nevada is the Nevada Risk Assessment System (NRAS). These have been proven risk factors based on an Ohio system through the Cincinnati University. When you start looking at the real risk, that is a factor, as well as the length of time between sentences. This can be difficult to determine in Nevada, because 28 percent of our prison population are not inmates from Nevada or have no known address. When you start looking at risk assessment, you have to start calculating in age, family, behavior, treatment, sex offense treatment and mental health treatment. All of these are factors in risk assessment. When you start utilizing these in the courts, you'll start seeing what really makes sense for some of these sentences. There are those that we want to make sure are in prison, and those that will benefit more when they're out in the community. The most important thing is not just putting them in the community, but having those alternatives and making sure that someone violating parole has alternatives. Having these options rather than prison will make those offenders more successful. Like I kept

saying, making them more successful means that we're going to be seeing fewer victims and less crime in the community.

Six years after Connecticut started implementing these changes to the Sentencing Commission, crime rates went down almost 40 percent. That was directly related to the prison population and those changes in the sentencing structures. A lot of the sentencing structures changed our consideration of what are considered violent crimes and nonviolent crimes. When you start breaking those down and look at drug offenses, the mandatory drug sentences that were in Connecticut were changed to misdemeanor sentences, but wrap-around services in the community became mandatory for these sentences. You need to have those wrap-around services if you start changing some of the sentences, because if you're not putting those with drug offenses in prison, we need to have something to help them change their behaviors while they're out in the community.

Finally, when we talk about data, it's also important to know about levels of reported crime, not just the crime rate or those that were charged with a crime. Connecticut did this as well. We should look at how many calls were made into a jurisdiction or a police department that a crime has happened. Even though no arrest comes out of it, we'll know if those levels of reported crime changed as we started making changes to some of the sentences. When we change community-release programs or prison release, we'll see what happens with reported crime rates as well.

We can really make a big difference in this State, and making that big difference isn't just about reducing victimization. Making that difference includes what we can do with our education in our communities. Like Connecticut, we have to start really looking at juveniles in the education system, along with the risk of being incarcerated down the road and focusing on the educational piece to keep that risk to a minimum or reduce it. In Connecticut, we found that special education populations are one of the most dramatic areas in which you can reduce risk down the road. In a previous meeting of the Advisory Commission on the Administration of Justice, I mentioned that Connecticut has one of the few super-max prisons in the country. When I first took over as the commissioner of all the prisons and jails in Connecticut, we saw an increase in violent crimes over a 4-year term in the super-max prison. These were crimes that were happening in prison. When we broke down the history of the inmates and their offenses, we didn't find that they were related to drugs or gang involvement like we had thought. We found that 60 percent of those offenders that were causing the crimes were the same inmates over and over again. When we took those 60 percent out, we found out that over 75 percent of those 60 percent were those diagnosed with autism, Asperger's, dyslexia or had IQs less than 70. We moved that entire population to a different part of the state and focused on programs around those populations and educating those offenders on what their diagnosis actually means, how to keep themselves from being revictimized by future involvement with gangs. We found out that the majority of these offenders didn't even know they had these diagnoses. When we put them back in the community, we started really using the money that was being saved in the reduction of

prisons for wrap-around occupational therapy, speech therapy, physical therapy, social skills, networking and having services in the community for these offenders to get away from the drug dealers. We focused on services that could teach them real morals and set up relationships with mentors. That was a big, huge piece in how we started reducing crimes and preventing these offenders from coming back into the system.

The other portion of data points that I thought was important was our veteran population. Our veteran population in Nevada is currently 1,024. When you look at the overall population, that is the highest number of inmates per inmate population of any other system in the United States. So in the Sentencing Commission, we have to start looking at what are we doing when we start looking at sentences that are related to dementia, dramatic brain injury and post-traumatic stress disorder (PTSD), all of which are issues that we're starting to deal with in Corrections around the veteran population. So, we have to keep bringing it up to remind us that it's not so clear and black and white when we're starting to look at some of these offenders and the risk, because it changes down the road. We also have to start looking at how we can get those services in the community so we can stop receiving them in our prisons. I know we can build on this as time goes on, but I think those data points are going to come up when we start to talk about specific crimes or sentences.

Assemblywoman Tolles:

I appreciate the data, and I just had a question in regard to the primary offense categories pie chart ([Agenda Item VIII](#)). I'm having a difficult time differentiating the color scheme, so I'm just wondering if you could help fill in the correct categories with the percentages so I am comprehending that correctly.

Commissioner Dzurenda:

Yes, I will. So, in our primary categories, you do have some that are overlapping. That's why this is a basic breakdown of these categories. You may have some that we categorized between drugs and violence that were two different crimes that were still part of the primary sentence category. But we have to really break it down a little further into the actual nature of the crime, because some crimes could be drug related that are violent, so you're going to have some overlapping categories. A lot of the ones that we don't find to be overlapping are the sex offenses. On this chart, we tried to do it in order from right to left ([Agenda Item VIII](#)). So, the 13 percent is related to drugs, the 3 percent is driving under the influence (DUI), 5 percent is "other," property crime is 19 percent, sex offenses make up the 16 percent and the violence offenses are 44 percent. Like I said, the violence offense has a lot of overlapping categories as well, so it needs to be broken down further, but that's what's spelled out here.

Commissioner Hicks:

I'm just curious, from your experience in Connecticut, what distinguishes a sex offense and a sex predator?

Commissioner Dzurenda:

A lot of it is the psychological evaluations that were done. I'm not 100 percent sure what the evaluation is that they do on the offenders. I know it's separated, but the evaluation is actually done by a psychologist or psychiatrist to determine the difference between a predator and an actual sex crime, for most of them. Some of them are pretty clear cut. What really took the turn on the sex offenses was what to do with the registry of sex offenders, trying to separate those that really needed to be part of a sex registry, which are predators, and those that were maybe just related to two minors or charges that were related to urination in public or exposing themselves in public, which most of the states have changed already, so it might be different. I don't know what that is. I know you're looking for the exact difference between the two, and I'm not sure that it's as clear cut and black and white, but there is a distinction in Connecticut, which I'm sure we could do some research on when we start looking at it.

Senator Kieckhefer:

I was curious about the drug offenses. I've heard the narrative before that our prisons are full of nonviolent drug offenders, but I'm trying to figure that out from the offenders you see that are there exclusively for drug offenses. How would you respond to the narrative that our prisons are full of nonviolent drug offenders? If you have data to break that down, that would be helpful for me.

Commissioner Dzurenda:

Like I said, I think what's going to be important is breaking this down a little more. You have to look at drug offenses, and this is something I'm sure we're going to look at because different categories of drug offenses are dependent upon weight or the amount of drugs that the offender was actually arrested for. There is a difference with nonviolent drug offenses, which are inmates that are caught with pounds or large kilograms of drugs as opposed to those that are just small amounts of drugs. It really determines what we're going to look at with the Sentencing Commission on the amount, I don't know if we're going to be able to determine the amounts, but we'll determine the levels of the crime. It's not just drug categories, because there's such a huge range. For example, drug trafficking is not violent, but it's actually a pretty significant crime that could affect the community. So, something like this would have to be broken down further.

Senator Kieckhefer:

I appreciate that, because it is hard to understand some of those discrepancies. There are certainly nonviolent crimes that are worthy of significant prison sentences.

Chair Hardesty:

I think this Sentencing Commission needs to look at the mandatory nature of some of our drug sentences as well. You heard that from Ms. Mitchell and Director Dzurenda. Some of those mandatory sentences will add prison days. Some of it's appropriate, some of it isn't, but I think it needs to be taken into account in the guidelines. But one of the points I wanted to mention that the Director mentioned, so that it isn't lost on anybody, is that a lot of our drug laws are built around weights. Well, a weight in opiates, for example, is not a very significant issue. You could have a Splenda or less that can have a significant impact, so one of the things that the Commission might want to consider is how the drugs themselves are being categorized so that we're more effective in dealing with some of those, rather than just focusing on weights. I'd defer to Commissioner Hicks and Sheriff Logan and others, but it seems like weights are not as appropriate a measure of assessing the seriousness of the crime as the type of controlled substance and its impact.

I want to leave time for public comment, but I also want to cover a couple of other things. We haven't really had an opportunity to have a free-for-all conversation about areas that people would like to explore or get additional information about, so I'm going to offer this as a suggestion. Based on what you've heard, if each of you wouldn't mind—this is another homework assignment in addition to the data request—I'm requesting that each Commissioner please provide within the next couple of weeks a communication to the staff counsel, Mr. Anthony, with a list of either questions or areas that you feel the Commission should consider or look at. I want to try to build a solid agenda of information around which we can make informed decisions. So, obviously, your input has to be areas that you have an interest in or that you'd like to see further developed or you'd like to see us reach out to others to gain additional input. That would be very valuable. I've spoken to chief justices in Utah, Washington, Alabama, Connecticut and Michigan about making their Sentencing Commission people available to provide experiences and what they learned and what they saw differently. If you're interested in those kinds of presentations, I think we should let Mr. Anthony know that, because I know that those folks are very interested in sharing their experiences and their data and information with us. Mr. Anthony, we'll defer this presentation to the first agenda item on the next agenda. I hope that our next meeting can be longer than 3 hours so we can really grapple with a lot of these issues, and we'll obviously take into account the suggestions that you all have.

Judge Togliatti:

For the list of questions or areas, should we keep it at the 30,000-foot view, or are these things that are something more specifically related to sentencing issues? I guess I'm looking for some direction as to how much minutiae we're talking about.

Chair Hardesty:

My preference is the latter rather than the former. The more minutia and the more specific, the better off I think we'll be. We've seen the 30,000-foot, so to speak. We probably have questions about the 30-foot. I think we can gain some valuable input by getting into the minutiae from other states' experiences. That's what I was referring to earlier. Also, when you look at these grids, it can be a little bit daunting. You're thinking, "Whoa, what are we doing here?" I think one of the things that will be a huge challenge for this Commission is to take a look at the various crime types that are contained on the agenda. A lot of folks don't really realize how many crimes we have, what the various elements are and how they're broken down. How do you approach that? Based on the comments Ms. Mitchell made earlier, most states look at an offense severity level of 0 to 15. That to me personally has some appeal versus five categories that you can't even define. But those are the kinds of debates that we need to have. In order to make real progress, I think minutiae are exactly what we need.

Sheriff Logan:

Can we also look at the urban, rural and frontier counties as they relate to services? We talked about the wrap-around services. There's a lack of services that we have in the smaller communities to address some of those things and sentencing, as Commissioner Hicks said, of how a crime in one community is addressed, versus much bigger communities where you have parole and probation officers, whereas in my community, we don't. We don't have counseling and things of that nature, so we can discuss where possible savings can be addressed and directed.

Chair Hardesty:

Sure Sheriff, and I'd request that you include that on your list of areas. But I want to make an observation about this, because the Advisory Commission has talked a lot about this in the past. I particularly want to mention this because we have four new legislators sitting here that haven't really been exposed to this topic before. It's directly related to the rurals. If one is concerned about the prison cost of incarceration, we actually force our rural communities into a default position. The judge has no choice but to incarcerate someone, where if there were wrap-around services, they would not do so. So, we're paying a much greater cost to incarcerate those folks than trying to figure out ways to make available those wrap-around services for the kind of folks that would otherwise not be in the prison system. I do think that's part of your point.

Commissioner Dzurenda:

To build on what you just talked about, just so everybody understands the financial impact, 1,000 inmates incarcerated in the State of Nevada costs us in the State about \$14,000,000 to \$18,000,000 a year depending on the level of the inmate. That is about three times more than the cost it would be just to put services out in the community. You can add additional services that aren't even out in the community to make these offenders more successful by not even having them in the prison setting. So, it's important to find out which inmates really need to be in prison and which ones would actually benefit more in the community, and the cost that we're going to save down the road without seeing some offenders coming back in. The reduction of victimization is going to play a big role in all of this.

Commissioner Callaway:

This is the same mindset I had last interim. We could spend the whole interim just going through this document from Director Dzurenda and trying to pick apart this graph. We talked about the 30-foot rule. I think this is the 30,000-foot level. Just looking at the pie chart, you could argue that 60 percent of the folks in prison are either violent offenders or have committed some kind of sex offense. That category of the drug offenses is a huge area. As was stated, it could range from drug trafficking to the use of date-rape type drugs, and the intent of that is to use them on another person. If someone's in prison for DUI, they've probably had multiple offenses or they've hurt or killed someone driving under the influence. My point is, the fact that we have a Sentencing Commission, that the Legislature approved this, means that there are some areas in our process that can be improved. So, for the sake of the brief time we have, my suggestion would be that we make an effort to try to identify the areas where maybe we're doing things right, and maybe where we're doing things wrong, and then put our efforts toward fixing those areas where we might not be doing the best we can. I'm not trying to put a bunch of work on anyone, but I think it would be interesting to take these processes or graphs that they have in New Mexico or one of these other states that has a sentencing commission and throw our data on top of that. Take the offenders from our system and use the Minnesota graph to look at our offenders and see where they fall. If we see a trend of, "Wait a minute, in Minnesota or Alabama, this person wouldn't even be in prison," or maybe we see that we're kind of falling in line with some of the other states even though we don't have a sentencing commission, I think we could save ourselves a lot of time and effort if we could identify key areas that we could make improvements upon, and use our time in the interim wisely.

Assemblywoman Tolles:

I certainly appreciate the analysis on the deep level of each category and certain specific offenses, but I am curious too if it would be beneficial for our Commission to take a step back and first establish what our criteria for decision making is and come to some agreement on what kinds of outcomes we're looking for, how we're going to base

our decisions as we get into the minutiae and how they fit into that overarching goal. I'd be interested to hear from the Commissioners how they determine success in those goals as well.

Chair Hardesty:

Seeing no further comment from the Commission, I will open agenda item X, public comment. Seeing none, I will close public comment.

Commissioners, within the next 2 weeks, please offer an email to Mr. Anthony making suggestions along the lines that were already articulated so we can begin to develop some shape and direction for the Commission to attack some of these issues.

I will now adjourn this meeting at 12:11 p.m.

RESPECTFULLY SUBMITTED:

Jordan Haas, Secretary

APPROVED BY:

Justice James Hardesty, Chair

Date: _____

Agenda Item	Witness/Agency	Description
Agenda Item A		Agenda
Agenda Item B		Attendance Roster
<u>Agenda Item V</u>	Nicolas Anthony, Commission Counsel	Senate Bill 451
<u>Agenda Item VI A-1</u>	Kelly Mitchell, Robina Institute of Criminal Law and Criminal Justice	Sentencing Commissions and Guidelines Presentation
<u>Agenda Item VI A-2</u>	Kelly Mitchell, Robina Institute of Criminal Law and Criminal Justice	The Role of Sentencing Commissions
<u>Agenda Item VI A-3</u>	Kelly Mitchell, Robina Institute of Criminal Law and Criminal Justice	What are Sentencing Guidelines?
<u>Agenda Item VII A</u>	Nicolas Anthony, Commission Counsel	History of Criminal Sentencing Categories in Nevada
<u>Agenda Item VII B-1</u>	Pat Guinan, LCB Research Division	Category A Felonies
<u>Agenda Item VII B-2</u>	Pat Guinan, LCB Research Division	Category B Felonies
<u>Agenda Item VII B-3</u>	Pat Guinan, LCB Research Division	Category C Felonies
<u>Agenda Item VII B-4</u>	Pat Guinan, LCB Research Division	Category D Felonies
<u>Agenda Item VII B-5</u>	Pat Guinan, LCB Research Division	Category E Felonies
<u>Agenda Item VIII</u>	James Dzurenda, Director, Nevada Department of Corrections	NDOC Statistics