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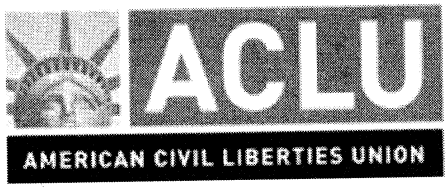

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TESTIMONY PRESENTED TO THE NEVADA ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE

PRESENTED BY

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Good morning Chief Justice Hardesty and other distinguished members of the Advisory Commission on Administration of Justice. My name is Larry Frankel and I am the State Legislative Counsel in the Washington Legislative Office of the American Civil Liberties Union (ACLU). The ACLU is America's oldest and largest civil liberties organization. We have 53 affiliates and more than half a million members. Our affiliate in Nevada has approximately 3,000 members. As State Legislative Counsel I work with ACLU legislative advocates in all 50 states. One of my primary responsibilities is to monitor legislative trends. An area of particular interest to us is sentencing reform.

I became the ACLU's State Legislative Counsel earlier this year. Prior to taking this position I spent 15 years as the Legislative Director for the ACLU of Pennsylvania. In that capacity I became quite familiar with a range of criminal justice and sentencing issues. I regularly lobbied the Pennsylvania General Assembly on many of the very subjects that this Commission is considering.

I also had the honor of serving on the Advisory Committee on Geriatric and Seriously Ill Inmates established pursuant to Pennsylvania Senate Resolution 149 of 2002. Serving on that advisory committee allowed me to see first hand the range of problems posed by overcrowded state prisons. It also provided me with the opportunity to become familiar with some of the latest ideas for addressing a number of those problems.

Today, the primary focus of my testimony will be habitual offender statutes also known as recidivist statues.

HABITUAL OFFENDER STATUTES AND NEVADA'S HABITUAL OFFENDER STATUTES

Habitual offender legislation dates back to the 16th century in England and colonial North America. Unlike many of the current habitual offender statutes, these early laws were limited to criminals who specialized in certain kinds of crimes and only imposed harsher sentences on people convicted of identical crimes. Sundt, Joey L. and Turner, Michael F., *'Three Strikes and You're Out Legislation: A National Assessment,* 59 Federal Probation 16 (September 1995). Although habitual offender laws continued to proliferate and expand during the 20th century, the last several decades have seen a dramatic growth in the breadth and depth of state habitual offender laws.

Currently, all fifty states have some sort of legislation that provides for enhanced punishment for recidivist offenders. While the numerous habitual offender regimes in the states have a similar fundamental structure, they differ with respect to the details: which offenses trigger the application of the habitual offender statute; which predicate offenses are counted; the range of sentences that are required, and the amount of discretion judges retain in determining an appropriate sentence. Although Nevada's statutes compare favorably on some of these criteria, there are ways that they can be improved.

California enacted a habitual offender statute, commonly known as "Three Strikes and You're Out," in 1994. It is arguably the nation's harshest habitual offender law. Under the California law, a person convicted of any felony who has twice before been convicted

of felonies designated by the legislature as serious or violent, is to be sentenced to life imprisonment. The broad scope of what counts as a prior offense, the absence of any meaningful judicial discretion, and the fact that any felony can be counted as the third strike, has led to results that many believe are unduly harsh and fiscally unsound.

Shortly after the enactment of the California law, Leandro Andrade, a nine-year Army veteran and father of three, was caught shoplifting children's videotapes. Because twelve years earlier he had been convicted of three unarmed residential burglaries, the trial judge was required to sentence him to an indeterminate life sentence with no possibility of parole for fifty years.

By and large, states have tried to target their habitual offender statutes on those who repeatedly commit serious and violent felonies such as murder, rape, robbery and aggravated assault. Maryland, Massachusetts, Nebraska and Tennessee have habitual offender statutes that require that a sentence of incarceration must have been imposed for the prior convictions for those offenses to be considered under the habitual offender sentencing scheme.

States also vary over how much discretion judges are given. States that have enacted "Three strikes" laws generally require mandatory sentences (often without parole) upon the third conviction for specified crimes. Other states continue to provide judges with some discretion in applying the particulars of the statutes. Nevada is one of the states that preserves a degree of judicial discretion in one of its habitual offender statutes.

Nevada's habitual offender system operates through three different statutory sections. The first is N.R.S. Section 207.0101, Nevada's basic habitual criminal statute. Under this section there are two levels of habitual criminality. Under subsection (a), a person who is convicted of a crime where fraud or intent to defraud is an element, or of petit larceny, or any felony, who has two prior felony convictions, or three prior petit larcenies or misdemeanors where fraud or intent to defraud is an element of the offense is deemed to be a habitual criminal and is to be sentenced to 5 to 20 years. Under subsection (b), a person convicted of any felony who has been previously convicted of three prior felonies or five prior petit larcenies or misdemeanors where fraud or intent to defraud is an element shall be sentenced to: (1) life without possibility of parole; or (2) life with possibility of parole with eligibility for parole after ten years has been served; or (3) for a definite term of 25 years with eligibility of parole after 10 years. Discretion is given to the prosecuting attorney as to whether to seek a finding of habitual criminality and discretion is given to the trial judge to dismiss a count under this section.

Nevada has two other habitual criminal statues. NRS Section 207.012 targets habitual violent offenders. Under this section, a person convicted for the third time of a listed violent felony shall be sentenced to: (1) life without possibility of parole; or (2) life with possibility of parole with eligibility for parole after ten years; or (3) for a definite term of 25 years with eligibility of parole after ten years. No discretion is given to the trial court to dismiss.

Under NRS Section 207.014, a person convicted for the third time of a fraudulent felony, where each victim has been an older person or a mentally disabled person shall be sentenced to a five to twenty year term with no judicial discretion to dismiss.

While Nevada has preserved some judicial discretion in its habitual offender laws, those laws still cover a very large class of offenses. Nevada has not limited the application of its habitual offender statues to violent or serious felonies. The laws not only cover low level and non-violent felonies but also cover some classes of non-violent misdemeanors. Eliminating the over-sentencing of nonviolent offenders under Sections 207.0101 and 207.104 is one way of relieving Nevada's overtaxed criminal justice system. Consideration should also be given to adding to those sections a requirement that a sentence of incarceration must have been imposed for the prior convictions in order for them to be considered under the habitual offender sentencing regime.

CRITICISM OF HABITUAL OFFENDER STATUTES

Constitutional lawyers and academics have criticized habitual offender laws for many reasons including potential violations of the Fifth and Eighth Amendments to the United States Constitutions as well as their frequently unjust results, their limited ability to reduce crime and their restriction on judicial discretion.

The most common constitutional attack on habitual offender statutes is that they place defendants in double jeopardy by punishing them twice for the same crime. See, Seltzer, Nathan H. "When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause," 83 Boston University Law Review 921

(October 2003). Lawyers have argued that under habitual offender statutes, an offender is punished once when he is sentenced for a criminal offense and then punished a second time when a harsher sentence is imposed for a subsequent offense and that harsher sentence is attributable to the fact that the offender had been convicted of an earlier crime.

To date, the United States Supreme Court has not found this argument to be persuasive. The Court has said that habitual offender laws do not subject defendants to double jeopardy because the first crime is not considered to be an element of the second crime, or the creation of a new crime. Rather, the first crime is used only to enhance the punishment for a second crime.

But, Justice David Souter has warned that: "As triggering offenses become increasingly minor and recidivist statutes grow, the sentences advance toward double jeopardy violations." *Lockyer v. Andrade,* 538 U.S. 63, at 77 n.2 (2003) (Souter, J., dissenting) Thus, even though the Court has yet to sustain a double jeopardy challenge to a recidivist statutes, it would be unwise to completely ignore Justice Souter's statement that there may be a claim that he and his colleagues would consider under the Double Jeopardy Clause.

The Court has rejected many claims that the punishment prescribed under a habitual offender or recidivist statute results in cruel and unusual punishment. The Court has set a high threshold for what it considers a violation of the Eighth Amendment. In *Ewing v.*

California, 538 U.S. 11(2003), the Court, considering California's Three Strikes law, held that only extreme sentences that are grossly disproportionate to the crime violate the Eighth Amendment. By a vote of 5-4, the Court upheld a life sentence without parole for a defendant whose third strike was stealing three golf clubs worth $1,200.

But in *Solem v. Helm,* 463 U.S. 277 (1983), the Court held that the life sentence without possibility of parole imposed under the South Dakota recidivist statute was so grossly disproportionate as to be unconstitutional under the Eighth Amendment. That decision shows that at times the Court will consider the gravity (or lack thereof) of the offense that triggers the enhanced sentence under a recidivist statute.

Others have put forth public policy arguments against habitual offender statutes. V.F. Nourse, in his article, *Rethinking Crime Legislation: History and Harshness,* 39 Tulsa Law Review 925 (Summer 2004) observed that crime legislation from the 1920's and 30's is remarkably similar to the laws passed in the 1980's and 90's. Nourse contends that habitual offender laws are cyclical, do not produce effective criminal justice, and are often only enacted by legislatures to address the fears of the public. He points out that the situation in the 90's, like that in the 30's, produced many of the same kind of ineffective laws merely to address public fears.

This argument that recidivism statutes are more about public fear than effective crime fighting was also articulated in a Justice Policy Institute Policy Brief: "Three Strikes and You're Out: 3 Strikes Laws, 10 Years After Their Enactment" (2004). The author of that

paper looked back to 1994 when California passed the first three-strikes law in the modern round of habitual offender statutes. Over the next ten years many states followed California's example and enacted three-strikes laws or other kinds of recidivist statutes to address public fears about crime. However in the late 90's public opinion began to shift away from habitual offender laws.

By 2004, half of all the states had changed their sentencing laws, abolished mandatory sentences, or reformed parole policies to ease overcrowding and reduce the rate of incarceration. According to the author, the cyclical nature of these habitual offender laws is evidence that their enactment has more to do with public perception of how bad crime is since there is little evidence that such laws actually influence the crime rate.

One of the reasons that the habitual offender statutes have little impact on the crime rate is the fact that they are largely redundant. See, Clark, John "Three Strikes and You're Out: A Review of State Legislation," (National Institute of Justice: Research in Brief, September 1997). Of the states that adopted three-strikes laws, 23 of the 24 already had habitual offender statues on the books for the covered offenses. (Kansas being the exception.) Frequently, the three -strike statutes only mandated harsher punishments or broadened what qualified as a triggering offense. In some cases nonviolent felonies became triggering offenses.

Proponents of habitual offender statutes argue that these measures are reducing crime by extending the sentences of offenders who are likely to recommit. Certainly, it cannot be

disputed that a person will not be committing crimes against the public while he is imprisoned. However the effective impact that longer sentences have on reducing the crime rate is suspect because longer sentences only reduce the crime rate if the incarcerated person would be committing crime were he not in jail. Beres, Linda; Griffith, Thomas. "Habitual Offender Statues and Criminal Deterrence" 34 Connecticut Law Review 55 (Fall 2001).

Furthermore, as Marc Mauer points out in his book, *Race to Incarcerate,* longer prison sentences for nonviolent offenders suffer from what he describes as diminishing returns. The reason that longer sentences produce diminishing returns is that most criminal careers last only five to ten years. Most criminal start their careers when they are young, many of them when they are between the ages of 16 and 20. Most offenders do not receive the legal sanctions for being in a recidivist status until they are in their 30's. But, the rates of recidivism dramatically decrease the older an offender gets. Thus most habitual offender penalties do not affect offenders until they are past their prime crime committing days and probably are near or at the end of their criminal careers. This means that the extended portion of the sentence will prevent far fewer crimes because during the extended portion of the sentence the offender is less likely to reoffend. See Beres, supra.

In a recent report, the Vera Institute of Justice summarized current research that looks at the relationship between incarceration and crime rates and found that most analysts have concluded: "that continued growth in incarceration will prevent considerably fewer, if

any, crimes than past increases did and will costs taxpayers substantially more to achieve." *Reconsidering Incarceration: New Directions for Reducing Crime,* (January 2007). (In that report the Vera Institute also discuss the problem of increased incarceration of drug offenders that leads to inadequate capacity in prisons for incarcerating those who might be deemed to be more serious offenders.)

Many have criticized habitual offender statutes because they, like all mandatory sentencing statutes, limit judicial discretion. Judges are not allowed, in most instances, to consider the age of the offender or other potentially mitigating factors. Habitual offender statues severely limit the ability of a judge to account for all of the facts in a case and may force them to impose an unfairly harsh punishment on a non-violent offender. Clark John. "Three Strikes and You're Out: A Review of State Legislation" (National Institute of Justice: Research in Brief, September 1997

NATIONAL TRENDS

Over the last few years we have seen a significant trend in many states towards sentencing reform. One of the key changes has been the refinement of statutes and policies to better distinguish between violent and non-violent offenders. States are recognizing that their prisons are finite resources and that prison space needs to be primarily used to protect the public from physically dangerous offenders. States are also recognizing that sentencing judges must be given greater discretion in determining who goes to prison and who receives an alternative sentence both to better address the risks associated with any particular defendant and to conserve limited state resources.

I would commend to you two reports from The Sentencing Project that review developments in sentencing policy and practice from 2004 though 2007. Those reports detail the changes that are occurring in the areas of sentencing law, parole and probation, drug courts, and reentry assistance. They show just how many states are taking a serous look at the kinds of issues this Commission is studying. (In fact, among the developments reported by the Sentencing Project in their latest report are Nevada AB 508 and AB 510 from 2007).

[The Sentencing Project reports can be viewed at:

http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf

http://www.sentencingproject.org/Admin/Documents/publications/sl_statesentencingreport2007.pdf]

I will briefly review for you some of what has happened around the country in the area of sentencing reform as I believe these changes can guide your consideration of possible reforms in Nevada. In Maryland, in 2007, legislation was passed that allows individuals convicted of burglaries prior to October 1, 1994, and sentenced to a mandatory minimum sentence, to have their cases reviewed for parole eligibility. In Delaware, Maryland and Rhode Island we are seeing significant legislative activity that hopefully will result in the repeal or reduction of some mandatory minimum sentences for certain drug offenses.

Quite a few states have passed legislation that established or expanded diversion options, including drug courts, for drug offenders: Connecticut, Hawaii, Indiana, Louisiana, Maryland, Michigan, Montana, North Dakota, Pennsylvania, Texas, Utah, Virginia and Washington. The New York Legislature passed the Drug Law Reform Act of 2004,

which addressed several of the concerns with the harsh Rockefeller Drug Laws. One of the changes made by the 2004 Act permits certain prisoners to petition for resentencing under the revised laws and another provision increases the available reductions for merit time.

Arkansas and California are allowing the early release of non-violent offenders as one means of dealing with prison overcrowding. As you know, Nevada passed AB 510, which, among its many provisions, extended the number of days of "good time" that a prisoner can earn.

Colorado, Oklahoma and Pennsylvania have directed commissions to study sentencing policies including taking a look at the efficacy of mandatory minimum sentences.

Another good source of information on what is happening in various states with regard to sentencing practices and reforms is the recent report from The Pew Center on the States called "One in 100: Behind Bars in American 2008." [This report can be viewed at: http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf]

In that report there is a description of changes in Kansas and Texas that have helped those states contend with their growing prison populations. The changes are intended to help those states make sure they have enough prison space for violent offenders while

providing less dangerous offenders with the assistance they need to become productive and taxpaying members of our communities.

Responding to a tremendous growth in the number of state prisoners, the Texas legislature, in 2007, passed legislation that resulted in a major expansion of drug treatment programs in prisons as well as an increase in drug courts. The legislators also enacted significant changes in parole practices that allowed for a variety of intermediate sanctions that could be imposed on technical violators. Utilizing intermediate sanctions should allow Texas to free up prison space for violent lawbreakers. The reforms are also projected to save the state of Texas approximately $210 million over the next two years.

Kansas looked at how it treated offenders who violate the terms of their probation or parole. The legislators were faced with a situation where nearly two-thirds of the prison admissions in Kansas were the result of probation or parole revocations and ninety percent of those were for technical violations. The legislature commissioned a survey and found that a majority of Kansans favored combining prison construction with programs to assist offenders avoid reincarceration. Ultimately the Kansas legislature established grants to help community corrections agencies cut down on the number of parole and probation revocations. Those grants were used to track and monitor revocations and to develop guidelines for revocation decisions.

Finally, I would be remiss if I failed to mention what is happening in Pennsylvania where the Department of Corrections, Parole Board, District Attorneys Association and the

counties have come together to support a package of reforms that includes many of the strategies that have been utilized in other states. The package provides for more opportunities for offenders to be placed in intermediate punishment programs, particularly programs that offer substance abuse treatment. The package creates what is called the recidivism risk reduction initiative (essentially a form of good time) so that prisoners will have an incentive to complete rehabilitation programs offered in the prisons. The legislative package also contains parole reforms and changes to the Sentencing Commission. (For more information about the contents of the Pennsylvania package and the rationale for it, please see the transcript of the Pennsylvania House Judiciary Committee on November 15, 2007, which can be found at: http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2007_0207T.pdf)

This reform package has passed the Pennsylvania House and it is expected to pass the Pennsylvania Senate before the end of this year.

CONCLUSION

Nevada, like so many other states, is taking another look at how it uses prison resources and how its criminal justice system can better distinguish between violent and non-violent criminals. One way that Nevada can address this problem is through a modification of its existing habitual offender statutes so that non-violent offense will not be treated as predicate or triggering offenses under the statutes. Another reform would be amending existing law so that only prior offenses that led to a sentence that included a period of incarceration would be treated as predicate offenses. Such changes would be consistent with the direction that many of its sister states are moving and could help Nevada cope with its fiscal problems associated with a booming prison population.