

**MINUTES OF THE 2017-2018 INTERIM
ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE'S
SUBCOMMITTEE ON PRE-TRIAL AND SENTENCING
IN THE CRIMINAL JUSTICE SYSTEM**

December 18, 2018

The meeting of the Advisory Commission on the Administration of Justice's Subcommittee on Pre-Trial and Sentencing in the Criminal Justice System was called to order by Chair James Hardesty at 1:05 p.m. at the Legislative Building, 401 South Carson Street, Room 3137, 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
Christine Jones Brady, Deputy Public Defender, Washoe County
Julie Butler, Representative, Central Repository
Mark Jackson, Douglas County District Attorney
Judge Jim Wilson, Carson City District Court

COMMITTEE MEMBERS PRESENT (LAS VEGAS):

Paola Armeni, Representative, State Bar of Nevada
Chuck Callaway, Police Director, Las Vegas METRO
Amy Rose, ACLU of Nevada, Inmate Advocate

COMMITTEE MEMBERS EXCUSED:

Assemblywoman Lisa Krasner, Assembly District No. 26

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:

Tonja Brown, Advocate for the Inmates, Advocate for the Innocent
Quentin Weld, Policy Specialist, Community Resources for Justice
Maura McNamara, Policy Specialist, Community Resources for Justice
Len Engel, Director of Policy & Campaigns, Community Resources for Justice

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

I will now open the second meeting of the Advisory Commission on the Administration of Justice's Subcommittee on Pre-Trial and Sentencing in the Criminal Justice System. I believe Ms. Armeni is planning to be here, so we will mark her present when she arrives. Let's open up [agenda item III](#), public comment.

Tonja Brown (Advocate for the Inmates, Advocate for the Innocent):

Last time we were here, there was discussion over parole boards and the risk assessment. I failed to mention, because some of you are new, perhaps maybe you may want to go back to, I believe, September or August of 2016 and look at the presentation submitted to this Committee by Flo Jones and myself. It really gets into some of the reasons why the Parole Board is denying inmates parole. Some of the information that was provided was sometimes there's false information in their files and it's not corrected so they view that. I won't get into all the details, but Flo Jones is correct. If the risk assessment is low, then you must let them go. Inmates will have that as a low risk to reoffend and it will remain that way for years and they fail to parole them.

Chair Hardesty:

Thank you very much, Ms. Brown. Seeing no additional public comment, I will close [agenda item III](#). The minutes have been prepared by staff ([Agenda Item IV](#)). I had an opportunity to review them and I don't have any corrections or changes. Does anybody have any edits they wish to offer? Is there a motion with respect to the minutes of the meeting of November 29?

MR. JACKSON MOVED TO APPROVE THE MINUTES FROM THE NOVEMBER 29 MEETING OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE.

JUDGE WILSON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Hardesty:

I will open item V of the agenda, and I would like to make a couple of introductory remarks before we get started on that. First of all, I want to thank everybody for dedicating your time to this effort. I appreciate all the work that's taken place since our last meeting. Today, we will continue our discussions from the last meeting and cover a new topic area of pretrial diversion that we weren't able to get to in the last meeting. At the end of our meeting, the goal was to have a set of recommendations that will focus our system's resources on serious offenders, reduce recidivism by eliminating the exposure of low-risk offenders to high-risk criminogenic behavior and address behavioral health crisis impacts in our state. The objective is to come to a consensus to the extent we can on recommendations and put forth the best steps Nevada can take for a more effective criminal justice system. Just as a reminder to our group for the goals here today, as you know, the Governor and the leadership of the Legislature tasked the Advisory Commission with conducting a comprehensive analysis of Nevada's criminal justice system, using this information to develop policies that increase public safety, hold offenders accountable and shift resources toward more cost-effective public safety strategies. I hope all of us will approach this discussion with our charge in mind and think about implementing measures to make our criminal justice system better. It is not our role to think about what will pass the Legislature or how things will be paid for. I think we need to approach this with the opportunity of what should be best for Nevada and the criminal justice system. With that said, we have a package of information that summarizes many of the key data, system assessments and so forth ([Agenda Item V A](#)). Quentin Weld from the Crime and Justice Institute (CJI) will lead us in a review of the key data findings and research, and after these meetings I would like to have Commissioners authorize certain of these recommendations to be forwarded on to our January 11 meeting. As you know or as you will recall from our last meeting, I had asked everybody to consider a homework assignment with respect to the subject of burglary. We talked about how burglary is the predominant driver of Nevada's prison population and how our statute appears to be an outlier among most states. We identified how it does not require any type of breaking in or unlawful entry and it doesn't differentiate between types of structures like other states do. I think the members of the subgroup were generally supportive of breaking down the burglary statute, and I asked for the homework assignment so we could do that. Most of you responded. I think Mr. Anthony has distributed to all of you the responses that we got. Actually, I was quite interested in that. There was quite a bit of general agreement on some aspects. We have a chart containing policy options that CJI has prepared based on the responses to the homework assignments ([Agenda Item V A](#)). I will ask them to explain

those policy options, and then I would like to have a discussion among the subgroup as to whether any of these options are appropriate to move to the full Commission. Additionally, I see that Ms. Armeni is now present.

Quentin Weld (Policy Specialist, Community Resources for Justice):

You noted that for most of these policy areas in this packet, there are a few options for each of them that are in there based on comments made by members of the subgroup at the last meeting and, in certain circumstances as you mentioned, based on information that members returned to the Commission in the past few weeks, specifically with regard to burglary. These options aren't necessarily set in stone, obviously. It is the hope that members will agree on some version of either. But with regard to the first area of burglary, we have the first column there listed in option one, maintaining the highest sentence for home invasion as it is currently written, and then descending to create some separation between home invasion and "simple residential burglary" and then descending there all the way to a misdemeanor for motor vehicle. The second column reflects a change to home invasion. That was a comment by a few different members at the last meeting that it might be odd for the penalty for home invasion and residential burglary to be the same in Nevada. That's certainly the case from our research. It is the only state we have found where those penalties are generally the same. This has a higher sentence for home invasion and adding additional elements. Last but not least is the fact that all of these options would add an unlawful entry requirement, as is the case in the overwhelming majority of other states. An offender would be required to enter the structure unlawfully or remain in the structure unlawfully after they should have left. With that, I will turn it back to you.

Chair Hardesty:

Thank you. You had a couple weeks to think about it. Some of us have written suggestions. I for one was trying to open a debate, frankly. I wasn't sure anybody was going to respond to the homework assignment so I was putting mine out there because I just wanted to open a debate about breaking up the burglary statute. I see that several of you did that. But as to the options that are here or other options, I'd like to hear from each of the members of the subgroup about what you think. Mr. Jackson, you wanted to initiate a comment?

Mark Jackson (Douglas County District Attorney):

I had set up a very brief, unfortunately, telephone conference with the district attorneys (DAs) across the state in connection with that homework assignment. As a result of that, I submitted to the Advisory Commission on behalf of the District Attorneys Association what our recommendations would be for any changes to the burglary statute and reform associated with that. It is not included in any of the options, and I don't know if CJI had

received a copy of what I had, kind of following how they do it in the Legislature where the omitted material is included in brackets and red bold and interlineation and then other changes would be in blue bolded italics. Basically what our primary concern was—and there has been a lot of testimony, there's been a lot of information provided to not only the Subcommittee but the Advisory Commission as a whole from CJI in collecting this data from across the state, and focusing in on some of the reforms, part of that stated goal is to reduce the number of inmates in our prisons across the state, but you've heard from individuals like Chuck Callaway, a member of the Subcommittee, a member of the Commission, that we can't sacrifice public safety for money, and the focus shouldn't be just about trying to get people out of our prison, it's to make sure the right people are being let go out of our prison or the right people are not being sent to prison, and the biggest concern we would have again goes back to the public safety of someone that would have been sent to prison under what our current laws are that isn't sent to prison and then continues to commit crimes and takes advantage of the citizens of the state as well as all of the tourists that we welcome to our state each and every day.

With that in mind, looking to our neighbor to the west, California, I'm sure that every member of the Commission—I know that CJI is well aware of Proposition 47 that passed in 2014. The purpose of Proposition 47 in California was basically what is being suggested to the Subcommittee and ultimately to the Commission and what will be brought before our Legislature. There were some initial studies as to what was the effect of Proposition 47 following its enactment in 2014. A lot of those initial studies are now being attacked because it is the most underreported types of crimes where people just aren't reporting them because they are not being policed, they are not being enforced whatsoever. There was a study that came out in June of 2018. I have an article here from the Independent Institute. The new study concludes that Proposition 47 caused California's smash-and-grab crime wave. It reads, and I'll just read parts of it, "Many Californians had high hopes for Proposition 47, a ballot initiative passed in November of 2014 with 60 percent voter approval. The measure reduced penalties for some crimes, including certain drug violations, to help relieve overcrowding in state prisons." In addition to that, the vehicle burglaries and thefts—there were significant changes kind of in line with what's being recommended before the Subcommittee today. It continues, "While Proposition 47 succeeded in meeting those objectives, it also triggered a major unintended consequence. It set in motion a wave of smash-and-grab motor vehicle burglaries and a surge of retail shoplifting. For this reason, Proposition 47 has earned the dishonor of receiving the Independent Institute's fifth California Golden Fleece award, which is a recognition given to state or local government programs or laws that either break the public trust or swindle taxpayers." It continues, "The main reason Proposition 47 spurred an epidemic of property theft and destruction was its weakening of criminal penalties. By raising the monetary threshold for felony theft to \$950 in property value, up from \$500 before the measure passed, Proposition 47 lowered thieves' expected cost of criminal activity. By reducing penalties associated with car break-ins, shoplifting and other property crimes and by making it more difficult to issue felony sentences, Proposition 47

deprioritizes justice for California residents and businesses, which are now increasingly victims of vandals and thieves operating with near impunity.” It goes on and it makes certain types of recommendations. There was a similar article in the *San Francisco Chronicle* talking about that Proposition 47 is linked to a rise in vehicle break-ins and thefts. The motor vehicle break-ins and motor vehicle burglaries averaged 16,000 to 17,000 a month before Proposition 47 passed. It has now increased to 20,000 a month or over the course of those following 2 years. In San Francisco, vehicle burglary soared by 24 percent last year in 2017 to a total of 31,222. There is quoted a manager of an apartment complex regarding the thefts that stated that literally every single bicycle at that apartment had been stolen. Because of the reduction to the misdemeanors, law enforcement officers, as you know, can only arrest for felonies committed in their presence. Because of the large number of crimes, they have an arrest rate or prosecution rate that falls below two percent on these types of property crimes that have been reduced down to misdemeanors. There is discussion in these reports about—I don't know if anyone in the Subcommittee has been to San Francisco since 2014, but you will see—I would dare anyone to go to the city and not see someone inject heroin into their veins. When I went a few months ago, I saw it on two occasions a block from each other. Law enforcement officers were standing 10 feet away from an individual as he was injecting heroin into his veins and there was no enforcement action whatsoever. Part of it is because, as Chuck Callaway had commented on at the last hearing, some of these offenses that even Clark County is looking at right now on these misdemeanors are literally just a walk-through. If it's a citation only, why issue the citation when the person is not going to appear and there's not going to be any ramifications as a result of it? That is part of the basis as to why the District Attorneys Association stands first and foremost that public safety must be paramount to anything else, and it's not just about reducing crimes expecting that recidivism rates will go down, that we will reduce our prison population.

In connection with the burglary, under the existing statute, Nevada Revised Statute (NRS) 205.060, suggested changes were to try to clean up some of the language, removing the word “tenement.” It is covered by the word “room” and “apartment.” Removing the outdated “house trailer” and inserting the word “travel trailer” or “motorhome.” But as far as the vehicles, the vehicle, a vehicle trailer or semitrailer, an airplane, a glider, a boat, a railroad car, removing those from the burglary statute, NRS 205.060, and we would create another statute, NRS 205.061, for example, that would be entitled “vehicle burglaries” definitions and penalties and venue. Under the burglary statute, as Justice Hardesty had talked about some of the cases that he presided over as a district court judge of even exploring the possibility about increasing the penalty for residential burglaries. Is the 1 to 10 enough? Does that give district court judges enough discretion during sentencing? In some of these really egregious cases, is that limit enough? The District Attorneys Association is not recommending changing the sentence for vehicle burglary from 1 to 10 years but did include in there that there would be an increase if the residence was occupied by a human being at the time that the entry was made and it would be 2 to 15

years sentence on that. Also, increasing the firearm from the current 2 to 15 years to 2 to 20 years, and then under the vehicle burglary, very similar language to what the current burglary statute is, but again it would include the vehicle, vehicle trailer, semi-trailer, trailer, airplane, glider, boat, railroad car, and it would reduce that down to a category C felony with a punishment as provided under NRS 193.130. The home invasion would remain the same. However, again, if it was occupied at the time, if there was someone present or the use of a firearm, it would go to 2 to 20 years.

Those are our recommendations. I am extremely fearful that we would take something as serious as some of these burglaries and consider reducing them down to a misdemeanor offense without having the opportunity to examine what these unintended consequences are, not only in California. The *Denver Post* did an investigative report 2 years ago, and in their investigative report they came across the same thing that Californians are now looking at with their Proposition 47 of some of those unintended consequences and individuals that would've been sentenced to prison under Colorado's existing laws prior to the reform resulted in multiple murders, law enforcement officers being shot and killed, sex assault victims who were not only assaulted but then murdered, all because these individuals in the reforms where someone would have gone to prison, they were out because these crimes have been reduced down simply to misdemeanor offenses. Again, it comes down to the public safety, and I would really hope that the members of the Subcommittee would take a serious look at this and we would spend some time—or perhaps we are out of time. This is our last Subcommittee meeting. We only had two, but with the hopes that the Sentencing Commission could move forward from this legislative session. I really think we need to take a hard look at this, and the Sentencing Commission would be the perfect venue to be able to really explore this issue more.

Chair Hardesty:

Thank you, Mr. Jackson. Does any other subgroup member want to comment?

Amy Rose (ACLU of Nevada, Inmate Advocate):

I just want to say a couple of things that I hope our subgroup can keep in mind as we go forward. We are here to look at what we can change and what we can do better. I think looking at the enormous amount of data and analysis that CJI has given to us, we have a lot of areas where we can change to make the criminal justice system better, to make our communities better, to make our communities safer. It's not just about letting people out of jail for the sake of saving money. What this is about is are we putting the right people in jail for the right amount of time to achieve the criminal justice outcomes that we want? I am convinced from the data and many, many meetings that we have had with CJI that we are not, and so I think we do need to make some serious changes beyond just reducing some penalties here and there. I think we need to give more guidance to judges. We need to break down specifically what they need to do. We saw through the CJI data

that it is really—when you just say category B felony for all burglaries, 1 to 10, there are some people who are going to prison for 10 years for motor vehicle theft, and that I think we as a Committee had decided, or there was a lot of discussion, that that's really not what we think is an appropriate punishment for someone who has committed that type of an offense, so I just want us all to think about is what we're doing here, what our purpose is. This isn't just to save money, this is about improving our communities. This is about making Nevada better, and this is about making a difference in the criminal justice system and the way that it runs today. I just want to point out a couple things too, and I understand Mr. Jackson's concern with some of the burglary statutes, but the only thing that's being changed to a misdemeanor from all of the two options that are being presented to us, and we can of course do whatever we'd like, but from the options that we have from CJI today, it's only motor vehicle burglaries that are going down to a misdemeanor for the first or second, and then for the third would be a category E, so everything else still remains a felony. I just want to point that out to the Committee also so we all understand what that is. I think what's also important to understand about the burglary statute as it is today and what I understand from speaking to CJI and listening to all of their presentations is the way that we have it broken down right now, where it's category B, 1 to 10 years regardless of whether it's a motor vehicle or home invasion or someone's breaking into a store or shed is really out of step with the way that the rest of the country has their burglary statutes set up and the way that people frankly think about what burglary means and so there really does need to be some type of reform and breakdown of the way that we sentence and the statutes and the guidelines that we give to judges so we can have a fairer and more just outcome and make our communities safer. I like both of these options to think about what can we do. I think option one makes a lot of sense and I really like changing the statute to say that it has to have unlawfully entering or remaining in, because we don't have that now. I think, again, to make our burglary statutes more in line with what a burglary really is, which is being somewhere unlawfully, that we need to add that part in. I think I would be more in favor of option one, although I think both of them are good changes. I like breaking down the statute into different categories so we can more accurately reflect in sentencing what the crime actually was and to help guide judges throughout the state when they are doing that to make sure the sentence is appropriate for the crime that is committed.

Chair Hardesty:

Thank you, Ms. Rose.

Chuck Callaway (Police Director, Las Vegas METRO):

I'll admit going into this that I did not do the homework assignment. I had every intent to do the homework assignment, but I did some soul searching on this burglary issue and had a discussion with officers who are out there working on the street and I had discussion with property crime detectives who are investigating these offenses on a daily basis.

There is no doubt we've had the discussion that the burglary statute is broad, but the crime of burglary is in and of itself broad, and I'll explain what I mean there. I think as we go into this, there are things that we know and things that we've been given data on, and then I still think there are things that we don't know. For example, we know that Metro's jurisdiction alone, and I've said this before, we have on average about 13,000 reported burglaries a year in Metro's jurisdiction alone. I reached out to Washoe County to try to get their numbers, Henderson, North Las Vegas, and if we put them all together, I'd say conservatively we probably have somewhere around 20,000 burglaries in the state occurring annually that are reported, not counting ones that go unreported. What we do know also is that the data we were given was that 442 burglars were put into prison in 2017 in Nevada based on the data we were given. What we don't know about those 442 burglars and what I've asked for and have not gotten an answer to is, first of all, what were those 442 burglars? Were they residential burglars? Were they auto burglars? Were they the trailer, the plane? What was the crime they committed that landed them in prison? Number two: what was their previous criminal history? How many of those 442 burglars was that their very first burglary that they committed in their life and they ended up in prison? What was their original charge that they were charged with that was plea-bargained down potentially to burglary? Were they charged with armed robbery and it was plea-bargained to burglary? That we also don't know. Like I said, since we're talking about lowering auto burglaries to misdemeanors, how many of those 442 were auto burglars that committed one auto burglary offense and they ended up in prison? I still think that the scary thing to me from a public safety and law enforcement perspective is—and again, when I talk public safety, we all agree that violent crime is the number one priority, but quality of life is also a high priority. These burglary offenses strike at the very core of our community when people are getting their vehicles, their homes, their residences broken into and getting their personal property taken. This strikes to the very core of our communities when it comes to quality of life. If you are afraid to go to bed at night in your own home, I can't think of crimes, obviously other than sexual assault and murder and gang-related crimes, that have that much impact on public safety and people's fear in the community. Again, we've had discussions in here about the plea-bargaining issue, so as was described to me, if we reduce these crimes to a misdemeanor for auto burglary and someone can commit multiple offenses before it becomes a felony and we have already established that the vast majority of auto burglars are already getting away with what they're doing because only 442 of them went to prison, so of those 442 that got caught or were convicted, they can continue to commit the crime multiple times as a misdemeanor before they're ultimately convicted and receive a felony, and then throw in the plea-bargaining component of it. It just seems to me like we are making the career of auto burglary a lucrative career for folks if that's what we choose to do.

As I thought about this, I don't think that changing the categories—changing the penalties does not address the issue, which is people stealing from other people. I'd like to use analogies, and I know it's apples and oranges, but we could say that running stop signs is a broad crime. There are people that say, "Hey, no cop no stop," and they fly through

at 50 miles an hour, and then there are people that are paying attention and accidentally roll through, and there's California stops and some stuff in between. We can say, "Well, we've had a lot of citations and crime last year for people running stop signs. Maybe we should break that down into categories and maybe rule the California stops not as serious as the person that just flies through," and we're still not addressing the issue, which is the issue of people running stop signs, and I think that that applies here. Just saying that we're going to make auto burglaries a misdemeanor is not addressing the issue of the crime that is occurring, which is people stealing other people's property. As I went through this and I wrote down my notes and what popped into my head, I think it all comes back around for me to what we as a society and as members of society on this Commission, what we on this Commission and what the Legislature feel are the appropriate sentences or the appropriate punishments for these crimes, and obviously that's a very objective topic and we could sit here and argue forever whether it should be 1 to 6, 1 to 10, should be a misdemeanor, should be a gross misdemeanor, and then all those other factors that we have debated forever come into play. I think that Mark Jackson hit the nail on the head when he talked about resources and absolutely when he said that first of all, a crime if it's a misdemeanor offense has to appear in the officer's presence for us to take action, so literally someone can get their car broken into and have it on surveillance video and know where the person lives or see the person walking down the street away from the scene of the crime and call the police and if the crime didn't occur in the presence of the officer, the most we're going to do is take a report and submit it to the DA for potential charges against the person, and we all know for a misdemeanor offense that's probably not going to happen or it's going to be rare that it happens. Again, what is the message we are sending to the community? People's vehicles in a lot of cases are their livelihoods. We talk about how this is a broad category for burglary. Vehicle break-ins are a broad crime because you have commercial vehicles—I'm a plumber, I drive my car home and park it in the front of my house and somebody breaks in and steals my plumbing tools that I need for work, or maybe I'm living in a motorhome, maybe I'm retired and that's my residence, and it's parked in the Walmart parking lot while I'm in buying toilet paper or whatever and someone's out there breaking into my motorhome that I live in. It's my residence, but it's a vehicle. These are wide categories and I think that saying that this is a misdemeanor offense, I just can't support something like that.

Then there's the other component that was brought to my attention by detectives and folks that I talked to was these vehicles are often damaged in this process. Windows are busted out, the locking mechanisms are damaged, the windows won't roll up or down after the burglar gets inside, and these are vehicles that people have to repair. They have to use them to get to work. It's very expensive to replace a window on a car. Yeah, we can say that you could add the cost of the window. You could do them for the misdemeanor auto burglary and then I guess you could try to go after them for destruction of property for the window, but if we raise the threshold of those crimes as well then those are misdemeanors, so we get ourselves in a vicious circle, I believe.

I also wanted to bring up the issue of guns in cars. We have thousands of guns stolen every year in burglaries, both residential and some people make poor choices and leave their guns in their vehicles, and so breaking into a vehicle and stealing someone's gun out of the car would be a misdemeanor offense, and then we've got more guns on the street. There's an education component for law enforcement on that where we try to get word out to people not to leave firearms in their vehicles, and then again the threshold of crime. I just bought a new firearm recently for personal protection and I paid \$499 for it, so it would be a misdemeanor crime to steal my gun under the current law, and are we going to raise the threshold? I know that's another topic, but are we going to raise the threshold higher?

Finally, we recently had a case with storage units, and this actually—the same similar situation happened to me. I was on vacation and a pipe broke in my house. My home flooded and I had to move out while repairs were being done, and I had to move probably 90 percent of the property that was in my home into a storage unit, including jewelry, including musical instruments, family paintings, things that have been in my family for a long time. Thankfully I wasn't a victim of a crime, but recently we had a similar case where a well-known individual in town had moved some of their property into a storage unit while they were moving and had family jewelry stolen from inside the storage unit. Just because the burglary occurs to a storage shed or storage unit again doesn't mean that it doesn't have a significant impact. It's your property, some of your property that can't be replaced. I understand that when we look at this, we're trying to categorize and determine who we want to go to prison, and I agree that somebody that goes out and commits one of these offenses the first time doesn't necessarily need to go to prison, but by the same token I can't support lowering the penalties to the point where we're enabling folks to commit crime over and over and victimize our citizens and not be held accountable, if that makes sense.

Chair Hardesty:

Director Callaway, you proffered a lot of good information there. I wanted to get some clarification though. Is it your view, Director, that there should be no amendment to the burglary statute at all? In other words, you wouldn't support any change to it, or am I misunderstanding your position? Because as I understand it, what you said, I want to cover a couple of points because I think that it's important. You made it clear that you don't approve of any of the burglaries being changed to misdemeanors, and I get the point you're making there. But I also want to remind everyone that section 4 of NRS 205.060 changes the outcome if a person who commits a burglary, and that would include any of these burglaries, has possession or gains possession of a firearm or a deadly weapon. Part of my recommendation was that wouldn't be changed in any respect. If it was a \$440 pistol and someone obtained it, they just bought themselves a 2 to 15 category B whether it was out of a vehicle or whether it was out of a storage shed. The comment with respect to firearms I don't think is being changed at all. But in between that, in between not doing

anything or not having misdemeanors and not addressing firearms, what I'm trying to clarify, Director Callaway, is whether you would oppose reclassifying the lengths of sentences. That's really what we're talking about here. All of these are felonies with the exception of the misdemeanor issue, and I understand your comments there, but after that, they're all felonies. It's just a matter of whether it's a C, a D or whether it's 1 to 4, 1 to 10, 1 to 7 or 1 to 5, so I was wondering if you had thought about that or wanted to comment about that.

Mr. Callaway:

First of all, to clarify my position, I don't support the two options that I have in front of me on this document ([Agenda Item V A](#)). I haven't seen it, but I conceptually support the proposal that the district attorneys made. What I would say is this, and I've said this in the Advisory Commission in the past is I'm a firm believer—and I know this is where folks get frustrated because they think this is where maybe the unfairness comes into play, but I'm a firm believer in discretion. I've said before that law enforcement is not black-and-white, it's gray. Every single case is different, every case has different circumstances, every case has different mitigating factors. I'm a firm believer in not only discretion for law enforcement officers in the field—like I've said, we don't want every person that gets pulled over to receive a ticket every single time. Sometimes the officer needs to have discretion to say that's not best for this situation, and I think judges need that same discretion, so what I support is the judge having the ability to look at these cases on an individual basis and say, “You know what? This was the first time this guy broke into the car, and he was out of work, it was Christmastime,” whatever the facts are, “so I'm going to give this guy probation” or whatever, versus the judge saying, “You've been in my courtroom 4 times for this, so I'm sentencing you to prison for 6 years.” I think to me that's a key component is giving the judge that ability, so if the statute needs to be tweaked in order to give our judges that ability to use their discretion when they hear these cases and give a sentence that's appropriate for each case versus a blanket saying that every time someone breaks into a car, let's say it's a category B felony, I don't think that best serves justice. I think it's best on a case-by-case basis, and obviously there has to be a framework. We don't want the judge saying, “You're going away for 40 years, and you get 2 days,” but I think there needs to be discretion as a critical component of that framework, if that makes sense.

Chair Hardesty:

Right now, as you know, the statute makes all burglaries regardless of where they fall in the range of behavior a category B, and while the judge has discretion to sentence between 1 and 10, the fact that it is a category B has other ramifications, so while it is true that the judge may have some discretion in terms of whether to send them to prison or what the length of the sentence is, the judge has no discretion between category B and any other category. That is part of, I think, what is being considered in these options. The

other thing is that under our current statute, it's essentially a two-strike statute. By the time you get to the second burglary, regardless of the type, it's mandatory prison.

I'm not trying to cross-examine anybody, I'm throwing out comments for people to be thinking about as we look at the breadth of the burglary statute in our state. Director, I don't know if you wanted to comment further about my observations or if we'll just move on.

Mr. Callaway:

Yes, I would. I think that you're making very valid points, and maybe that gets to the core issues that we need to be addressing here is maybe the change needs to be that in auto burglaries the judge has the ability to deviate from the restrictions of a category B felony. Maybe, as you said, the second offense isn't automatic prison, the judge has that discretion, but saying let's take these and make them a misdemeanor offense or let's move them from a category B to a category D or something doesn't in my mind address those issues that you raised.

Chair Hardesty:

Okay. Ms. Armeni, did you want to comment on the burglary statute?

Paola Armeni (Representative, State Bar of Nevada):

Mr. Callaway hit a lot of points and I honestly wasn't writing fast enough to give a counter, but I think we need to remember that CJI did a lot of work. They came in as a neutral party, didn't have a bias in their evaluation of our system and have made some recommendations, and I think it's really important that—all of us come with a little bit of bias, I think we can all agree to that, but we should all keep an open mind and, more importantly, try to figure out what we can compromise on. I venture to guess that I'm comfortable saying that most of us would agree in this room that a home invasion is at the most serious end of the spectrum and perhaps a vehicle burglary with no occupant inside is at the lower end of the spectrum, and that's what we're trying to do here is we're trying to see how do we evaluate the spectrum of degrees of seriousness of different burglaries and provide the appropriate sentence. I understand that one of the goals of CJI is to see who we have in prison and eliminate maybe some of that unnecessary population. As I stated during our last meeting, I think it's broader than that and that we are too quick, and even with this recommendation, frankly, we're still labeling people as felons right off the bat. As I said last time, that is something that I think we should consider, because once you label someone a felon, that changes their life very much and may continue, or once they've gotten labeled that and they start to have one obstacle after another, it is very possible that they would continue this life of crime.

Just a couple comments: I don't disagree with Mr. Callaway about the motor vehicle. I don't think it should be a felony. I think my recommendation was a first should be a gross misdemeanor and the second would rise to the level of a felony and that is—we're not giving, as Director Callaway said—I understand his concern is that we are allowing people to get away multiple times and it is still a misdemeanor, but I don't see that as the recommendation here. Even the recommendation here is the first one or two are lower level but then it will actually go up to a felony, and I think the enhancement is a good way to, I think, meet in the middle a little bit, lower the offense level for some of the burglaries but also have on the backend of it a higher enhancement after—basically they get one chance, and after that the penalties and the category of the felony increases. The other thing is, our recommendation was—and I talked to both the Nevada Attorneys for Criminal Justice (NACJ) and I talked to our Clark County Public Defender's Office. One of the things that I would have liked to have seen here with a commercial building is a differential between business hours opposed to nonbusiness hours and the seriousness in the punishment based on that distinguishing factor. Again, to the judge's discretion, it would be nice if, for instance, a burglary in a commercial building during hours where nobody is present, perhaps that gets not to a robbery and the judge has the discretion at that point to say, "I'm going to give them the felony," or based on the circumstances, this requires a gross misdemeanor. I will state that I don't think after your first offense, I don't think you're entitled to any of the benefits of a gross misdemeanor. I think at that point we do move to a higher felony category, but I do think there are some of these categories like the commercial building or the other buildings, if they're not occupied or they're not during business hours, that maybe a judge's discretion would be better served in determining whether they're going to characterize this person as a felon with a category E felony or in some circumstances a gross misdemeanor.

The other thing that I had recommended, and I'm sure Director Callaway will correct me if I'm wrong, but it's been my experience with a lot of burglaries tend to—it's a younger offender, an offender under 21 years old, and I really, really, really would like to see some sort of diversion program that if a youthful offender under the age of 21 picks up a first felony burglary that they are given the opportunity to prove themselves and go through a diversionary program, and perhaps at the end of that either get a dismissal or a gross misdemeanor, something less so that they do have the opportunity to move on with their lives. Just some highlights. I probably have more comments, but those were the general ones that I wanted to touch on.

Chair Hardesty:

As I did with Director Callaway, I wanted to pose a question to you, Ms. Armeni. Under either option one or two with the motor vehicle burglary, my understanding of its categorization as a category E, that would extend to the judge the authority to treat that for diversion. It would also be probatable, so it seemed to me that—and I understand the debate going back and forth between gross misdemeanor, a misdemeanor or no

misdemeanor, but if that were a category E, that seems to me the judge then has the maximum amount of discretion to avoid incarceration and at the same time direct the defendant to a diversionary program. The diversion statute would have to be perhaps expanded slightly to recognize that, but it seems to me that that would afford the judge the maximum opportunity to address that kind of situation. Do you care to comment about that, or do you want to just hear from other folks first?

Ms. Armeni:

I think I would be open to that in the art of compromise. I really think that we need to find a way that we are not immediately labeling people that do these offenses, especially more so for the first time offenders, that we are immediately labeling them a felon. If they have the opportunity to go through a diversionary program, I think that takes into account that you're starting off with a felony because this is a serious offense and we want to respect that, but we're also giving them the opportunity to learn their lesson and not label them as a felon at the end of the day.

Chair Hardesty:

Okay. Let's hear from Ms. Jones Brady.

Christine Jones Brady (Deputy Public Defender, Washoe County):

What we did at the Washoe County Public Defender's Office was we conducted a focus group that consisted of a variety of our employees. We had the Public Defender from Washoe County, John Arrascada. We had people in the focus group from our chief deputies, including Maizie Pusich and John Petty, and we also had other chiefs and input from people consisting of the felony area, appellate area, family law area. I say that to say that not everybody in the focus group agreed 100 percent on everything. There was a robust discussion in this area. First of all, the overall ideas though, there was an overall consensus of—let me start with the judges, that there should be more judicial discretion regarding the burglaries. That concerns disfavoring the mandatory prison on the second burglary. There should be more judicial discretion. There should be more judicial guidance in the sense of maybe going to—in option one or two where the vehicle or commercial burglaries would be a different category than the home burglaries. We felt that that gave the judges some guidance as to what was appropriate for sentencings, but then also—so we have the judicial discretion, judicial guidance to the judges, but also judicial responsibility and that judges should be compelled to give more findings of facts concerning why they might deviate up or down on a given case. One of the things was that sometimes they'll just go along with the district attorney's recommendation or Parole and Probation's but they don't give really a good robust reason as to why a particular defendant deserves a prison sentence or a longer prison sentence.

With that, I also wanted to comment about the community. Everyone in the group felt that community safety was paramount and that they agree that a residential burglary of a home is different and more dangerous, and so they agree that that should not be disturbed in terms of home burglaries and that there should also be more allowances within the home burglary. If we were able to separate out residential burglaries where you have enhancements, so even though grand larceny of a firearm is a whole other category B crime of itself, as is possession of a stolen firearm and burglary with a firearm, those are all really separate enhancements there, but of course enhancements with weapons used or stolen, enhancements with people being home and other aggravators so that there would be aggravators, that would ratchet up the 1 to 10 to more, to 2 to 15 or 1 to 15, those things. Just going off of our discussion, they would probably be leaning really to sort of a combination of the two, maybe option one but with the home invasion and the—let me go back. The people in the group thought we should do away with home invasion. They felt it was redundant that the home burglaries should be the home invasion statute, so maybe it would be residential burglaries/home invasion, have that together with the enhancements built in and available for the judges to be able to sentence people.

Back to the community safety, there was a discussion about the fact that many of our defendants in Washoe County are members of our community and their families are members of our community. We talked about how much time we spend as public defenders in Washoe County just working with families and consoling families and families helping us to get treatment and different things, and that leads me to the next point we discussed was that the point of this—we were hoping the goal of this is not just to reduce sentences to save money so that the money can be used for miscellaneous stuff but that we would invest in services so that people would be getting help. Right now, we have a month's waiting list for people to get a bed in a treatment program. We have people that aren't able to get mental health services. More people want to get into mental health court than mental health court can take, and so families come to us crying for help, and there really are not a lot of choices for their loved ones. That was a big part that people talked about too as an aside is that we have more services. This isn't just reducing sentences but getting more services to the people so that they can get help. Part of that would be like the graduated enhancements, so in a case like a first-time offender where there is evidence of drug use or mental health, that there would be some sort of mandatory—even on the vehicle burglaries being a misdemeanor, there would be some sort of mandatory drug treatment or court that they could participate in, whether on the misdemeanor level or on the felony level, but they couldn't just get a ticket and call it a day. They would have to go through program of treatment, so that would mean obviously more money or more resources towards the specialty courts. Of course, people in my office are big fans of the specialty courts. Moving a little bit more on the value, there was debate on whether or not we should take account of value of items taken in burglaries. Some people thought maybe we should. To I think it was Director Callaway's point of sometimes you can take a gun from someone's car or something very valuable from a shed and that should still be—how was that taken into account? We didn't come up with

any conclusions necessarily, but there was a robust debate regarding possibly taking into account the value of items and then graduated enhancements trying to do away with the mandatory prison to give judges discretion for that. Those were some of the things just on the burglaries that we talked about. I think we would probably lean, just going off of what I remember people talking about, the option one, but then maybe melting in the residential inhabited dwelling with the home burglary, kind of melting those in together.

Chair Hardesty:

Judge Wilson, did you have any comments about these options or other options?

Judge Jim Wilson (Carson City District Court):

Several comments: I guess the first are, between the last meeting and this, I have been thinking about unintended consequences, and I wondered what the effect of some of these changes if they were made would be, and I think that's a valid point and something that we need to consider. I'm wondering if CJI has other information about other jurisdictions in their experience in changing—if San Francisco and Denver or whatever the *Denver Post* was reporting on is characteristic or an anomaly. I'm wondering about causation. A statute changes and there's an increase, so there is certainly correlation and maybe there's causation. I guess I'm just not sure about that. As we've been talking, there have been extreme examples given. For example, in an auto burglary, if the burglar causes \$5,000 in damage to the vehicle breaking into the vehicle and then steals priceless heirlooms and this is his tenth felony offense, that's kind of on one end of the spectrum. On the other hand, and this has happened to me, somebody walking through my neighborhood, an unlocked door, they just open the door. There's no damage. They take whatever change is in the ashtray, which in my case is a dollar or less. Should that be a felony? Perhaps we're not talking about that because the district attorneys have wide discretion, and perhaps no district attorney would charge a felony under those unlocked doors, dollar in change. But somewhere between that and the other extreme, there are cases that, having thought about it more, I was thinking the auto burglary should be a misdemeanor, but if we consider the harm caused and make that part of the statute, that makes sense to me. If they cause a lot of damage in breaking in, if the amount of the harm because of the value of the property because it's just an heirloom, whatever that might be, it seems to me that gives the judge and the district attorney discretion on what's charged and what an individual is sentenced for. Those are my comments.

Chair Hardesty:

Thank you, Judge. If you don't mind, I'd like to ask a follow-up question to the point you made earlier about value of the property. One of the things that we're going to talk about, hopefully we'll get to it next, has to do with the value that is assigned to theft and whether that amount should be reconsidered. In the context of rather than looking at a dollar in an

ashtray but what the theft numbers are, if the burglary did not cause damage but the amount taken was less than the theft amount, so it would otherwise potentially be a misdemeanor, then you would be suggesting that that would be a misdemeanor burglary? Or maybe it would be a gross misdemeanor, I don't know, but if it were above that theft amount that it might be considered a felony, and perhaps then a category E? Is that my understanding of what you were expressing there?

Judge Wilson:

Yes, and that's with the understanding—or I guess I'm assuming subsection four of the statute, currently if they're stealing a firearm, it doesn't matter the value. I'm assuming that that's a separate case. Otherwise, yes.

Chair Hardesty:

The property being taken is not a firearm, it's something else?

Judge Wilson:

Correct.

Chair Hardesty:

Okay. Ms. Butler, did you want to offer some observations?

Julie Butler (Representative, Central Repository):

I've actually been a victim of this myself in a motor vehicle smash-and-grab several years ago. They smashed a window in a vehicle, had to replace that, had to replace the locking mechanism in the door and took all of our clothes. We were on a family vacation, and one of the things that I was really bummed about was my youngest son was seven at the time, and they took all of his stuffed animals. I swear if I could have put the person in jail at the time right then and there, I certainly would have done it. They obviously never caught the person. What are you going to do? But a misdemeanor, at least relating to my personal experience, it was pretty devastating, and I would like to see that at least be bumped up to a gross misdemeanor, but I do like the thought of graduated. You don't throw the book on them maybe the first time out, but I think misdemeanor may be a little too lenient. I would like to give prosecutors and judges the discretion to consider the appropriate aggravating and mitigating circumstances and criminal histories of the person. From that perspective, I kind of like the framework and where the discussion has been going.

I did actually submit this to my staff. We deal in a different realm. We're not so much the boots on the ground that deal with this day to day, but as far as our business, it would

help us if these statutes were worded such that it is very clear what is a first offense, what is a second offense, distinguish enhancements during business hours or nonbusiness hours, inhabited or not inhabited. Because of the way the Nevada Offense Codes work and how we share this data electronically statewide, the more specificity we can give, the easier it is then to share the data electronically statewide between disparate criminal justice information systems.

Finally, there had been some talk about diversion programs, and one of the things that my office deals with are the background checks for firearms. To the extent that we are diverting these people that commit these burglaries into a substance abuse treatment program or mental health treatment program, we need to know because we don't want those folks to get firearms in the course of—if they go down to Cabela's and try to buy them while they're under a diversion program for mental health issues because they are burglarizing places to get money wherever. Those are my observations. I appreciate the opportunity to make these statements.

Chair Hardesty:

Thank you, Ms. Butler. One of the things I would like to do is circle back to a comment made by Ms. Jones Brady, and I want to go to the upper end first in discussing burglary and throw this out there for people to comment about. It seems to me that with the exception of the element of forcible entry, there isn't a lot of difference between home invasion and burglary. Would you all agree that essentially that is the only same element, forcible entry? From my standpoint, I'm not sure that that element should distinguish the punishment, because whether the entry was made forcibly, and there have been numerous examples around our state where the entry was just an unlocked door and a horrible crime ensued, warrants a pretty severe punishment? I guess my point is that one of the things that I was looking at is treating those kinds of crimes that I referred to in our previous conversations differently. Burglary would be treated in one way and home invasion, whether it is forcible entry or not, would be treated separately. It occurred to me that the forcible entry or the home invasion statute would be modified to take into consideration those most egregious of entries, forcible or otherwise, that would create the highest level of consequences to the person who commits that crime. Quite frankly, sometimes I'm sure, and I would imagine from the prosecutor's point of view, that element might be easy to prove in some cases or very difficult to prove in other cases, but what we are pointing to in all of this is the safety of people in their homes and in their residences. I know this is a little bit different than what has been talked about in the options, but it seems to me that when we are in the context of home invasion, I would just remove forcible entry and talk about any entry into an inhabited dwelling in a residence, day or night or whatever.

Returning to the burglary statute then, what you end up with is, based on our various comments, I want to offer a suggestion. I recognize this is vastly different than what Mr.

Jackson is pointing to. I appreciate his point, but I want to open the discussion to see whether an option three is something that a majority of the subgroup would be inclined to consider. Option three from what I'm hearing from everybody would be, in the context of a motor vehicle, the first offense would be a gross misdemeanor depending upon value, and if the value is less than the theft value, then it would qualify as a gross misdemeanor, but if it exceeds the theft value of property, it would then become a category E felony. Then, with respect to category E felonies, that would occur on the second offense. But in any event, the category E felonies would qualify not only for probation but also for diversion in the judgment of the trial judge. Then, the remaining suggestions here for other buildings, commercial buildings and then residence inhabited dwellings, I personally think we should maintain the 1 to 10 years, not go to 1 to 7, because that's another instance in which this is a fairly serious circumstance. I throw that out as an option three, and I wondered if a majority of you would find an interest in supporting that approach. I will just canvass folks. Nobody is bound by this, I'm just trying to get a sense of where we might be headed.

Mr. Callaway:

First, to the discussion about the value dictating the level of the crime, I can tell you for a police officer in the field, that's a logistical nightmare. If that happens on the backside when it gets into court, if the officer treats the crime as, say, a felony, and then when it gets to court, the court says, "Well, the guy stole a penny. We're going to make this a gross misdemeanor or a misdemeanor," that's one thing, but I can tell you firsthand from literally thousands of burglary calls that I went on in my career as an officer that a lot of times people don't even know what's stolen right away out of their car. Maybe the trunk was popped and I thought I had my tools in here, I'm not sure, or I don't know if my wife had her purse under the seat and I've got to call her, she's over at the day care center. A lot of times we give the people a victim's information guide where once they realize what was in the car, they fill it out and turn it in. Like Ms. Butler said, the window's broken and there's damage to the locking mechanism. The officer's not a mechanic, he doesn't know how expensive it's going to be to fix the window or fix the lock, so putting that weight on an officer's shoulders in the field to determine if this may be a felony or a gross misdemeanor or a misdemeanor because of the cost associated with what was stolen and damage to the car is just a logistical nightmare. Then, I'm sure you'll have people just like we see where people call 911 and say, "I need a cop out here," and the dispatcher says, "Is the suspect still there?" "No, he left." "Okay, we'll get there when we get there." "Well, you know what, I hear something. Maybe he is still in the house" to get an officer out there right now. Same kind of thing here where, "What was stolen?" "Probably some pennies from the center console." "Well, we only come out if it's a lot of property stolen." "Oh yeah, I had \$3,000 worth of tools in the trunk" to get a response. So, I think from a logistical standpoint, it's a nightmare to try to put that on the frontend.

Chair Hardesty:

Maybe the place to resolve these value issues is when the judge is hearing what to do if it's a category E felony as opposed to trying to sort out the difference between a gross misdemeanor and a category E felony for law enforcement, so that if you have the instance in which it's, I'll say, a lower end theft or lower value theft or an unprovable theft, it influences the judge about making a diversion program, because we all know under that process if you succeed you can get rid of the felony altogether. I don't know if that addresses your comment. I cut you off, and you may have had other comments based on what I had observed.

Mr. Callaway:

I think my concern would be addressed if, as I've said before, philosophically I don't agree with lowering it to a misdemeanor. If it remains a felony and there is an opportunity on the backend and that responsibility is not put on the officer to determine the value, I think that sounds reasonable. The only other comment I was going to make to the home invasion issue, and maybe this is a comment or a question for legal counsel for Mr. Anthony, but my understanding is, at least terminology cops use on the street is, if somebody forces their way into the home and people are there present, we treat those as a home invasion robbery. If there is force or fear involved and the people are present and they encounter the intruder, I don't know if there is an overlap between home invasion and robbery, if there's an actual statute or if it's just under the robbery statute and how that may overlap with home invasion burglary.

Chair Hardesty:

Those are charging decisions, but the force or fear is an element in robbery where it is not an element in home invasion. It actually makes the home invasion easier to charge. You don't have to prove force or fear. But it certainly is not surprising that in those instances there is going to be force or fear and so they are going to charge both as separate counts, and because it is a separate element you don't have a double jeopardy question. You can prosecute both and you can get convictions on both counts. Maybe law enforcement has a shorthand for them, but I'm sure when it comes to the DA that the elements are different in the two crimes. Mr. Jackson, did you want to weigh in on that point at all?

Mr. Jackson:

You are correct, it is a charging decision. It's very fact driven. Most of the robberies that we see are actually taken directly from the person. There is some case law talking about within the presence of a person and how far that goes, so breaking and entering into

someone's home if they are in the bedroom asleep and someone steals the TV and goes, that would not fit the robbery statute. That would be home invasion.

Chair Hardesty:

I'd like to canvass everybody to see what your reaction is to the suggested option three.

Ms. Rose:

I like that option. I think that helps to address everyone's concerns. I would like to see, though, the first motor vehicle still being a misdemeanor and not a gross misdemeanor. I'm interested in the suggestion that Ms. Armeni had suggested earlier for the commercial building, business hours versus nonbusiness hours for a commercial building and trying to see if we can work that distinction in as well. I think again what we really want to do is capture the seriousness of the offense, where if someone breaks into a commercial building when it is not business hours, making that a much lower category of a felony. Maybe Ms. Armeni can talk a little bit more about what the suggestion was from NACJ. I think that might be something we could incorporate into that, but I think option three does make sense to me the way that you described it, Justice Hardesty.

Ms. Armeni:

I would support option three. I think it is a good compromise between all of the positions that we have here today, and so I think I would be willing to support that.

Ms. Butler:

I would support that.

Ms. Jones Brady:

I would support that.

Chair Hardesty:

Mr. Jackson, I assume you wouldn't?

Mr. Jackson:

I really appreciate what you're doing and I have a great deal of respect for everything that you have done as a justice in serving on the Advisory Commission, but I'm also reminded over the last several interims of one of the points that you made, Justice Hardesty, is that you wanted to know why the Legislature was setting certain crimes at certain punishment

levels. Why would they take this crime and say that it is a category B? Why is this one a category C? Why is this one a category D? What did they rely upon? The answer is, basically, in most instances, whoever drafted that or who was proposing it kind of came up with that concept. I know it goes through the Legislative Counsel Bureau (LCB) and they get some direction on it, but for the most part, there's no specific criteria that's been relied upon by our Legislature, and I know that you've been extremely critical of that. Missing from this discussion is the why. Why are we doing this? I get that you can report back and say there are certain data, the data is that we have 400-and-some individuals in 2017 that were sentenced to prison, but it doesn't answer the questions that Chuck Callaway has raised as to who exactly are those 400-and-something individuals that went to prison? I would submit that of the 20,000 people who committed burglaries in Clark County approximately last year that it is not that 19,400 of them got away with it, it's that the majority of them that were arrested and prosecuted did not even get the felony burglary conviction, and there's no doubt that some probably were found not guilty or there were dismissals or pretrial motions that were dispositive with that particular case, but it just seems to me that this recommendation is solely about "Here's the endgame: we want to reduce the number of people that go to prison. We don't care how we get there. This is an easy way to get there because the category B's and the burglaries are the largest number of individuals that are sent to our prison. So, to prevent that from happening, let's make it a mandatory probation on these vehicle burglaries." I appreciate that Judge Wilson has recognized that there are unintended consequences. We have not looked into those unintended consequences. There again, there's the study from June of 2018, which is the most recent study coming out of California on their unintended consequences. There's investigative reports in other states regarding these unintended consequences. It is going to result in an increase in vehicle burglaries by, to a certain degree, decriminalizing it. There's no incentive really for these individuals—and we know that for the large number of them it's driven by the drugs. That is a reality, and they are going to continue and probably increase the number of those smash-and-grabs. Based upon public safety first and foremost, I am against that, and I would ask that at least what we had submitted still be given an option number four or be assigned at least some number.

Chair Hardesty:

I appreciate that. Let me respond to a couple points that I think are important. I agree with you that I have been critical about the Legislature's routine selection of sentencing lengths without debating those, so let's debate them. The burglary of a commercial building is a category B right now. The consequence of a category B is the sentencing judge can put you in jail for 4 years to 10 years. More importantly, if you are a category B felon, you don't qualify for specialty court, you don't qualify for diversion, and you don't qualify for anything. The other point about that is the nature of that crime is vastly different to me than the crime of entering an inhabited dwelling. It is also vastly different to me than entering a tool shed or work shed in the backyard, or even a vehicle for that matter, so to

me, what I see is proportionality in sentencing, which I don't believe we have, and the benefit from my perspective in establishing proportionality is to recognize the reality that when a drug dealer or someone who is trying to steal in order to perpetuate their drug habit by going through the vents on the roof of a commercial building and crawled down that venting system, which is one case we had, and steals a bunch of stuff and then gets grabbed before he can get out of the building and there were no persons there and it was at night is a perfect category C offense, but to have a judge then say, "I have to treat this as a burglary. You are a category B, you don't qualify for specialty courts of any kind and I'm going to put you in for 3 to 7 years," doesn't make sense to me.

I am also very concerned about the fact that there needs to be some recognition of the proportionality of what is being burgled, the facility that is being entered and the then-rehabilitative consequences for the defendant who is committing the offense. Right now, our burglary statute doesn't address any of those. That's why I proposed the option that I proposed. I recognize that there are differences of opinion, and everybody on this Commission and on the subgroup will have an opportunity to offer alternatives to whatever is passed by the subgroup onto the general Commission for discussion on January 11. This is just the subgroup's thought, and certainly whatever communications are moved over to the general Commission, everybody will have an opportunity to express those, and our minutes will reflect the fact that there are differences of opinion with respect to these issues. I'm also mindful of the smash-and-grab concerns. I'm sure misdemeanors create some problems in that, which is why I suggested option three. What I think the judge then at least can take into account is those instances where that person might be subject to rehabilitative efforts and perhaps get themselves out from underneath the felony if they behave and participate in a program that results in that.

What I'm hearing, at least, is there's a majority of you who would be willing to pass along the so-called option three. There certainly is not unanimity on this, and our minutes will reflect our discussion and our difference of opinion. Unless somebody else has further comment about this burglary subject, I would ask CJL to re-conform our report to the overall group about option three but make clear that it is not a unanimous position and to include Mr. Jackson's proffered option as part of the discussion.

Mr. Jackson:

Because you said it was a debate, I just wanted to respond to two of your points. On the commercial burglary, under the current statute under subsection 5, the crime of burglary does not include the act of entering a commercial establishment during business hours with the intent to commit petty larceny unless a person has been previously convicted 2 or more times of committing petty larceny within the immediately preceding 7 years or of a felony. Part of it does already address about the commercial burglaries during the business hours, and as far as a diversion, there is a diversion that is available currently for category B felonies. Under NRS 458.300, judges have the discretion to grant diversion

to someone who commits a residential burglary or a commercial burglary or a vehicle burglary. Those programs are in fact available, and I think that needs to be part of the record too.

Judge Wilson:

Could we get any additional information on unintended consequences? I understand we're not going to meet again, but I would still be interested in that information on the misdemeanors.

Chair Hardesty:

Sure.

Mr. Weld:

We can give some of that now. Thank you very much for all of your comments so far. This is with regard to some comments DA Jackson made a little bit earlier with regard to Proposition 47, which I think unless I'm mistaken was a lot about felony thresholds, that one was, and some other things about treating current inmates in prison for felonies as misdemeanors, but my understanding is that it was largely about thresholds. There's been a whole lot of research done in that area. Between 2000 and 2012, about 30 states raised their felony thresholds considerably, and it is a huge concern of ours as a technical assistance provider working with states to think about such a change, whether or not that results in an adverse public safety result. Granted, I haven't read the articles you mentioned, but the overwhelming finding is that it does not change the property crime rates for the worse when those changes are made and that existing declines in property crime continue after those thresholds are raised. I just wanted to say that. That is less related to the structural burglary changes you all have been talking about, but it is related to the threshold issue that I think was at issue in those smash-and-grab articles.

Judge Wilson:

Do you have an explanation for the San Francisco experience?

Mr. Weld:

We do not. We'd be happy to get more research on that exact change though.

Chair Hardesty:

I think that's what the judge was inquiring about, if you're able to do that.

Maura McNamara (Policy Specialist, Community Resources for Justice):

Particularly with Proposition 47, there has been a lot of research on the offenders impacted by those changes in recidivism and rates of re-arrest and reconviction. In the studies that I read, granted again I haven't read the particular study cited here today, which we will do so and do our due diligence and follow-up research with, has shown that recidivism has decreased since the passage or enactment of Proposition 47 with respect to those felony threshold raises.

Ms. Jones Brady:

I had a question about Proposition 47. I don't know anything about it, first of all. I'll look at it. Did it include provisions of treatment or any kind of services for those people? I would be interested in knowing more about the specific features associated with that law. The other thing I was going to say on being able to obtain specialty court on category B felonies, there seems to be a norm that on category B felonies, judges are very hard pressed to give diversion on category B felonies, just as a norm. Would you agree? I don't know if people would agree with that or not, but that's my observation.

Mr. Weld:

I think we anecdotally heard from stakeholders that it's unusual, but that is as far as we know.

Len Engel (Director of Policy & Campaigns, Community Resources for Justice):

And just one last thing about the environment in which Proposition 47 was passed and this effort you're doing here. The bill and proposition passed in California and Colorado were not part of Justice Reinvestment. Justice Reinvestment is not about opening the prison doors, it's not about the incarceration. It's about reinvesting in things that work effectively to address recidivism to improve public safety. Your colleagues in the other half of the ACAJ this morning went through a series of analyses about better probation services, better services in the community, reinvestment opportunities, release provisions, the things that have to be in place to address characteristics of reoffending: behavioral health, substance abuse, things like that. They made a series of recommendations that you'll hear next week or in 2 weeks, and they are to be part of this package. What you are talking about, changes to sentencing, largely front-end changes, they are talking about things that are going to occur that will address the support and supervision of these offenders when they are in the community. The goal here is to free up resources that allow those things to occur, that improve probation or interventions, the availability of resources other than drug courts, specialty courts, the use of risk and needs assessment tools, clinical analyses throughout the system. That requires resources, and the Justice Reinvestment Initiative (JRI) is designed to come in and assist the state in, if

we're not going to raise taxes to put a whole lot more money in the community for these services, what can we do to get a better outcome? What can we shift? Where are resources being used now that may not be as effective as research shows other things? That's what this is about. It's two-pronged. It's taking a look at how you are using prison space, but it is also taking a look at what can we do better in the community through probation and parole services, through interventions outside of the criminal justice system to intervene in this behavior to improve public safety. California and Denver, Colorado, as far as I know, did not have this comprehensive approach that you have today.

Ms. Jones Brady:

Did they include improvements of resources to the educational system? Because most of my clients don't have a high school degree. You don't have to answer now, but I hope they did.

Ms. Rose:

So, CJI just mentioned a bunch of studies across the country talking about the unintended consequences, and by and large changing these thresholds or changing some of these things around don't result in some of the really large, horrible behaviors that we've been thinking about and worrying about today. Can you pass some of those along to us, just a few of them or some of the ones that you think would be helpful for us to understand the issue or all of them or whatever you can send along? I think that would be helpful.

Mr. Weld:

We can absolutely do that.

Chair Hardesty:

Thank you. Moving onto another less controversial topic, theft. You have on page three some material that has been provided ([Agenda Item V A](#)). We did discuss this in our last meeting, and so I wondered if folks had a chance to think about adjusting the theft statute based on the conversation, and CJI has put together different options just so you have different alternatives in front of you if you want to consider or explore any of those.

Mr. Weld:

I wanted to explain the category B level on this chart. We went back and watched and listened to a couple previous ACAJ sessions in 2016 where the Committee was considering reclassifying a few category B felonies to category C's. In those discussions, the category B threshold was batted around at \$50,000 or \$100,000, which is why we went more conservative here and set it at around \$25,000, but I just wanted to inform the

Commission where that number came from in these options. When this reclassification was considered in the past, it was a higher amount that was here for that. I just wanted to explain that. The felony threshold is reflecting comments from the last meeting.

Mr. Jackson:

I do appreciate it. I think this one really captured a lot of the comments from our last meeting, especially some comments from Judge Wilson. I don't want to misstate the term "super theft," but you just commented on it and captured that. In a discussion with a few of the DAs—this wasn't part of the teleconference because we ran out of time—how about just as a consideration as the options just sit here, solely based upon that, I think the DAs Association would be okay with option two. However, would the Subcommittee consider a little tweak? If you're looking at a threshold above \$650, kind of combining the beginning of option 2 with option 3, the \$1,000 threshold at that misdemeanor, and then changing under option 2 where it says \$1,500 to \$5,000 that that be \$1,000 to \$5,000? Otherwise, option two would be the recommendation.

Chair Hardesty:

Would you have a gross misdemeanor, Mr. Jackson?

Mr. Jackson:

No.

Chair Hardesty:

Okay. You would make under \$1,000 a misdemeanor, and then \$1,000 to \$5,000 a category D felony?

Mr. Jackson:

Correct.

Chair Hardesty:

And there would be no gross misdemeanor involved?

Mr. Jackson:

Correct. I know how our district court judges despise gross misdemeanors. I'm not speaking for all district court judges, just in Douglas County.

Chair Hardesty:

Does anybody want to weigh in on the options or Mr. Jackson's suggested alterations to that?

Mr. Callaway:

I conceptually support what DA Jackson is proposing, that option two, but what kind of strikes me with this when I look on page four ([Agenda Item V A](#)), the data that I had asked for last meeting is that the threshold was tripled by the Legislature. Over a 2-year period after tripling the threshold, it resulted in about 283 less reported larcenies, so I guess it gets back to what's the goal here and are we getting our bang for our buck and what are we trying to accomplish. In the heading of this flowchart it says "Nevada's 5-year average larceny rate," and again, I don't know if I would accurately depict it as larceny rate versus reported larcenies because I believe that when you raise the threshold that folks may not report where they would have before. If they think that it's a felony crime and they're going to call in a report and the threshold goes up, "Heck with it, I'm not going to report my laptop stolen or my cell phone or whatever. The cops aren't going to do anything about it." I think that changing that threshold, raising it up, I don't know that—again, it goes back to what I said earlier. It's not addressing the problem of theft, it's just kind of in my mind a shell game of now the pea's over here and now it's over here. Let's raise this up a little bit and then people aren't going to report it. "Hey, look, our numbers went down," when the theft really didn't go down, just people aren't reporting it. That's just my perception from a law enforcement perspective, a long-winded way of saying I support what DA Jackson was saying.

Judge Wilson:

I can live with option two. I like option three better. I like the breakdown between the \$25,000 and \$50,000 and above. The \$100,000, the highest category, I think the penalty should be more than 15 years. The specific examples are the individual who steals the money of people who have saved their entire lives for retirement and receive hundreds of thousands of dollars and are not going to be able to make restitution for whatever reasons. I think it should be at least 20 on the high end on that upper category.

Ms. Armeni:

My preference would be for option three. If we were going to do option two, I would like to see the \$1,000 to \$5,000 become a category E instead of a category D felony.

Ms. Rose:

I also prefer option three, but with option two, if we were going to break it down like that, I would like to see some change in the numbers. For the gross, instead of up to \$1,500, it would be up to \$2,000, and then category D then to \$10,000 and then category C to \$10,000 to \$25,000 if we were going to lean more towards that, but I would prefer option three.

Ms. Jones Brady:

I personally like option three of these, but in terms of the group discussion that I had at the Washoe County Public Defender's Office, they weren't sure on specific value amounts, so any of these would be an improvement, I think, to them, any of these options. But one of their biggest frustrations was that the Nevada statutes aren't consistent across embezzlement, grand larcenies of motor vehicles, so their thing was, whatever we have, it should—some thought, maybe the Legislature should debate on making them, the values, some consistency across Nevada law.

Chair Hardesty:

So you would add that comment, at least be consistent. To Director Callaway's comments, in the shell game, at least make the shell game equally applicable, is that fair?

Ms. Jones Brady:

Yes.

Chair Hardesty:

Maybe other members of the subgroup would agree with that additional recommendation for Mr. Weld and Ms. McNamara to include?

Ms. Butler:

I just like Ms. Jones Brady's comment about consistency, because this is something we deal with daily in just trying to set the offense codes and sometimes it seems there's no rhyme or reason to what those dollar thresholds are. But I will defer to the group because this really isn't the area that the Repository deals with.

Chair Hardesty:

Judge Wilson, Mr. Jackson's point was driven in part by a concern by at least maybe the judges in his district and other ones about the use of gross misdemeanor. Do you want

to comment about that? Are you comfortable retaining gross misdemeanor in this category? How do you feel?

Judge Wilson:

I am comfortable with using a gross misdemeanor. I didn't get a response from judges on this area, so that's just me.

Chair Hardesty:

Let me begin with the top end as I did before. Judge Wilson has suggested that the top end for those egregious thefts provide for a sentencing range of 1 to 20 for the reasons that he expressed. The judge still has the discretion, of course, to fit within that area, so I'm going to treat that as the first segment of option four, if you will. I appreciate Mr. Jackson's point about this division. It sounds like there was a larger number who favored option three, so let me ask if option three is something that a majority of the group would support with the addition of the change to the category B offense to a 1 to 20.

Ms. Jones Brady:

Personally, I would support it. I haven't surveyed the group about it, but I think that at this point with the great improvements on the lower end that—I don't want to speak for anyone else, but I would support it.

Ms. Armeni:

Can I get clarification when you say raising it from a 1 to 20, are you talking about an amount \$100,000 or higher?

Chair Hardesty:

Yes.

Ms. Armeni:

Then I support it.

Mr. Callaway:

I'm doing the math here in my head and, again, looking at this from a law enforcement perspective. Under the current statute, over \$3,500 is a category B, 1 to 10, and under this proposal \$25,000 to \$50,000 is a category C, 1 to 5, so we're basically saying you

could steal 5 times the amount that you currently can and get 1 to 5 versus 1 to 10 under the current statute? I have an issue. I can't support that.

Ms. Rose:

I support that option four that you described, Justice Hardesty.

Judge Wilson:

I support option four.

Chair Hardesty:

Ms. Butler, you are maybe ambivalent?

Ms. Butler:

Yes, I will abstain.

Mr. Jackson:

For the same reasons that Mr. Callaway put out there, it is too much of a jump, going to \$2,000 to the \$25,000 and then up to \$50,000. To only make it a category C, 1 to 5, is too much of a departure, so I'm not in favor of option three or the option four that you've proposed. But I do agree with the greater than \$100,000 that that sentencing range should be 1 to 20.

Chair Hardesty:

Okay. Let me just ask the group, if instead of option three you took the first two categories—in other words, less than \$1,000 would be a misdemeanor; \$1,000 to \$2,000 would be a gross misdemeanor; \$2,000 to \$5,000 would be a category D felony; \$5,000 to \$25,000 would be a category C felony, 1 to 5; then you would break out the \$25,000 to \$100,000 would be a category B; and then \$100,000 or excess would be 1 to 20. Director, does that address or answer your concerns or not?

Mr. Callaway:

Sorry, I'm trying to wrap my head around what you said. So, taking what the current statute is, raising it to \$1,000 on the low end, inserting a gross misdemeanor in after \$2,000?

Chair Hardesty:

It would be \$1,000 to \$2,000, and that would be a gross misdemeanor, and then \$2,000 to \$5,000 would be a category D and \$5,000 to \$25,000 would be a category C. I'm assuming based on your comment that that still wouldn't be acceptable to you because of the fact that it is still 5 times above \$3,500, although I don't think it's quite 5 times, but in any event it would still be a 1 to 5 and that would be objectionable to you, right?

Mr. Callaway:

That's correct. It's roughly five times the amount that the thief could steal and half the penalty of the current statute, roughly.

Chair Hardesty:

Right. What I would like to do then in the interest of time is move forward the suggestion, I'll characterize it as option four, by the majority of the subgroup but make clear that there was dissent with respect to the proposal. Let me ask you this, Director. Mr. Jackson had proposed when we started this conversation essentially \$1,000 misdemeanor and the elimination of the gross, and then as I understood it, Mr. Jackson, the rest of that was going to be okay. But I'm assuming, Director, you would still have a problem with it just based on treating a \$5,000 to \$25,000 range as a category C, is that right?

Mr. Callaway:

Yes. I would support conceptually raising the lower threshold to \$1,000 and however the numbers fall after that, eliminating the gross misdemeanor not only from the crime perspective on the front end, but those gross misdemeanor offenders spend their sentences in the county jail, and then maybe keeping the center of the current statute somewhat intact. Obviously, you would have to adjust the numbers to conform with the \$1,000 bottom end, and then at the top end maybe adding the \$1,000-plus category, if that makes sense.

Chair Hardesty:

It does, except I wanted to ask this question. If you look at option 2, if that was \$1,000 to \$5,000 and \$5,000 to \$25,000, would you support that for category D and category C? Because that's what Mr. Jackson, I believe, had proposed.

Mr. Callaway:

Yes, that looks reasonable.

Chair Hardesty:

Mr. Jackson, is that consistent with what you had proposed?

Mr. Jackson:

It is.

Chair Hardesty:

I'm just trying to have this expressed in a way that CJI can show the two options that were discussed by the subgroup, or would you rather have a different option? I'm not trying to characterize the option you mentioned, Mr. Jackson.

Mr. Jackson:

There's a lot of talk about sitting down and doing a compromise, and I think that the struggle that Chuck Callaway and I have is we're never going to compromise on what we consider as public safety versus money, that particular cost associated with it. These theft offenses in and of themselves are property crimes. I think if you asked Director Callaway and I, we would both say we're kind of pretty good with how our theft statute reads today, but taking into account Ms. Jones Brady's comments about one of the things that needs to be addressed is that consistency. Even those other category B's that we discussed later on about if there's any reduction on those, they still need to be consistent with whatever movement we do on this. But of the options that were presented here, again, I know it's not going to stay the same. So with that, where I was coming from on behalf of the District Attorneys Association would be option two with those changes that I discussed and which you have accurately stated.

Chair Hardesty:

Okay. Ms. McNamara, Mr. Weld, do you guys have what Director Callaway and Mr. Jackson would have proposed? Okay.

Mr. Callaway:

Before we move forward, while DA Jackson was talking I had a chance to clarify my thoughts for a second. I don't want to muddy up the water, but this is what I would conceptually support. This is what I would support as an option and the way I understood the proposal made by Mr. Jackson. Maybe I misunderstood, but under \$1,000 dollars would be a misdemeanor, up to 6 months in jail; \$1,000 to, say, \$5,000 since we have to boost it up to account for the raise to \$1,000; \$1,000 to \$5,000, category C; \$5,000 to

\$100,000, category B; and \$100,000 or above, category B, 1 to 15. I think that would be something that I could support.

Chair Hardesty:

Okay. I think you also agreed that on that over \$100,000 you would be supportive of 1 to 20 along the lines of what Judge Wilson had commented about?

Mr. Callaway:

Yes, 1 to 15, 1 to 20, whatever's the pleasure of this body. I would support both.

Chair Hardesty:

Do you join with, and I'm assuming I'm correct about this, Mr. Jackson, that you both would agree that whatever the Commission and ultimately the Legislature does, get these things consistent throughout? You would agree with that part, right?

Mr. Jackson:

Absolutely.

Mr. Callaway:

Yes.

Chair Hardesty:

Okay, so there is some piece of this that everybody agrees about and then there are a couple different versions of the theft statute changes. All right.

THE CHAIR CALLED FOR A BRIEF RECESS.

Chair Hardesty:

The next area that we have on our schedule to discuss and we have talked about before is the issue of making drug possession a misdemeanor offense. My impression was that members generally supported the notion from our last conversation. We also talked about the seriousness of having a felony conviction and how this adversely affects people's stability and success in the future, job opportunities, educational pursuits and the like. So, CJI has prepared three different options to look at for the schedule I to IV substances, so I wanted to throw that out for discussion.

Judge Wilson:

I was visiting with the CJI staff right before—the drug court manual that I am familiar with says that there is importance and value in the leverage, and I'm not going to remember the exact language, but there's value in having leverage against all of the drug court participants by having some sanction at the end if they fail to complete. I asked them if that meant sending the individual to prison, which the drug manual I read does not say. It just says that there needed to be a severe—actually, I'm not sure they used that word—there needed to be a significant sanction at the end to encourage all of the participants to successfully complete the program. I'm not sure why in option three we jump from a gross misdemeanor to a category D instead of a category E felony. I continue to believe that the only thing that is accomplished—well, perhaps two things. One: by sending somebody to prison is to punish them, which is not going to help the addiction. The other thing is that potential leverage, and I think it was Director Callaway at the last meeting had concern whether the misdemeanor would be sufficient leverage. I don't know the answer to that question. I don't know if CJI can provide us with information. I don't see any public safety benefit, any financial benefit, any rehabilitative benefit from sending a person who is in drug court, in diversion, to prison if he does not successfully complete the program. That is the reason that I think we should at least seriously consider making those a misdemeanor. As far as the options go, I think maybe a gradation, option two up to a gross misdemeanor, maybe after a five or subsequent felony. I'm still curious about the category D as opposed to a category E, but those are my comments.

Mr. Callaway:

As the judge just stated, I did say last meeting that I had issues with a misdemeanor offense because I don't think it will result in people getting the treatment and the diversion they need, and I've talked to officers in the field who basically tell me that if this is a misdemeanor offense, people are going to get a citation and they're going to be on their way. They'll probably never show up in court if they're a habitual drug user, and then they'll get a warrant out for their arrest and then eventually down the road they'll get picked up for the warrant and then they'll finally get in front of a judge. If it's a misdemeanor offense, unless there's some kind of strict mandatory treatment—and then again, if they don't complete the treatment, what's the punishment? I just don't see that as being beneficial. I do agree with everything that's been said, that I don't think prison is the place for people with an addiction. I do believe that we need to get them help and get them out of that cycle of addiction, but I don't think that making everything a misdemeanor is the answer to that. The only other thing I want to clarify is I did mention last meeting that I thought it would be beneficial, because a lot of these are walk-throughs anyway at the jail, that if the officer had the ability to cite. I had some officers that got wind of what I had said and called me and said that they shared the concerns I just shared a minute ago about people not showing up. We had a discussion about maybe it being a class II citation where the person is actually transported to the jail and they're fingerprinted. To clarify,

that would be giving law enforcement the ability to do that for a category E felony offense where it's a first-time drug offense and there's no crime against a person or anything like that, giving us the ability to do a class II where they are transported to the jail, they're fingerprinted and they're processed like they would be if they were booked, and then maybe that's the time where some type of services could be plugged in to try to get them into that treatment. But I just don't know, again, that making it a misdemeanor gets to the core, which is getting the folks treatment.

Chair Hardesty:

Would you make it a crime at all?

Mr. Callaway:

Well, Justice Hardesty, in a picture-perfect world, which we obviously don't live in, if we had the ability to get these folks into some kind of program and get them off the addiction and not give them a criminal record, I think that would be ideal. But by the same token, I think that when they are using and they are caught in possession of a controlled substance and there is no hammer, so to speak—and the other side of this too, that I'm told, is that detectives typically when they make an arrest for a low-level drug offense, they will try to work that person and find out where they bought it from and try to move up the ladder, so to speak, and get the bigger fish. Having the ability to say, "Hey, listen; you're facing a felony charge here. If you help us out, tell us where you got this, tell us who sold it to you and the District Attorney's Office can work with you on lowering these charges," that's beneficial in helping us track down the more serious dealer or the person that's supplying. Again, if this is a misdemeanor offense, if I'm facing a misdemeanor slap on the wrist, there's no way I'm going to point to the guy that sold me the narcotics. I think in the big scheme of things, the intent is good, the heart's in the right place to help these folks, but by taking away the hammer, I don't believe we're accomplishing that.

Chair Hardesty:

Ms. Butler, you had some observations?

Ms. Butler:

I do. Thank you, Justice. I apologize, but I'm going to have to leave here shortly, so I'm going to combine my observations on drug possession with some of the policy options that occur on page 12 of the packet for mental health ([Agenda Item V A](#)). One of the things that we deal with at the Criminal History Repository, and I've mentioned just briefly here this afternoon, we run the point-of-contact program for the background checks for firearms transfers. We want to make sure that individuals attempting to purchase a firearm are not prohibited under state or federal law. Recently in March of this year, the Congress

enacted and the President signed the federal Fix NICS (National Instant Criminal Background Check System) Act, which requires that each state develop an implementation plan to ensure that it is sending all available records to the NICS indices. I was not at the last meeting, but I did watch it from my office, and there was a lot of discussion on drug possession about reducing this to a misdemeanor and just issuing citations. My concern with that and where this ties into the federal Fix NICS act is that if it's just a citation, it is not visible to my staff when they run the person's name through our name-based background check system. So, if the person is issued a citation in the greater Las Vegas area, my staff can see those in SCOPE (Shared Computer Operations for Protection and Enforcement), but if it's any of the other 16 counties and it's just a citation for drug possession, we won't be able to see that. Drug possession is an unlawful user of or a person addicted to any controlled substance, which is a federal firearms prohibitor, and that information would be available for my staff to share in the NICS indices. Similarly, on page 12 where we talk about establishing pre-prosecution diversion programs for first-time nonviolent felony offenders and we talk about establishing presumption of sentence deferral for certain nonviolent offenders to mental health court, again, it's not illegal to be mentally ill, but it is a federal and a state firearms prohibitor. To the extent that we are going to establish diversion programs for these types of individuals, I think we need to make sure there is either a mechanism in the statute or we establish very strong policies to make sure that information does get reported to the Criminal History Repository so we can enter that individual's name into the NICS indices and ensure that we are supplying all available records to NICS as required under the federal Fix NICS Act.

Chair Hardesty:

Thank you for the input. Ms. Rose, did you want to comment on the drug possession policy options or alternatives?

Ms. Rose:

I think I would be most in favor of option two where the first three convictions are misdemeanors and the fourth or subsequent is a gross. I'm not quite sure with some of the concerns that have been brought up with—law enforcement don't want to issue a citation but they still want to book people in the jail even though it's a walk-through. I'm not really sure what the difference would be, why we'd want to walk them through and they leave immediately versus issuing a citation. I'm not really sure why we would want to still do that. The way that I understand it is that the police officer would have the ability to issue a citation but they don't have to, and so we are giving that discretion to the officer in that certain situation. Maybe it is just a possession issue. The person isn't using, maybe they're holding it for their friend or something like that. It has nothing to do with them actually using the drugs, but it's just the simple act of possession, so then they would have that discretion to just issue the citation as opposed to an arrest. I do think that's important to give that ability to the police officer to do that. I'm not quite sure exactly what

Ms. Butler was saying, and I'm not 100 percent sure what the requirements were, but I think this is the same concept, that just simple possession doesn't mean that you are a drug user by virtue of just having the drugs. I'm not quite sure that this would really make a big difference in what our requirements are, if we can find a way to make sure there's a distinction for that, but I think option two would be the best way to treat people who just simply have drugs on them. As far as the concern of what we do with people who need help, I don't think there's any reason that we can't still say, "We still want you to participate in diversion programs." Getting rid of the gross misdemeanor is still a big deal, not going to jail for a year. I would participate in a diversion program to not go to jail for a year. That's definitely an incentive. I think just because it's not a felony doesn't mean that people don't still have that incentive to participate. I think we should tack on and make sure that the diversion programs are a part of anything that we change. Those are some of my thoughts.

Mr. Jackson:

I'm probably struggling with this one more than any of the others, and for anyone who thought that my comments on the burglary were strong, I would like to stress at the very beginning that I think we are making the biggest mistake by reducing this or even considering reducing possession of a controlled substance of certain drugs: drugs that are used for drug-facilitated rapes, for example GHB or heroin or cocaine or methamphetamine. I can't think of a bigger mistake that we could make as a Subcommittee moving it forward to the ACAJ and as that Commission making those recommendations to the Legislature. I would really hope that the Legislature, who I know is going to address this issue, will take into consideration and look at the concerns associated again with what has happened. I've already addressed some of the issues with Proposition 47, and part of that was reducing these felony drug crimes down to misdemeanors. I'm aware of the reports that CJI has referenced where they are talking about the successes of Proposition 47. The problem is the fallacy in that information. If law enforcement is not enforcing because it's now a misdemeanor and crimes that must be committed in their presence or they're turning their back because of limited resources and are focusing those very limited resources on felonies, which you are going to find in all of the metropolitan areas, then it's a crime that is not being policed so you're going to see a drop in those particular numbers. We talk about recidivism, but here's what happens: when Proposition 47 passed, or when House Bill (HB) 2355 just passed over a year ago in Oregon, it didn't mean that all the sudden the people that were addicts that were injecting heroin or smoking meth or snorting coke, it didn't mean that they stopped doing that. They were addicts before that law passed and they were addicts the day after, but all the sudden now it's not being enforced. That's why they were seeing an increase, and along with that were reducing certain property crimes down to misdemeanors. The incentive was, before where I wasn't going to steal, now all of a sudden it's so much easier to go and steal because no one's going to do anything about it. We reached out to a prosecutor in Oregon recently, the district attorney in a particular county, and off-line I will

share that information with you. The biggest mistake that Oregon ever made was making these felony possessions of controlled substance and turning it into a misdemeanor. He's talking about in those larger jurisdictions where they just aren't policing it, but in his jurisdiction they've seen a significant rise, and before where you weren't seeing middle school kids and elementary school kids using this drug, now it's more open, much like what we're seeing with marijuana. Ever since we've had the recreational marijuana passed here in Nevada, we're seeing kids as young as 8 years old that are taking it to school now in Douglas County, a rural county. You never saw that early of an age kid be in possession of drugs. We're telling kids that it's okay because a misdemeanor is really nothing. That's a traffic citation. They're not going to enforce this down in Clark County. People are going to look at the numbers and say it's all great, but we're going to have the increase in the property crime. I am very concerned about the future of the state by even considering this. I did ask a question during a presentation about the states that you used because I thought that that really focused a lot of the comments by members of the Subcommittee. You compared Nevada's current laws on possession to Tennessee, Utah, Oklahoma and West Virginia. I haven't looked yet, but I would assume because Oklahoma also has been part of the Justice Reinvestment that they changed to the misdemeanor as a result of that.

Mr. Weld:

Actually, Oklahoma was a ballot question. It was voted on by the citizens of Oklahoma and overwhelmingly passed. It was actually not the result of JRI.

Mr. Jackson:

Much like Proposition 47 in California that was overwhelmingly passed by 60 percent. But I wanted to look at—it was interesting. I wanted to know. We're looking at Oklahoma, West Virginia and Tennessee, and I was aware of Utah. But I know we're going to be looking at not only the possession of a controlled substance but surrounding states. For schedule I or schedule II, it's a category E felony. I will tell you that there is a definite distinction between the quantity of heroin and the quantity of methamphetamine or cocaine. Such a small amount of heroin can be so much more destructive. I think I testified or informed you all last time that in Douglas County we've had 24 deaths related to opioids in the last 5 years. Two of those were fentanyl, three I believe were heroin and the rest were opioid prescription drugs. Nevertheless, we would hope that there wouldn't be any deaths. But in Utah, while it is a misdemeanor, their similar possession for sale statute, where ours is still a 1 to 4, theirs is a 1 to 15. Arizona: for possession of a controlled substance, methamphetamine, it's a class IV felony. It's 1.5 years to 3 years in prison. Their narcotic drugs, cocaine, heroin: class IV felony, 1.5 to 3 years in prison. Their possession for sale: they don't really have a trafficking, but they have threshold amounts. It's 9 grams for methamphetamine, only 1 gram for heroin and 9 grams for cocaine, 2 to 12.5 years. Idaho: possession of a controlled substance today is 1 to 7 years. Ours again

is only 1 to 4, mandatory probation. Possession for sale is 1 year to life. Their trafficking: 28 grams is 3 years to life. Wyoming: meth and narcotics, schedule I and II, over 3 grams of powder or half a gram of crack cocaine is 7 years in prison. Again, significantly higher than what our 1 to 4, category E, mandatory probation is. Montana: opioids, 2 to 5 years in prison. All other dangerous drugs, schedule I and II, 1 to 5 years in prison. New Mexico: schedule I and II, heroin, cocaine, meth, 18 months in prison. Washington: schedule I and II, 5 years in prison. Texas: schedule I or II, less than a gram is 180 days to 2 years, 1 to 4 grams is 2 to 10 years, 4 grams to 200 grams is 2 to 20 years. Again, significantly higher even than what our current trafficking would be. Utah, we've already discussed that. Again, it's not about a comparison, it's what are we attempting to do here in the state. If the whole idea's to try to reduce again the number of people just in prison, then we could turn around and just say, "All right, we're just not going to send people to prison." Instead, we're just grabbing at certain types of category B felonies because they're the majority of our people that go into prison, but we have not had any discussion, we haven't had any of those debates about the risk to the public and about the public safety and about victims of crime, and those should be what we are focusing on first and foremost. I think this is the worst thing, again, that this Subcommittee could push forward. I am opposed and the district attorneys across the state unanimously are opposed to taking these down to a misdemeanor. We are opposed to all three of these options.

Ms. Armeni:

My preference would be for option three. I agree with Judge Wilson. I would prefer to see instead of a category D it be a category E for the fifth or subsequent. But I will say that although I prefer option three, I would be open to—as Mr. Jackson just explained, I think there are different kinds of drugs, and I would be open to maybe providing different categories for certain current drugs that are on the higher echelon or the ones that are more scary, frankly. I think they're all scary to their own degree, but some that are a little bit more serious. I prefer option three, but I would be open to having further discussion on additional categories based on different categories of drugs.

Ms. Jones Brady:

I'd like to incorporate Ms. Armeni's comments as my own. I agree with what she just said. Also, I want to say just in terms of what are we trying to do here, it is my hope that what we're doing here is increasing the quality of life for all Nevada's citizens, including the low-income citizens. What I'm seeing sometimes is that, being a public defender, my clients are indigent. They're low income, and they disproportionately get these felonies for drug use. They are the biggest victims of the drug trade, and so my hope would be that they get the help they need and that their families have the resources to help the defendants and that when these people are arrested—I can just see the faces of so many of my clients. These young kids—well, they're not kids. They're adults, but 18, 19, 20 years old, felons for drug possession, and they have so few options moving forward. Their lives are

devastated. Their families are devastated. So, that's what I would like to see. Just again, I would agree with what Ms. Armeni said in terms of option three but also be open to other considerations.

Chair Hardesty:

Let me weigh in here. First of all, I had expressed in the previous meeting my concern about the fact that our drug statutes are not necessarily responsive to drug types or to drug quantities. That to me is an important issue in deciding what penalties should be used. I also think that the objectives of Judge Wilson need to be recognized, that placing perpetual drug users in prison is not the best approach. I think Director Callaway shares that view too. Our problem in Nevada and with these options, frankly, is that we don't have many options because we don't really address the problem with the alternatives. I think most of us would agree, I'm assuming most of us would agree, that if we grab a drug possessor that we would, for the most part, want to find a way to channel that individual into a program to see if they aren't subject to rehabilitation. I think the reality as discussed by Mr. Callaway and by Mr. Jackson is correct, that to the extent that the penalty is a misdemeanor, there not only is a lower incentive for enforcement but a lower incentive on the part of the drug user to respond to treatment.

One of the things I had hoped the Sentencing Commission would be able to do is to spend some meaningful time on recognizing that there is a difference in how we approach different drugs and the quantities of those drugs. My suggestion for this is what do we do in the meantime? What is the best approach in the meantime? I was going to offer this as a separate option altogether, and my option would be to continue to treat drug possession as a category E felony. That would apply no matter how many drug possessions there are. I don't care if you get to a sixth or a seventh, but I would strike the language that currently exists in category E that excludes offenders who have previously failed treatment. They don't qualify for a category E felony, and I think that's always been a problem in that statute. I would say that simply because you've failed before doesn't disqualify you as a category E felony. But then the other piece of this would be to recommend to the Advisory Commission and to the Legislature that the way to reduce the prison population for category E felonies is to use the resources by getting them out of there and providing law enforcement and judges the ability to put them in programs where you can treat them. My view is really maybe quite a bit different than what CJI has proposed here. My view is to maintain the category E felony, strike the portion of the language that limits access to the judge's ability, to keep probation or to divert the defendant to specialty court programs even where there are multiple offenses, treat all the multiple offenses for drug possession as category E felonies, and even if that becomes perpetual, it becomes perpetual. But at the same time, we've got to urge that this problem is not going to get solved until you provide adequate resources, which has been one of the recommendations of the Sentencing Commission to increase the amount of dollars available for specialty courts in the state. Hopefully, the reinvestment comes

because you've shifted those resources away from the prison, and then defer to the Sentencing Commission how to consider other alternatives with respect to this when it comes to drug type and drug quantity. That's kind of my view. I would certainly be interested in CJI's observations about this, but I think we are in an awkward place when dealing with this drug possession issue. Mr. Weld or Mr. Engel, if you have any observations, you can help guide us with any suggestions, but that's kind of the place where I'm at on this.

Mr. Engel:

A couple of things. First, I think one of the things that we've heard consistently over the past couple meetings is the adverse effect of a felony conviction, and for possession offenders, a recognition that possession is largely driven by addictive behavioral health needs that are largely unmet in the community. The option for law enforcement is to get them off the street and hope that they get treatment while they're incarcerated. Maintaining it as a felony will keep that scarlet letter as an intended consequence of this behavior, largely an addiction. That's one part of this.

Chair Hardesty:

Before you go on, though, one of the benefits of a category E felony is the diversion and specialty courts and the successful completion of that program eliminating that felony, and so that, I think, we can't lose sight of.

Mr. Weld:

On that point, Justice Hardesty, part of the data points that led to the inclusion of drug possession in this material was the fact that there's a very high failure rate for drug possessor conscience on community supervision and that something like, of the huge increase in revocations in the last 10 years, I think it's up 43 percent or something like that. Mr. Packard should correct me if I'm wrong, but 11 percent of those failures are drug possessors, so people who receive the benefit of probation on the first time, so I just thought it was relevant. We didn't include data in this presentation because we've presented so much of it before, but people really are getting into prison after receiving the benefit of probation for this offense. Just briefly to a few of the examples that DA Jackson mentioned, my understanding is a lot of those penalties, and we will get to this in the next section once we discuss trafficking, what they did, they were with regard to sale or possession for sale, not simple possession of a substance, which is what this page concerns.

Ms. McNamara:

Just to add on, in addition to thinking about how specialty courts are operating in Nevada and the use of a felony conviction upon completion, what the data did show is that in the majority of specialty courts here that offenders who completed those programs still had a felony conviction at the completion, so the option is only being afforded in certain jurisdictions and it is used very rarely that someone will complete that program and not have a felony conviction on their record that is prohibitive.

Chair Hardesty:

That's one of my objections, that statewide if you successfully complete, you should be absolved of the conviction. That's the point. Mr. Engel, I interrupted you. Go ahead.

Mr. Engel:

The only other thing we will mention at this point is if the Sentencing Commission is charged with figuring out the severity and appropriate responses based on the scientific severity of substances, I think that would be a monumental result because we've seen—as DA Jackson has indicated, this is an incredibly difficult, very emotional public policy. I can tell you, I've been doing this for several years across the country and at various points over my 12 years of doing this, there have been different substances that have captured the public's attention, driven by level of addiction. The crack epidemic is a perfect example. A very spontaneous reaction to crack versus cocaine led to significant disparities in sentencing, in the treatment of individuals involved in very similar activities but supposedly different substances or the perceived severity. I was in a meeting with the Chief Justice in Georgia several years ago and she said, "Heroin is not an issue in our state, hardly. We don't see heroin cases often. Meth is killing our state. We can't deal with meth fast enough. That's something we've got to get off the street." Over the border in Florida, same conversation. It was pills. It was oxycodone, and they were struggling because Florida was a pill mill. We're seeing all the exposés on how Florida became a hot bed for the pharmaceutical industry to present the effects of various pain medications. Prior to the pharmaceutical industry getting heavily involved in opioids, we didn't see heroin, but we see it now largely because of things that existed in a very legal environment. This is a tough thing to navigate, and I know states have tried to grapple with this. As a matter of public policy, I think the country would benefit from an in-depth analysis of the actual effects of these various substances on the body, on communities and things like that, and then apply appropriate responses. I think it will be a long time before we get to that point. If we're going to move largely this public policy decision to an analysis by the Sentencing Commission of this issue, it could be a while before we come back to a point where we can effectively address possession of drugs and what the response should be for the state.

Chair Hardesty:

Right, but I'm concerned about the fact that looking at the pragmatic approach that we have available to us, the choice comes down to—and let's break these up. For marijuana, probably most people would say possession of marijuana—pure possession. I'm not talking about possession for sale or distribution or sale of marijuana, but just marijuana, pure possession. I think most folks would probably agree that should be a misdemeanor, particularly in light of other public policy-type decisions that have been made. But other drugs, methamphetamine, very addictive, or very small quantities of other drugs, that's concerning, and so what I'm looking at is the pragmatic approach available to our state. What do we do with this drug possessor, the possessor who just perpetually possesses? Nobody thinks it's a good idea to put them in prison. I don't care whether it's the fourth, fifth, sixth or seventh, but that's the only option we have left available to us if we don't figure out some alternative for them other than prison. So, what is that alternative? Is it halfway houses? Is it some other form of confinement and treatments, a treatment that they haven't been responsive to for the three or four previous occasions? Because it seems to me that other forms of confinement ultimately is the only thing that society can do if they just won't conform, or just let them kill themselves.

Ms. McNamara:

I think a lot of the conversations here have been about public safety and about making sure we're thinking about what's best for Nevada communities. The research overwhelmingly has concluded that for drug offenders in particular and drug offenders who are convicted of drug possession that serving time in incarceration has led to an often increased likelihood to reoffend, and reoffend at a more serious, more impactful on the community type of offense because they're going to prison, they're being housed with individuals who are high-risk serious offenders, and there's been large indications of learned criminogenic behavior. We have been talking about what to do with these offenders, but there's also a component of what these offenders are going to do to the community if we're not taking into account their offense. Going back to the conversation about the felony conviction, if they are struggling to get control of their addiction prior to having a felony conviction, it's only going to get worse with a felony conviction.

Chair Hardesty:

Okay, we've had this discussion. Would anyone like to recommend one of these three options, a different option or no option? Judge Wilson, what would you like, if you'd like to recommend anything?

Judge Wilson:

I like your thought of continuing to treat it as a category E felony regardless of how many prior offenses, leaving the door open to diversion. If they successfully complete a rehab program, no felony on their record. I don't know that this would need to be in the statute necessarily, but the question is what if they don't? I'm opposed to sending them to prison for the reasons that Ms. McNamara said. Again, and I've said it so I won't repeat it, I don't see any benefit to that, and there is potential harm to that individual committing more serious crimes later than if he or she didn't go to prison would be less likely. I think maybe something else we can look at is a shorter time to seal that felony record in a simple possession case so that they are not carrying that big F letter around with them for a number of years. I'd like to just say that I guess I don't see this as the number one goal of this being to reduce the prison population directly. Since President Nixon declared the war on drugs, we have been fighting drugs the way we're fighting them today, and we are not winning the war. We are not, as far as I can tell, reducing addiction. We're not reducing the rate of addiction. In short, it appears to me to be a failure, and the primary goal that I see from this, which is indirectly reducing the prison population, but it's shifting those resources from having these people being prosecuted in district court, meaning they go through a preliminary hearing. They're probably incarcerated for that period. Whatever the process is, a trial, pleading guilty, all of that could be used to rehabilitate them. To me, the way that we are doing it is a tremendous waste of resources and reaping benefits far less than the cost, but I am retreating some from what I said at the last meeting about the misdemeanors for a couple of reasons. Mr. Callaway's comment about maybe it's not enough leverage over the other participants, but I like your thoughts. As I've already said, I'm not going to take the time to repeat those, and I hope maybe there would be some consideration to a shorter period to seal records. That could ameliorate for some the felony.

Chair Hardesty:

One of the things that I wanted to mention also, and Judge, your comments caused me to think about this additional point, we have a number of specialty courts in our limited jurisdiction courts around the state, and when you cite people or arrest people for category E, they immediately end up in district court. What I was hoping we would achieve is for a large number of these schedule I to IV substances, channeling them from—and that's why I kind of was intrigued with Mr. Callaway's suggestion of a citation—channeling these kinds of offenders into our specialty courts and limited jurisdiction courts. I did have occasion to talk to a number of limited jurisdiction judges about this citation, and referenced the individual and their place to appear was going to be in the specialty court in the limited jurisdiction court. I would like to open that door or open that discussion also, because I think this kind of gets to the point you were making before where you've got a drug user, and here we're talking about ranges of penalties, but really the focus is to try to take advantage of all of our specialty courts, both limited jurisdiction and those in the

district court. I don't know how we can better feed those cases into the limited jurisdiction courts, but I'd like to explore that. I don't know if any of that makes sense, but you wouldn't be able to do it unless you only cite them for not even a gross misdemeanor. You'd have to cite them for a misdemeanor in order to have them respond in that way. So, maybe a first or second offense of certain drugs could be a misdemeanor as long as they are cited to the specialty court that is operating in that jurisdiction.

Judge Wilson:

Seattle has a program where they can cite for a simple possession. They can cite, and the citation directs them to attend the next drug court meeting so they are immediately—they don't have to be arrested. They show up, hopefully. But the program, I was present for a presentation about that. They think it is tremendously successful and it avoids a lot of what I'm hoping that we can avoid.

Chair Hardesty:

And it gets these people some treatment earlier. Those that are amenable to it. Now, the person who is perpetual or is not going to show up, we're going to be dealing with them either in district court or maybe ultimately in prison anyway, but I like that point.

Judge Wilson:

I have an article about that that I can forward to Mr. Anthony to distribute to everybody.

Chair Hardesty:

Sure, and maybe CJI already knows about that.

Judge Wilson:

It's in that list I gave you.

Chair Hardesty:

Mr. Jackson, in Douglas County, you have drug courts in your limited jurisdiction courts, don't you?

Mr. Jackson:

We do. The question is about having a limited jurisdiction drug court. It doesn't work, it's not effective, and there are reasons as to why. If it was run like our Western Regional Drug Court that Judge Blake primarily comes down for, or we've had Judge Breen who

actually started that. Those have been very effective, but I think that we're seeing the failure in Douglas County similar to the failure that Judge Bateman described to me about the justice courts down in Clark County and for the same reasons that they're failing there. A big component of it has to be—

Chair Hardesty:

Excuse me, Mr. Jackson. I'm trying to draw on your experience. Why are they failing? Maybe there are multiple reasons, but what would be a major reason why they're failing?

Mr. Jackson:

Consistency and lack of accountability. Drug courts have rules, and as much—and I have a lot of respect for Judge Wilson. I know where your heart's at on this and I absolutely appreciate that, but I can tell you the number of individuals who were addicted to drugs, and so many of them are multigenerational. We see that just passed down, unfortunately. The only reason that they finally won at the end and they think it's a victory, and it is a victory and we're there celebrating it with them, is because of the fact that they were being prosecuted, that they did go through that felony drug court. We're not seeing those successes in the misdemeanor drug court. Judges set the rules but then they control it because it's not a mandated program. We have two townships in Douglas County. The one in the Carson Valley where the majority of our community lives, that judge will change the rules based upon that particular individual to reach a desired result. The success of these programs are those immediate sanctions, and those are not being implemented at all. If he does it, which is very, very rare, he will hold that person to be the last person and everyone else will be excused. No one else sees it. No one has ever seen any ramifications associated with their behavior, so the word on the street from the defense attorneys, they tell us this, we're aware of it, is no one is being held accountable. To them, it's just biding that time. I get to continue to use because it's not going to effectuate those changes. That's what it's about is making these particular changes, and I've questioned this. I was questioning a few years ago where I previously prosecuted, who now is a grandmother, I prosecuted her on trafficking charges, sales, drug possession, been through drug treatment, been through multiple diversions, and then her daughter when she was 18, and then she was busted where they were passing around the 18-year-old's 6-month-old daughter. While they're passing the meth pipe, they're passing the child off. This child now is in our school system, and guess who the problem child is? It's not her fault, but that's where we need to make those changes. That's even without involving the criminal justice system. I want to see these changes too. I think we all do. Every prosecutor across the state that I've talked to, we are aware of these issues. They are one of the most challenging things that we face as a prosecutor. I am intrigued by some of the things that you had stated, Justice Hardesty, on the limitations, and it brings up some other questions. But every single response that we have to me just opens up more issues that we haven't even begun to discuss or drill down on. That's why, to me, this

thing of all of these needs to go to a sentencing commission. It's almost like we would need a controlled substance commission just to spend an interim really examining the issue. I think that ultimately, this session, I anticipate there is going to be some movement on drug trafficking, on what those levels will be. I do expect that to come out of the session, and that will have some control on some of those numbers of individuals going to prison. I've got to tell you, and I can't speak for all of the counties, but from talking to the other district attorneys, I can't think of anything where someone has to work so hard to get into prison such as possession of a controlled substance. I understand your numbers, the raw numbers, about that 11 percent, those 187 individuals, but I can't think of anybody in my jurisdiction that goes to prison on a simple possession of a controlled substance. Typically we have a lot of sales cases, possession for sales that we will resolve at a felony possession of a controlled substance, category E, but in order to get revoked, it's amazing what that person has—they just have to really almost just give up, commit another crime, which typically will happen. I would love to know a lot more than just those sheer numbers about how hard someone has to work in order to go to prison on a simple possession of a controlled substance, but I would like to hear a lot more about what you had brought up, Justice Hardesty.

Ms. Rose:

I really appreciate the conversation here today and thinking about how complicated this issue is, and I think all of us are coming from a place of wanting to help people who have an addiction problem, who have a mental health disorder and they just end up going through the criminal justice system. We obviously are not equipped at this present time to deal with helping everyone and trying to get them to a place where they are not consistently using drugs or a way that we can help them get to a better place. I think we're all coming from a place where we want to help people, but I'm just very concerned about leaving the current statute the way it is, even with the changes that you suggested, Justice Hardesty, which I think are great, but still keeping it as a felony for the reasons that CJJ has already articulated about what that means to have a felony on your record. The first time that you're arrested with a controlled substance, that is a felony. It doesn't matter how much you have, it doesn't matter what drug it is, it doesn't matter the circumstances, you're going to be charged with a felony and facing that. I think, Justice Hardesty, you make a very good point that it really does need to be broken up by the types of drugs and thinking more about this problem, but I also am really hesitant to just leave this to the Sentencing Commission because the Sentencing Commission isn't going to meet until the next interim, which means they won't make any recommendations until 2020 and then that won't even be able to be presented to the Legislature until 2021. We here have a really unique opportunity to try to make some changes now and to try to fix this issue for people who do have felonies on their record for just simple possession who are going to prison for 4 years, 3 years, for several years of their lives repeatedly for just being addicted to drugs. I really would like to see what other ways we can move towards the misdemeanor concept, towards the gross misdemeanor concept. I know there was some

support for option three where the first two were misdemeanors, the third and fourth were gross, fifth or higher was a category E. Those are my notes and I don't remember any more exactly what that was, but I just think that also the option—and I really like the option of specialty court. I think that's fantastic. We should move towards that, but from the data that we've seen, so many people still fail specialty court. They're still going to it. We hope that they will complete it. We want them to go through it, but just going to the specialty court isn't going to solve their drug addiction, and obviously a lot of people are failing that. We can still create a specialty court for gross misdemeanors or even for misdemeanors. We were having some discussion here. I'm not exactly sure about what exists right now for drug court or how that works, but I don't really see any legal reason that we can't create a specialty court or create a diversion court or something like that for gross misdemeanors. I would even be in favor of changing gross misdemeanor or even earlier, maybe after the second one if that's something we would want to consider, but I think we really want to be careful about what we are suggesting and what we want to do as a Commission and use the opportunity we have now to help as many people as possible. At the end of the day, we can also only do so much through legislation. We can say we want to solve all of these problems, we want to help people, we hope that if it's a felony, they're facing a felony, they'll go to drug court and we'll help them solve those problems, and I really hope that's true, but we're not going to be able to solve everyone's drug addiction through mental health or through drug court or through any other options through the criminal justice system. I think we just need to think, then, if someone has a drug addiction, do we want to punish them with a felony, and at what point do we want to punish them with a felony. Should that be their first, their second, their third, their fourth? Because of all the giant ramifications that come with having a felony, even a category E, it's very difficult to succeed in life with that felony, even if—I like the suggestion, I think it was Judge Wilson, I'm sorry if it was someone else, saying that maybe we can make the period shorter to seal your record, also great. I think that's fantastic, but you're still going to lose people in that. It's a very long and involved effort to seal your record. It's difficult to do, it takes a lot of steps, and in the meantime, you can't find a job. In the meantime, you're going to lose the ability to take care of your family or you have other sorts of ramifications because of this felony on your record just because you had one drug possession. I don't want to lose this opportunity, so I really am not comfortable today keeping it as is, even with the changes that you suggested, Justice Hardesty. Just to make a suggestion, maybe what we can do is CJI can get us some more information about the other states, like Oklahoma and West Virginia, who have all misdemeanors, and then also Tennessee and Utah who have misdemeanors for the first and second offense, that maybe we can—it's 4:15 p.m., we're not going to be able to talk about it today.

Chair Hardesty:

I was going to make a suggestion to try to move this along and then see if there is a majority that supports it, and then obviously there may be others who don't. This was my

suggestion, that you would make the first two convictions a misdemeanor and every conviction thereafter would be a category E felony, striking the provisions that we currently have in our category E offenses that preclude offenders from getting subsequent treatment and/or be on supervision and allowing them to divert away from that category E felony offense. Then the larger Commission can join in on this debate and we can see where we are from there. I throw that out there to see if that's a proposal that at least a majority of the subgroup would entertain moving on to the Advisory Commission. I will exercise the prerogative of the Chair and canvass Judge Wilson.

Judge Wilson:

I could support it. I still would like maybe added to that the shorter period to seal the records, but the way you outlined, if that's option four, I would support that.

Ms. Armeni:

I would support that.

Mr. Callaway:

No, I can't support that.

Ms. Rose:

I would support that. I would like to also have presented to the full Commission the option of creating the drug courts for the misdemeanors. I like Judge Wilson's suggestion of the shorter period to seal the record as well.

Ms. Jones Brady:

I support that. The other thing I was wondering is if we could invite Judge Pearson or one of the other judges from Washoe County to give us some information at the overall group about what successes they've had with their misdemeanor specialty court.

Chair Hardesty:

I'm glad you mentioned Judge Pearson, because I think there is a difference between maybe the way the drug courts have been operated in some of the limited jurisdictions versus others. Mr. Jackson, on the proposal?

Mr. Jackson:

No.

Chair Hardesty:

I think what we will do is at least pass along this, but I think it's important in doing so that we make clear that treating drug possession as a misdemeanor has some objections to other members of the subgroup and that as well there was support for reducing the length of the time that it takes to seal a felony record and also seeking access to limited jurisdiction courts through misdemeanor arrests. I don't favor, at least for now, citations. I think you would still end up with arrests, but you'd have to cite, I suppose, with misdemeanors. But I think the greater Commission should weigh in on this. At least this moves this forward, but they need to have the benefit of the differing points of view as well. All right, it's 4:20 p.m. Let's see what happens with respect to trafficking and then I'll make a general observation. Mr. Weld, do you want to talk about these schedules and then we'll get into that discussion?

Mr. Weld:

There are two pages that concern drug distribution generally. The first page is less about the policy option, really, and more about putting trafficking in context with other statutes that Nevada has at its disposal for punishing distributive behavior, so that is possession for the purposes of sale and then sale, distribution or exchange. We laid that out here, just showing how those currently step up. The policy option that is displayed on this page is really taking comments from members at the last meeting regarding judicial discretion in certain cases, the acknowledgment that in most cases where distribution occurs that that is a serious offense and should be treated accordingly, but for some there are outliers for which a judge in some cases would want discretion to not sentence someone to prison. The option that's reflected in the last column is largely concerning that, enabling judges for any level of possession for sale or sale, distribution or exchange to sentence to probation, and course that's just a starting point. It's just a reflection of some of the comments. The other change that was made here was really to create more of a step up between the sale statutes and the trafficking statutes, just kind of principles of sentencing suggest that for more serious conduct you want to really have a separation of sentences. We did also have the option on the page here of a category C felony for first-time sale, and that's the only term of years that would be different in that column.

There wasn't room on this page here for the trafficking options, but I'd like to just briefly talk about those before the group starts discussing them. There was sort of an acknowledgment at the last meeting that there were sort of three different ways to change trafficking statutes generally. You can sort of take the strict liability aspect away from it so it's not just weights anymore, it does require indicia of sale, and basically making it a more severe category of the sale statute. That's reflected in option one, and those weights are really just based on some other states that often make that first level 28 or 30 grams as a very common amount. The second option there is maintaining the strict liability idea so you are presumed to be a seller if you have this amount, and just increasing in severity

with the higher the amount. The third option is something that was discussed at the last meeting, also which would be to the discretion point I was talking about, really allowing judges to impose probation for these offenses if the facts warrant them. That's just sort of an explanation of what's on these two pages and I'd turn it back to Justice Hardesty.

Chair Hardesty:

So in effect, with respect to the existing sale and distribution penalties, there's really just two changes recommended by the option. One is to change the first offense for sale distribution from 1 to 6 to 1 to 5, making it a category C felony, and then all of those offenses for possession for sale or sale, distribution, exchange or transport would be, at the discretion of the judge, probatable. Is that correct, Mr. Weld? Okay, so before we get into trafficking, let's talk about that because the sentencing lengths in the categories, except for one instance, haven't changed. What has changed is the judicial discretion at sentencing, so I'd like to first find out if there are objections to that policy, just talking about those two crime sentences or crime types, if there's an objection to that policy option.

Ms. Rose:

We just wanted to be clear down here.

Chair Hardesty:

On page 6, everything except the first offense, sale, distribution or exchange has the same penalties and categories of penalties, but the difference is in the first offense for sale, distribution or exchange, it becomes a category C, 1 to 5 instead of a category B, 1 to 6, and all of those crimes are judicial discretion on incarceration versus probation.

Ms. Rose:

Yes, I agree with that recommendation.

Mr. Callaway:

As I've said before, I support judicial discretion. The area that's kind of a hard rub for me on this possession for sale, distribution and trafficking is that that category we just spent an hour talking about, the addicts, the people that are out there addicted to these substances, these folks are the ones supplying them with what they need for their addiction. These are the ones that are the main contributors to the problem from the supply and demand side. I fully support giving the judges discretion because every case as I said before is different, but I just have a hard time tinkering with some of these too much without further discussion.

Chair Hardesty:

Well, they're not being tinkered with, it's just the discretion of the judge except one, and that is essentially the same except for 1 year. It's the same sentencing range, so the only change in any of these from existing statutes is whether the judge in certain cases can probate them or not.

Mr. Callaway:

I do support that.

Ms. Armeni:

I support it.

Mr. Jackson:

I share Chuck Callaway's comments regarding that these are the individuals that are putting the supply out there, that are pushing it through the pipeline. I can tell you one of the things I was most proud of is one of the things dealing with the drugs issue in Douglas County. As you all know, Stateline, Nevada, where the casino corridor is, is in Douglas County, and not nearly to the degree of Las Vegas, but it is an international destination. People come from all around the world both for the winter for the skiing, for the summer because the jewel of and one of the prides of Nevadans is Lake Tahoe. Because we deal with so many drugs up there for people, the transients that are coming up for the weekend, there's a lot of drug trafficking, a lot of drug trades. But because of Nevada's laws, the drug transactions, the dealers, those involved with the Mexican drug trafficking cartels, they don't want to come into Douglas County, Nevada to deal drugs because of our statutes. This is going to be opening up the doors for the cartels bringing drugs into our state, inviting them by taking away some of these mandatories, and that goes to the drug trafficking but also to the category B sales. It's not a 1-year difference. It is 1 year if you just state it that way, I agree with Justice Hardesty on that, but the difference between a category B and a category C in the State of Nevada are the Assembly Bill (AB) 510 good-time credits. We all are aware of the prison math associated with it, but if we prosecute someone on sales of a controlled substance, that methamphetamine, the cocaine, the heroin, and we convict them on a category B and the judge sentences them, for example, to 2 to 5 years under the current statute, able to do that, we know that they're going to serve that 2 years in prison, that the credits that they're earning are going to come off the backend, off that 5-year sentence. They're not going to earn it off that frontend. We take that into consideration as part of our negotiations with the public defenders and the contract attorneys across the state. Turning it into a category C felony, those credits are going to come off the frontend so if someone did have—they're going to get their jail credit, but the truth is that these people that are selling drugs, if they're sentenced to that

same 2 to 5, that person is not going to be serving 2 years in prison. That person will be out of prison probably within the first 8 months without any credit at all, if they're even sentenced to prison at all. That's a significant difference, and then that person gets to go out again and continue to engage in that type of criminal activity, which unfortunately is occurring. So, for the sales category B, as far as the prosecutors are concerned on the sales, it should remain as a category B. I know we're only doing this one, but part of a concession the district attorneys have considered is allowing those discretions in exchange for not reducing the possession of a controlled substance down to those misdemeanors, not putting so many Nevadans at risk by basically decriminalizing felony possession of methamphetamine, cocaine, GHB, heroin. Yeah, let's give some discretion there, but without any of those concessions, I can't agree to any changes at all on the possession for sale, the sale. When we get to the drug trafficking, these numbers are just so far out of bounds, but I'll address that next time.

Ms. Jones Brady:

I could support it. I think that I would be open to also supporting leaving the sale or distribution as a 1 to 6 but still giving the judge discretion to give them probation on that. One of the things is just to incorporate the substantial assistance statutes, that that can always be still a factor that a judge could consider when deciding whether to give someone probation.

Chair Hardesty:

Okay, so I think at least with this section, what I'm hearing is most everybody would pass this along to the Commission. Obviously, Mr. Jackson's views as well as to some degree Mr. Callaway's views would be included in the report. So, let's turn to drug trafficking. I have just a general question. If there were no changes to drug trafficking other than extending to the judges discretion on sentencing, then based on your earlier remarks, Mr. Jackson, you probably would be opposed to that also, right? You want mandatory sentencings in these cases, is that right?

Mr. Jackson:

Based upon my previous remarks and everything else that we've been through, yes, that would be our position.

Chair Hardesty:

I want to hear from CJI as to the trafficking subject matter and then we can see what other people think about changing those weights or offering discretion on trafficking.

Mr. Weld:

There's really just a big variance in how states define trafficking and how they set the weights that create the presumption of intent to sell, and there are a handful. Nevada's just one of the few with weights that are as low as 4 grams. The majority of states that do have that presumption of sale created by an amount, it's closer to the 28-gram number. From my comments before, it's usually either they have no weight threshold that alone can create a crime, and that's true of the majority of states, or they have thresholds for higher levels of sale, so there would, for example, be categories that came to those on the previous page like possession for sale or sale and another higher penalty for sale of higher amounts. But it's difficult to say that there's a consensus among states as to how to do this because there is such a wide variance, just that Nevada currently treating all substances as a mandatory minimum at that 4-gram threshold, that's a big outlier. It's an outlier for a state to have the mandatory minimum start at 4 grams.

Chair Hardesty:

Let me ask the members of the subgroup what approach, if any, you want to take with regard to trafficking.

Ms. Armeni:

I would support option two, but with the understanding—I think the way I understand this is the first 2 categories, the 56 to 100 and the 100 to 300, those would not be mandatory prison. It would still be in the discretion of the court, is that right?

Chair Hardesty:

Yes.

Ms. Armeni:

Okay, so I would support option two.

Mr. Callaway:

First of all, let me start by saying I don't support any of these options based on the comments I made earlier, and I share the same sentiment as DA Jackson in regards to that. But in the spirit of negotiation, looking at the documents that CJI supplied us on November 8 where it says that only 5 percent of folks in prison, if I'm reading this chart correctly, fall into the 4 to 10 gram category, and we've also had discussion about the mule, although I do have some reservations about opening that door too much to where it's convenient for drug traffickers to just claim they're the mule and then transport their

own product, but I would be open to maybe a fourth option where in that lower category which only makes up a very small percentage of our prison population, the 4 to 14 grams, that we eliminate the prohibition on probation and specialty court eligibility, give the judge discretion that if they have reason to believe that that person is a mule or the facts of the case support that they didn't know what they were trafficking, they were paid a certain amount of money to haul the stuff across the country and they didn't know what it was. If the facts show that, they would have discretion in those 4 to 14 gram cases, but leave the statute as it currently is in the 14 to 28 gram and above categories.

Judge Wilson:

I would support option one with eliminating the prohibition on the probation in specialty court. For my jurisdiction, those are significant amounts of drugs. The conduct evincing sale or manufacturing, to me, at those levels I don't know that that's necessary, but I don't have an objection to it.

Ms. Rose:

I really am very much in favor of, regardless of the weight requirement, making sure that we do have some type of requirement that there has to be an indicia of sale, and I know that is with option one with the lower weight requirements, so I think I would feel comfortable even with the lower weights as long as there was that included in the statute that there does have to be evidence of sale and that burden is on the prosecution to show that. Whatever weight we come to, I think that that is the most important thing to me, that we show that they actually meant to sell it.

Chair Hardesty:

That sounds a little bit close to what Director Callaway was saying. I would like to hear from Mr. Callaway to see if he agrees with that. You phrased it a little bit differently.

Mr. Callaway:

I would disagree. I think as far as the weights go, we've had these discussions about arbitrary weights and about where did we come up with 4 to 14 grams. In my mind, option one and option two are more arbitrary weights. We plucked those from some other state or whatever. I don't support changing the weights. My recommendation was that very low level of trafficking that makes up only 10 percent of our traffickers, give the judge discretion in that low level. Keep the remaining levels the same.

Chair Hardesty:

Maybe I misunderstood Ms. Rose, but I thought she agreed with you that, in the context

of the lower weights, and I thought she was referring to the 4 to 14 grams, that there would be discretion for the judge in instances in which there was a question about whether you could prove evincing sale or manufacture. Did I misapprehend that, Ms. Rose?

Ms. Rose:

Yeah, I think kind of what I would like to see—and I do agree with Mr. Callaway that I do think sometimes the weights are arbitrary. As we talked about last time, I really have no idea what these weights mean. I think it would be better to break it down by drug. I think that would make a lot more sense, but because we don't have that opportunity for us to do that at this particular moment in time, the most important thing to me is making sure, regardless of what weight we tack on in the spirit of compromise and trying to figure out what we can make as a recommendation and make some change, is that there is always an indicia of sale requirement for the prosecution. That's what's listed in option one for the category. It's in option one in all three of the boxes is an indicia of sale or manufacturing is required. Personally, I would certainly be in favor of the higher weight options, but I think that talking about what's most important in the spirit of compromise and timeliness, that's what I would really like to see. I do agree that we should also—for all substances, for all levels, the way option three describes eliminating the prohibition on probation and specialty court eligibility for at the very least your first offense, however that tracks.

Chair Hardesty:

Judge Wilson favored option one. Is your position more aligned with option one?

Ms. Rose:

Option one, only because that includes the indicia of sale. If it's not able to be separated, then yeah, option one.

Ms. Jones Brady:

In our focus group, they were mostly concerned about having the indicia of sales, having that as an element, adding that as an element. They were also concerned with the indicia of sales, and then in terms of the weight, we didn't really know—we didn't have any science to recommend specific weights. The group did agree that the weights, as they are, are too low and that a lot of our clients, especially IV meth users, the 4 grams is really nothing for them in terms for the heavy drug users. We would like higher weights, especially at that first level, and indicia of sales. The other thing that they wanted was no life sentences except for the real heavy amounts of weights. I'm just giving general guidelines. Based on that, the one that would most closely fit the responses from the group would be option one.

Chair Hardesty:

Okay. I think we have maybe a three-way split here, I will characterize it. Oh, I'm sorry, Mr. Jackson.

Mr. Jackson:

I'm sorry, I responded to the question only and wanted to reserve the comments. I apologize at the outset for maybe some strong words. Of course we have individuals, members of this panel, that are going to agree to option two, the higher amounts, but I can't think of anything that is so much more destructive to a community. You're talking about an indicia of sales. We are in 2018, moving into 2019. This isn't about drug sales in the 1960s and 1970s where people went around with their drugs and their little scales and their pay-and-owe sheets. Those don't exist. We don't see those in the cases. But what about the person who is transporting an ounce of heroin, an ounce of fentanyl, an ounce of Rohypnol, an ounce of GHB, 28 grams, transporting that? They live in the Bay Area, and say they get pulled over by a law enforcement officer outside of Winnemucca on I-80 and they say that they are driving to Salt Lake. They just make up some story. Their story's not consistent. They're transporting the drugs. There is no indication in the vehicle that they are going to sell it. They are not admitting to selling it. They are trafficking. They are transporting it based upon that quantity. This isn't about personal use. This isn't about someone that has a couple grams of methamphetamine in their pocket who gets busted snorting it inside of one of the casinos up here because they go into the bathroom. It's not one of those types of cases. This is about protecting our community and about doing what's right. So, 56 grams, 100 grams, there's about 454 grams as I recall in a pound. Do you know how much fentanyl it takes to kill someone? How much GHB or Rohypnol for someone to put into a female's drink at a bar to help facilitate through that drug and rape that individual? A small, small quantity. I'm not saying that our current statute is right. I agree with Director Callaway; those were arbitrary. These are just as arbitrary. We sometimes look at the feds' numbers, but the feds don't prosecute trafficking cases unless it's some quantity that is a lot higher than what their minimum levels are. We can't get the feds involved in our cases through the state. It's very rare that we will see them take on a particular case. The reason that our Legislature—and if you go back and look at the history, there was a lot of testimony about, at certain quantities, there is that presumption that they are not having that amount for just their use over that day or over that particular weekend. Having us as prosecutors trying to show evidence of sales basically makes the entire statute hollow. It doesn't take into consideration the transportation of it, for example. Based upon any of these options, absolutely not. I think these are horrible options, horrible decisions for us to be making on it. Again, no one is talking about the drugs. At our very first hearing, Justice Hardesty was talking about heroin, and his comments were along the lines, and I wrote notes, 4 grams for heroin, shouldn't it be less weight and a higher penalty? Shouldn't it be? I'm asking you, members of this Subcommittee, shouldn't it be a lower weight for heroin, GHB,

Rohypnol, for example, and a higher penalty than the current 4 to 14? And you're talking about 56 grams?

Chair Hardesty:

My position aligns with the recommendation or the suggestion of Mr. Callaway, for now. There may be a majority of folks that we would reflect option one. My position and Mr. Callaway's aligns with a modification to the existing trafficking, 4 to 14, where the judge would have discretion to consider specialty court or probation in those instances in which there isn't a demonstration of sale but the person is actually a mule and not involved in that approach, and then of course Mr. Jackson's position would be not to change these at all. I return to the comments I made that Mr. Jackson attributes to me. I stand by those. I think that the weights need to be evaluated, and I appreciate the fact that that would be an extraordinary study, Mr. Engel, but at the end of the day, these drugs are different and the quantities are different and the impacts from the quantities are much different. I just think that maybe Nevada is an outlier, or maybe I'm an outlier, but I think part of the reason, and I share Judge Wilson's point of view, we're losing the war against drugs is because we are regulating drugs or we are criminalizing drugs improperly. I think we don't take into account the impact that a particular drug has, and certainly different states have different issues.

But anyway, we'd asked CJI to pass along option one but with the other noted alternatives. I'd like to turn to the habitual criminal options to see if we can get through this issue, and then there are a couple remaining things that might not be quite as difficult. Before we get to habitual criminal, could I ask everybody to turn to page 10 on felony B offense policy options? I want to mention just in the interest of time, and I don't mean to cut you off, Mr. Weld, but in the interest of time, I had asked Mr. Anthony to list the crimes that were identified by Mr. Jackson in a session of the Advisory Commission. That was a couple of years ago, anyway. Those 13 crime types are listed on the left side, then there are 3 nonviolent category B drivers that would be shifted down to a, as proposed anyway, category C on the right-hand side, and then there would be a series of adjustments that would be made. We were talking about burglary and trafficking and others, but that's a consequence of how the Advisory Commission eventually decides to resolve those issues. What I was interested in knowing is if the subgroup was prepared or would be willing to pass on the 13 crime types and transfer those to category C's and the 3 crime types that are on the right-hand side of that column, recognizing that the others are more consequences depending upon how that turns out. In the interest of time, is there a discussion there? Maybe I shouldn't have just clumped those together, but that's a starting point. Does everybody understand the question I posed? Again, looking at page 10, the top 3 on the right-hand side would be reclassified from category B to category C, and the 13 that Mr. Jackson had proposed back in 2016 on the left-hand side would be also reclassified as category C's.

Mr. Jackson:

On the left-hand side of those 13, the comments that we had earlier under numerous individuals, members of this Subcommittee, when we were talking about the theft is to make sure that the numbers used there are still consistent with the other numbers as far as other recommendations. On the right-hand side, as to those three, the DUI (driving under the influence), ex-felon in possession of a firearm, transportation of a controlled substance, I know that myself and the district attorneys would be opposed to the ex-felon in possession of a weapon and the transporting of a controlled substance reduced down to a C. I have not had a discussion nor have I even considered the DUI, but I could bring back some information before the full Commission, and then of course the other 10 will take care of themselves based upon our other recommendations.

Ms. Jones Brady:

I don't have any objections. I think that they sound reasonable.

Ms. Armeni:

I support changing all those offenses to a category C.

Mr. Callaway:

I cannot support changing specifically the three on the right: the DUI, ex-felon in possession of a weapon and transport of a controlled substance.

Chair Hardesty:

Okay, but the others you would be okay with, Mr. Callaway?

Mr. Callaway:

Justice Hardesty, I don't want to get back on a soapbox. For the sake of brevity, I know we had discussion on these 13 in previous Advisory Commission meetings several interims ago. We've had lengthy discussions about the category B's over the years. I think that taking another look at these right now, just briefly, there are some of them that seem like common sense to me, like the vending machine one and the fire prevention device, although firefighters may not like that. But to say today at this point in this meeting that I'm good with that policy option moving forward, I'm hesitant to do that.

Chair Hardesty:

Yes, I remember specifically that you had an objection to number 3, grand larceny of a motor vehicle, when we talked about this in 2016, if my memory is right.

Mr. Callaway:

Yes, that's correct.

Chair Hardesty:

Okay. Ms. Rose, how do you feel about shifting those 13 and the 3 on the right to category C?

Ms. Rose:

I agree with that recommendation. That makes sense to me.

Judge Wilson:

All okay except for the DUI. That should remain a category B.

Chair Hardesty:

I think most everybody supports the 13 crime types listed on the left column and there is a mixed bag on the other 3, so I would just say these were offered and people didn't have enough time to vet those. That would probably be the best way to describe that one, I guess. Let's just take up page 9, the PSI sentencing recommendation. We are running a little short on time, so I'm cutting off CJI a bit, but we can ask them input.

Mr. Jackson:

I have no objection to option one, which would remove the sentencing recommendation from the PSI's and also would require sentencing training for all judges.

Chair Hardesty:

Let me just ask, by a show of hands, does everybody support option one and basically what Mr. Jackson said? I do. Judge Wilson, you do. How about in Las Vegas? Can you raise your hands if you support it? Okay, it looks like we're good to go on that one.

Ms. Jones Brady:

I support option one, but I also like down there where they say increased sentencing training for probation specialists that create the report.

Chair Hardesty:

Yes, I think that was intended, at least, to be part of the recommendation, both training of sentencing writers as well as judges, both. Everybody okay with that?

Ms. Rose:

Yes, I agree with option one I just would like to add to that, though, that the current PSI, I think still includes some factors that I don't think should be considered at all, like attitude, even if there is no actual number assessed to that or there is no sentence recommendation. I think what I'd like to see is also a revamp of the PSI in addition to all of this and to look at all of that. I know that's one of the long-term goals, but I'd like to just make sure that that's included in our recommendations, if that's possible.

Chair Hardesty:

Didn't the other subgroup take up the use of evidence-based risk assessment tools and the preparation of the PSI's, or am I conflating this?

Ms. McNamara:

They talked about it more in the context of using a risk assessment tool to establish supervision conditions and guide supervision decisions. They also conduct a risk assessment tool at intake, so that's what they are mostly talking about, that risk tool, the Nevada Risk Assessment System (NRAS) being used for supervision level.

Chair Hardesty:

Ms. Rose, you are talking about certain segments of option three, aren't you?

Ms. Rose:

I think so. I think maybe I was confused, so I take back my comment and I agree with option one.

Chair Hardesty:

Okay, sounds good. We will move that forward, and then that takes us back to habitual criminal. It would be useful, maybe, Mr. Weld, if you could comment on that, or Ms. McNamara or whomever.

Mr. Weld:

This reflects a couple different ideas that members had at the last meeting. The first was to base the lookback period on Nevada's record sealing statute. The prior conviction could not qualify for use as a habitual charge if it's a category A felony or a violent felony until 10 years have elapsed; for a category B, C or D, 5 years; category E, 2 years. Option two is to base it on other statutory lookback periods in Nevada already for domestic violence or DUI, and option three is just a shorter period based on a few other states. One thing just to note is there is a slight difference in a couple of these options between if the time starts when the previous sentence ended or when the previous crime was committed, and I think DA Jackson spoke a little bit to that at the last meeting, but that is another thing that the Committee would probably have to decide is if the clock starts to run, as it were, when the past crime was committed or after the time is served, and that's with regard to lookback policy. We also have a bullet point here in response to a few comments about not being able to earn credits off the minimum on that fairly high floor that third-time potentially nonviolent felons receive. This idea would retain the high maximum for such offenders but reduce or eliminate that 5-year mandatory minimum. Those are the policies in a nutshell.

Chair Hardesty:

Okay. Mr. Jackson, do you want to weigh in on this subject?

Mr. Jackson:

I'm still processing this. I may need some help, and I don't know if there are some habitual offenders that you guys, from looking at your notes, you can plug back in to this, because here's the question is who would even qualify anymore? My concern is that this would become so hollow that no one who currently is a habitual offender would continue to be a habitual offender. Probably under some category A's because of the 10 years following the completion of the sentence. If anything is about from the commission of the prior offense, for the most part, some of those will still be in prison, some of our worst offenders we want to keep in prison who are multiple offenders. Those times will have lapsed while they are still in prison, so when they get out we would be prohibited from going after them. But on our B felonies, for example, consider somebody who had seven or eight residential burglaries, stealing firearms and plugged that in to someone that served a sentence, got out for a year, committed five more burglaries, residential burglaries, got sentenced on

that, a global resolution, pled guilty to one, goes off to prison again, gets all of those benefits. Ultimately, those are the types of individuals we would like to target, if I understood everyone. Definitely Justice Hardesty when he was a sentencing judge wanted to target, but I don't know if they would qualify. I like the fact that we looked at that and you presented what was requested by looking at the current sealing statute, but I'm concerned that individuals we would want to use a statute for we would be prohibited by moving forward.

Chair Hardesty:

What about that, Mr. Weld?

Mr. Weld:

There are several other states that have this lookback period built into their repeat offender or habitual offender statutes. Those states still do put away people for those offenses. I think it's really a question of how you define habitual, if there is no consideration of staleness for the past offenses or if there is some mechanism by which a conviction is too old to be used for these purposes. As was talked about in the last meeting, the Nevada Supreme Court has weighed in and has found convictions in the past to be too old if they are after a certain amount of time. There is some research to suggest that crimes are committed by offenders in their youth, and often those happen in pretty rapid sequence, so I think it's really just an effort to address the staleness issue but in statute as several other states have done.

Mr. Jackson:

Justice Hardesty, I know that you will give every member the ability to speak on this whether they like certain options, but I would just make a request that this be brought before the entire Commission, that we just kind of kick this forward to the January meeting. Part of those questions I may be able to answer by looking at and talking to some other district attorneys and getting that, and if you guys could provide that material and submit it to whoever you're supposed to submit it to, but I am not in a position to be able to talk one way or the other. I will tell you, from the DAs, option two and option three, we think that absolutely kills it, that there is no further habitual offender if you go with either one of those options, because again, those go from the time of the elapse of the commissioned offense. Once we talk about option 3, 5 years elapsed, it's going to make just about anything stale, so anyone who basically was sentenced to prison, got out for a month and went back to prison, they get out, we are not going to be able to meet even the lesser, much less the greater. Everything then would automatically be stale.

Chair Hardesty:

Yes, we want to hear from everybody. My own view was I would have preferred option one but to run it from the completion of sentence, because then that's the most effective way to assure that you are really dealing with a habitual offender.

Ms. Armeni:

I support option one, and as far as the record sealing statute is concerned, it does exactly what you just stated. The time does not run until the case is completely closed, so if somebody is released from prison and then has a parole term, that parole term has to expire before the time period, those 10 years, would even begin to run. I don't know if that alleviates Mr. Jackson's concern, but they couldn't just be in prison and the time is running. That's not how it works. It would have to be the end of their sentence. I don't know if this is something we want to address or not. The way sealing works, for those that don't know, is if they have three convictions and two convictions are qualified for sealing, it doesn't matter. All three convictions would have to qualify. I don't know if that is something we want to take into consideration overall, because if we are following the record sealing statute, I think we'd have to follow it the way it is set out, and that is any conviction that person has would have to qualify for the sealing process, and if it doesn't, they can't seal their records.

Judge Wilson:

I favor option one. I would like it better if the category B was a 7-year and if the category E excluded simple possession of a controlled substance.

Chair Hardesty:

Good point. Mr. Callaway, are you in a position to weigh in on this, or would you like some additional time to reflect on it?

Mr. Callaway:

Justice Hardesty, I agree. I would like to have a little further time. It's not my area of expertise, and so I'd like to have some discussion.

Chair Hardesty:

Sure. Ms. Rose, would you like to comment on this tonight?

Ms. Rose:

Yes. I would be in favor of option one. I like Judge Wilson's suggestion to exempt the simple possession from category E or from habitual offenders, if I understood what he was suggesting correctly entirely, but otherwise I'd like option one.

Chair Hardesty:

Okay. Ms. Armeni, would you agree with that suggestion from Judge Wilson?

Ms. Armeni:

I agree with the exemption of the possession of controlled substance. I would have a little bit of concern of changing the category B only because then it's not mirroring the record sealing statute, and I think that may cause some confusion.

Ms. Jones Brady:

I would agree with option one and also Judge Wilson's recommendation about the category E felonies. However, I note that if the Legislature were to change the category, the simple possession cases, then the first or second use of that wouldn't necessarily qualify anyway if simple possession first time was reduced to a misdemeanor or gross.

Chair Hardesty:

I think maybe it's best to just pass these options onto the Commission with maybe a reflection of the discussion here, and perhaps we could hold—I don't know if this will work under the Open Meeting Law and all that sort of stuff, but maybe this subgroup could have another brief meeting to address this issue, or we could do it maybe just before the start of the general meeting, I don't know, or just allow our comments to be shared at the overall Commission meeting, but I think my own view is that those adjustments I suggested would keep us in line with the sealing statute under option one. Running it from the time of completion would be consistent also. I like Judge Wilson's suggestion and would ask that that be added maybe to the report that we make, if we could. I think that covers everything except pretrial diversion, and so could you review that, Mr. Weld?

Mr. Weld:

Turning to the last subject of the day, which is the pretrial policies on pages 11 and 12, we didn't discuss this at the last meeting, but it's important to consider as it directly relates to the kind of offenders that are overwhelmingly entering the prison system in Nevada. You see very high instances of behavioral health needs in this population and a lot of stakeholders reporting the difficulties that can arise. Just to point out that a lot of these

policies do cost money, which is part of where the Justice Reinvestment process comes in and the savings that can be realized from some of the tough decisions that this group might make going forward can be reinvested into some of these policy options that alleviate these issues. Some of the policies contemplated here reflect how other states have addressed these problems. They include establishing training requirements for law enforcement and requiring law enforcement work and behavioral health professionals to understand and address the needs of this growing population they are coming into contact with, with a big caveat there that it's not always the case that a given policy can work the same way in every county. Some counties might have the capacity to have programs like this. There are currently very successful ones in place in Carson and elsewhere, but it just might not be the case that it could occur in Elko, for example. So, when these things are discussed and implemented, there is often that flexibility there. Additionally, consider establishing diversion programs for offenders other than the specialty court programs that currently exist and removing existing eligibility barriers for some of those, strengthening specialty court programs by looking at the aforementioned eligibility requirements and establishing a presumption for certain nonviolent offenses for deferral, because as we have seen in the data, that practice varies quite widely by county. In some counties, the majority of people entering specialty court receive deferred sentences, and in other counties, the majority enter on the condition that they receive a conviction. That's sort of a brief overview of the pretrial policies. I'll turn it back to Justice Hardesty, but if any of the members have additional questions, they should ask us.

Chair Hardesty:

You bet. Let's begin with the policy options on 12. My question is, in the interest of time, are there any of these that members of the subgroup object to? Maybe you object to all of them. If that's the case, feel free to say so, but my question is are there any here that you object to.

Judge Wilson:

I don't have a problem with any of them.

Mr. Callaway:

Justice Hardesty, number one, obviously for probably almost two decades our agency has been requiring every officer that goes through the academy to be CIT (Crisis Intervention Team) trained, so the vast majority of our commissioned officers, COs in the jail and also some civilian personnel are CIT trained, so we are already doing that. There is a number of other steps we're taking as an agency to deal on the frontend with behavioral health issues and people in crisis with mental illness and also on the backend in the jails. I have no issues or concerns there. I think that if our agency was looked at, we are probably well above what the standards are across the country for that. As I move

down the list, I don't have an issue with number two. Number three I don't have an issue with. Number four is kind of a vague statement, to remove existing barriers to probation. I'm not sure what all those barriers are or what would be involved in removing them, so I'm not comfortable with saying yes on number four. Five and six at first glance don't pop out to me as major concerns. I guess, for the most part, probably 85 percent yes.

Chair Hardesty:

If we eliminated four, I think you agreed with most of the others?

Mr. Callaway:

Yes.

Ms. McNamara:

Justice Hardesty, do you want me to clarify kind of what four might mean?

Chair Hardesty:

Yes, it's pretty vague.

Ms. McNamara:

I apologize for that. Some of the things were actually what you all were discussing before in terms of the category E's having a previous failure of a treatment program, being on supervision. Those are the types of things specifically that this sentence is referring to.

Chair Hardesty:

Yes, I think this language is too broad. If it were narrowed to that point, I don't want to speak for you, Mr. Callaway, but I think you would agree with that also, wouldn't you, if it was focused on category E felonies and specialty court probation access?

Mr. Callaway:

Yes.

Chair Hardesty:

Yes, okay. Maybe we could reword that to be more specific?

Ms. McNamara:

Definitely. Sorry about that.

Chair Hardesty:

Ms. Rose, have you had a chance to review these six, and do you have any you find objectionable?

Ms. Rose:

I think generally I agree with all of them. I think they all make sense. For number six, I just have some questions about how that would work and what that risk and needs assessment would look like. I think we want to be really careful about exactly what we are looking for, who we are excluding, who we are allowing in. I would certainly be on the side of ensuring that everyone who wants and is eligible otherwise to participate in a specialty court should be able to. I'm not sure if I'm reading number six right, but it seems to me that it's saying the people who are the highest need would be able to enter the court first, and then if there is room available for other people that they would also be able to access it. I am just not entirely sure what number six would mean generally, and then when we are doing a risk and needs assessment, before I would say yes to that, I would want to see exactly what that would look like. But generally, I would agree that we would want the people that are the highest risk to be able to access the specialty courts first.

Chair Hardesty:

Mr. Engel, did you want to comment on this?

Mr. Engel:

Sure. Eligibility criteria for drug courts, the research on it has shown that drug courts, because they are intensive intervention, fairly highly resourced, that they should be preserved for those who are most likely to benefit from that level of intervention, and those have been found to be folks who have a moderate to high risk of recidivism and moderate to high needs for the interventions that work to reduce recidivism. The lower-level individuals, low needs, low risk, normally don't benefit. Because they interact more with higher-risk people in a drug court, there can be some damaging effects to that intervention, so not only does it waste money but it also could have a criminogenic effect on low-risk offenders.

Chair Hardesty:

Ms. Armeni, did you want to comment on these?

Ms. Armeni:

I support one through five. Number six, I agree with it generally, but I am concerned with the language of "restrict participation" so I think I would want more information before I was 100 percent in on that one.

Ms. Jones Brady:

I support it. Number six, again, I would need more information about that. I generally would like more people to be able to have access to the specialty courts than to add additional restrictions. In terms of removing existing barriers to probation, I guess what I was thinking of as a barrier would possibly be resources that we give to the Division of Parole and Probation. I would like to see them get more resources specifically for rehabilitative kinds of services, more social workers, more day reporting centers, more ability to give people house arrest, things like that.

Chair Hardesty:

Yes, the Sentencing Commission has made that recommendation, but I think if we reword this to be more specific about category E, you would be acceptable to that?

Ms. Jones Brady:

Yes.

Chair Hardesty:

Okay.

Mr. Jackson:

I was actually expecting a lot more discussion on this because I thought these were extremely vague and very broad. I thought most of today or this afternoon, we would probably have an hour that you guys would give a presentation on it. Policy option number one, requiring a certain percentage of law enforcement officers to have CIT-trained officers—one is a certain percentage, one percent. I have no idea what the percentages are. Conceptually I agree that this is a very good thing in all of the communities throughout the state, so conceptually I agree that there should be a certain percentage. I don't know what that percentage would be, and it would be hard to give a recommendation ultimately without inserting some percentage there and how we arrived at that percentage. I know that Clark County has been doing it with Metro, Washoe, I think the majority of the larger rurals have some form of the CIT-trained officers. We have a Mobile Outreach Service Team (MOST) in Douglas. Number two, conceptually I agree with that as part of the

reinvestment. Ultimately, decisions will be made with that reinvestment as to where those dollars will be allocated. I've had some discussions off-line with Mr. Engel that I think that most of that money needs to go to the treatment because it is lacking so much across the state, and especially in the rurals. I don't have enough information at all on number three, establishing pre-prosecution diversion, and that can be read one of two ways. Either it does come to the prosecutor's office but our hands are tied because of this particular diversion, or it's something that occurs even before it could come to a prosecutor's office. Then, when we're talking about, again, what's the definition of a nonviolent offense and then we're talking about treating certain offenders with minor children differently, there's just not enough information. I would say, based upon what I read there, no. Removing existing barriers to probation: the one example that was given by Justice Hardesty, you've already heard all my reasons as to why the district attorneys are opposed to the possession of a controlled substance, so of course we would be opposed to this because it's part of it. Five: establishing a presumption of sentence deferrals for certain nonviolent offenders admitted to specialty courts. Still, we need a lot more information on that. As it's written, solely based upon that, it would be a no. Conceptually with the explanation, yes on six, but again, I would need more information on that, much like has been asked by two other members.

Chair Hardesty:

On some of the areas, I agree with the comments that have been made by other subgroup members. My only observation on number six is that I think there should be a risk and needs assessment, but I'd like to defer to the specialty court judges on that point. I'd like to speak with them and discuss with them their own experiences in Nevada about this point. Certainly I've already commented about number four, so I think there's some support for each of these four as reworded, six not yet but it can be tendered, except that we need further conversation or discussions and specificity on that, as well as Mr. Jackson's observations about specifics on three and five. I am concerned, unless there is more information that you wanted to share, Ms. McNamara, behind this?

Ms. McNamara:

Just with respect to the pre-prosecution diversion, I think the intent was that it be similar to the pre-prosecution diversion that exists for misdemeanor offenders now that it has established criteria in statute about it. In thinking about nonviolent, its context of that is offenders who are not charged with an offense that involves a threat or use of force. I am looking at the statute now, but I will get it to you shortly.

Chair Hardesty:

What I was thinking maybe to be productive is, having heard the comments from the subgroup, maybe some of these could be reworded to be more specific and then we could

pass those along to the Commission as a whole to discuss. I don't know that we are in a position to say that any or all of them are recommended by the subgroup, but we did discuss them, but maybe they could be reworded with more specifics so that we can have a conversation at the Commission level about these and what's intended in your thought process about why they are presented, and then I'll get a chance to canvass some specialty court judges. Maybe, Mr. Engel, you guys could reach out to a few of those judges and get their input on that. I've heard some judges talk about this, I just don't have it fresh in my mind about their view about access. I think you're right, because I've heard them say we want to focus on those folks and the others, the low-risk offenders. Even though there is this view that we should give access to everybody, well, no, that isn't always the case, and I don't think that is consistent with the National Drug Court best practices either. That's where I had heard it. Could you comment on that?

Mr. Engel:

Sure. Exactly; the National Drug Court Clearing House has a grid that shows fairly clearly what the criteria should be based on risk and needs by a validated and appropriate risk tool and a clinical analysis. We can send that stuff to you over the next few days.

Chair Hardesty:

I think it would be helpful in passing this one on would be to add that data or that information in the report.

Mr. Engel:

We will.

Chair Hardesty:

Okay. Is there anything else, Mr. Weld, that we need to cover from our list here?

Mr. Weld:

No, Justice Hardesty.

Chair Hardesty:

Okay, thank you. Do any of the Commission members have anything they would like to add with respect to these discussions before we move to close this agenda item? Seeing none, I will close this agenda item and move to public comment. Thank you, again, very much. I really appreciate all the hard work and the input from CJI and your staff. It's really

appreciated, and we've got some additional work to do before now and January 11, but thank you so much, all of you, for your input. I'll open it up for public comment, item VI.

Ms. Brown:

On the policy option—in fact, this was just a discussion during, I think it was the Washoe County Commissioners I attended, number two, as part of the reinvestment, the MOST program. Now, I spoke with the Chief of Police with Reno dealing with some of the issues that were going on. A lot of people through the jails and out in the private sector, public sector, were losing their lives, and they were all there for mental health issues. I had learned that the MOST that is implemented in Washoe County, it covers Sparks, Reno, Washoe County, Verdi, all the areas, and there is approximately only seven, I believe there are seven employees that cover the three shifts. That includes the jails, going out into the community. It's not enough. Our recommendation that we asked for would be that there is one on shift at the jail on each of the shifts, and each of the shifts within the cities and the counties, because seven is not enough to cover Washoe County and all the cities and the jails. There was an incident in which Mr. Serrano was shot and killed in October. That came about from a sister who had called because he had taken some drugs, an overdose of drugs, and it just escalated from there. When the police arrived, ultimately he was shot and killed, believe probably about 20 rounds in his truck, and that didn't have to happen. Now, my understanding is like, in London, in the United Kingdom, they do things differently. They don't just send out the police. What they do is they send out someone who deals in—social workers who deal primarily in that area. If there is a problem, then what they do, then they call on the police, because that just tends to escalate the situation. This is something that we were looking at is if there is a situation, they call and they say, "Well, I'm having some problems," they send someone out, not an officer, there to appear. He can be in the background or whatever, and that will de-escalate the situation, and that's not what's happening. It's escalating the situation when an officer comes, and so I'm thinking that should cover all of them. Thank you.

Chair Hardesty:

Thank you. Seeing no further public comment, I thank everybody for their work. We'll see you on January 11. There will be some additional distributions, maybe, of some materials. Thanks everybody. I will adjourn this meeting at 5:33 p.m.

RESPECTFULLY SUBMITTED:

Jordan Haas, Interim Secretary

APPROVED BY:

Justice James Hardesty, Chair

Date: _____

Agenda Item	Witness/Agency	Description
A		Agenda
B		Attendance Roster
<u>Agenda Item III</u>	Paul Corrado	Public Comment
<u>Agenda Item IV</u>	Jordan Haas, Committee Secretary	Draft Minutes from the November 29, 2018 Meeting
<u>Agenda Item V A</u>	Staff of the Crime and Justice Institute	Discussion Materials on Pre-Trial and Sentencing
<u>Agenda Item V B</u>		NRS Citations