MINUTES OF THE
2015-2016 INTERIM
ADVISORY COMMISSION ON
THE ADMINISTRATION OF JUSTICE
JUNE 14, 2016

The meeting of the Advisory Commission on the Administration of Justice was called to order by Chair Hardesty at 9:39 a.m. at the Legislative Building, Room 3137, 401 South Carson Street, Carson City, Nevada, and via videoconference at the Grant Sawyer Building, Room 4412, 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):

Senator Aaron D. Ford, Senatorial District No. 11
Justice James W. Hardesty, Nevada Supreme Court
Connie Bisbee, Chairman, State Board of Parole Commissioners
Judge Kevin Higgins, Justice of the Peace, Sparks Justice Court
Mark Jackson, Douglas County District Attorney
James Dzurenda, Director, Nevada Department of Corrections
Jorge Pierrott, Lieutenant, Parole and Probation, Department of Public Safety
Eric Spratley, Lieutenant, Washoe County Sheriff's Office
Judge Lidia S. Stiglich, Second Judicial District Court, Washoe County
Holly Welborn, Policy Director, ACLU of Nevada, Inmate Advocate

COMMITTEE MEMBERS PRESENT (LAS VEGAS):

Senator Mark A. Lipparelli, Senatorial District No. 6
Assemblyman John Hambrick, Assembly District No. 2
Paola Armeni, Representative, State Bar of Nevada
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Adam Laxalt, Attorney General, Office of the Attorney General

COMMITTEE MEMBERS ABSENT:

Assemblyman Elliot T. Anderson, Assembly District No. 15
Phil Kohn, Clark County Public Defender
Lisa Morris Hibbler, Victim's Rights Advocate

STAFF MEMBERS PRESENT:

Nicolas C. Anthony, Senior Principal Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau
Angela Hartzler, Secretary, Legal Division, Legislative Counsel Bureau
Linda Hiller, Interim Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

William O'Connell, NV-CURE
Laurie Johnson
Robyn Grace Byers
Dee Williams
Vuki Wilson
Tonja Brown, Advocate for the Innocent, Advocate for the Inmates
Toree Warfield
Wes Goetz
Michele Feldman, State Policy Advocate, Innocence Project
Marla Kennedy, Executive Director, Rocky Mountain Innocence Project
Brett Kandt, Chief Deputy Attorney General, Office of the Attorney General
Alison Lawrence, Commission Counsel, Criminal Justice Program, National Conference of State Legislatures

Chair Hardesty:
I will open the meeting of the Advisory Commission on the Administration of Justice (ACAJ) with Item III, public comment. I am respectfully limiting it to 3 minutes today and, as always, invite written comments and suggestions. While some might believe we are not reading these submissions, we are, especially information submitted prior to the Agenda which is also circulated to all Commission members.

William O'Connell (NV-CURE):
I see that voting rights restoration for ex-felons is on today's agenda. After reading the document associated with that presentation (Agenda Item XV), I am not clear about how many voting rights have been restored to ex-felons. One part of the document said that voting rights to ex-felons is restored except for category A or category B felonies. To me, whether it is a category A or B felony, when someone has done something wrong and served the time, they should be able to vote. We are more than the worst we have ever done and we should be able to have our voting rights restored.

Laurie Johnson:
I come before you as a citizen of Nevada for over 20 years, a previous victim of child sexual abuse and a mother of a juvenile sex offender immediately adjudicated to an adult. I am focused on the previous concern in 1995 of both Senator Mark E. James and

Ernest E. Adler on focusing on the repeat sex offenders. I have compiled actual research to share with each of you regarding the actual facts of recidivism of sex offenders already apprehended and punished for their crimes.

I have submitted my written testimony (Agenda Item III A) which includes statistics from the Sex Offender Support and Education Network (SOSEN.org). My point is that due to proper research done by true professional organizations, we have the knowledge to legislate properly and not based on fear. I propose that our State do their own study on actual repeat offenses of sexual crimes versus violations of a nonsexual nature of our sex offenders. I truly believe our research will stand for itself.

Robyn Grace Byers:
To put inmates into segregation without probable cause is becoming a major issue inside the institutions. One inmate has been there since January 22 without a charge. Another inmate was put in on another inmate's directive. Why would you take an inmate's word over somebody who just did 10 years without a write-up? That is something we need to look into.

The second issue is that we need to do more for the indigent inmates getting released. Regarding recidivism, I am not talking about the 3-year marker everyone is looking at; I am talking about the 6-week turnaround for these people who get out and have nothing and it is not a matter of choice. It is a matter of not having other options because they have no money, no way to get IDs and their caseworkers are not helping them get their birth certificates or their social security numbers. When they get out, they get $21, no clothing, no food and no way to get help from social services because the caseworkers are not doing their jobs behind the walls. It has to stop. We need more programs like mine in place to help them get from point A to point B without having to commit a crime because they have no money and nowhere to go.

Has anyone found statistics on the 6-week turnaround, which means they get released and then within 6 weeks they are back in prison? Unfortunately, my computer will not let me get to that federal level. There is something like $68,767 for the indigent inmates for the whole state of Nevada, which is less than a C.O. makes in a year. Is there any logic in that? Why are we not building a facility to release them to? It is costing more than $40 million a year to keep them behind bars. They have already been paroled and they cannot get out.

Chair Hardesty:
I am not aware of any statistics that measure the number of inmates who come in and are sent back within 6 weeks. I will inquire whether anyone has such a statistic. I think what you need to do is to stress to your Legislators the importance of providing funding necessary for those reentry programs we have been talking about.

Ms. Byers:
I am working on that with Assemblyman Anderson who is trying to get me with the Nevada Department of Corrections (NDOC) so I can make my case with them.

Dee Williams:
Thank you for putting domestic violence on the Agenda under Item VIII. I am a survivor of domestic violence and I speak on behalf of survivors. Today's presentations are being made by Brett Kandt. My concern with him is that he is not fully disclosing that he is related to Jennifer Kandt who works in the Office of the Attorney General and is on the committee that oversees the task force of the office of domestic violence under the Attorney General. That task force includes Wendy Wilkinson who was investigated by the Las Vegas Metropolitan Police Department (Metro). Wendy Wilkinson confessed to destroying child abuse evidence in ongoing domestic violence cases. She works for the courts in Clark County. Brett Kandt signed a letter in 2013 from Attorney General Catherine Cortez Masto that she supported Senate Bill (S.B.) 57.

SENATE BILL 57: Revises provisions relating to legal representation of certain persons by the Attorney General or the chief legal officer of a political subdivision of this State in certain civil actions. (BDR 3-389)

In 2013, that unanimously passed the Legislature. A day later, she testified before the Nevada Legislature that she does not support section 4 of that bill. We have already asked that that be repealed. That is historical move by the Nevada Legislature because section 4 of that legislation gave the Attorney General not only his established rights, which are to prosecute criminals and to defend government persons who have committed errors and omission, but to now defend criminal activity by government persons.

Chair Hardesty:
You have raised this issue before and I appreciate your input. I do not want to be rude, but it seems to me it is repetitive other than your comments with respect to Mr. Kandt. I want to mention to you, and I mentioned to others, that this Commission is not a free for all for every single issue that someone wants to talk about concerning the criminal justice system and how it is managed. Our focus is to deal with sentencing structures. I am not even sure that section 4 of S.B. 57 is within this Commission's authority to even comment to the Legislature about. I want to mention that because I think you might be in the wrong place when you advocate on that issue.

Ms. Williams:
I am talking about (Agenda Item VIII).

Chair Hardesty:
Other than disparaging Mr. Kandt's credibility, you have not said anything about domestic violence yet, so I do not know what the point is of your presentation. I do not mean to take away your time, but I wish you would make the point you want to make about domestic violence so we can move on.

Ms. Williams:
That the survivors of domestic violence are not being addressed under Item VIII.

Chair Hardesty:
We have not heard that presentation yet. Do you want to come back and do public comment after that presentation has been made and then point out why there is a problem? That would be helpful.

Ms. Williams:
OK, Elynne Greene is speaking today and she is with Metro. Her presentation will not address that Metro investigated the courts regarding domestic violence cases and received a confession from two persons—Wendy Wilkinson and Jillian Prieto—that they are destroying child abuse evidence.

Chair Hardesty:
I am sure a Commissioner here is happy to ask whether they have any evidence that somebody is destroying domestic violence records.

Ms. Williams:
That was put on the record two meetings ago.

Chair Hardesty:
We are getting the presentation made today and we have not heard what they say.

Ms. Williams:
And she will not present; that is my whole point.

Chair Hardesty:
OK, well, let us find out.

Ms. Williams:
Will you be putting us survivors of domestic violence on the agenda?

Chair Hardesty:
As soon as we hear what that subcommittee intends to do. These issues will be referred to the subcommittee that is chaired by the Attorney General.

Vuki Wilson:
I am here about my son, who is incarcerated at High Desert State Prison. I have issues with his safety and his future Board of Parole Commissioners (Parole Board) hearings when they come up. He has been in prison for about 18 months. I raised four boys and he is the only one I have had a problem with. In June of last year, he got stabbed by three Aryan brotherhood guys because he would not join their Aryan Brotherhood. He has had a big awakening. He has learned what life is about. He was on drugs for the last 16 years. He wants to do his time and get out of there.

One of my concerns is now that he is in protective custody because he was stabbed, he gets no good time and no work program, so he has to do his straight time. He is serving 6 years to 15 years on a drug charge and alluding. I do not know what all the charges were here in Carson City. He has people in there who are doing 5-15 years that have murdered people. I have accepted it, but I do not understand. I know he has done bad things. I know his heart and how he feels because I talk to him at least three or four times a week. The concerns are his safety. He has been offered drugs and he has refused to take them. He has been told that if he does not do certain things that things can happen to him. He has had to get tattoos because everybody else gets tattoos. I know that sounds crazy, but I talk to him a lot. He knows how I feel about tattoos which is neither here nor there.

He was moved from Southern Desert Correctional Center to High Desert State Prison and is in protective custody. One of his concerns is that the food is prepared by the general population of prisoners. The general population of prisoners are basically the ones who sent him there. He is what they call a green light inmate, which is a person who has a green light with any gang affiliated. If they come near him, they are supposed to retaliate against them. He wants to go out and get some good time. Anyone in protective custody has no chance to better themselves. You have the prisoners over here who are creating the problems and who want to be in the gangs, they get the choice of what they want to do. That is not right.

Chair Hardesty:
I have two requests for you. One is to make a presentation about your son's situation to the State Board of Prison Commissioners (Prison Board). That Board consists of the Governor, the Secretary of State and the Attorney General and it is responsible for supervising and managing the prisons in the State. The question about the availability of good time credits and programming is an issue the Prison Board should address in the context of your request. They have public meetings and I urge you to make a presentation to them to address this issue.

I also think it would be worthwhile for you to send a letter to the Director of Prisons, mentioning your son's name and expressing your concerns about his particular circumstance. He would be interested in looking at what options are available to the

prison to provide programming and good time credits to people like your son. To the extent that there are statutory changes, I am sure the Prison Director would come to this Advisory Commission and provide us with information and suggestions about what could be done in that area.

Mr. Wilson:
One other thing I want to say is that disciplinary action against him when he got stabbed goes against him even though he was the one who got stabbed.

Chair Hardesty:
You should include that in your information to the Prison Board because they have jurisdiction over these issues involving the operation of the prisons.

Tonja Brown (Advocate for the Innocent, Advocate for the Inmates):
I want to talk about Agenda Items VII and XI. You have heard my story before and know that my brother's case was based on mistaken identity. This is why we need a public integrity unit commission to look at wrongful convictions based on misidentifications. I have submitted my written testimony and documents (Agenda Item III B).

Toree Warfield:
I am here to talk about concerns I have regarding Parole & Probation (P&P). I realize that my experience is limited to one parolee but I feel that if these things are happening to Wes Goetz, a registered sex offender, they may also be happening to others. I have submitted my written testimony (Agenda Item III C).

Wes Goetz:
A lot has happened in the last month. My civil rights have been violated because I come to these committees and I come to the Legislature and tell them my stuff. I feel that P&P is retaliating against me. When I started all this in 2011, it seems like I had a lot of freedom to do my business. I started a business doing labor work and then trying to sell skis. I had a meeting with Lt. Pierrott on May 18, 2016. We talked for 2.5 hours. To me, it felt more like an interrogation and psychological torture. In that meeting, he wants me to start giving a lot of receipts and stuff about my business; how I make my money. I do a lot of labor work and I can show those receipts, but with my other business trying to sell skis and stuff, it has not taken off. I help Toree Warfield sell calendars. We are trying to sell calendars to make money but it really has not made much.

Chair Hardesty:
Mr. Goetz, I do not want to interrupt you, but I feel compelled to ask you what policy do you want this Commission to consider? This Commission does not have jurisdiction to adjudicate individual complaints like yours with the Division of Parole & Probation. This is not the place to adjudicate your ongoing dispute with them. Yet, repeatedly, your public comment focuses on your ongoing dispute with P&P. This Commission is

focused on what policies should be considered to improve the criminal justice system, not to adjudicate specific disputes. Do you have a suggestion or offer comment about what policies this Commission might consider? Perhaps you might want to reflect on that and make some further comments at the end of that regarding that point. You can do it now or do it then or do it both, but you use up time focusing on your ongoing dispute with P&P that this Commission has no jurisdiction or grounds to even become involved in. I mentioned this to Ms. Brown, and I am not trying to be rude. I am just saying I do not want to see people come up here and make public comment which has no benefit to the Commission and does not get you any closer to resolving your individual dispute. Fair enough?

Mr. Goetz:
Right.

Chair Hardesty:
So let us have what policy question there is.

Mr. Goetz:
We have a department called Professional Responsibility. We do not have a department where we can file grievances like we do in prison. But we can file something with Professional Responsibility. I actually talked to Lt. Blair Harkleroad on June 9, 2016 about my complaint. He just says the department read it over and then gave it to P&P to investigate themselves. To me, how I feel about them giving it to just the department, to Pierrott, the person who is actually doing the investigation, he is on the panel here today. He investigates what I said in my complaints and said he is not going to change my parole officer. It just seems like they are tightening up more reins because I file my complaints here. We need to look at a place where a parolee can file a complaint if he is having problems with his parole officer.

We also talked about me seeing my records on the computer. My parole officers before gave me this freedom and then I get another parole officer. This has probably happened to other parolees. They get one parole officer with the discretion to give them a little more freedom and then down the road, if they are being paroled for 10 years like me as a sex offender, they get another parole officer who takes away that freedom. It does not seem right. When I talk to the Professional Responsibility Lieutenant at 8:22 in the morning and by 9:30, my parole officer calls me and says they want me to show that I am doing something in my business or they are going to take my Internet access away. Then, 40 minutes after that, they call and want me to take a polygraph test. It seems like as soon as I talk to the Professional Responsibility that is supposed to be investigating my complaint, it seems like they just call the parole people, tell them what is going and then they retaliate by calling me to see if my travel permit is being used properly. To me, a travel permit is supposed to be for pleasure and for work.

Chair Hardesty:
You are back arguing your individual case. I get the point you have made and you have raised it before. I have an inquiry out—where does a parolee lodge a complaint that involves Professional Responsibility, the equivalent of law enforcement's internal investigation for misbehavior. Secondly, what are the policy ramifications surrounding a parolee's access to their computer record?

Mr. Goetz:
Right. He was saying to me that it was public safety, but we are all one unit and all one part and that is why we give it to the Division.

Chair Hardesty:
I have made that request.

Ms. Byers:
The man who spoke about his son talked about exactly what I talked about when I first came up here about being put in administrative segregation. These inmates are forcing other inmates to join them or they "roll them up," which is to get them in trouble and thrown off whatever yard they are at. What can we do? In his son's situation, he is in protective custody; he is not allowed good time, work time; he is not allowed to do anything. He is probably in fear of his life.

Chair Hardesty:
I appreciate your additional comment to the specific comments made by Mr. Wilson. I am going to ask you to do the same thing I encouraged him to do, which is to make your public comment and presentation to the Prison Board which manages the prisons. There are issues the Prison Board should hear about and they have the capacity and the jurisdiction to deal directly with issues they believe are appropriate for investigation and policy decisions regarding the management of the prisons. I would urge you to make your comments to that board, please.

I will open item IV, approval of the minutes from April 19, 2016 and May 6, 2016.

LIDIA STIGLICH MOVED TO APPROVE THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE MINUTES FROM APRIL 19, 2016 AND MAY 6, 2016.

KEVIN HIGGINS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY

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Chair Hardesty:
I want to give you an overview of my objective for today's meeting which should focus our attention on the fundamental objective of this Commission. We have a plethora of issues referred to us but not enough time or resources to deal with all those issues. We have some other issues referred to us that we probably have no business hearing, given the statutory limitations on what we are supposed to do—medical marijuana is one area that we have previously discussed.

At our last ACAJ meeting, we agreed we should focus our attention on a primary objective that deals with sentencing. Today, Agenda items IX through XVI focus on those objectives—how the Legislature should approach sentencing, what considerations should be made when establishing sentencing structures, and what considerations should be made by the Legislature while establishing sentences for behavior it criminalizes in statutes. It also provides this Commission a framework to use in evaluating category B felonies.

My objective is to ask the Commission to engage in a conversation after these presentations on what considerations we should be adopting as a Commission and recommending to the Legislature when we assess the sentencing ranges that are in category B, which was our primary focus, and making recommendations to the Legislature on what kinds of considerations the Legislature should be making when engaging in legislation that criminalizes behavior and establishes sentencing ranges as a result. These are probably the most significant decisions this Commission could entertain and make since I have served on this Commission starting in 2007.

I will now open Agenda item VII, a presentation on suspects and informants in criminal proceedings.

Michele Feldman (State Policy Advocate, Innocence Project):
We are a national organization working to exonerate the wrongfully convicted with DNA evidence. We work with local partners across the country on policies that prevent and address wrongful convictions. In Nevada, there have been nine wrongful conviction cases overturned since 1989. Two of those cases occurred last year.

Some of the leading contributing factors to wrongful convictions are eyewitness misidentification, false confessions and in-custody informant testimony page 2, (Agenda Item VII A).

Eyewitness misidentification is the leading contributing factor to wrongful convictions proven with DNA. Last year, the Innocence Project spoke before this Commission regarding best practices that have been proven to enhance the accuracy of line-up procedures page 3, (Agenda Item VII A). Currently, Nevada has a statute, *Nevada Revised Statutes* (NRS) 171.1237, that requires every agency to have a written

policy on eyewitness identification, but it does not say what those policies must include. We discussed different ways to implement these practices throughout the State. I am happy to report that we worked closely with law enforcement setting up trainings since that time page 4, (Agenda Item VII A). Those law enforcement agencies—the Las Vegas Metropolitan Police Department (Metro) and the Washoe County Sheriff's Office—have both implemented best practices and really took the lead on this. Together, those two agencies cover about 80 percent of Nevada's population. Because of this and our ability to reach substantial Statewide compliance, no legislation is needed.

Marla Kennedy (Executive Director, Rocky Mountain Innocence Project):
As the executive director of the local Innocence Center that serves Nevada directly along with Utah and Wyoming, we want to publically thank Metro and the Washoe County Sheriff's Office for helping us in a dramatic way to reduce the possibility of wrongful convictions.

Ms. Feldman:
The next most common reason for wrongful convictions is false confessions, accounting for 28 percent of those page 5, (Agenda Item VII A). Of the nine wrongful convictions that were overturned in the State, three were from false confessions—either the innocent person confessed to a crime he or she did not commit or a codefendant implicated that person in a crime. Most recently, Cathy Woods spent 35 years in prison for a murder she did not commit (Agenda Item VII B). She is schizophrenic and was in a mental hospital when she told a staff member she had murdered a woman named Michelle Mitchell in Reno. She was interrogated by the police and confessed to the crime but she also made blatantly false statements, like saying she was in the FBI and that she was being poisoned. She later recanted the confession, but despite that and despite no physical evidence linking her to the crime, she was convicted. In 2014, DNA found at the crime scene on a cigarette butt was uploaded into the DNA database which matched to a known killer named Rodney Halbower who has since been charged with murdering two other women in California. There are clearly public safety implications when the wrong person is convicted of a crime.

Recording custodial interrogations is the best known safeguard against wrongful convictions stemming from false confessions pages 6-10, (Agenda Item VII A). Tom Sullivan, a former U.S. Attorney from Illinois, has made it his life's work to talk to law enforcement on how to implement the recording of interrogations practices, talking to hundreds of agencies all over the country. Once the police start using this technique, Sullivan has found that they appreciate the help it provides for their casework. The response has been very positive from law enforcement—those who begin recording do not stop the practice after seeing how useful it is.

All federal law enforcement agencies record their interrogations for all crimes. Twenty states mandate the process, either by statute or court action. Eyewitness identification can be achieved through voluntary compliance, but recording of interrogations is a little different. It is most effective when implemented by statute or court rule. This is because in eyewitness identification, there is a built in legal mechanism for the court to assess whether best practices were used. When a judge is deciding whether to admit witness identification, the legal test of reliability is used. They can then consider if evidence based practices were used, which is a strong motivation for law enforcement to use proper lines of practices.

For confessions, a legal test is voluntariness. The court does not consider whether or not an interrogation was recorded. There is no compliance mechanism if an interrogation was not recorded. Of the 20 states that mandate best practices, the vast majority have a direction to the court to either consider suppressing an unrecorded interrogation or to give the jury a cautionary instruction. All the agencies on page 9 (Agenda Item VII A) are recording interrogations in some form. There is not a uniform Statewide practice requiring a recorded interrogation; it is up to the agencies or officers when or if to record their interrogations. We therefore recommend a mandate to record interrogations for certain crime categories, especially the most serious, violent crimes. We also recommend a legal remedy that could ensure compliance.

The objections to these laws usually have three concerns from officials page 10, (Agenda Item VII A). The first objective is usually cost. In Nevada, many agencies are already recording interrogations so they have the equipment already. The Innocence Project surveyed agencies in states with mandated recording of interrogations for more than 10 years and found that the smaller agencies had no problem complying with the mandate. Many used handheld digital cameras that retail for about $50 and some do equipment sharing with other agencies. Many agencies have been using body cameras. The upfront costs are outweighed by long-term savings page 11, (Agenda Item VII A) with greater court efficiency, less court time required of officers to testify and fewer frivolous lawsuits.

We often hear that guidelines are preferable to a mandate page 12, (Agenda Item VII A) because the guidelines are voluntary, are not statewide and have no consequence for failure to record. Utah is a good example of some of the drawback of guidelines. In 2008, the Attorney General's Office issued a best practices statement that agencies should record interrogations for violent felonies. There were some agencies that followed this, but some did not. As a result, in 2015 the Utah Supreme Court issued Rule 616 of Evidence requiring that every interrogation for a felony be recorded in its entirety and unless good cause is shown, there is the presumption of inadmissibility.

We sometimes hear a fear that a remedy could help guilty individuals get off and that good confessions will be thrown out. The opposite is more commonly true. Recording

interrogations helps authenticate substantial confessions, aiding law enforcement to build stronger cases. It also removes any doubt for judges and juries about what occurred in the interrogation room. Every state that has passed a mandate has included a number of good cause exceptions—if the equipment malfunctions, if an officer does not initially believe a suspect has committed a qualifying offense or if the suspect refuses to speak. There is a very small chance that a good confession would be thrown out simply because it was not recorded.

The third most common reason for wrongful convictions is in-custody informants, accounting for 16 percent of these convictions (Agenda Item VII C). Informants exchange information and testimony for benefits from law enforcement. There are three reasons these informants enhance the risk of a wrongful conviction page 14, (Agenda Item VII A)—inherent reliability issues, the possibility of fabricated testimony to gain benefits and the fact that traditional protections against false evidence are insufficient to weed out perjured testimony of informants. This is because there is a secrecy surrounding the use of informants and the benefits given to these informants.

There is a U.S. Supreme Court case, *Brady v. Maryland,* that requires prosecutors to turn over evidence to the defense that is favorable to the defendant and material to the case page 15, (Agenda Item VII A). It can be limited by the materiality standard, which is somewhat confusing. The standard says evidence is material if, had it been turned over to the defense, there is a reasonable probability that the outcome of the trial or sentencing would have been different. It is hard for prosecutors to know what an appellate court is going to consider material years later. There is no timeliness requirement so defense attorneys are often given information at the last minute, which makes it hard to prepare a meaningful cross examination.

Recognizing the inherent problems with in-custody informant testimony and the limits of *Brady*, many states and jurisdictions have taken steps to regulate the use of in-custody informants. There are five categories of regulations page 16, (Agenda Item VII A). Four states—Florida, Illinois, Nebraska and Oklahoma—have created comprehensive pre-trial disclosure requirements when informant testimony is used. All these states require timely disclosure of specific information related to an informant's credibility. Illinois probably has the best disclosure requirements page 17, (Agenda Item VII A).

Illinois also has a great pre-trial reliability hearing requirement for capital cases if informant testimony is used. There is automatically a pre-trial reliability hearing and the prosecutor has to show, by a preponderance of evidence, that the informant testimony is reliable. That allows judges to act as gatekeepers, ensures that discovery obligations are met and improves reliability of evidence heard by jurors.

Seven states require a jury instruction if in-custody informant testimony is admitted at trial. Oklahoma probably has the best one, listing a comprehensive number of things

that the jurors have to consider when they are weighing the in-custody informant's testimony so they understand the benefits and incentives given to the informant page 19, (Agenda Item VII A).

Both Texas and California prohibit criminal convictions based only on in-custody testimony. There has to be other corroborating evidence for a conviction to occur. In a number of jurisdictions in the country, prosecutor's offices have implemented excellent policies for tracking and monitoring the use of in-custody informants and other types of informants. The Los Angeles District Attorney's office created an Internal Jailhouse Informant Committee that has to approve the use of any jailhouse informants. They also created a central index system that tracks informant testimonies and the benefits they received. In Manhattan, the New York District Attorney's Office has a comprehensive disclosure checklist going beyond materiality standards page 21, (Agenda Item VII A).

The Nevada Supreme Court (NSC) has taken some steps to regulate the use of in-custody informants. In *Buckley v. State (1979),* the court said there has to be a cautionary jury instruction if there is informant testimony admitted at trial that is not corroborated with other evidence. In *D'Agostino v. State (1992)*, the NSC said that in certain instances in the penalty phase of the case, judges have to hold reliability hearings before the jury can hear in-custody informant testimony.

In 2008, the criminal defense bar came before this Advisory Commission and talked about informant problems. They also asked for a statute requiring every prosecutor's office in the State to track informant information and disclose it to the defense. At the time, the Clark County District Attorney's Office said they were already implementing a tracking system and that other prosecutor's offices around the State were also doing that, so there was no need for legislation. It does not seem that voluntary adoptions of these policies and implementation is really happening effectively. The Las Vegas Review-Journal just published an article that found there were only 130 entries into the Clark County D.A.'s database since 2008 (Agenda Item VII D). There have been roughly 330,000 criminal prosecutions since 2008, so defense attorneys consider the 130 entries a laughably low number page 23, (Agenda Item VII A). This could be a good opportunity for the ACAJ to revisit this issue and think of some regulations to improve the use of in-custody informant testimony.

Future considerations could be the statutory requirement that the prosecutor offices establish internal systems to track informant data, requiring pre-trial reliability hearings and requiring jury instructions. Right now, a defense attorney can request a pre-trial reliability hearing but it does not guarantee it will be granted. I have submitted some additional documents for your information (Agenda Item VII E) and (Agenda Item VII F).

Ms. Kennedy:
We cover Utah, Nevada and Wyoming. There is no other nonprofit that provides post-conviction innocence investigation or litigation for free. Sixty percent of our cases are from Nevada and 70 percent of those cases are from Clark County. Considering the problems Clark County has had with incentivized witness, or "snitch testimony," I support Michelle's comments on this Commission trying to find a remedy to that issue as well as the recording of interrogations. I have submitted a document for your information (Agenda Item VII G).

Brett Kandt (Chief Deputy Attorney General, Office of the Attorney General):
In 2008, this Commission asked me to provide research on the number of states that at that time mandated the recording of custodial interrogations. I identified approximately 12 states. The update on that information is included in a memo I have submitted (Agenda Item VII H). There are now well over 20 states that mandate recording either pursuant to a mandate issued by the State's highest court or to a legislative mandate.

Looking across these mandating states, they are all consistent in providing exceptions to the recording requirement. The main four exceptions are typically: if the suspect requests that the interrogation not be recorded, if the interrogation takes place out of state, if there are public safety exigent circumstances and if the recording equipment fails or breaks for some reason. These mandating states are inconsistent in terms of the offenses for which recording is mandated—some specify violent felonies, some specify certain enumerated felonies—it is across the board. It begs the question, what offenses should be mandated?

These states are also inconsistent in the consequences of a failure to record when it is required. In some states, as a consequence of a failure to record, the statement is excluded and inadmissible at trial. In other states, they provide that there is a rebuttable presumption that the statement was not voluntary. Other states require that if a statement which was supposed to be recorded was not recorded, a cautionary instruction must be given to the jury about the reliability of the statement.

Nationwide including Nevada, recording by law enforcement agencies has become the standard practice. Every agency in Nevada that I know of records, including my office and our investigators.

Chuck Callaway (Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department):
I want to thank the Innocence Project for working closely with us on the witness identification issue several years ago. As a result, we substantially changed our policy at Metro and we have what I have been told is a model policy that is now used with other agencies throughout the country. Witness identification, in-custody video or audio recording and use of informants are police practices and procedures. Criminal justice is

always an adjusting science. I have concerns about putting things into State law that I believe should be policy and procedure. We all know that best practices change and evolve and when we codify things into State law, it becomes problematic for us. There are ways through training and post-certification and working with witness identification through the Nevada Sheriffs' and Chiefs' Association and the majority of the State is already recording interrogations to some degree, so I would question the need for legislation in that area.

When we talk about law enforcement in the State, especially about witness identification, remember that Nevada is a very diverse State with many different types of law enforcement. We have constables that do evictions, animal control people with a degree of law enforcement power, marshals and park rangers, BLM and federal officers plus local officers—it is not a one-size-fits-all state. We may have law enforcement agencies that very seldom do interviews because their work does not involve that activity. Animal control does not do witness identification. If you put something into State law requiring all law enforcement agencies to record interrogations, it is not applicable to all law enforcement agencies.

I believe we can work with these presenters and if there are areas of Metro's policies and procedures that can be improved, that is the route to go. Just like we did with witness identification, we did not go through the State Legislature, we worked it out ourselves. I would be happy to work with the Nevada Sheriffs' and Chiefs' Association on this and I am sure Eric Spratley from the Washoe County Sheriff's Office would, too, on improving policies and procedures rather than making more laws. We all know what happens in the Legislature, where everyone has a different opinion on what they think is best practice or should be in a law and sometimes things do not come out the way we intended. My recommendation is that we work on this through policy and procedure, not through State law.

Paola Armeni (Representative, State Bar of Nevada):
I understand what Mr. Callaway is saying. I believe, though, for disclosure purposes, what is being disclosed to the defense, that is properly codified because that sets a standard throughout the State that times when everything should be turned over to the defense. So in that, I would differ from Mr. Callaway.

Eric Spratley (Lieutenant, Washoe County Sheriff's Office):
I agree with Chuck Callaway and want to thank the Innocence Project on behalf of the Washoe County Sheriff's Office. We had a newly-elected sheriff when we started this, establishing his command staff, training people and developing policies so it took us about 18 months to get our eyewitness identification policy signed by our sheriff. It was almost a comedy of errors. Things sometimes take a lot of time, but way back in the detective part of things, they were already utilizing the policy; it just had not been signed by our sheriff yet.

We appreciate you bringing to light any errors in our policy, like the issue of using informants. If we have a policy that needs to be tightened up, we want to work with you to make sure we have the best policy moving forward. We modeled our eyewitness identification after Metro's policy, even putting in some tighter restrictions at the request of some of our detectives who do those identification procedures. I just looked up our policy regarding some of the things you brought up regarding interrogations and it is kind of loose. Certainly, we will work with you on making sure those are tightened up. We want this Commission to know that we are a willing partner to make sure we have best policies going forward. I agree with Chuck Callaway that we should work on it at an agency and policy level to the extent that we can and then move forward on legislation if it requires that.

Mark Jackson (Douglas County District Attorney):
I appreciate Ms. Feldman addressing the Cathy Woods case. When Reno Police Department (RPD) detective Allan Fox transferred from homicide over to the cold cases, he was aware of Cathy Woods who had repeatedly claimed her innocence. He and fellow RPD detective Kathleen Bishop created a multijurisdictional task force to investigate the case, spending thousands of hours reviewing all the files and information. There is no doubt Cathy Woods was innocent but unfortunately she stood to suffer for many years in prison because of her mental health issues, a statement she made and how that was used to prosecute her. Her release from prison would not have occurred if it was not for those two dedicated detectives with the support of RPD, the Washoe County Sheriff's Office and Washoe County District Attorney Chris Hicks.

My biggest fear as a District Attorney and chief prosecutor in my county is that any innocent person would be put in prison. You discussed the costs of the recording equipment and how inexpensive it can be for a $50 handheld digital recorder. The majority of the agencies are already using technology, so all this information is being recorded and stored. The cost is not necessarily with the equipment; it is more about the storage and the storage area networks. I just had to add $20,000 to my budget for storage for the information we receive, largely video or audio digital recordings that really eat up the storage. Smaller agencies will not have the funds available for storage.

When you were talking about guidelines regarding interrogations, and in legal terms we call those the custodial interrogations, I want to make sure everyone understands that there has to be a custodial setting and it has to be an interrogation within that setting. We recognize that is in the high 90 percentile of those that are recorded, at least it is in my jurisdiction. I cannot recall a specific custodial interrogation that was not recorded aside from the suspect refusing to give a statement that was being recorded.

Ms. Kennedy:
You are right; it is custodial. I appreciate the time it takes to uncover innocence. We have a current case in Nevada that has been ongoing for 7 years regarding a person

who was convicted more than 20 years ago strictly on bad eyewitness identification and incentivized witnesses. There is not a police officer, prosecutor, defense attorney, judge or citizen who is not on the same page. No one wants to see an innocent person go to prison, but the system is made up of people and people make mistakes. All we ask is that when a mistake is made, you help us correct it. We think these policies and procedures we proposed today will help do that.

Chair Hardesty:
In addition to the observation made by Ms. Armeni, I would add that where there have been failures of either past or updated police practices in recording interrogations or the use of informants, it is the court system, by rule or adjudication, that must address the consequences of those failed practices. To that end, I am interested in the canvass made of court rules that addresses the policy questions. That clearly is within the jurisdiction of the Nevada Supreme Court to assess. Other supreme courts throughout the U.S. have taken the same review, regardless of whether the Legislature acts or not.

Ms. Feldman:
We have a list of those courts and I am happy to send them to you.

Chair Hardesty:
This topic has come up at conferences of chief justices where supreme courts look at rulemaking to provide guidance to trial court judges about what kinds of consequences should be evaluated when there are deficiencies in these areas. I, too, applaud Metro and Washoe County with respect to the identification policy issues. Sometimes, some agencies do not initiate policies that address either eyewitness or the other two areas you mentioned. Having a statute requiring law enforcement to address these issues and apply best practices is what motivated the adoption of NRS 171.1237 that you mentioned in your presentation. At least it would statutorily encourage law enforcement to maintain vigilance of its policies and practices with respect to the recording of interrogation and the use of informants. This Commission should look at that as well as the disclosure concerns Ms. Armeni mentioned in the State's discovery statutes.

In 2008, this Commission was assured, and Mr. Kandt was very helpful doing research, on the question of informant information. One of the more disappointed things I read was that Las Vegas Review-journal article you referenced page 23, (Agenda Item VII A) that reported the limited number of cases in which that data had been compiled. The Commission took on faith in 2008 that this would be done. It did not happen and it underscores the importance of a statutory requirement for that kind of information to be made available and that discovery rules are effectuated to provide appropriate disclosure of that data. I encourage the Commission to take up these policy questions and make suggestions to the Legislature. We can debate this further in future meetings.

In the meantime, I encourage you to submit court rules that have been enacted where the supreme courts have addressed these questions independent of the legislature and filling the court's obligations about the consequences of the failure of these policies. This is timely, because we have a commission in NSC currently examining the rules of criminal procedure in the State. That commission is making tremendous progress in a number of areas. That is an area where the court would refer those draft rules to that commission and ask for input from them.

Ms. Feldman:
We are happy to provide the information. We welcome working with law enforcement and it is wonderful that they have been leading the way on wrongful conviction reform. We could not have done eyewitness identification without Lt. Spratley and Chuck Callaway. To look at an old case like Cathy Woods and see what happened is remarkable. We are grateful to this support to look into wrongful convictions and to prevent them in the future.

On the recording of interrogations, the policies are a great start, but because the test for admitting a confession is voluntariness and not reliability, that is where the problems come. That is why there needs to be some direction to the courts about what to do. Maybe the NSC is the proper place to take that up. If only we could change the U.S. Supreme Court's decision and make them look at reliability, then we would have our built-in test.

On the informant issue, we welcome working with law enforcement, especially prosecutor's offices and looking at their policies. There is a lot of interest in this right now across the country, probably because there was a recent jailhouse informant scandal in Orange County, California that sparked a lot of interest in this issue. We are seeing a lot of prosecutor offices coming to us to ask how to enhance this policy. There is something to be said about statutes requiring that certain evidence is disclosed.

As to the storage concern about recording of interrogations, we did a survey of the Massachusetts and Wisconsin agencies and many said that if they ran out of storage, they would burn the interrogations on CDs and attach it with the case files. That is a little more manageable than bodycam footage which is hours and hours of video. Interrogations are shorter and can be more easily managed with these techniques. If you limit your requirement to record to certain crime categories it would take away the pressure on small agencies to record.

Chair Hardesty:
In your presentation, you indicated that federal agencies are recording all interrogations. I have to tell you that I have seen a bunch of cases in our court in which the interrogations were conducted by the FBI and the records show the FBI does not do that as a matter of policy.

Ms. Feldman:
They just implemented that in 2014.

Chair Hardesty:
Could you provide us with that new policy? Because we have had a number of cases where they do not do it. I am glad to see that has changed. It has been a huge problem where we have testimony from FBI agents that are at variance with some of the information that has come up in the interrogations.

Ms. Feldman:
I can provide that to you.

Senator Aaron D. Ford (Senatorial District No. 11):
I serve on the committee that deals with rape kits and the testing here in Nevada. One question that has been raised is whether it is appropriate to use affidavits on chain of custody for preliminary hearings and grand jury hearings. I hope I am using the terminology right; I am not a criminal practitioner, but that is part of where the discussion is and whether it is appropriate to do that because apparently it would be easier for us to be able to facilitate some of the prosecutions, if you will. It seems to me that this probably has some impact on innocence and you would have an opinion on this. Can you speak to that now? If not, submit something for consideration so I can mold that into the separate conversations that are happening in other committee hearings.

Ms. Kennedy:
It is something we have looked at and is best for me to submit something more detailed so I do not misspeak.

Mr. Kandt:
That is a legitimate policy question which is deserving of consideration and debate.

Senator Ford:
I have been asked by my other committee to inquire about this issue to any interested parties before our next meeting in 2 months, so I would appreciate any information and opinions on that subject by then.

Chair Hardesty:
My second request, Ms. Feldman, is on the subject of recorded statements. Frequently, in recorded statements an issue comes up on this subject about redaction. Issues based on *Bruton v. United States* is a common problem; any trial judge sitting on a *Bruton* issue knows that is a real challenge. I would like information you have with respect to redaction on recorded statements and how one approaches those redactions. Sometimes electronically it works out but if you are using certain equipment you cannot, so I am concerned about that.

Ms. Feldman:
I can talk to some of our law enforcement allies who deal with redactions. I do not think the statutes or court rules specifically deal with that, but in practice that is something they have to figure out.

Chair Hardesty:
As a district court judge, I remember conducting a week or more of pretrial hearings on a first degree murder case where two defendants were charged. That entire time was devoted to redacting statements. At the end of the day, I threw up my hands and severed the cases. There was just no way to do it. I think that is a real issue.

I will open Agenda item IX, an overview and history of Nevada's felony sentencing structure and discussion of State sentencing and corrections policy. Thank you for coming here, Ms. Lawrence, to make this presentation. We appreciate your input and guidance on how to approach sentencing and sentencing range decisions.

Alison Lawrence (Commission Counsel, Criminal Justice Program, National Conference of State Legislatures):
Sentencing is a very large topic, so I encourage anyone to ask for more details during my presentation. I will start with a broad overview of state sentencing systems speaking from the legislative perspective. I am from the National Conference of State Legislatures (NCSL), representing the 50 state legislatures, territories and commonwealths. We serve Legislators and staff on policy issues and institutional issues. I specialize in pretrial sentencing, corrections and reentry laws.

Criminal codes define what constitutes a crime, outlining the punishments for that crime. Most states have general offense classifications in order of seriousness page 3, (Agenda Item IX A). There are fiscal implications for where a crime is punished. States are looking at this issue to examine instances like punishing a crime as a felony, which puts the fiscal responsibility on the state. When a crime is moved down to a misdemeanor, it is often the fiscal responsibility of local governments. Most changes in crime classifications have been for drug and property offenses.

Last year, we took a new look at state sentencing systems, both indeterminate and determinate. At the basic level, sentencing systems guide courts, parole boards and corrections agencies on the amount and kind of punishments that offenders receive for their crimes. General differences are in the amount of discretion provided to the agencies and courts for the sentences. There are no universal definitions out there.

In my presentation Page 4, (Agenda Item IX A), the 33 indeterminate states, including Nevada, are dark blue. These are states where legislatures assign wide penalty ranges for offenses. Courts have broad discretion to impose prison or community supervision and to determine the length of the sentence via the range. One of the keys for

indeterminate states is that judges can order highly individualized sentences. They have the discretion to look at individualized factors in each case. Parole boards in these states also have fairly wide discretion to determine when an offender is eligible for release.

The 17 red states in the illustration represent what we call determinate systems, identified primarily by fixed sentence lengths so a judge will order a specific term. In most cases, the sentence will include a prison term and a separate community term. Time served is then based on that sentence, so there is no back end parole board. The rationale states have used to move to a determinate system is to increase certainty in time served and reduce disparities which may exist in portions of sentences served.

Half of the states have also added a structure component to their sentencing policies. These are the states with circled letters in the map illustration. The best way to look at this is sentencing guidelines. About half of the structured states have sentencing guidelines created by an administrative body. Sometimes they are codified; sometimes they are not. They may be advisory or mandatory. The other half of states without guidelines have created in statute what looks like a guideline system, but we call them presumptive ranges. They are just sort of statutory sentencing guidelines.

Mr. Jackson:
In those 17 determinate states, did that affect the prison populations?

Ms. Lawrence:
Those states have a better ability to predict if their prison populations will go up or down but there was not a huge impact on prison populations. The determinate states do not have higher or lower prison populations.

Mr. Jackson:
We have credits from Assembly Bill 510 of the 74th Session that apply to the C, D and E felonies in Nevada, allowing credits to also come off the front end of a sentence. That has resulted in a significant decrease in the prison population. One of the things we would be looking at is what type of state we want to be. There would then be quite a task for the Legislature in moving forward.

ASSEMBLY BILL 510: Makes various changes pertaining to offenders. (BDR 16-1377)

Ms. Lawrence:
You are correct; many of the states have seen a pretty significant reduction in prison populations as well as some document savings.

The structured sentencing is found in both determinate and indeterminate sentencing states and increases the certainty and consistency in sentencing. Structured sentencing does remove some of the discretion afforded to the courts and the parole boards.

Sentencing options page 5, (Agenda Item IX A) are another layer added to sentencing statutes in addition to the overarching indeterminate or determinate structure. Sentencing systems have grown increasingly complex with the addition of community supervision policies, diversion policies and mandatory penalties, most often known as mandatory minimums. They further depart from the primary sentencing system and can have an effect like sentencing guidelines in states, generally applying to smaller groups of offenders or offenses. Legislatures have targeted those groups as appropriate for whatever that alternative sentencing option is. One example is presumptive probation. We have seen states without strict guidelines put in place what they are calling presumptive probation for certain categories of low level offenders. They have not actually changed authorized penalties for the offenses and they have not moved crimes but they have written into law a caveat that if they are in this group, judges are required to first consider a probation sentence.

All of these three policies are used to support risk-sensitive and resource-sensitive strategies. States are using them to help adjust their prison populations according to what they see as drivers of prison populations. An example of this would be allocating resources to higher risk caseloads, so if you have probation caseloads based on risk, legislatures are directing more funds to the higher risk levels of caseloads with the intention of supervising them more and supervising lower risk caseloads on more of an administrative level. Targeted mandatory minimums are also used. A number of states have been trying to focus their prison population on high risk offenders or the most serious offenders. These states have had stated goals of actually increasing the portion of those high risk offenders in prison. They have achieved this with mandatory prison sentences and using the presumptive probation strategy.

Chair Hardesty:
In the materials you submitted, the June 2015 article *Making Sense of Sentencing: State Systems and Policies* by NCSL (Agenda Item IX B) discusses the impact on states for mandatory sentencing. The article says, “From 1990 to 2009, the average time served in prison grew by 36 percent according to a report by the Pew Charitable Trusts. The report found that mandatory penalties have contributed to the longer average prison stays, which cumulatively contribute to increases in state prison populations.” Is that right?

Ms. Lawrence:
Yes. It is very noticeable in many states because the mandatory penalties are still catching up with the laws. We are still seeing increases in time served.

Chair Hardesty:
Would that be true whether those had been enacted in determinate or indeterminate states?

Ms. Lawrence:
Yes, because those mandatory penalties will trump any other systems you have in place—the sentence credit laws, early parole eligibility and the truth in sentencing laws.

Chair Hardesty:
So if a legislature is not disciplined in its approach to sentencing and decides to adopt a whole bunch of crime types and make their sentences mandatory, it could have a serious fiscal impact on the state's budget. Is that right?

Ms. Lawrence:
Correct, and states have been addressing that. Some of the targeted mandatory minimum states have rolled back their mandatories.

Chair Hardesty:
In that same article (Agenda Item IX B), it discusses approaches taken by legislatures characterized as "data-driven decisions." There is discussion of Colorado, Kentucky and some other states that are now making those decisions based on data. One of the keys to that is the use of a corrections impact statement when crime is going to be legislated. Could you comment on the use of data-driven decisions and what the component is of that? Also, what does a corrections impact statement look like?

Ms. Lawrence:
There are two things going on with that. The states that have recently adopted reforms using data-driven decision making processes are using a multi-branch, multi-jurisdictional commission much like this Commission. It looks at the statistics on what drives prison growth, overall corrections growth, prison admissions, etc., crunching the numbers at different angles. The goal is to see what drives their prison population and then decide as a group what areas to tackle, using that data to adopt new or augmented policies.

Chair Hardesty:
I was looking for the components of those data-driven decisions. It was not in the article. What is the kind of data that is collected by commissions in those states to help evaluate and that and also forms the components for the corrections impact statements when the legislature is making future legislative decisions?

Ms. Lawrence:
I can follow up with some of that data. It is pretty detailed and long.

Chair Hardesty:
I have read some of it but I wanted to get it collected to share with my fellow Commissioners.

Ms. Lawrence:
Corrections impact statements are generally a little more targeted once you have that data collected. Each state is different, but for bills that make it past the first committee or are being considered by the floor, a statement is produced looking at the projected impact of that law on prison populations. When I was answering Mr. Jackson's question about the predictability when you have more structured or determinate sentencing, it is easier to predict how a bill will impact the corrections system. It requires good data collection to know the amounts and kinds of offenders that would fall under the crime category if you are changing it.

Chair Hardesty:
But it might be that the Nevada Legislature would be interested in investing some money to collect that data so they can be smarter on the criminal decisions they are making.

Ms. Lawrence:
Quite a few states have decided to invest in that.

Chair Hardesty:
Could you also give us some examples of corrections impact statements that are used in other states?

Ms. Lawrence:
Yes.

Chair Hardesty:
Back to Mr. Jackson's question about determinate versus indeterminate sentencing, about 4 years ago, this Commission obtained a study which showed the sentencing practices for all the district court judges in the state for 1 year. It showed that the incarceration decisions made were widely varied—some judges incarcerated at a rate of 33 percent and some incarcerated at a rate of 67 percent. How would a determinate system impact fluctuations like that in sentencing decisions by judges?

Ms. Lawrence:
A determinate system would not really affect that as we define it. It is more of a structured system that would affect it. A determinate system is going more toward getting rid of the parole board to make release decisions and a judge just orders a flat sentence. There would still be judicial discretion to order probation or not. In a structured system, judges are more limited.

Chair Hardesty:
My point is that if you have a determinate system which eliminates parole board releases in a state that currently paroles in excess of 47 percent, that could have a pretty dramatic negative effect on the prison population.

Ms. Lawrence:
Yes it could. States that have eliminated their parole boards generally do a time going forward that those sentences change for people. So parole boards would still look backwards. Going from an indeterminate to a determinate system is a drastic change.

Chair Hardesty:
It would increase the prison populations if you made that switch.

Ms. Lawrence:
It depends on how the law is written.

Chair Hardesty:
It is not just looking at the determinate versus indeterminate system; you have to look at the release valve that the determinate system would eliminate.

Ms. Lawrence:
Correct. That would eliminate what states do where, instead of ordering a range, they order shorter sentences. Time served comes out to be roughly the same between the two states.

Chair Hardesty:
That requires some pretty careful evaluation.

Ms. Lawrence:
Yes, it is a major change to law and operation.

Holly Welborn (Policy Director, ACLU of Nevada, Inmate Advocate):
Are we finding that when a judge in a determinate system is sentencing, it is for shorter periods of time?

Ms. Lawrence:
No, the idea back in the 1970s and 1980s was that it would result in shorter sentences but it really has not. In purist form, some may have that intent, but in reality, time served is roughly the same. It is more about some of the complimentary policies that states are putting into place which have more of an effect on time served.

Chair Hardesty:
There are two documented factors that are really driving prison population—mandatory sentences and the variance by judges in sentencing decisions.

Ms. Lawrence:
Short of sentencing guidelines, the way states have addressed that is to put in place some policies providing more guidance to judges on specific types or classes of crimes.

Chair Hardesty:
Or they plugged in credits.

Ms. Lawrence:
Release and time served policies exist in both determinate and indeterminate states, looking different in each state, but having basically the same effect page 6, (Agenda Item IX A). We found that 41 states have it as an integral part of their sentence calculations, so there needs to be an accounting for those kinds of credits when looking at how long someone is actually going to serve in prison. In indeterminate states, it advances the parole eligibility. In determinate states, it reduces the prison terms.

Regarding parole and automatic release, the way we have defined it, there is parole release in the indeterminate system and determinate is set in statute. Mandatory supervision is in place in about 26 states for some inmates. It is calculated from the court-ordered sentence—sometimes on top of a sentence, sometimes in addition to a sentence. The idea behind this model is supported by research showing that inmates are most at risk when they are immediately out of prison. Supervision during this period reduces their risk of recidivism by a significant number.

Chair Hardesty:
In Nevada, we have sentence credits that apply to the top end, so depending on when a person is released, if their top end is significantly shortened, then the amount of supervision time is also shortened. As I understand it from two of your document submissions (Agenda Item IX B) and (Agenda Item IX C), that increases the risk of recidivism and also has a direct impact on the offender's ability to be successful. Is that correct?

Ms. Lawrence:
It is interesting to note that in Nevada it is on the top end; the maximum sentence. In most states, that time comes off the prison time and is then just added to community service. Some states, including Nevada, have time the inmates can earn off of their community sentence also, but it is a separate policy. It is identical in a number of determinate states, so whatever time the inmate earns off in prison is the amount they will be serving in the community. So the full sentence length is not reduced; just the time spent in prison versus in the time in community service.

Chair Hardesty:
So these two articles support the statement I made about the reduction off the top end reducing the supervision period. It increases the risk of recidivism because of the shortened time of supervision and it also Increases the likelihood the inmate will not be successful after release back into the community. Is that correct?

Ms. Lawrence:
Research shows that it is up to the first 6 months following the inmate's release. If Nevada has reduced supervision in that 6 months, the research may confirm what you are saying, but I am not a researcher, so I cannot tell you this for certain. I can share with you the actual research on that but the idea in these states is to ensure there supervision for a period of 3 months to 9 months following release.

Chair Hardesty:
Yes, please give us that research data.

Ms. Lawrence:
Several states have addressed their criminal codes, crime categories and authorized penalties page 8, (Agenda Item IX A). I have targeted states most similar to Nevada in sentencing structure and indeterminate policy. Theft and drug crimes are where we have seen the bulk of legislative attention pertaining to how crimes are classified. In 2005, 30 states had increased dollar thresholds for theft offenses page 9, (Agenda Item IX A).The stated purpose for this adjustment is to keep up with the rate of inflation. Most states have amended their drug sentencing, redefining possession to differentiate drug abusers from drug sellers.

In the last 5 years, more than one-third of states have amended their drug penalty ranges, generally increasing the amount of drugs that qualify for possession. States have gotten more creative for anything above possession. Many states have also redefined what constitutes crimes related to possession and dealing. The goals here are to differentiate drug abusers from drug dealers, including offenders who are selling to their friends versus those who are criminal minded and out to make money from selling drugs.

In 2011, Arkansas and Kentucky were the first states to make changes with this issue as a stated goal. In Arkansas, they took their broad drug-dealing statute and broke it into three crimes—manufacture, deliver, and possess with intent—each crime assigned a different penalty category, increasing with severity. The law also wrote an exception into each of those crimes—if certain factors were met showing the drugs were for personal use, the crime would be penalized one category lower. In Kentucky, the Legislature wanted to give judges the option of treatment-based sentences, both in the community and secure. The ways the laws had been previously written, Kentucky had

possession and trafficking only. The Legislature added weights to the trafficking offenses, making the lower weights of drugs eligible for alternative sentences.

For offenses that do not involve drugs or theft, in 2010, South Carolina redefined their assault and battery sentences. They did a study and found that a lot of the specialized crimes—assault and battery against a sports official or any other special category of person, for example—had different penalty ranges. They also found some crimes that were hard to distinguish—assault and battery with intent to kill versus assault with intent to kill, for example. The statutory definitions were not very clear, so they consolidated all those offenses into seven or eight offenses and created clear definitions of each. It was part of a major revision of the South Carolina criminal code, the goal of which was to provide consistency in crime classifications, proportional punishments for those crimes and to focus their prison space on violent offenders. New statistics out of that state's department of corrections show the proportion of violent offenders in prison has increased by 5 percent while the overall prison population has decreased by 12 percent in the 5 years following the law's application. By realigning offenses based on severity, they made some big changes in their prison population.

Another area of change is graduated penalties page 10, (Agenda Item IX A), which is creating degrees of crimes with penalties increasing for more serious offenses. This has been done in many states, either through the aforementioned thresholds or through definitions for other crimes. In 2012, Georgia took their burglary offenses, divided them into two categories—burglary of nonresidential units and burglary of residential units. Within those two classes, they created tiers. If a person is a repeat burglary offender, the penalties start going up a classification. The top range of that grouping saw penalties increase, while some of the lower range for nonresidential units decreased.

Senator Ford:
I understand Connecticut has revised its drug laws in a way that nonviolent drug offenses which are not trafficking have been changed and the law is retroactive. Have you seen an effect of this out there in the landscape? How consistent is it happening? Are we seeing increased recidivism because of the retroactive application of these types of laws?

Ms. Lawrence:
I do not believe that any state implementing retroactivity has seen an increase in crime. There are not many states which have gone to retroactivity. Probably the biggest example of retroactivity was in New York when they repealed some of their Rockefeller laws in 2009. That state repealed a lot of mandatories and retroactively allowed many crimes to go back to the judges for resentencing, which in a number of cases, were granted to time served. New York's crime rates continue to go down. Retroactivity is difficult. Colorado did a retroactive law to decrease nonviolent drug offenses by allowing an earlier parole date for offenders who had been sentenced prior to the new law. It did

not guarantee early parole, but put the presumption into law. I do not believe drug crimes have gone up in Colorado but I am not positive. It would take a pretty detailed tracking to know the path of this group of offenders released early under that law .

James Dzurenda (Director, Nevada Department of Corrections):
Legislation is open right now in Connecticut and one of the bills being considered is related to the change in sentencing for nonviolent crimes, even just the misdemeanor nonviolent crimes, and whether they are going to incorporate it into nonbond or released on recognizance. What they did pass in legislation a few years ago was the nonviolent crimes with releases from prison is left up to the discretion of the commissioner of corrections 18 months prior to discharge with a specific program in mind, depending on the nonviolent crimes.

Ms. Lawrence:
I am familiar with that policy, the sentence credit piece of it. They have had good results in Connecticut. There is another report that highlights those results. They dealt with it like Colorado, where they retroactively allowed release on the back end. They instituted sentencing credits for inmates and it was a major overhaul for the corrections department there to change all their computer systems and backtrack credits for everybody.

Chair Hardesty:
Can we get that report?

Ms. Lawrence:
Yes.

Jorge Pierrott (Lieutenant, Parole and Probation, Department of Public Safety):
In Connecticut, did the changes increase the population of parolees and how did it affect that department? It appears to have been a quick change.

Ms. Lawrence:
I believe they increased full-time equivalent (FTE) positions by quite a bit. This was a major undertaking for corrections and parole. It required staff and resources for courts, corrections and parole. Connecticut increased funding for officers and I believe they also implemented caps on the parole caseloads.

Mr. Pierrott:
Do you have any idea of the timeline?

Ms. Lawrence:
I can get it for you. They did it pretty quick, in maybe 12 to 18 months, working in time increments of who the changes would apply to and when.

Mr. Dzurenda:
I ran the corrections and parole departments for Connecticut when these changes went through. It took 12 full months to incorporate the changes. We had to increase the parole division by 50 percent. It was actually reinvestment of the funds because the changes decreased the population so much that they were able to shut down a few prisons. It did not add any more to the budget. It just shifted the funding and staffing to a different part of the system.

Ms. Lawrence:
And 12 months is very fast.

Mr. Dzurenda:
And it was not that difficult. The hardest part was the recordkeeping. As long as the parole division got the staffing, monitoring the parolees was no big deal.

Ms. Lawrence:
Back to my presentation and graduated penalties Mississippi set out to clearly distinguish between nonviolent and violent offenses page 10, (Agenda Item IX A). In the crimes of theft and commercial drugs, they did not feel they had adequately differentiated between those who committed violent acts versus those who committed nonviolent acts. They then created some top tier trafficking and a criminal enterprise statute which is not violent but which looks at organized crime and retail drug theft. They put the more violent crimes into correspondingly higher penalties.

Chair Hardesty:
Can you provide us with the revisions made to the criminal code in Georgia regarding burglary, theft, possession and forgery statutes? That would be directly relevant to our Commission's conversation regarding the issues presents in the category B felonies.

Ms. Lawrence:
Certainly. States have pulled out certain crimes they identify as top tier or lowest tier offenses page 11, (Agenda Item IX A). When a state has determined that one penalty class has too much underneath it and the sentence range is too broad, one way they have tightened up the sentence range is to pull out some of the offenses. Drug possession is where we have seen states decrease from felony to misdemeanor, although not many states have done it. This is where you get into some of the state and local cost shifts. States are getting there, but they are not quite there yet with the cost shifting. It takes a leap of faith and a lot of work.

In Connecticut, even shifting from agencies has been difficult. Utah successfully did cost shifting last year. Their major reform package included shifting drug possession for first-time offenders and second-time offenders from felony to misdemeanor charges. They then took all their traffic offenses and reclassified them down a level. They did this to

reduce the resource burden on local jails. The Utah Legislature also said they did not feel like valuable jail resources should be spent on some of the lower level traffic offenses like traffic tickets that are nonviolent. The Driving Under the Influence (DUI) charges were dealt with separately in that law.

Chair Hardesty:
So they decriminalized some of the misdemeanors to citations?

Ms. Lawrence:
Yes.

Chair Hardesty:
That has been proposed in Nevada a couple of times. There was a draft of legislation in 2013 or 2015 based on something that was done in Oregon. That legislation was done by Assemblyman Jason Frierson, which is something I want to have him share with this Commission because it is in line with what Utah did.

Ms. Lawrence:
I can share the Utah information with you. They have done a good job of documenting it. Regarding top tier felonies page 11, (Agenda Item IX A), some states have defined drug kingpin high level dealers by quantity of drugs and also the way they define those crimes—if you are an organizer of the crime or a financial backer of the crime, you are included in the top tier of the highest level felonies. States have done this based on crimes that are considered especially severe, oftentimes based on circumstances in each state. South Dakota did a higher level theft of livestock, because livestock is very valuable in that state. Other states have targeted for grand theft auto.

In all the shifting that states have done with crime classifications, some states have added new crime categories. In Nebraska, they created a mid-level felony class. There an error on my presentation page 12, (Agenda Item IX), under "New," it should say 1-50 instead of 0-50 for the class II felony, so that was not changed. Nebraska created the felony class IIA and reorganized the felony classifications of IIA, III, IIIA and IV. They designated class III and class IV as nonviolent offenses and crimes that were in those two classes that were violent or sex offenses were bumped into one category higher. By doing this, they were more able to distinguish in their authorized penalties the offenses that were the most severe.

In Colorado page 13, (Agenda Item IX A), they pulled out the drug offenses into a separate penalty listing. They wanted to increase the options available to judges for drug offenders, especially those with substance abuse issues. Colorado had been increasing funding for drug treatment, working with courts, prosecution and defense. This change hastened placement of these offenders into alternatives like drug courts. It also created specialized offenses that judges could use to place offenders into specific

programs to help these individuals. In 2015, Alabama created a lowest felony class which include low level, nonviolent theft and drug crimes. When they added tiers and downgraded penalties, instead of a misdemeanor, they created a low level felony class, which has a lower maximum than the others.

Chair Hardesty:
Thank for you taking time to come here today; we appreciate your input. We will continue with Agenda item IX with Commission Counsel Nick Anthony's presentation.

Nicolas C. Anthony (Senior Principal Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau):
I did some research into Nevada's history of criminal sentencing. Judge Higgins told me this morning that he was present in a lot of these hearings in 1995 when the State moved to truth in sentencing (TIS). In criminal sentencing, the policy considerations that policy makers often look at are public safety, victim's rights, retribution, accountability, fairness and fiscal impacts page 2, (Agenda Item IX D). Earlier, Chair Hardesty mentioned the corrections impact statement. In Nevada we have fiscal notes. The statute requires the Department of Corrections (NDOC) to provide a fiscal note on any bill that newly creates or raises an imprisonment sentence. Any new felony would automatically generate a fiscal note and any increase from, say, a class B felony to a class A felony, would generate a fiscal note that the Legislature would review during session.

Ms. Lawrence covered determinate and indeterminate sentencing. There are also sentencing guidelines that are arranged. Between determinate and indeterminate sentencing, the big difference is that there is less judicial discretion with determinate sentencing since it is set by the Legislature. Indeterminate sentencing is more of a range and is discretionary case by case page 3, (Agenda Item IX D).

Before 1995 in Nevada, sentencing was largely based on the Model Penal Code (MPC), which was mostly indeterminate sentencing page 4, (Agenda Item IX D). In 1994, five states had determinate sentencing, 29 states including Nevada were indeterminate and 16 states had sentencing guidelines. In 1985 and 1986, the Justice Springer Report on Sentencing came out. Prior to that, a Nevada commission had established suggested sentences for felonies. This was the precursor of the Advisory Commission on Sentencing, more commonly called the Sentencing Commission, which was the precursor of this Advisory Commission on the Administration of Justice (ACAJ). Its duties and membership have changed over time, becoming more active as an advisory commission since 2007. In 1993 and 1994, an interim study of criminal justice study was done by the Legislature through *Assembly Concurrent Resolution 76 of the 67th Legislative Session.*

ASSEMBLY CONCURRENT RESOLUTION (A.C.R.) 76: Directs Legislative Commission to conduct interim study of criminal justice system. (BDR R-1626)

That study recommended that another interim study be done after the 1995 Legislature Session to look at the issue of truth in sentencing page 5, (Agenda Item IX D). Political attitudes changed, election results came in and there was a nationwide shift in attitudes toward criminal justice policy. At the time, research showed Nevada had sentencing uncertainty because of broad sentencing ranges and good time credits.

There were shifting national paradigms taking place around the time of the 1995 Legislative Session with influences from some federal laws. The Sentencing Reform Act of 1984 allowed states to establish unique sentencing guidelines page 6, (Agenda Item IX D), while the Violent Offender Incarceration and Truth in Sentencing incentive grant program was later established to encourage states to implement truth in sentencing (TIS).

During the 1995 Legislative Session, the National Conference of State Legislatures (NCSL) did a number of presentations on TIS. The American Legislative Exchange Council (ALEC) also presented a report card on crime and punishment, measuring prison population versus total crime page 7, (Agenda Item IX D). There was a fiscal evaluation of the State by the National Commission on Crime and Delinquency. During this time, the political shift was to be tougher on crime and Nevada made more of a push for determinate sentencing. Many other states including Washington and Arizona had already gone to TIS.

Before 1995, a judge sentenced an offender for a specific number of years within the sentencing range page 8, (Agenda Item IX D). After one-third of that sentence had been served, the offender was then eligible for parole. For example, the former penalty for robbery was not less than 1 year and not more than 15 years (1-15). If the judge sentenced the offender to 10 years, that offender would be eligible for parole after 3.3 years. During that time period, Nevada had four categories of felonies listed on page 9 of (Agenda Item IX D). There were no category letters assigned as we have now. There was a crime chart prepared for the 1994 A.C.R. 76 study which listed all of Nevada's crimes and what the sentencing ranges were for each crime.

In 1995, *Senate Bill 416 of the 68th Legislative Session*, the truth in sentencing bill, was approved after many committee hearings and much discussion.

SENATE BILL (S.B.) 416: Makes various changes regarding sentencing of persons convicted of felonies. (BDR 15-1872

The bill created mandatory minimum and maximum sentences, had habitual felon penalties, prohibition on the commutation of death, or life without sentence, to life with.

It was also the start of the Sentencing Commission, which was the precursor to the ACAJ. The Senate Committee on Judiciary reviewed in detail all the crimes and sentences that had been handed down by judges over a 12-month period page 11, (Agenda Item IX D). That data gleaned from NDOC was then broken into ranges. There where numbers and names associated with how they came up with the five different categories of A through E felonies that we now have. In that process, the Legislature moved some crimes up and some crimes down. Going from four to five crime ranges, some of the less violent felonies moved down and others moved up. There was a new category created—category E, which is a mandatory probation offense.

Truth in sentencing (TIS) was an effort to ensure the public that offenders actually served the minimum amount for the crime they committed, and that it would not be reduced by good time credits. In 2007, the Legislature passed *Assembly Bill 510 of the 74th Legislative Session* which added good time credits that go to both the maximum and minimum sentence lengths, so that effectively has changed TIS. It also stipulated that the minimum sentence must not exceed 40 percent of the maximum sentence.

ASSEMBLY BILL 510: Makes various changes pertaining to offenders. (BDR 16-1377)

After S.B. 416 went into effect, the offender was required to serve 100 percent of the minimum sentence. For example, robbery became a crime with 2-15 years, so the judge was required to sentence the offender somewhere within that range, such as 6-15. That offender would not be eligible for parole until serving the 6 year minimum sentence. That ratio was based on the 40 percent page 13, (Agenda Item IX D).

There are now five categories of felonies established by *Nevada Revised Statutes (NRS) 193.130*; category A through category E page 14, (Agenda Item IX D).

Chair Hardesty:
What does the legislative history reveal as to why 40 percent was selected? Prior to that, I believe it was 25 percent.

Mr. Anthony:
I believe that was a policy choice by the Legislature. There was quite a bit of debate on that number. Prior to 1995, it was 33.33 percent. From what I recall, there were some trade-offs based on which crimes moved up and which crimes moved down.

Chair Hardesty:
I just wondered if there was a penological reason for that 40 percent, or if it was more a product of legislative negotiation.

Mr. Anthony:
I would be happy to look back at that question. My recollection from looking at the meeting minutes was that there was debate at the dais which was part of the negotiation involving moving the crimes around and what would be most effective.

Senator Ford:
I would also appreciate some information on that. I am just surmising here, but one page of your presentation indicated there was a spike in crime page 7, (Agenda Item IX D) during the time periods this discussion was going on. It very well may be that it was contemplated that an increase in sentencing, a narrowing of the time between minimum and maximum sentences, would address a spike in crime as a deterrent. Do you recall reading anything about this in the 1,000 pages of legislative history you reviewed?

Mr. Anthony:
Absolutely. In the mid-1990s, some of the studies showed Nevada as third in the nation in violent crime. That was playing big into the discussions then.

Chair Hardesty:
But our position has changed considerably since then as to where we sit nationally, not only in violent crimes, but in crimes generally.

Mr. Anthony:
It has. I have not seen the latest crime reports but I can pull those and that might be a benefit to the Commission to see where we stand nationally.

Senator Ford:
Part of the discussion is having the political wherewithal to be able to do it, because we are looking at an increase in crime in southern Nevada—violent crime in particular, as well as burglaries happening in certain portions of our neighborhoods. This discussion of our criminal justice reform happening while we are seeing a spike in crime in southern Nevada may present a barrier to some politicians wanting to take this on. We should be cognizant of that issue.

The second point I wanted to make was that I wonder if the lowering in the crime rate between 1995 and now has any correlation between going from 33.33 percent to 40 percent. Is there any basis for determining or assuming that the lower crime rate was as a result of stiffening penalties?

Mr. Anthony:
That is a good question. I believe James Austin of the JFA Institute may have some more statistics as to the exactly what has driven prison population and if there was a shift with TIS. We also have to remember that A.B. 510 credits now play into the

equation, so you are not actually seeing 40 percent minimums because inmates are getting good time credits off their minimums as well.

Regarding the five felony categories established by NRS 193.130 page 14, (Agenda Item IX D), they are very specific "except as otherwise provided by specific statute." For example, within category B, there are 13 different ranges within that 1-20 years sentencing requirement. Some crimes are 1-6 and have been specifically set for that crime by the Legislature. The broad category B cannot be outside the 1-20 range, but there are a number of different ranges within the category B felonies.

Chair Hardesty:
Just for new Commissioners, there are no A.B. 510 credits for category B offenses, even though your sentencing range is 1-6.

Mr. Anthony:
That is correct; the A.B. 510 credits only apply to category C, category D or category E felonies. The number of crimes by category vary within all five felony categories from 51 category A offenses to 218 offenses for both category B and category D (page 14, Agenda Item IX D). I do not know if it is by happenchance, but in Nevada we have an "M" shaped graph pattern, not a bell curve with all our crimes in the middle. Our category B and category D crimes are balanced but higher than the other three categories.

The last time we examined this issue was in 2007-2008, when the ACAJ formed a Subcommittee to Review Truth in Sentencing, chaired by Chair Hardesty at the time. That subcommittee looked back to the 1995 S.B. 416 Legislation, commissioning the Grant Sawyer Center for Justice Studies and Dr. James Austin of the JFA Institute to do an in-depth joint study. They looked at all the crime rates, the parole grant rates and came up with several recommendations pages 17-18, (Agenda Item IX-D). Any changes to the sentencing structure would need to be fully debated and assessed, they said, implying that the lack of such a debate would lead to ineffective or counterproductive reforms. The Subcommittee was specifically interested in category B felonies and they banned the use of prison for category E offenders who violate the terms of their mandatory probation. The Subcommittee also recommended that A.B. 510 credits should be extended to category A and category B felons, but they did not specifically provide the formulas for that application.

In addition to A.B. 510, the legislative sentencing changes since 1995 include *Assembly Bill 142 of the 76th Legislative Session* in 2011, which changed the theft thresholds to a higher amount.

ASSEMBLY BILL 142: Makes various changes governing crimes against property. (BDR 15-599)

The Legislature also expanded diversionary programs and specialty courts and added new crimes to NRS. There have been sentencing reforms that have not passed or been vetoed by the Governor, such as *Assembly Bill 136 of the 76th Legislative Session*, which would have extended A.B. 510 credits to certain category B offenses. That bill passed the Legislature but was vetoed by Governor Sandoval.

ASSEMBLY BILL 136: Revises provisions governing credits for offenders sentenced for certain crimes. (BDR 16-634)

Connie Bisbee (Chairman, State Board of Parole Commissioners):
This is the first time I have realized that the 1995 Legislative Session is when they made the change to allow the State Board of Pardons Commissioners to reduce life without parole to life with, or death to life without or life with.

Mr. Anthony:
I believe in 1995 they changed it so you could not move it down.

Ms. Bisbee:
Right. Any idea how that came about?

Mr. Anthony:
I can go back and look for that. I was more focused on how they came up with the five felony categories. There was a lot of testimony from outside influences like NCSL, and ALEC and some of the big research bodies. It was a look at what was happening nationally in other states and what were some of the reforms there. It became an omnibus criminal justice bill. There were trade-offs including the moving of some lower level drug offenses to a lower category. Additionally, the category E felony was created, so there were trade-offs both ways. That particular change had to do with the prevailing attitudes at the time of being more tough on crime.

Ms. Bisbee:
It just so happens that we came up with a couple of suggested changes to maybe move that back to the way it was before. I do not know if anyone feels this is an appropriate time to do that, but I do have some draft language on that subject.

Chair Hardesty:
We should put that on the agenda. In the material provided by the NCSL, there is an article titled, *Principles of Effective State Sentencing and Corrections Policy* (Agenda Item IX C). On page 1, it references principles and points, laying out seven principles which would be applicable in determining an appropriate sentence for criminal behavior. It does not appear to me that the 1995 Legislation or criminal behavior that has been established since then, take into account, as part of the debate, these factors

in determining sentencing ranges. Does the Legislature, when they criminalize behavior since 1995, debate the sentencing range? How is that set?

Mr. Anthony:
I assume you are talking about when there is debate of a new crime being considered since 1995.

Chair Hardesty:
Right.

Mr. Anthony:
From my recollection in staffing Assembly and Senate Judiciary committees since 2001, that is debated oftentimes amongst the prosecutors and defense attorneys. There are policy discussions that occur in these committees and then there are also financial discussions that occur in the money committees.

You talked earlier about a corrections impact statement. In Nevada, we have fiscal notes. Any time there is a new crime established, a fiscal note request is automatically generated and sent to the NDOC and a fiscal note is returned. Say there is going to be a new crime called aggravated stalking with a weapon and the bill calls for the penalty to be a category B felony because maybe they have a new crime in California that is similar and the penalties there would be close to ours. That is the starting point. Then there is debate and discussion, policy considerations from prosecutors, defense and victims. There will then be discussion about what the appropriate punishment should be. Judges will weigh in. Oftentimes, the judicial branch would prefer more discretion.

Chair Hardesty:
This article lays out seven principles that should be debated with respect to the purposes behind establishing sentencing links. Noted in these materials is establishing consistency in the crime among defendants and making certain there is no disproportionality based on race, income, gender or geography. It articulates a balance of incapacitation, rehabilitation, victim restoration, etc. It is that kind of debate that I am wondering about. Does it take place? I get the fact that prosecutors and the defense come in and argue their sides, but I am commenting and advocating that when these sentencing ranges are established, they should be based on penological background and data, along the lines of what Ms. Lawrence spoke about—data-driven decisions being made before these sentences are established.

Mr. Anthony:
To that point, I think there is quite of bit of debate during session along those lines. Some of the principles in this article pages 1-3, (Agenda Item IX C) were on the first slide in my presentation page 2, (Agenda Item IX D)—fairness, consistency, proportionality, etc. Often, when a new crime is brought up, there is that discussion and

debate as to where this fits within our category A through E felonies. We have seen over the last few legislative sessions an eye toward cost savings. A number of new crimes have entered on a lower level. There has also been a push to look at crimes more in terms of a category E community supervision based on the fiscal resources. That goes to principle 3 in the article, "prison space for the most serious offenders." The Legislature has absolutely done that the last several sessions.

Chair Hardesty:
How do we end up with so many 1-6 or 1-10 sentences in category B?

Mr. Anthony:
I could look back at specifics.

Chair Hardesty:
As an example, "aid or conceal child escaped from a State detention facility." That is a category B felony with a 1-6 year sentence range. What would make that crime a category B when it was established? It is a crime that, as far as I know, the only thing that impacts that offender is that they cannot get A.B. 510 credits. I do not know what other consequences there are for being a category B felon. There are other examples in here that have to be taken into account when we talk about looking at these category B felonies. Another one is assault with a deadly weapon, which gets 1-6 years. Why would that crime be 1-6? My impression from a penological standpoint is that it would be a longer term. Why would it have the same sentencing length as aiding or concealing a child escaped from a State detention facility?

Mr. Anthony:
I see your point and we can go back and look at each individual crime. I think that is the Legislature's charge to this very Commission. There is not a lot of time during session to undertake a complete revision and look at every single crime. My guess would be that the aiding a child crime was probably a crime prior to 1995 and it just shifted over. I would have to research that. Some of those crime definitions came over during the 1995 shift. For instance, here is "statutory sexual seduction if 21 or older at time of offense." That was added in the 2015 Session and the sentence is 1-10 years. We can poll the legislative history on a particular bill and find the debate on why the Legislature felt a certain sentence fit a certain crime.

Chair Hardesty:
That statute has a sentence range of 1-10 years. On page 3 of your category B list (Agenda Item X), "sex trafficking an adult" is 3-10 years. The only thing that is different is the bottom end; the top end is 10 years in both cases and yet I would submit that the behavior for sex trafficking an adult is quite similar to "statutory sexual seduction at 21 or older at the time of the offense." These comparisons continue to raise questions in my mind about whether we have, in fact, developed fairness in our sentencing structure.

Then you get into the mandatory sentencing, which is mostly drug related. As Ms. Lawrence said, those mandatory sentences are what is driving an increase in the prison population. Judges do not have any discretion in those cases. I think that is another area we should look at. Burglary is a whole other topic but generally burglary is 1-10 and invasion of the home is also 1-10 and it does not matter whether it is commercial versus residential. Some of the reforms initiated in other states take into account those difference, but we do not. If I recall from a presentation from the former interim director of NDOC, E.K. McDaniel, around 63 percent of category B offenders incarcerated had burglary as part of their offense. We need to look back at that.

When we look at lengths of stay, this Advisory Commission should step back and take a look. When we do, my question is this: should we be applying penological principles in making these decisions rather than just horse trading, guesswork and shaking hands? That is what has troubled me about this process and why I urge this Commission to consider the material generated by the NCSL which sets out principles that would apply to determining proportionality and true penological principles; making the exercise more scholastic than anecdotal and visceral. I am trying to offer some suggestion of where I thought the Commission said they wanted to go in addressing the category B offenses and the sentencing ranges within those and what seems to be, at least on the surface, inconsistencies.

Senator Ford:
I do not know if many of my legislative colleagues will agree with this, but you have articulated a well-deserved indictment on what takes place oftentimes during the legislative process in considering these types of issues. Our presenter, Mr. Anthony, is constrained as nonpartisan staff from saying things I am about to say; I get it. I recall to his credit something happening exactly as he described it—the consideration of fairness and equity in at least one topic last Session. Senator Harris fought fervently over the graffiti bill about whether the penalty was appropriate. We had that discussion probably 100 of the 120 days of Session. That, in my view, has been an anomaly. I served on the Senate Committee on Judiciary in both the Sessions I have been a Legislator, and it is rare for us to have that level of discussion and debate about the appropriateness of the placement of a penalty on a particular crime, whether it is an old or a new crime. I vaguely recall the new crime about statutory seduction being 1-15 but I do not recall talking about seven principles on the appropriateness of putting in that range of punishment.

That said, what you have also suggested, Mr. Chair, is a very daunting task. I am not sure how much time it would take for us to go through our entire penal code and align appropriately, from a scholastic perspective as opposed to a negotiated perspective from a legislative context, these types of items. I do not think we have enough time left in the interim to do that with this Commission. You may, and if so, I am happy to join in.

As a civil court lawyer, I could not tell you before this Commission whether a category A felony or a category E felony was worse. I did not know. I venture that a number of members on the judiciary committee and a large number of people in the Legislature have no clue on these levels of delineation between felony categories. It would take a lot of training for us to be able to be knowledgeable on this issue. When we come back in 2017, whether I am in the minority or the majority, I am going to lean heavily on nonpartisan staff to remind us of this conversation. I will also remind our advocates on both sides of the aisle—criminal prosecutors as well as public defenders—that we need to be having a scholastic conversation on the appropriateness of categorization of crimes. I just wanted acknowledge what you highlighted as an issue as being in my view an accurate depiction of what has happened oftentimes in the discussions we have had in the Judiciary Committee. I have been in the majority and the minority on that, so it is not an indictment on one party or the other—it is an actual experience that I have had both ways.

Chair Hardesty:
I do not intend to indict the Legislature. What I am urging, as a threshold point of a Commission with a principle responsibility for studying sentencing practices in the State, is that it recommend to the Legislature a piece of legislation that would provide guidance by which these decisions are made. That way, issues of gender or race inequality, as well as appropriate penological considerations and impacts, both fiscal and prison and the like, can be assessed so those sentencing ranges are based on a vetting of those topics influencing the sentencing ranges on crime types. If that were the case, this Advisory Commission could begin the process of identifying certain areas within category B, calling on prosecutors, defense lawyers and probation experts to all comment on what a reasonable sentencing range for a crime should be from a penological standpoint.

This could be combined with the reform measures that have taken place in other states, comparing what they have done with what we are doing here. That alone would have a big impact on NDOC in the next 2 years to 5 years. If I were the director of NDOC and got a request from the Legislature to give them a fiscal note on what the impact on prisons would be by adopting a crime called statutory sexual seduction if 21 or older at the time of the offense. Talk about a crystal ball exercise; I do not know how you would do that. That fiscal impact, which sounds like the central piece or the only piece of outside information to determine sentencing length, really is not very valuable information for legislators to have. I am curious to know from Legislators, how they would feel about having a set of factors of principles to guide them to make these decisions on sentencing ranges. Also, what do they think about this Commission undertaking the application of those principles when evaluating certain crimes with in category B as part of this exercise in showing how it could work?

Adam Laxalt (Attorney General, Office of the Attorney General):
I cannot think of an analogous circumstance where we would send a proposed bill and the Legislature would pass a bill that would set out a multi-factored test before it can pass more bills. I understand what you are trying to get at and I think we are all on board with trying to clean up category B felonies but unless I am mistaken I cannot think of an analogous situation, or whether that would be even proper.

Mr. Callaway:
From my perspective, having worked a number of Legislative Sessions, to take an example such as you did off the category B felonies, and I will use an example of a bill I actually worked on—the filing of false lien against public officials. At first glance, looking at this chart, we may say, "Why on earth would filing a false lien against someone be 5 years to 20 years? It makes no sense, there are other crimes more serious than this." But maybe there is a victim who comes in to testify before a legislative committee who tells of their experience where they were targeted by a group of individuals because of their position, power and authority, and false liens were filed against them. They tell of how it had a negative impact on their finances and maybe damaged their ability to get credit to sell their home and the penalties become relative. What I consider to be proper punishment, the victim of that crime may not consider to be anywhere near proper.

Another example is if someone breaks into my home, steals my property, ransacks my house and goes through my wife's underwear drawer and whatnot and a committee hears the story. Someone on that committee may say it is deserving of a 1-5 year penalty, but I may want that guy to go to jail for 10 years when he is caught. It is relative to the victim who experiences the crime. It is also sometimes hearing the whole story and understanding that there is more to circumstances in some cases than just a graph on a page saying it is this category or that category. That is my perspective on how some crimes get put into different categories.

Chair Hardesty:
You are describing a criminal justice system where the penological results are driven by anecdotal stories rather than penological data. It is not an evidence-based outcome; it is an anecdotal story outcome. I do not know that we want to be developing our criminal justice decisions based on anecdotal stories because I submit that has produced a number of crimes in our State. I am not in any way disparaging someone's concern that they express to the Legislature as to why they want a particular kind of behavior to be penalized. I suspect that many of those stories would cause the victim to say, "It is not 1-10, it should be life. I am so incensed that I want them to be incarcerated for the rest of their life." But that is not a realistic approach, nor is it consistent with what the rest of the country is doing. I get what you are saying, but that is why I am asking the question of if there should be some guidance provided by which this Commission makes assessments about category B offenses as well as the Legislature itself. I appreciate

the point by the Attorney General, but the Legislature can enact a statute that provides it guidance if it chooses to.

Senator Mark A. Lipparelli (Senatorial District No. 6):
I agree a little bit along the line of where Senator Ford was going. I think what we are doing is exposing the inconsistencies. As a Legislator, if I had the benefit of this chart (Agenda Item X), it would be informative if someone came to the table and was suggesting a new criminal code. It would be easy for me to assess where does this new crime fall in the various ranges. This is like solving a big pollution problem—you have all these inconsistencies and what you are likely faced with is to go after the things that are obvious and let that be the guidepost, knowing that now the Legislature would be armed with this kind of summary information. As I see it in the throes of the Legislative Session, bills move around quickly and with this reference tool that we have now at our fingertips, it would do a lot toward taking out some of the emotion in creating a classification for prison term or fines. It is a big problem. This Commission could make a recommendation that the State maintain this kind of indexing in consideration of any new law and that the Legislators must look at the index prior to making its final decision. That could be one way to keep moving toward consistency.

Chair Hardesty:
To your point, I believe that is what we will see from NCSL when we get the correctional impact statements that Ms. Lawrence talked about earlier which are used in some states. The correctional impact statement will articulate some of the information so the Legislators who are voting on this issue are not flying blind or guided by emotion or anecdotal stories.

Mr. Callaway:
Maybe I can articulate my earlier point by turning it into a question. How would we provide the Legislature a guideline of what we believe the punishment should be for some of these offenses when by their very nature, some of these categories are subjective and relative? As a Metro police officer, having worked the streets of Las Vegas for 18 years, I may look at some of these categories and believe differently than others because of the impact I perceive them to have on public safety.

Take drugs for instance. When we had the presentation from the crime labs, it was reported that the hits we are getting back on DNA are coming from drug arrests. We know there is a nexus between drug offenses and other crimes. From a law enforcement perspective, I may see those drug offenses as deserving of more penalty than someone else may see them. As a body, it would be difficult for us to debate and come up with categories to then ask the Legislature to consider whether they are relative and subjective. I do not even know if states across the country have close comparisons when it comes to the different laws they have. I guess we could come up with some kind of general category for crimes but even then there is subjectivity.

Chair Hardesty:
This Commission is charged with making assessments about our sentencing structures. Why not bring up a crime and make a determination about the sentencing for that specific crime? Ask the questions about why that specific sentencing range was chosen for that specific crime? For example, if a certain crime is a 1-6 felony, what is it about that crime that puts it in category B? Is there some other reason other than the fact that it does not get A.B. 510 credits? That cannot be the case, because A.B. 510 came along 12 years after some of these crimes were in category B from 1995.

Some crimes in category B probably should be pushed out. I do not know the consequences of pushing them out, but that is the point of the debate this Commission should be having. With 218 crimes, that is probably way too much for this Commission to resolve during this interim, but what if we selected 25 or 30 crimes and debated those? Law enforcement could say, "Look, we think that given what we see on the streets, for the protection of the public, this crime should have a lengthier sentence term because this individual should be retained and will not be able to rehabilitate for this offense. At least there would be rationale attached to the sentencing lengths.

Judge Kevin Higgins (Justice of the Peace, Sparks Justice Court):
When I had a very different job many years ago, I sat in on some of these sentencing hearings and I think when the category A through category E crimes were categorized, it was an attempt to have a stovepipe for each set of crimes. Category A crimes were going to be limited to murders, crimes of extreme violence, extreme sex crimes and sex against children, etc. Category E crimes were going to be nonviolent offenses, victimless crimes, minor property crimes, etc. Then, as it moved up and down the spectrum, there a decision as to where each crime should be categorized. Category B crimes were crimes of violence that do not rise to the level of category A or offenses that are not against children; category C crimes were financial crimes and property crimes. There was a definition and a general category where the crimes were to be placed and sentences were attached appropriately.

Over the years, as Mr. Callaway said, if a crime has really affected someone and they wanted a bigger sentence for a crime, maybe that crime was made into a category B crime without doing the analysis and discovering that it was actually a property crime, for example, and should have been made into a category C crime. I think there is some analysis we could do on the very broad categories and that may be the reason some of the category E crimes are mandatory probation—the very minor drug and property crimes, for example. We could to the broad categorization and then see where things fit. My recollection is that this was done about 20 years ago.

Mr. Spratley:
Is it up to the Legislature exclusively to arrive at a category and a penalty during session? Or, could it be up to this diverse and well-balanced Commission we have

here? For example: if they pass a new law at the legislative level, put on the caveat that before it actually becomes enacted, this Commission would take its time and look at the issue from all sides and then make recommendations for the category, or if not the category, just the penalty.

Chair Hardesty:
Some states have sentencing commissions that do exactly that. Their sentencing ranges and placement within categories are determined by a sentencing commission that operates and is available to the legislature year-round.

Mr. Spratley:
I am not sure if legally within statute that is something that can be done. It seems like the time constraints and other factors during a legislative session makes it not the best place to do this. Maybe they could say, "Yes, we are going to move this law," and then send it to something like this Advisory Commission or some other commission that takes the time to look at facts and recommendations and then deliberate on a reasonable category and penalty.

Chair Hardesty:
And maybe applying some factors that are appropriate to determine those levels.

Mr. Spratley:
Then we could slowly go through the seven principles and ask if our classification met each one.

Chair Hardesty:
We do not necessarily have to resolve this today, but if we are going to pursue a more narrowed objective, my question is how are we going to do that? It is too big of a task to expect that we could go through 218 crime types and have an educated discussion about sentencing ranges for a particular crime. I do think the exercise would provide insight to the Commission about what kind of things to take into consideration and we could apply some of the principles contained in the literature we have received.

Sometimes the biggest projects are best addressed by breaking them into small tasks. What if we applied this process to 25 crimes within category B and see how it works? We could get input from others and have people come and address their views on sentencing ranges for certain crimes and give their reasons. The prison could provide us with information on issues like how many inmates are incarcerated on burglary, for example, and what are their sentencing terms. Or, in some of the mandatory sentencing we have had breakdowns. I have asked this before: how many mules do we have sitting in Nevada State Prison with a 10-year minimum and they have served 8.5 years? Did they really need to serve a full 10 years? I do not know. We should have that debate. Those are all areas where reforms have been made in other states.

Senator Ford:
Are you contemplating that 25 or so laws will be looked at between now and February? If so, then it is appropriate for me to say that with this being an Advisory Commission, you would be welcome to the Legislature in February when the next Session starts to report on the outcome of looking at those 25 laws and whether we need to make changes to those particular penal codes. I am only speaking for myself, but I am open to this process as a member of this Commission and as a Legislator.

Chair Hardesty:
I would like to expand it a little. We have talked of focusing on category B crimes but I would like to expand it slightly because I happen to think there are some category Cs and Ds that should be upgraded and there are probably a few crimes that could be downgraded. Here is the threshold question: what is the difference between category A, B, C, D and E, other than that category E is nonprobationable and yet we still throw you in jail—apparently 268 strong—if you violated your conditions of probation. Apparently category E is not entirely nonprobationable, like some other Nevada laws where we say it but do not mean it.

Mr. Anthony:
Looking at the chart (Agenda Item X), category B is 1-20, category C is 1-5, category D is 1-4 and category E is 1-4 with mandatory probation. There are breakdowns within those categories, and the A.B. 510 credits also play into effect for categories C, D and E. Other than that, it is the range of years and also fines.

Chair Hardesty:
If a 1 year to 6 year sentence qualifies to both category B and category C, what then is the difference between putting a crime into category B or category C?

Mr. Anthony:
Going back to Judge Higgins' point, when these were thought out 20 years ago, I do recall some testimony where they were looking for more violent offenses being in category B. Maybe property offenses were more into the category C range. I do not know that there has been a look back since then at exactly what each category should consist of. I do not know and am not aware of that type of study being done since the Legislature laid out the five categories in 1995. Since then, new crimes have been added and A.B. 510 credits applied to categories C, D and E.

Chair Hardesty:
I guess my point is that I call into question the general rationale of the five felony categories because I cannot find any distinguishing features between them other than the fact that categories C, D and E get A.B. 510 credits and if you are category E, you are supposed to get probation. Outside of that difference, there are really no distinguishing factors between the categories. If we are going to have categories, they

should mean something and we should be able to articulate why a certain crime is in a certain felony category. I challenge this Commission to do this even though I am not sure it is possible. What is the distinction? If the Legislature is going to use those categories as a basis for placing crimes within them, there ought to be some explanation of what the category means.

Judge Lidia S. Stiglich (Second Judicial District Court, Washoe County):
I echo your comments regarding the necessity to dig in and figure out why these crimes are where they are. When Senator Lipparelli commented on how it would be helpful for Legislators to have a chart to reference while making policy, the problem is that the chart itself has not been tethered to evidence based practices or any scientific interest in setting out the standards and the length of sentence.

I do believe we need a complete overhaul. It is a bit overwhelming for this Commission, but I do support a sentencing commission that could provide in-depth and thoughtful analysis to the Legislature who can then make decisions with some background and understanding about how we are going forward. It is difficult to compare sentences to an already flawed setup.

I share the Chair's comments about trying to identify some of the real problem actors. In recent years, this Commission laid out a chart on category B felonies, identifying the most problematic categories. Where the Chair has said we should identify 25 categories; those will identify themselves. There is substantial work to be done to bring this to a place we can be proud of and which properly reflects both the seriousness of the offenses in each category and how we move forward in our own justice system so it is a just system.

I did want to ask the Chair about the category E revocations. Are we going to be talking about that? There was discussion at the last meeting where the Division of Parole and Probation broke out the category E revocations by county, name and case number. Washoe County had 17 people on that list. I researched those 17 cases, and what I found was that of the 17 revoked category E probations, 11 of those cases involved some sort of failed specialty court venture, whether they were deferred outright or whether specialty court was a term and condition of probation. Everybody got probation or deferred sentenced at the outset and 11 of those involved the specialty court piece which adds substantial length of time and more opportunities for incarceration as part of the sanction piece employed by different specialty courts. The average credit for time served at the time of revocation for the 17 inmates was 145 days. By the time they were being revoked on probation and sent, presumably for a 12-month bottom, they had already served 145 days on average in Washoe County Jail, either in large or small chunks of time.

There were 2 outliers of the 17 class E felons—one had 19 days credit and one had 56 days of credit. The person who had 19 days credit committed a new violent felony offense. That was either an agreement on the new offense, but there was a revocation after 19 days. That was a substantial outlier. The person who had 56 days credit for time served had 45 convictions at the time of the category E probation, 10 of which were felonies. When you take those two outliers from the 17 that were in Washoe County, you have an average of 160 days served at the time of revocation. When they are going to prison on those offenses, it is 160 days. The criminal history average was 15 convictions per person. When you took the outlier with 45 convictions out of the equation, the average was 13 criminal convictions per person.

Looking at the length of time these cases were pending—with numerous probation violations, reinstatements, violations and noncompliance—it was pretty tough in Washoe County to go to prison on a category E felony. And when you do, you have already done almost all of your time in the Washoe County Jail. It is really a turnaround. I was surprised as I looked at the numbers. There were not any outlier judges. Unless there was some unusually plus factor, the numbers did not bear out that people were getting revoked and sent to prison on these category E individuals, at least not in Washoe County.

Chair Hardesty:
That underscores a point Mr. Jackson and others have made—it is harder than people perceive it is to go to prison in Nevada. You have to really mess up.

Mr. Jackson:
In Douglas County, there were four cases of revocation. All four had an opportunity for Western Regional Drug Court State of Nevada. Because of lengthy criminal histories of two of the four individuals, it was a condition of probation. The other two were allowed to go straight into Western Regional and have that additional care and if they successfully completed that it would result in dismissal of the charges. All four were violations. The presentence terms of incarceration were 85, 90, 91 and 15 days served. Three of the four had additional criminal charges at the time of their violation that were pending and that were not prosecuted based upon the revocation of them going off to prison. One person decided after absconding and not showing up to any meetings, getting kicked out of drug court, violating probation and was in on his third probation violation, that he just wanted to serve his time.

Chair Hardesty:
Ms. Armeni, do you have observations about the task we have been discussing? I have some suggestions to make to the Commission about how to proceed with this. I would like to hear from you on the topic.

Ms. Armeni:
I do not have much to add. By the next meeting, I would like to have information on Clark County. Maybe I could go back to the defense bar and get some detail on the criminal history of the revoked individuals in Clark County. Is it within our prevue to set up a subcommittee and divide these up into smaller groups?

Chair Hardesty:
It is, but I think it would be better to do it as a committee of the whole. Quite frankly, it is an exercise we have not engaged in for 9 years and I think it is an exercise we should all participate in. It should be a smart approach; we should not just randomly pick 25 crimes out of category B to just to do it. I think we should drive that decision based on how big an impact that assessment might make. Turning to NDOC, out of the category B felons, would we be able to identify how many are in prison under a given crime type? I do not think it is necessary to debate prostitutes who are going to engage in sex with HIV people because I doubt that is a high number of people in prison but I bet there are a lot of burglars in prison. If we are going to take this exercise on, why not take it on with respect to certain crime types that have higher numbers of defendants in prison for those crimes?

Mr. Dzurenda:
I am not sure what the Nevada Offender Tracking Information System (NOTIS), our system computer, can tell us because not every inmate comes in with one charge. It is mostly multiple charges and then what is the controlling sentence. There are others that we would have to do by paper instead of by computer. There is a way; I just do not know how easy it will be.

Mr. Callaway:
I agree with what you said. Let us say—I am making these numbers up—we have 500 inmates for burglary. Of those 500, how many were charged with other crimes and were plea bargained down to a burglary? Was it originally a robbery or a home invasion that was pled down to burglary? That is important because we said ourselves here that, for the most part, it is hard for people to go to prison. Most of these folks have prior convictions, so if we are strictly looking at categories and we decide that burglary has too high a penalty or should be put into category C so they get good time credits, we are not really getting to the core of the issue if the majority of the people in prison for those crimes have those cases plea-bargained down or if it was multiple crimes they committed before ending up in prison on that crime. That is an important component to the puzzle.

Chair Hardesty:
We might be able to get that data. Forgetting about the plea bargaining, should there be differences between sentencing lengths between residential burglary and nonresidential burglary?

Mr. Callaway:
How about the question of whether there should be a difference between a juvenile who sneaks in to his friend's bedroom window and steals the Xbox when he knows the family is out of town versus a person going from Kmart to Kmart, stealing multiple pieces of merchandise to sell on craigslist? You could say the same for the person who breaks into someone's home while they are sleeping versus someone who steals food from Wal-Mart because he or she is hungry. Many of these areas are not black and white; they are gray. The statute of burglary may cover a lot of scenarios. This is where discretion from the judges comes into play. A judge may decide that the burglar who broke in to his friend's house and stole the Xbox does not warrant the same penalty as the person going from location to location, stealing and selling their goods.

Chair Hardesty:
In one of the states, they segregated out some of the permutations to burglary, still placing limitations on the sentencing ranges so you did not have the judge sentencing the individual who stole the Xbox the same as the serial Kmart thief. Some of the information from NCSL might help provide us with a basis for making differences in that discussion. It takes us back to considering sentencing ranges as one thing, but is there a reason for the category differences?

Assemblyman John Hambrick (Assembly District No. 2):
Many states have burglary 1 and burglary 2 charges. Burglary 1 is the illegal entry of an empty home and burglary 2 is the illegal entry of a home, knowing it is occupied. The sentencing guidelines realize that someone entering a home knowing it is occupied will have a propensity for more violence. So burglary 1 is a lower category.

Mr. Jackson:
I want to thank Mr. Callaway for singing my song. Every interim I have been on his Commission, I have been talking about just giving me the data. Every presentation before us says this is supposed to be data driven. Of those seven principles, it is data driven and we have not received that information. If we are going to do it, let us do it right. But if we do this before we have the data, we are being somewhat arbitrary in that approach.

I bet that without relying on NDOC, the individuals in this room could pick 20 of the 25 crimes that make up the majority of the population within the prisons just from our experience. Those are also going to be the most controversial crimes; the ones that are specifically data driven and we can hear all the anecdotal stories. In order to formulate the principles around the best decision for the future of this State, I believe that without that data today, there are certain category B crimes that all sides would agree probably should move down. There may be a couple of category C crimes that should move up. This is all from our collective experience which amounts to many years. These issues

come up in Session and these are the fights that occur between prosecutors and law enforcement and the public defender's office. We need that data.

Ms. Bisbee:
I am not concerned about getting into the weeds of the 268 or 600 category B crimes. We know what the charges are so what does it matter if this person has other charges in their sentence structure or if it has been pled down when you are talking about the actual crime? The definition of this crime is this and that is what the prison term is. That is really the only information we need—this is the crime, that is the definition and that is what the prison term is. Based on that definition, is that the category it should be in and is that the sentence it should have? I know there are plea downs, but it does not matter who those people are right now. You are looking at what is an appropriate crime for a particular category. I am not concerned about the data in the weeds about that particular person because I do not think we should apply it to an individual person. This is the category as a whole and who should be in that category.

Chair Hardesty:
Before the next meeting on August 3, certainly no later than about July 15, I ask for Commission members to look at the category B felony list and nominate the crimes types you think we should debate. Pick 20 crime types out of that group that look to you like they might be inconsistent. Why was the range set for this? I do not care if it should be higher or lower, but why was the range set for this crime type? Using the principles that are contained in the National Conference of State Legislatures (NCSL) material, if I look at this and I apply those principles, would I have come out at a different range? Then, Nick and I can assimilate those and put together that group which would form the basis of this discussion. Then let us test it and see what it looks like. It may be an exercise that fails but at least it is a good old college try to begin with. How do you all feel about that?

Ms. Armeni:
I like the way this list is set up, but is it possible to also see the list in a view chronologically from prison terms, so all the crimes in category B that are 1-6 years could be together and so on?

Chair Hardesty:
Do you mean reorder the list based on the sentencing lengths?

Ms. Armeni:
Right. I do like the list as it is now because, for instance, trafficking is all in one section so you can compare all the different trafficking crimes and see what their sentence structure is. Additionally, perhaps having the different view of all the sentence terms in order would also be helpful. I was sitting here doing this and we have anywhere from

1-6 years to 7-20 years all in category B. It would be helpful to see it in a different perspective than just sentencing structure.

Chair Hardesty:
Is that possible, Mr. Anthony?

Mr. Anthony:
Absolutely.

Chair Hardesty:
What we will do is email that to the Commission members, maybe in a week or so. How do you all feel about approaching it this way?

Mr. Callaway:
I am supportive of coming back with each of us putting together a list, digging in and going from there.

Mr. Laxalt:
You want each of us doing 10 to 15?

Chair Hardesty:
I would like each Commissioner to nominate 20 crime types they would like to look at. They may all turn out to be the same. I do not care if you confer. I am not trying to limit anybody. I am just trying to get everybody's input on crime types they felt ought to be debated by the Commission as to why the sentencing ranges were assigned; why it was mandatory, if that is a mandatory crime type as opposed to discretion. The other thing I would like to overlay with this is that by the next meeting we will have additional information from Ms. Lawrence and we will see some of the reforms that have been used in other states that probably addresses some of the crime types some of you would select. You could then compare that information.

Mr. Dzurenda:
If you could get me the list ahead of time, I could see the numbers it would impact in NDOC. It might make a difference to see which one of those charges we are all looking at to see what the biggest impact is.

Chair Hardesty:
Sure. We can send you an email of what we think are going to be the most frequently selected groups. We will get out to everyone a revised list that is organized based on sentencing length in addition to the one we have here. I am going to ask everybody to email to Nick Anthony your selected crime types by July 8, so we can give NDOC time. We will try to get the revised list out by maybe the 21st of June so everyone will have roughly 3 weeks to work on it, in addition to all the other things you are doing.

The other thing I would like to do is get a little bit more research into the legislative history to see if we can figure out why A, B, C, D and E categories were picked. As you saw from the presentation, a number of states have divorced themselves from an existing category and picked a new category, redefining their categories. This, to me, makes sense. If you are going to have categories, we should assign definitions to those categories. Let us see what was behind ours.

Mr. Anthony:
When the Legislature in 1995 came up with the five categories, they had NDOC look at all the sentences that were handed down. Then they grouped those crimes within each category based on the sentences that were actually handed down prior to 1995.

Chair Hardesty:
So the categories were picked, at least in the beginning of this process, based on sentencing ranges?

Mr. Anthony:
Actually, Nevada had indeterminate sentencing where the judge would pick 10 years. That was the sentence.

Chair Hardesty:
So the determinate sentencing ranges selected the categories?

Mr. Anthony:
That is right, and then they went through the different categories and grouped them all with what the sentences were by the judges.

Chair Hardesty:
I am not sure why we would establish, going forward, our categories based on what the determinate sentencings were prior to 1995. That is an odd definition of categories. That begs the question of what the definition of these categories should be today. For example, category A, the worst offense, should probably consist of those who are sentenced to death, life without or life with. That seems like an easy one. Similarly, category E could be an offense sentenced to probation; no prison sentence unless you violate. So then the question is, how do you define the other three categories? If the definition was that the sentencing range is 1-20 years for category B, why do we have a whole bunch of crimes in there with 1-6 years or 1-10 years? Should those be in category C and category D? So if the category is defined by sentencing range, that not only changes what the sentencing range is for some crime types, but it provides a basis for moving a crime type within the category. You have some 1-10 year sentences in category C. Maybe if you are going to go to 1-20 years, it should go to category B. I do not know if I am making sense, but if the definition is based on the sentencing range, then that would be the case.

I also want to ask the rest of the Commissioners in Carson City, how do you feel about Mr. Spratley's suggestion that the Commission provide guidance to the Legislature on future sentencing ranges?

Mr. Callaway:
I think Mr. Spratley brings up a great concept. My question would be with the logistics. The way I understood the proposal, a bill would pass at the Legislature, but no penalty would be assigned. Then it would go before a sentencing commission to review. The sentencing commission would then have to send their recommendation back to the Legislature. Is that right? The Legislature would probably be now out of session. So would this have to come before an Interim Legislative Commission to review? Or, would it have to wait for the following Legislative Session to go back to be assigned a penalty? My only questions is the logistics of it, which I am sure could be worked out.

Chair Hardesty:
In a few states that have sentencing commissions, they actually set the sentence. And probably in states like ours that have biennial Legislative Sessions, that would be the only way you could really do that.

Senator Ford:
I think this Advisory Commission already has that authority to recommend to us what the sentence should be. That is what you are going to be doing with the 25 we look at. You are going to talk to us in February and if I am in a decision making authority, I will guarantee that we will give due consideration to those types of recommendations. So we have that ability through this Commission already.

The concept where a sentencing commission sets the actual sentence as opposed to the Legislature doing so, I think, requires the creation of an entirely new apparatus. We already get challenges about having the Legislative Commission available to entertain regulations and things of that sort in-between sessions, so I would be interested in knowing just legally, lawfully and constitutionally if we could create that to give the ultimate authority to a different body to do something that the Legislature by itself has typically been doing. I just do not know. I am not saying we cannot, but I think we would have to enquire about that first before we can make a determination on that type of proposal.

Chair Hardesty:
To be debated further. But let us get some examples of how sentencing commissions are operating in other jurisdictions. The other thing I would like to challenge Commission members to do by July 8 is to share your thoughts on what you think should be the definition of each category. How should we define the categories if we are going to have categories? Should they be defined by sentencing ranges? Should they be defined by something else? Otherwise, in the longer scheme of things, it is going to be difficult to

understand what the category is for and where you put things within the categories. What should be the definition of categories? Should they be defined by sentencing range? Should they be defined by S.B. 510 credits? As Judge Higgins suggested, should it be defined by property crimes? Crimes against the person? That is another way to approach it and that makes sense to me, too.

Send these emails to the Commission Counsel, Nick Anthony. We will collate these and put them on the August 3 agenda. I think it is fundamental to what we are doing here that we define what our categories ought to be. I do not think we necessarily have to limit ourselves to five categories, but if we are going to have categories, we should try to understand what the theory is behind the category. I commend to your reading the articles we have circulated that have discussed these very topics.

Mr. Jackson:
Even the presentation we received today from the National Conference of State Legislatures shows where other states are going through their categories or classes of felonies based on a sentencing range. If we go back to the common law or the Model Penal Code and we start even with what is the definition if a misdemeanor, the definition is any crime the Legislature has decided that the maximum punishment will be not more than 6 months or a fine of $1,000. A gross misdemeanor is any crime that the Legislature determines shall be punished by no more than 1 year in the county jail and/or a $2,000 fine. Then we have these different levels of our felonies which we did not have prior to 1995, based upon the presentation.

I still believe the categories and classifications have to be based on what the prison or sentencing ranges will be. Getting into those other things, including crimes against the person under NRS 200, there are a lot of misdemeanors. There are a lot of category A felonies under that chapter. Whether it is a crime of violence or not. It would be difficult to classify. I still think that across the U.S., the crimes are defined based on the sentencing range.

Chair Hardesty:
Then if categories are going to be defined by sentencing ranges and category B has a sentencing range from 1-20 years which is what we decided back in 1995, then all the 1-6 year crimes should fall out or they should be increased to 1-20 year sentences.

Mr. Jackson:
The way it reads now is “not to exceed.” So if we know our category C’s are limited to 1-5 year sentences, then anything the Legislature would want to look at that would carry a maximum punishment above 5 years would have to fall into that next category. That is why the category B felonies will carry a maximum punishment from 6 years up to 20 years because that is what has been defined by the Legislature. However, there are

some 1-6 year crimes that probably should be a category C and be capped at a 1-5 year sentence.

Chair Hardesty:
Actually, category C's are 1-10 years and D's are 1-5 years.

Mr. Jackson:
Category C's are 1-5 years.

Chair Hardesty:
But we do have a few category C's that are 1-10 years.

Mr. Higgins:
I do not disagree with Mr. Jackson, but I think that when the Legislature aggregated the crimes, it tended to aggregate crimes of violence in one section and property crimes in another section, because the property crimes already had lesser offenses. So I think you can almost have it both ways. If they are aggregated by sentence length and severity, because the crimes of violence and the crimes against children are pushed higher in to the category C's and category B's anyway. I think there ought to be a predictive factor on a new crime where it is categorized by the comparative severity to other correlated to the severity of other crimes as opposed to picking which category it goes into based on the sentence you want. In my mind, crimes against children ought to be in one section and letting your notarial bond expire should be in a different section. I think we get to the same place, maybe from different directions.

Chair Hardesty:
I have one other request of the Commission. You all have constituencies you represent here, so I am asking you to reach out to those constituents—Chuck and Eric to the Nevada Sheriffs' and Chiefs' Association, Jorge to your Division, Mark to the D.A.'s Association, Ms. Armeni to the criminal defense bar association and other private counsel, we will get in contact with Phil Kohn and I hope everyone can reach out to their constituents to get their input on this exercise.

Mr. Anthony:
In (Agenda Item X), you will see category B offenses and then under (Agenda Item XI A), (Agenda Item XI B), (Agenda Item XI C) and (Agenda Item XI D) you will see the other categories of felonies. There was no presentation on those charts; the staff was thinking you would have that conversation just at the dais.

Chair Hardesty:
To Ms. Armeni's suggestion, could you send out another schedule for categories A, C, D and E that is ranked according to sentencing length?

Mr. Anthony:
Absolutely.

Chair Hardesty:
Because you have 218 crime types in category B and that could be useful to the Commission. The other thing I was going to ask you to address is Agenda Item XVI, a presentation on the collateral consequences of convictions.

Mr. Anthony:
Collateral consequences was a duty added to this Advisory Commission in 2013 via *Senate Bill 395 of the 77th Legislative Session* pages 1-4, (Agenda Item XVI).

SENATE BILL 395: Requires the Advisory Commission on the Administration of Justice to identify and study certain information. (BDR 14-22)

The bill amended NRS 176.0125 which, when originally introduced, was going to enact the Uniform Act from the Uniform Law Commissioners on collateral consequences. The bill was pared down to just require this Advisory Commission on the Administration of Justice (ACAJ) to study it, so it is a duty under Chapter 176 of NRS. To my knowledge, the Uniform Act has only been passed in one state so there has not been as much of a push as originally thought.

What we are talking about in collateral consequences is not the underlying prison term or fine. It is anything else that springs forward from that conviction, such as a prohibition on becoming a licensed attorney, a member of the bar, a bus driver or are there prohibitions on working with minor children, etc. Those are the collateral consequences. Senate Bill 395 required this Commission to touch on the subject but also to inventory all the collateral consequences currently in the State. That inventory has been done at the national level. We have a link to it on our ACAJ website.

I have some information for you in my handout on this topic that includes a few of the 788 collateral consequences you can get on the website pages 9&10, (Agenda Item XVI). That site was last updated for Nevada in 2013 and fully completed in 2014. The plans are to keep it updated as funding becomes available through the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Last interim, we had Margaret Love, an attorney in Washington D.C. specializing in collateral convictions and post-conviction relief speak to the ACAJ. I could reach out to her if we want a formal presentation or if simply adding the link to the website complies with the statutory requirement.

Chair Hardesty:
If we had that presentation, it should come at one of our later meetings so we can limit our agenda and limit our attention to the primary focus of what we have been discussing.

Senator Ford:
One thing I have heard is that if you have a felony, you cannot become a barber or a beautician. Lo and behold, that is one of the collateral consequences. My barber was in jail. I guess he did not have a felony because he still cuts my hair. Some of these things make no sense to me. We need to look at this, especially when we are talking about trying to get people to reintegrate into society and get jobs. When we say you cannot cut hair because of a felony, we should be looking at that.

Chair Hardesty:
I will now open public comment, agenda item XVIII.

Mr. Goetz:
I have asked for my parole officer or the Professional Responsibility lieutenant or sergeant to see my psychologist and have a meeting. I want to have a meeting with my psychologist because he knows who I am and how I express myself. Sometimes I do not explain myself right so he can help mitigate things. Toree Warfield takes me to things and says a suggestion might be beneficial for parole officers to meet periodically with parolees along with their psychologists to help the parole officer to better understand the person who he is managing. It would not hurt to have parole officers attend sensitivity training. I would like this committee to look into why can we not have a not a psychologist working with the parole officer to manage the parolee. I feel they do not want a psychologist there because he has a PhD and they might be able to help him understand the parolee better.

The other thing is that they want me to put a device on my phone to monitor everything I do. In my lifetime supervision rules it does not say anything about that I have to have a device on my phone. They could look at my emails of what I write to my private conversations with state representatives. When I first got out I was able to be on the computer and I could go to libraries and to unemployment to look on the computers for jobs and other things. But now they say I have to have a device to go on the Internet. When I talk to Chambers last week, he recorded my conversations over the phone with a special phone where they call a parolee and they are recording that conversation. In the polygraph exams, they record everything and have it on DVD's but when you try to bring a recording device to the parole office, they have a sign that says, "No recording devices in this building."

With the polygraph examiners, the one who examined me twice 3 years ago, I found out later that he was not licensed by the State. I believe a person who is a polygraph

examiner should be licensed by the State. Just because he is on law enforcement does not mean he should be able not to be licensed just like the psychologists that are in prisons who do not have to be licensed to give treatments to sex offenders while they are in prison.

Why should I be forced to sell my business so I can afford an attorney to defend myself? Is this justice? It seems like they are sabotaging my business that I have. Professional Responsibility investigates all this stuff but I was thinking why not have an independent agency investigate P&P when a parolee has a complaint? That office is just giving them the complaints and letting them investigate themselves. We need an independent agency to investigate P&P and stuff like that. You talked about category B crimes. My crime was a category B and I got 2-6 years. I did get probation because a psychologist said I was a low risk to reoffend. My crime was lewdness with a person under 14.

You should look at the category B's and take some of those off that are less crimes, especially if you have a psychologist saying this person is low to reoffend. This is all about keeping the community safe. You still need to give more programs and treatment in prison so when a person does come out, he has a low risk to reoffend. I was talking to the Director of Prisons today and he is on board with that. I hope that in our next Session in 2017 that we can work out something with UNR to get better programs through videoconferencing to treat our inmates so when they get out they have a better chance of staying out. Other parolees like to testify in front of the Legislatures like I do but they are too afraid to because they are afraid they will be retaliated against.

Ms. Brown:
I liked the presentation by Ms. Feldman and Ms. Kennedy, however they were not able to show the Commission the nonfactoring. On eyewitness misidentification, 80 to 90 percent of those who have been wrongfully convicted have no DNA. So they only take cases when you have DNA available. Inmates have gone to trial and maintained innocence, been picked up through photo lineups or live lineups and have been convicted because there has been no DNA or forensic evidence to tie them to the crime. They are still sitting in prison for crimes they did not commit. That is why I have asked for the public integrity unit commission to be established; perhaps a subcommittee for the ACAJ or legislation to be created to look into that.

If you have DNA available for testing, you have a better chance of getting your case overturned and exonerated. Most of the people who have contacted the Innocence Project have no DNA available. I have provided you what I would like to see qualify under the public integrity unit commission—those who have maintained innocence, have gone to trial, whose defense was based on mistaken identity, those who are positively identified through a photo lineup array, a police lineup, in-court identification, those who have confessed but later recanted their confession, witnesses or victims who

recant their testimony, witnesses who commit perjury, prosecutors who withhold evidence and those who have raised grounds in their petition and the courts and have never been fully addressed.

Last month the discussion was drilling down on the parole. The Commission and the Legislators really do not know what goes on behind making the decisions on the parole boards. Fortunately for me, I have seen it through litigation where the courts have ordered the litigation to be turned over and then we are actually able to see it. This is why have asked for the ombudsman. The bill was passed; it is under the Office of the Attorney General in 2011. In A.B. 510, part of that litigation that came out was that I discovered at the time inmates were told as long as you were appealing your conviction you will never be paroled. That is the Parole Board telling them but no proof. That was until a court ordered it to be turned over and appeal was pending. That became A.B. 510, that the Parole Board "in determining whether to grant parole to a prisoner, the Board shall not consider whether the prisoner has appealed the judgment of imprisonment for which the prisoner is being considered for parole." That information is still in those files although this law exists. Eventually, the Parole Board commissioners are going to retire, new ones are going to step in and see this information. These are people who have maintained innocence, most of them, who have been wrongfully convicted through eyewitness identification because there is no DNA available.

Chair Hardesty asked me to present something on inconsistency in sentences. Embezzlement and bad check writing crimes compared to other crimes like burglary demonstrate that the more money they embezzled, the less time they got, if they got any time at all. Those who could not afford an attorney got more time. Rocky Boyce ended up going to the Pardons Board last year. There was another one that deals with truth in sentencing in 1995. We were so hard on putting away our people that they have changed it. Back then, they did the three strikes and you are out. I read a letter to the editor by a female inmate whose crime was that she had written three bad checks to three different casinos; each counted as a felony. She got a life sentence, I think without the possibility of parole. When you are looking at this, go back to 1995 and look at the three strikes rule, do a comparison on those crimes and see what the sentence would be then and look at it now. Should it really be a life sentence now? I do not know what became of that woman but I believe she may still be in prison. The Parole Board would have that information. Look at when they changed truth in sentencing and see how many of those category C or D crimes became a category A, which is a life sentence for a nonviolent crime.

Earlier in public comment, Mr. Wilson did not bring up the issue of the disciplinary; that he is being forced to do things and is acquiring disciplinary actions against him. That disciplinary action does go before the Parole Board who has no way of knowing what is behind it. I would like to be on the agenda next month. I would like to show you, through information I have that inmates do not have, that would demonstrate how we really need

to drill down to find out in the Parole Board why these people are still in prison. Inmates have no way of looking at the record to see if the information is correct, what is disseminated to the Parole Board. The Parole Board has no way of knowing whether that inmate has litigated in federal court, sued and won and that disciplinary action still remains in the file. They do not know the outcome. That affects the outcome of the denial. I would like to be on the agenda for next time if that is possible.

Chair Hardesty:
Please submit what you specifically would like to address to Mr. Anthony and we will talk about when we can agendize it. Seeing no further public comment, I will adjourn this meeting of the ACAJ at 3:11 p.m.

RESPECTFULLY SUBMITTED:

_____
Linda Hiller, Interim Secretary

APPROVED BY:

_____
James W. Hardesty

Date: _____

Exhibit / Agenda Item	**Witness / Agency**	**Description**
A		Agenda
B		Attendance Roster
Agenda Item XV	Nicolas Anthony	Restoration Rights of Convicted Persons in Nevada
Agenda Item III A	Laurie Johnson	Written Testimony
Agenda Item III B	Tonja Brown	Written Testimony and Submitted Documents
Agenda Item VII-A	Michelle Feldman	Presentation: *Preventing Wrongful Convictions, Regulating Suspect & Informant Evidence*
Agenda Item VII-B	Michelle Feldman	*Requiring Electronic Recording of Interrogations*
Agenda Item VII-C	Michelle Feldman	*In-Custody Informant Regulation*
Agenda Item VII-D	Michelle Feldman	Criminal Informant Safeguard Article
Agenda Item VII-E	Michelle Feldman	Los Angeles District Attorney's Office Legal Policies Manual
Agenda Item VII-F	Michelle Feldman	New York County District Attorney's Office Conviction Integrity Program
Agenda Item VII-G	Marla Kennedy	Innocence Protections Proposal

Agenda Item VII-H	Brett Kandt	Recording Custodial Interrogations
Agenda Item IX-A	Alison Lawrence	Presentation: *Nevada Felony Sentencing Structure*
Agenda Item IX-B	Alison Lawrence	Making Sense of Sentencing
Agenda Item IX-C	Alison Lawrence	Principles of Effective State Sentencing and Corrections Policy
Agenda Item IX-D	Nicolas C. Anthony	Presentation: *History of Criminal Sentencing Categories in Nevada*
Agenda Item X	Nicolas C. Anthony	Penalties for Category B Felonies under Nevada Revised Statutes
Agenda Item XI A	Nicolas C. Anthony	Penalties under Category A Felonies Under Nevada Revised Statutes (NRS)
Agenda Item XI B	Nicolas C. Anthony	Penalties under Category C Felonies Under Nevada Revised Statutes (NRS)
Agenda Item XI C	Nicolas C. Anthony	Penalties under Category D Felonies Under Nevada Revised Statutes (NRS)
Agenda Item XI D	Nicolas C. Anthony	Penalties under Category E Felonies Under Nevada Revised Statutes (NRS)
Agenda Item XVI	Nicolas C. Anthony	Collateral Consequences of Convictions in Nevada