A Look at Parole in Nevada and in the U.S.

The Problem

Nevada is now experiencing a "perfect storm" of conditions that militate in favor of a drastic change in the way Nevada manages release of its offenders. With the Nevada Department of Corrections advancing an agenda of balancing security with programs and prioritizing rehabilitation of offenders, its gains are negated if the corresponding authorities responsible for parole release and community supervision do not move in complimentary directions. In the current atmosphere, those agencies are offsetting the Department of Corrections' statewide improvements and cost-efficiencies, undermining rehabilitation of offenders, and likely increasing recidivism in Nevada. Imminent action is necessary.

In 1995, Nevada passed "Truth in Sentencing" laws, which, in some cases, lengthened prison sentences for serious crimes. As a general rule now, Nevada tends to have longer sentences for Category A and B[1] crimes than many other states. The impact of those changes is now being felt in Nevada corrections. While the rest of the United States is experiencing a decline in crime, Nevada's prison population is not declining. To the contrary, Nevada's new commitments to prison have increased. (This may be due, in part, to it being an election year.) The Department of Corrections is now experiencing a "bubble" of increased numbers for both male and female inmates. That situation is exacerbated by several factors

- Parole Board releases have declined;
- Terms of parole in Nevada are short compared to other states;
- Too few offenders participate in Nevada's Residential Confinement programs;
- Drug Courts are now self-pay and few inmates can afford the $2,500 to $5,800 costs ($2,500 in rural courts; $3,300 in Clark County; $5,800 in Washoe County);
- At any given time, there are a few hundred inmates who have been granted parole serving out their sentences in prison because of inability to obtain housing or meet other conditions imposed by the Board of Parole Commissioners.

[1] *Category A crimes are the most serious and carry sentences of 20-life, life with or without parole, and death. Category B crimes carry sentences of up to 20 years.*

recidivism; fewer releases; dissatisfaction with subjective or arbitrary parole hearing procedures; rising capital construction costs for prisons; and the public's demand for treatment and

- Nevada's Parole Board recognizes that parole and probation officers have few resources with which to help an offender stay out of prison, and thus seem to opt more often for full expiration of sentence rather than releasing an offender on parole to face probable failure in community supervision and inevitable re-incarceration;

- Nevada's Pardons Board occasionally changes a sentence so an offender can be eligible for parole, but the Board of Parole Commissioners most often denies parole to those offenders.

For over a year, the Nevada Board of Parole Commissioners worked with James F. Austin, Ph.D., whose company has prepared the Department of Corrections' inmate population projections for the last decade. (Dr. Austin retired from George Washington University and, together with Wendy Naro, now runs JFA Associates, LLC, and consults nationwide on corrections issues.) Through the National Institute of Corrections, Dr. Austin was brought to Nevada to review and validate Nevada's parole procedures, which were literally created on a member's kitchen table years ago and had never been scrutinized by any outside observer or organization.

Dr. Austin found Nevada was outside the mainstream and utilized subjective methods. He recommended that the Nevada Board of Parole Commissioners adopt objective guidelines and begin to use a risk-based instrument for making parole decisions, in line with most other Parole Boards in this nation. An objective study would evaluate the success or failure of that instrument's use and whether or not its recommendations were being followed or routinely disregarded in favor of subjective decision-making again.

Additionally, the Parole Board has determined that it overlooked a 1995 amendment to the statute that allows forfeiture of an inmate's programming merit credits upon revocation of parole. The statute previously provided for forfeiture only of "good time" (good behavior) credits earned against a sentence. Now the Board seeks to also forfeit any programming credits an inmate earned while in prison. Programming credits include those awarded for earning a GED, High School Diploma or college degree; those earned for completing long-term drug treatment programs; those earned in a vocational education or training program; those earned in the Department of Corrections' 48-week sex offender treatment program and other psychological programs; and those earned for fighting fires or doing some other heroic act. The Department of Corrections believes that forfeiture of such credits would sound a "death knell" to programming and destroy any motivation inmates now have to become educated, to seek treatment and to engage in positive programming while in prison. An amendment to NRS 213.1518 would prevent the Parole Board from forfeiting earned programming credits for offenders.

Parole in the Unites States

Various conditions have caused many states to abolish discretionary parole releases entirely and to more strictly dictate mandatory release practices through legislation. Those include such things as longer prison terms; burgeoning prison populations; failure to impact

recidivism; fewer releases; dissatisfaction with subjective or arbitrary parole hearing procedures; rising capital construction costs for prisons; and the public's demand for treatment and rehabilitation of offenders in lieu of "warehousing" them.

An examination of the parole systems utilized in the 50 states and the District of Columbia, from the most recent information available over individual state websites and those of the American Parole and Probation Association (APPA) and Association of Paroling Authorities International (APAI) reveals that 21 states have entirely abolished Discretionary Parole Release by Parole Boards. They have done so either by: 1) imposing determinate sentences; 2) establishing mandatory parole release periods; 3) establishing a system of combined prison and post-incarceration supervision sentences imposed by the court at the time of initial sentencing; or 4) empowering the The Department of Corrections to determine when to release inmates into community supervision programs they operate or oversee.

21 states abolished Discretionary Parole Release for sentences occurring during a specified date in or after the years shown below:

Maine	1976	Indiana	1977
Illinois	1978	Florida	1983
Washington	1984	Oregon	1989
Delaware	1990	Kansas	1993
Colorado	1993 (5-years of mandatory parole)		
Arizona	1994	Arkansas	1994
North Carolina	1994	Mississippi	1995
Virginia	1995	Ohio	1996
South Dakota	1996	Wisconsin	2000
Oklahoma	2000	District of Columbia	2000
Minnesota (date unknown)		California (date unknown).	

A majority of states (38) have their The Department of Corrections as the agency responsible for the parole supervision of offenders once they leave prison. Probation supervision is placed with the District Courts.

The Department of Corrections supervises parolees in 20 States:*

Alaska	Connecticut (for offenders with less than 2 yrs of supervision)
Georgia	Idaho
Iowa	Kentucky
Louisiana	Michigan
Missouri	Montana
Nebraska	New Hampshire
New Jersey	New Mexico
North Dakota	Oklahoma
Rhode Island	Vermont
West Virginia	Wyoming.

For the other states that have abolished parole, supervision of their dwindling parole caseload also is the responsibility of the Department of Corrections in 18 of the 21 states[2]:

Arizona	California	Colorado
Delaware	Florida	Illinois
Indiana	Kansas	Maine
Minnesota	Mississippi	North Carolina
Ohio	Oregon	South Dakota
Virginia	Washington	Wisconsin

Parole supervision comes under an independent state agency in seven states:

Arkansas
District of Columbia
Massachusetts
Maryland
Nevada
South Carolina
Utah.

Parole supervision comes under the parole board itself in only six states:

Alabama	Connecticut (for parolees requiring 2+ years of supervision)
Hawaii	New York
Pennsylvania	Tennessee.

28 states have "community corrections" programs, according to The Corrections Yearbook 2002:

Alaska	Colorado	District of Columbia
Florida	Hawaii	Idaho
Iowa	Kansas	Kentucky
Louisiana	Maine	Maryland
Mississippi	Montana	Nebraska
New Hampshire	New Jersey	North Carolina
Ohio	Oklahoma	Pennsylvania
Rhode Island	Utah	Vermont
Virginia	Washington	West Virginia
Wisconsin	Wyoming.	

Parole in Nevada

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[2] *The Corrections Yearbook 2002 (the most recent edition available, reporting data through the end of 2001) reports that a total of 33 of the 51 states and District of Columbia are responsible for parole supervision of offenders, but presumably the states' websites are more current, listing 38.*

Nevada remains one of the few states primarily utilizing the most expensive corrections options to address virtually all criminal conduct. Nevada incarcerates more people per capita than do most other states; uses probation considerably less than most other states; and has shorter terms of parole supervision than most other states (excluding those offenders who come under "lifetime supervision" requirements). According to the Bureau of Justice Statistics Bulletin "Parole and Probation in the United States, 2003," Nevada is ranked 4th in the percentage of correctional population that is incarcerated, as opposed to being on probation, on parole, or in community-based correctional programs:

1.	Mississippi	56.0%
2.	Virginia	54.6%
3.	West Virginia	50.5%
4.	Nevada	49.7%
5.	Oklahoma	47.9%

In the year 2002, Nevada also ranked 4th with 50.3% and in 2001 Nevada ranked 3rd with 50.7%. The average of all the states by geographical region is

West	30%	South	31 2%
Mid-west	25.6%	North-east	25.7%.

Clearly, as reported by the Bureau of Justice Statistics, the number of inmates being released on parole in Nevada is declining. To assure consistency of measurement, the BJS reports both the actual number of parolees (which reflects state growth or decline), and the number being released per 100,000 state resident population (which reflects the rate of release). Nevada's parole population has been:

YR	# on Parole	# on Parole per 100k
2003	4,126	243
2002	3,971	246
2001	4,519	283
2000	4,056	273
1999	3,893	295

According to the latest Department of Corrections figures, the Nevada Board of Parole Commissioners has dramatically reduced its percentage of **Discretionary Parole Releases** from 50.7% to 41 7% through July 2004. **For males, the rate of Discretionary Release overall has dropped 6 6% from the 2003 rate. For females, the rate has dropped from 66.9% in 2002 to 57% in 2003 and so far in 2004, to 48.8%.**

Furthermore, the more telling statistic is the point in time that an offender is finally granted parole. While the Nevada Parole Board reports that a *high* percentage of inmates are

paroled, a great number of them are paroled six months or less before the end of their sentences. (Certainly, a shorter period of supervision insures a higher "success rate" since most recidivism records are measured in one-year, three-year, and seven-year increments.) Nevada is reputed to have some of the shortest parole periods in the nation. It is common in Nevada for Category A and B felons to return to the Parole Board as many as five times before they are granted Discretionary Release. The rate for Discretionary Release of male Category A felons is 31.5% and for Category B felons it is 45.8%. Curiously, Category C felons[3], who represent less serious crimes and property crimes, are only paroled at a rate of 38.5%. Felons convicted of Category D and E[4] crimes, Nevada's least serious or dangerous, are only paroled at a rate of 50.5% and 44.2 %, respectively. National research confirms that low-risk offenders who are treated like they are high-risk, actually experience an increase in recidivism. Thus, Nevada's parole practices may be actually contributing to recidivism, rather than reducing it.

Supervision periods of less than six months are insufficient to assist the parolee in re-integrating to the community, finding housing, finding decent employment and re-connecting with family and other positive social contacts. The states that have revamped their parole practices have recognized this. For example:

- Oregon instituted periods of post-prison supervision of a minimum of 6 months for crimes categories 1-3; 12 months for crime categories 4-10; 3 years for "dangerous offenders" (as defined by ORS Chapter 163), including murderers; 3 yrs for robbery or arson offenders; and the entire sentence term for a particular group of non-violent offenders. *See Oregon Revised Statutes 144.096 et seq.*

- In Oklahoma, inmates in the highest crime categories can go to community corrections work release placement when they have 330 days left to serve on their sentences. Those in crime categories which require service of 85% of their sentence may go to work release placement with 760 days remaining to serve. Non-violent inmates can transfer to community corrections with 210 days left to serve. *See Oklahoma Operations Policy 060104.*

- In Ohio, F-2 and F-3 (violence) felons are subject to mandatory release periods of 3 years.

- In Minnesota, offenders serving indeterminate sentences undergo Adjustment Reviews annually and are placed in community supervision at least 2 years prior to sentence expiration. *See Minn. Stat. 242.10; 242.19; 244.05, subd.2 and 5 and DOC Policy 106.110.* Offenders under supervision in the community and those under lifetime supervision undergo annual Restructuring Reviews, too. *See Minn. Stat. 244.08, subd.1 and DOC Policy 203.065.*

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[3] *Category C felons can be sentenced to 1-5 years in prison and a $10,000 fine.*
[4] *Category D and E felons can be sentenced to 1-4 years in prison and a $5,000 fine.*

- In Maine, an inmate can be transferred to Supervised Community Confinement when he has served 2/3 of the sentence, if the sentence is 5 years or more, and ½ the sentence if the sentence is 5 years or less.

On the other hand, with a very short parole period, the pressure is tremendous for the offender to successfully accomplish re-integration and re-connection with family, employers and society. To expect all that to be achieved in six short months is essentially an invitation to failure for an offender who has been incarcerated a long time and lost the support network in the community.

Certainly, the ineffectiveness of such short parole periods in Nevada and the utter futility of the revocation process is demonstrated when a parolee with such a remaining sentence is re-arrested and returned to prison to await a revocation hearing. The inmate's re-incarceration Intake Processing costs the Department of Corrections an average of $500 per person. Imprisonment costs Nevada taxpayers an average of $45 per day. It usually takes 2-3 months for the Parole Revocation Hearing to occur, incurring incarceration costs of $2,700 to $4,050 per parolee. By the time a decision is made to revoke, the inmate only has 2-3 months left to serve. Nevada has, thus, used its most expensive correctional option to accomplish very little. No strong message of punishment is delivered but the damage in job and family loss is great. Furthermore, the re-integration process is totally derailed.

Nevada has a statute mandating release of offenders one year before the end of their sentence. The Nevada Legislature passed it intending to ensure community supervision for most offenders:

NRS 213.1215 Mandatory release of certain prisoners.

1. Except as otherwise provided in subsections 3, 4 and 5 and in cases where a consecutive sentence is still to be served, if a prisoner sentenced to imprisonment for a term of 3 years or more:

(a) Has not been released on parole previously for that sentence; and

(b) Is not otherwise ineligible for parole, he must be released on parole 12 months before the end of his maximum term, as reduced by any credits he has earned to reduce his sentence pursuant to Chapter 209 of NRS. The Board shall prescribe any conditions necessary for the orderly conduct of the parolee upon his release.

2. Each parolee so released must be supervised closely by the Division, in accordance with the plan for supervision developed by the Chief pursuant to NRS 213.122.

3. If the Board finds, at least 2 months before a prisoner would otherwise be paroled pursuant to subsection 1, that there is a reasonable probability that the prisoner will be a danger to public safety while on parole, the Board may require the prisoner to serve the balance of his sentence and not grant the parole provided for in subsection 1.

4. If the prisoner is the subject of a lawful request from another law enforcement agency that he be held or detained for release to that agency, the prisoner must not be released on parole, but released to that agency.

5. If the Division has not completed its establishment of a program for the prisoner's activities during his parole pursuant to this section, the prisoner must be released on parole as soon as practicable after the prisoner's program is established.

6. For the purposes of this section, the determination of the 12-month period before the end of a prisoner's term must be calculated without consideration of any credits he may have earned to reduce his sentence had he not been paroled.

(Added to NRS by 1987, 945; A 1991, 702; 1993, 1526; 1995, 1260)

Unfortunately, there has been a consistent trend of Nevada's Parole Board denying Mandatory Parole Releases in spite of the statute. **Mandatory Parole Releases** are down since 2003 For males, that figure has decreased 3.4% and for females it has decreased 4.2%. Rather, the Parole Board conducts a Mandatory Parole "Review" during which an increasing number of offenders are being "dumped" entirely under the explanation that there is a "reasonable probability they will continue to pose a danger to public safety while on parole." Basically, the exception in the statute (*see statutory language in red above)* has become the rule. Thus, the Legislature's intent to ensure that every parolee undergoes at least one full year of community supervision and assistance is being thwarted

Much to the frustration of offenders and their families, a denial of parole release is usually ordered without inclusion of any findings or reference to specific facts in the inmate's case that support such a conclusion. There are repeated complaints that this violates Due Process of law.

Presumably, the reason that 38 states placed parole supervision within the responsibility of their Department of Corrections is that prisons and parole should share a common objective—to promote public safety by using practices that will ensure that the inmate does not return to prison. That common objective does not appear to exist in Nevada. Rather, the Board of Parole Commissioners demonstrates little belief in the concept of rehabilitation and sees its job as guaranteeing that an offender "does not make the headlines." Because of an unfortunate incident more than a decade ago, a common refrain from individual Parole Board members is that "it's my name that will appear in the front page if he gets out and re-offends." Without any statutory requirement to provide a fact-based reason for continuing the commitment of an inmate, the Parole Board is free to arbitrarily and subjectively extend an offender's incarceration to the point of expiration. Many inmates have reported that a Parole Board member has stated during a hearing, "I just don't feel it or hear it in your voice." Statements such as that promote the perception of arbitrariness and undermine the public's confidence in the fairness and justice of the process.

Yet, given the short parole terms in Nevada, it is difficult to see how an additional six months or even 12 months of incarceration ensures greater public safety. At the most, it provides the face-saving public justification that "we kept him off the streets as long as possible."

It is generally understood that the Division of Parole and Probation slants toward law enforcement rather than offender rehabilitation As the agency responsible for preparing Pre-Sentence Investigation Reports for the court to use in sentencing a defendant, the Division used to boast that the courts followed its incarceration recommendation 90% or more of the time An examination of the Performance Indicators reported by the Division to the state's Department of Administration, however, indicates that has changed:

<u>% of Court Concurrence with Prison Recommendations</u>

<u>FY</u>	<u>Goal</u>	<u>Actual 12-mos. Ave.</u>
2001	87%	not reported

2002	87%	82%
2003	87%	70%
2004	76%	71%
2005	76%	68%, 66%, 69% (3 months reported so far).

Nevada's parole officers do not function like those in most other states. They clearly see themselves as "street cops" rather than case managers whose job is to help the offender re-integrate and stay crime-free. The Division has repeatedly sought Category 1 peace officer status for its officers from the Nevada Legislature and changed its managers titles to correspond to those in law enforcement, such as Lieutenant, Sergeant, etc... This attitude is an historic one in Nevada. The Division of Parole and Probation has not often sought to create or fund programming for parolees in the community. Until just this past year when the grant funding the *Going Home Prepared* project required it, the Division of Parole and Probation had not utilized graduated or intermediate sanctions as an alternative to re-incarceration like most other states do.

Without exception, all the states that abolished Discretionary Parole Releases have some level of "community corrections" established. Most include such easily-implemented options as Day Reporting Centers, Work Release Programs, Diversion Centers, short-term detention centers, and drug treatment programs All such options cost considerably less to implement and operate than "hard" prison beds

Nevada has two Residential Confinement programs. One is for DUI offenders sentenced by the court to prison and treatment. It was created by Assembly Bill 305 and is called the "305 Program." The actual sentence determines which offenders go into that program. DUI offenders make up barely 5% of the Department of Corrections' population of 11,300 offenders. That would be over 500 inmates one would think were eligible for the 305 Program. Over the past few years, the Division has lowered its goal for 305 Program participation from 76 inmates per year to just 60.

The second Residential Confinement program is for other eligible offenders It was created by Assembly Bill 317 and is called the "317 Program." To get into this program, offenders are selected by the Director of Corrections and approved by the Division of Parole and Probation for supervision. A review of the Division of Parole and Probation's performance indicators and achievements as reported to the Nevada Department of Administration shows how little the 317 Program is used.

In the last four fiscal years, while the Department of Corrections' population has been growing every year, the Division has decreased its use of Residential Confinement and continually lowered its goal for the number of inmates put into the program:

FY	Goal in 317	Actual # in 317
2001	88	70
2002	65	62
2003	66	50
2004	56	48.

NRS 209.392 currently provides that the Division may accept for supervision offenders referred by the Director of Corrections into the 317 Program. The Department of Corrections lets qualified offenders apply for the program. However, the Division of Parole and Probation frequently find reasons to reject those nominated. Offenders must pay for their electronic monitoring devices themselves. The cost is determined by what the offender is paid in an hourly wage. One hour's pay is required to be paid daily to the Division in order for the offender to be in Residential Confinement. That is in addition to the supervision fee that must be paid monthly to the Division. That, too, likely discourages some from applying. In the 2005 Legislature, the Division of Parole and Probation secured additional funds to be able to pay up to 30 days for some offenders who could not afford electronic supervision immediately upon release from prison. Presumably this was done to increase the number of offenders in the 317 program. The Department of Corrections, however, does not predict such an increase because it says it already screens every inmate entering prison for eligibility for Residential Confinement. If the statutory eligibility requirements are so strict that few inmates qualify for 317 Residential Confinement, perhaps they should be revisited as occurred with Drug Court a few years ago.

By mandating the use of cost-effective alternatives to incarceration, the Nevada Legislature could force Nevada into the nation's mainstream in correctional rehabilitation and find more effective ways of accomplishing its public safety obligations. Category C, D and E felons are ideal candidates for Residential Confinement, due to the nature of their crimes and the relatively short tenure of their incarceration.

Nevada's Pardons Board consists of the Governor, the Attorney General, and all members of the State Supreme Court. Nevada citizens believe it is supposed to be the "final word" in release decisions in Nevada. In the 1980s, Nevadans acted through Initiative Petition and legislation to restrict the exercise of discretion given by the Nevada Constitution to its Pardons Board. That may explain why the Pardons Board infrequently pardons or actually orders the release of an offender. More commonly, it commutes consecutive sentences to concurrent ones or reduces sentences such that an offender can be eligible for parole.

In Pardons Board meetings, members of the Pardons Board often state their opinions that a given offender should be released, then the Board votes to refer the offender to the Board of Parole Commissioners for further action. The Parole Board appears to frequently disregard the directions or stated intent of the Pardons Board. From the December 2003 Pardons Board meeting, seven offenders were referred to the Parole Board and three of the seven were denied parole and "dumped" from 2 to 4 additional years. From the January 2004 meeting of the Pardons Board, five offenders were referred for release and all five were denied and "dumped" from 1 to 3 additional years. Clearly, the Parole Board does not consider itself to be required to

comply with the intent of the Pardons Board, or effectuate release of offenders commuted by the Pardons Board.

~~The attached~~ An article by Dr. James Austin, Ph.D., delivered to the 2002 Salt Lake City Conference of APAI (~~copy attached~~), aptly describes some of Nevada's major issues:

- Low-risk offenders who require minimal supervision and services are not being released as early as they should be;
- Changing the length of stay by a few months has produced no impact on individual recidivism rates or aggregate crime levels;
- Without true empirically-validated parole guidelines, decisions can be arbitrary and capricious decisions;
- High risk offenders should be given close supervision and more services to promote their re-integration and maintenance of a crime-free life;
- Parole revocations should be limited to serious felony crimes and not misdemeanors or technical violations of parole rules.

The Department of Corrections receives a constant barrage of complaints about the practices of the Parole Board. The complaints are usually referred to the Office of the Governor. The courts have ruled that the grant of parole is a privilege and not a right, and there can be no successful appeal from a Parole Board denial. Once appointed by the Governor to a 4-year term, Parole Board members are frequented re-appointed. Members are seldom removed by the Governor. No office or agency oversees the operations of the Board or monitors its decision-making. With the Judicial and Executive branches taking a "hands off" attitude about the Parole Board, that virtually places the actions of the Board of Parole Commissioners "above the law" if the Nevada Legislature does not choose to serve as that "check and balance" of power.

Offenders and their families, who are used to having appellate avenues of relief, see this as a denial of their Due Process. Parole Board issues continually raised by Nevada offenders' families and lawyers include:

- There is an "uneven playing ground" in that an offender does not see or know of material submitted to the Board by victims, law enforcement or even Corrections authorities, and therefore, cannot adequately or appropriately respond;
- Legal counsel is not required, and sometimes is barely tolerated by the Parole Board;
- The factual basis for the Parole Board decision is not required to be given verbally or in writing to an offender who is denied parole;

- The scores of the offender on the "guidelines" form used by the Parole Board are meaningless. Offenders with low or no "points" are often denied parole while those with high "points" can be granted parole. The Board acknowledges that they routinely disregard the scores;

- There are no standards of achievement by which offenders can set their sights on parole as the Board subjectively evaluates inmates' performance and has no definitive method of assessing programming or treatment performance;

- The Parole Board routinely requires mental health treatment, substance abuse treatment and specialized housing without any specified or articulated evidentiary basis from the inmate's record and sometimes in disregard of professional opinions stated by the Department of Corrections' staff in reports to the Board;

- Nevada's Parole Board operates without realistic data from the community on the availability of transitional housing, treatment beds or professional programming, and thus, often requires unrealistic and impossible conditions that prevent an offender from being able to meet the Board's prerequisites to release. Hundreds of offenders end up expiring their sentences in prison; and

- Nevada's Parole Board ignores the instructions and/or intent of the Pardons Board

Nevada has several options to consider that could be proposed in an Offender Accountability Act:

1) Nevada could follow the example of many states that have rectified Due Process violations by implementing statutes setting forth in detail how the Parole Board must conduct its business, leaving nothing to interpretation. This should include mandating the use of an objective risk-assessment instrument as the basis for release decisions, in much the same way the Legislature mandated standard instruments to determine the risk of sex offenders to re-offend.

2) Nevada's Legislature could strengthen the Mandatory Parole Release law to direct that all offenders must receive a longer, specified term of community supervision, and eliminate the exception to the rule, which gives the Parole Board the discretion to disregard the statute.

3) Funds could be allocated for prison inmates to enroll in Drug Court. The current system is ripe for a Denial of Equal Protection lawsuit asserting that only the wealthy can receive court-supervised treatment.

4) The Nevada Legislature could mandate a system of intermediate sanctions to be used by the community supervision agency and could prohibit re-incarceration for technical violations of parole.

5) The Nevada Legislature could eliminate Parole Board jurisdiction for Category C, D and E felons and enact a statute that such low-risk felons must be released upon completion of their minimum sentence.

6) Nevada could improve parole supervision by providing more funding for the Division of Parole and Probation to assist offenders in securing mental health and/or substance abuse treatment and other forms of assistance that would reduce their barriers to success in the community. Funding for ID cards should be included so offenders can go straight to work upon their release.

7) As Idaho has done, the Nevada Legislature could allocate some housing assistance funds, in the form of a voucher program to be operated by an appropriate entity, to enable offenders leaving prison to secure housing in the community upon release from prison. The fund could provide security deposits, first month rent, cleaning deposits or whatever other form of assistance the Legislature deemed appropriate.

8) The Nevada Legislature could fund some Social Worker positions for the Division of Parole and Probation, as proved successful in the *Going Home Prepared* program, to help parolees navigate the bureaucracies and overcome the barriers that prevent them from successfully accessing community resources.

9) As part of its Specialty Court Program, the district courts could create Re-entry Courts as the Eighth Judicial District did for the *Going Home Prepared* program which proved that on-going judicial involvement in the community supervision process, rather than just at revocation time, promotes compliance and offender success in the community.

Whatever options are chosen, Nevada must take some immediate action to reduce its costs of incarceration, use more cost-effective alternatives to prison, and establish some level of cooperation and continuity in the objectives of Corrections, the Parole Board, and the community supervision agency.

ACLU of Nevada MEMO

DATE: March 14, 2006
TO: ACR 17 Subcommittee to Study Sentencing and Pardons, and Parole and Probation
FROM: American Civil Liberties Union of Nevada
RE: The Parole Board, Policies for Granting of Parole, Operations of the Parole Board, and Alternative Methods of Offender Management

1. The Pardons Board

The Pardons Board currently functions in a tentative and rather unpredictable manner in terms of both process and results. These conclusions are supported by relevant sections of the paper entitled, "A Look at Parole in Nevada and the U.S." We understand that this paper was given to Assemblyman David Parks in 2005, and that its distribution contributed to the creation of your subcommittee. It was also presented to the ACLU of Nevada. We have been told that the paper was written, at least in part, by officials of the Nevada Department of Corrections while Ms. Jackie Crawford was the director of that department. Although our copy of this report is undated, it was presumably completed in 2004 or 2005.

The report suggests that the Nevada Pardons Board is highly constrained by an initiative petition and by legislation from the 1980s. It emphasizes that largely due to such legal and political developments:

> "...the Pardons Board infrequently pardons or actually orders the release of an offender. More commonly, it commutes consecutive sentences to concurrent ones or reduces sentences such that an offender can be eligible for parole."[1]

Furthermore, the paper indicates that the when Pardons Board does vote to refer the offender to the Board of Parole Commissioners for further action, that "The Parole Board appears to frequently disregard the directions or stated intent of the Pardons Board." It documents this by noting that of the 12 offenders referred to the Parole Board at the Pardons Board sessions of December 2003 and January 2004, the Parole Board denied parole in 8 of the 12 cases. The author(s) of the report then comment, "Clearly, the Parole Board does not consider itself to be required to comply with the intent of the Pardons Board, or effectuate release by offenders commuted by the Pardons Board."

We also endorse the argument in the Department of Corrections paper that the will of the Pardons Board, its members being elected officials, should not be routinely ignored or overruled by the appointed Parole Board. We do not believe that the operative role of the Pardons Board should be largely advisory in relation to the Parole Board.

[1] DOC Memo at 10.

Americans are increasingly aware that the criminal justice system is capable of convicting and sentencing innocent persons as well as persons whose guilt is based on flawed, negligent, and even intentional use or abuse of evidence. At the same time, federal and state law has made it increasingly difficult to obtain post-conviction relief in the state or federal courts based on evidence of innocence or inequity. In Nevada, sentencing can be extremely harsh, and the Pardons Board's role in mitigating the harshest and most disproportionate sentences is a crucial one. The need for proportionality in sentencing demands more scrutiny from state officials, and the Pardons Board should be an integral part of that process.

As such, the ACLU of Nevada suggests that the subcommittee consider legislation to ensure the adequate staffing of the pardons process as well as equal access to that process for offenders regardless of their race, nationality, gender, class, or political connections. Membership on the Pardons Board should be based on consideration of such factors as the will of the electorate, the accountability of Pardons Board members to the voters, the sufficiency of each member's time, commitment, and expertise, and the absence of conflict among the official and unofficial duties of each member. That body exercises a historically important function, and should consist of members who believe in equity and justice, and in the availability of clemency as an integral part of the criminal justice system.

2. Policies for Granting of Parole

Our main concern is the continued failure of the Parole Board to set objective criteria and formal policies for granting or denying parole. A subjective 'risk assessment' system, without any requirement for written justification, is a threat to fairness and due process for every prisoner. In addition, this lack of standards fails to respect the legislature's wishes concerning the need for supervised releases from prison as codified in NRS 213.1215. It is vital that the subcommittee recognize that all those involved will be released within one year. It is basically a question of release with or without parole supervision.

NRS 213.1215 has strong language mandating release on parole for most inmates at least 12 months before the end of maximum prison term. However, this mandate is routinely ignored by the Parole Board, which seems to be greatly overusing the public safety exception to that rule. In fact, the approval rate for "discretionary parole releases" fell from 50% in 2003 to 41.7% in the first half of 2004.[2]

If the legislature is serious about enforcing their own mandate that most prisoners be released prior to their maximum terms, the Parole Board's discretion must be reduced. As previously decided by the Legislature, grants of parole 12 months prior to sentence expiration should be the standard, with the Board having the

[2] These figures have been obtained from the "covert" Nevada Department of Corrections report issued anonymously in 2004 or 2005 and given to our office. We have forwarded a copy of this detailed report to members of the committee.

responsibility of articulating objective risk factors on the record for extending incarceration past that point.

The Legislature should consider stripping Parole Board jurisdiction over Category C, D and E felons. Mandated release of low-grade felons upon completion of their minimum sentence would help to achieve legislative goals set out in NRS 213.1215. The only exceptions to this mandated release should involve definite and specific factors, such as commission of crimes while incarcerated. Otherwise, these low-risk felons are exactly the target population for the release schedule set out in NRS 213.1215. Yet a high percentage of these low-risk felons continue to be incarcerated for no stated specific or objective reason. This current practice taps limited prison resources and threatens rehabilitation efforts.

3. Operations of the Parole Board: Open Meetings

Another issue of major concern is the Parole Board's interpretation of the state Open Meeting Law statutes (NRS 241), which exempt judicial proceedings from Open Meeting Requirements (NRS 241.030 (4)(a)). While the Parole Board does exercise certain judicial functions, it is clearly not a judicial body. Potential parolees have no right to counsel, no protection against self-incrimination, and lack other procedural rights standard in judicial proceedings. Crucially, the Division of Parole and Probation is part of the executive branch, not the judicial branch, of government.[3]

Indeed, from the enactment of the Open Meeting Law statute in 1960 through 2001, common practice, memoranda from the Attorney General's office, and legal opinions affirmed the applicability of the Open Meeting Law to Parole Board hearings.[4] However, after the Parole Board unsuccessfully lobbied the state legislature to exempt them from the Open Meeting Law rules in 2003, the Parole Board began operating outside of the Open Meeting laws. Without proper notice and meeting requirements, this allows for the kinds of subjective decision-making and abuse of process documented in the covert DOC memo. Parole grants have been reduced by a significant percentage since the Board exempted itself from Open Meeting law requirements. Without public oversight, it is impossible to ensure that the Parole Board is operating fairly and appropriately.

The Open Meeting Law statutes are based on the premise that "the Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their

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[3] The Open Meeting Law exemption for judicial proceedings is paired with extensive constitutional and statutory law that guides the operations of the judicial branch and safeguards the rights of defendants. This cannot be said of Parole Board proceedings. The fact that the Division of Parole and Probation is not within the judicial branch is a critical distinction. *See, i.e., Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 874, 878 P.2d 913 (1994).

[4] *See, i.e.*, Division of Parole and Probation Manual, Operations of the Board, Parole Application Hearings policy 2 (revised October 12, 2001) ("All hearings conducted by the Board are open to the public in compliance with the Nevada Open Meeting Law."); *Donnelly v. Nevada*, Nev. Dist. Ct. Case No. 01-00360A, Order Granting Motion to Dismiss (March 25, 2002), at 3 ("[N]o specific statutory exemption in the Open Meeting Law to Parole Board meetings has been cited to this Court.").

deliberations be conducted openly" (NRS 241.010). Certain exemptions exist for judicial proceedings and for meetings concerning private disciplinary action. In a Parole Board meeting, neither the protections of a judicial proceeding (constitutional guarantees, extensive record-keeping), nor the interest of protecting the innocent exist.[5] As for privacy concerns, the person in a Parole Board hearing who has the primary right to privacy is the potential parolee, who, like other individuals listed throughout the Open Meeting Law statutes, can waive this right. Thus, Open Meeting Law exceptions grounded on parolee privacy are unfounded. As for testifying victims and their families, details of past events or crimes are already part of the public record of any prosecution, so any privacy interest is minimal and inadequate to trump the public interest in having open government.

A state inmate whose mother was turned away from his parole hearing has recently filed an appeal currently under consideration by the Nevada Supreme Court, asking the Court to interpret whether Parole Board meetings are in fact subject to the Open Meeting Law as it now stands. Had we at the ACLU of Nevada known of this lawsuit earlier in the process, we would have joined in urging the Court not to allow the Parole Board to exempt itself from the requirements of the Open Meeting Law.

We urge this subcommittee to affirm that Parole Board hearings are covered by the Open Meeting statute. Unlike judicial proceedings, which offer constitutional protection, explicit written records, and the assessment of guilt or innocence, Parole Board meetings are within the spirit and letter of the Nevada Open Meetings Law. It is only through open government that we can hope to improve our parole system and make necessary policy changes.

4. Alternative Methods of Offender Management

a. Issues Concerning the Current Drug Court System

Nevada drug courts are now self pay and few inmates can afford the $2,500 to $5,800 costs ($2,500 in rural courts; $3,300 in Clark County; $5,800 in Washoe County). As the DOC report provided separately to the subcommittee states:

> "Funds should be allocated [by the state] for prison inmates to enroll in Drug Court. The current system is ripe for a Denial of Equal Protection lawsuit asserting that only the wealthy can receive court-supervised treatment."

The goal of getting nonviolent drug offenders out of the system and into treatment programs is laudable, and one the ACLU of Nevada supports whole-heartedly. But such a system means little when those who would choose this method of

[5] The Nevada Supreme Court has unequivocally held that exceptions to the Open Meeting Law must be "expressly enacted and specifically provided." *McKay v. Board of Supervisors of Douglas County*, 103 Nev. 490, 492-93 (1987).

rehabilitation cannot afford to participate. Currently, the benefits of the Drug Court program are available only to financially better-off defendants.

The legislature should allocate funds, on an equal or need-based basis, to those who wish to enroll in Drug Court. While allocation of funds is often a thorny issue, in this instance it stands to save the state money. When defendants can go through a one-time cost of a drug treatment program, they remain out of the expensive jail system. Furthermore, genuine treatment is more likely than incarceration to reduce recidivism rates. Nonviolent drug offenders should all have the opportunity to benefit from the state's new alternative treatment programs. If funds are allocated for this purpose, the Nevada public will benefit as well.

b. Intermediate Parole Jurisdiction for Technical Violations

Currently, reincarceration for technical violations of parole is a leading cause of unnecessarily lengthy sentences. There should be provision for intermediate parole sanctions to be used by the Community Supervision agency. Rather than have every parole violation lead to formal proceedings or automatic reincarceration, an intermediate sanction system could more appropriately address causes of technical violations, increase supervision, and assist with successful rehabilitation into society. Since the Community Supervision process is in place, this would be a cost-effective and efficient manner of responsively sanctioning minor violations of parole conditions. Some of the causes of parole violations, such as substance abuse or mental health issues, or access to stable housing or transportation, could also be more thoroughly addressed by better Community Supervision agency programs, as suggested below.

c. Suggested Programs to Assist with Successful Re-Entry into Society

Recidivism rates cannot be lowered without some meaningful social and occupational programs for parolees reentering society. We believe that the Division of Parole and Probation can become much more responsive to the root causes of reincarceration with the addition of more such programs. As the vast bulk of criminal justice literature finds, keeping offenders outside of the prison system is a far more difficult task in the absence of access to stable housing and help for mental health or substance abuse problems. Therefore we believe that the highest priority should be given to new funds for affordable housing and treatment programs. Housing assistance should be given in the form of housing vouchers; and funds should be available for access to treatment programs. Finally, in order to evaluate individual cases to make sure appropriate services are being provided, the legislature should fund positions for social workers within the Division of Parole and Probation.

5. Legislative Suggestions

This section recaps concerns listed throughout this memo, and proposes changes to the NRS in the form of an omnibus parole and sentencing act. This proposal would:

A. Mandate that the Parole Board use an objective risk-assessment instrument as the basis for all release decisions and make written findings of each decision;

B. Remove discretion from the Parole Board for release on parole 12 months before the expiration of the maximum term for most offenders, and require specific, recorded justification for departures from that release structure;

C. Eliminate Parole Board jurisdiction for Category C, D and E felons; instead mandate release to parole of low-grade felons upon completion of their minimum sentence;

D. Allocate adequate funds for prison inmates to enroll in Drug Court;

E. Mandate a system of intermediate sanctions for parole infractions to be used by the Community Supervision agency;

F. Prohibit re-incarceration for technical violations of parole;

G. Fund Division of Parole and Probation to adequately assist offenders regarding mental health and substance abuse;

H. Fund housing vouchers for released inmates; and

I. Fund Social Worker positions for Division of Parole and Probation.