Suggested revisions to Nevada's
non-violent habitual offender statute (NRS 207.010)

Rationale

Nevada, like virtually every other state, has as part of its statutory scheme specific provisions to deal with recidivists. The goal of these statutes, to quote prosecutors, is to punish the "worst of the worst" and remove from society those few individuals for whom the prison gate has become a revolving door.

Nevada's statutory recidivism provisions, commonly referred to as the "habitual criminal statutes", are less developed than in many other states. While the goal was to punish the "worst of the worst", the actual result has been less than ideal because the statutes currently in place cast too wide of a net. Oft times it is not the "worst of the worst", but rather the petty offender who becomes entangled in the statutory scheme leading to costly punishment that is grossly disproportionate to the crime committed. Punishment under the habitual criminal statutes has also been widely inconsistent, depending more upon the court a person stands before than the crime committed or the record of the offender---systematic Russian roulette if you will.

This is not say that discretion for both prosecutors and judges is not a vital part of any workable habitual criminal scheme--- one need only look at the problems California has encountered with its' "three-strikes" law to see how unworkable a "no discretion" system is. That said, the unfettered discretion and lack of definable standards can, and has, led to disproportionate enforcement of the habitual criminal statutes. This flaw works to the detriment of both those unlucky enough to end up before the wrong sentencing

body and the tax-payers who ultimately have to foot the bill. The trick then is to tailor the statutes in such a way as to provide guidance and control abuse of discretion. The net must be cast widely enough to catch the "worst of the worst", yet narrowly enough to protect against uneven/unfair enforcement. This is the goal of the attached suggestions.

One good thing to come out of California's well publicized and costly "three strikes" mistake is it has led a number of commentators to take a dispassionate look at the ins and outs of how recidivist statutes should be drafted. After reviewing this literature, along with the language of **NRS 207.010**, the following recommendations are made:

1) **Codify and clarify the rationale of Rezin v. State, 95 Nev. 461 (1979) by adding a specific "brought and tried separately" requirement to NRS 207.010.**

A similar requirement is currently in place in more than half of the States. Under such a provision, each offense counted toward the habitual criminal total must arise out of a separate indictment or information, that is be "brought and tried" under separate pleadings. These provisions ensure that it is the true recidivists who are punished as opposed to the one time offender who received multiple felony convictions based upon a single course of criminal conduct. If the goal of the habitual criminal statutes is to punish recidivism, then when determining habitual criminal eligibility it is simply unfair to count multiple felonies arising from a single indictment or information as more than a single strike--- a principle recognized by the Nevada Supreme Court in **Rezin v. State**, 95 Nev. 461 (1979).

While **Rezin** recognized and adopted a "brought and tried separately" requirement, no such rule has been formally adopted by the legislature. Further, the decision in **Rezin**

was not the model of clarity. In particular, **Rezin** appears to add a requirement to the "brought and tried separately" rule which is unnecessary, confusing and unique, to wit: an additional "single transaction or occurrence" prong. This additional prong is unnecessary in that the vast majority of separate instances of criminal behavior are "brought and tried separately" because of the limitation on the admission of prior bad acts, hence the system itself has a method in place of determining whether multiple convictions are part of a single course of criminal activity; it is confusing because it is undefined and is unique in that other states adopting a "brought and tried separately" requirement do not use such language.

Simple is usually better, hence the suggested modification of NRS 207.010 mirrors that language already in place in other jurisdictions rather than the more complex and factually intensive test set forth in **Rezin**. This revision is reflected by the addition of the language "brought and tried separately" to subsections (1) and (2) of **NRS 207.010**.

2) **Add a section to NRS 207.010 to eliminate certain minor offenses from the determination of habitual criminal eligibility, specifically those which resulted in a term of probation which was successfully completed by the offender.**

The second proposed change is to limit which offenses count toward the habitual criminal eligibility total. Currently, any felony conviction qualifies which leads to the potential for unwanted and widely disproportionate results.

As an example, let us look at a hypothetical working man with a drug problem, call him Bill, and a hypothetical violent recidivist, call him Jimmy. If Bill is arrested for felony drug possession and has two felony convictions for possession of cocaine that led to successful probationary terms he is eligible for habitual criminal treatment under **NRS**

207.010. The same would be true for Jim, arrested for a hot prowl home burglary having just got out of prison for armed robbery which had been preceded by another lengthy prison term for forcible rape. As both Bill and Jim are currently under arrest for non-violent crimes, the most either is eligible for is small habitual criminal treatment under **NRS 207.010**. While who might be more deserving of the habitual criminal treatment might appear obvious, in practice who might receive it is far less certain. The problem is the system as it now stands does not have a standard in place to differentiate minor transgressions from major ones when it comes to habitual criminal eligibility

There is, however, an evaluating body in the system which has taken a look at the relative severity of past criminal conduct--- the initial sentencing court. All things being equal, the more serious the criminal activity the more likely it is to land an offender in prison.

Once a person has been convicted of a felony, the question with regards to recidivism becomes whether they are a danger---can they stay trouble-free for a long period of time or do they need to be warehoused for society's protection? There is also a way to evaluate this question---has the person been able to successfully complete probation? If so they have demonstrated the ability to follow the law for an extended period of time because the less willing a person is to follow the law, the less likely they are to succeed on probation.

If the goal is not only to incarcerate the "worst of the worst", but also to make sure the minor offender is treated fairly and consistently then the solution is simple---add a provision to the habitual criminal statutes which excludes from the tally of priors those charges for which an offender successfully completed probation.

This is not say that a prior probation has no relevance---it might, for example, still be considered by a district court is determining whether habitual criminal treatment is appropriate--- but a completed term of probation without revocation should be excluded from the base number of convictions which determine habitual criminal eligibility.

The only offenders helped by this provision are those worthy of consideration for two compelling reasons: 1) the prior offense was relatively minor (or the offender would have been placed in prison in the first place); 2) the offender demonstrated a willingness to comply with the law for an extended period, at least several years, otherwise they would have had their probation revoked. This proposed changed is reflected by the addition of proposed subsection 3 to **NRS 207.010**.

3) **Eliminate from NRS 207.010 those offenses which are most susceptible to abuse and/or are adequately covered by other statutes.**

The third change would be to eliminate the "habitual petty larceny" provision altogether. By definition, a petty larceny involves the taking of property worth $250 or less and is not punishable by prison time. Currently the "habitual petty larceny" provision is rarely used, but even if it were, the punishment under the provision would be draconian (and costly) in proportion to the crimes committed. A simpler solution to this problem of the chronic petty larceny offender would be to establish a stepped punishment provision for subsequent offenses similar to that used in DUI cases. For example, a fourth petty larceny might be eligible for felony treatment as a category D felony with a potential term of 1 to 4 years. Such a felony would be covered, the same as any other felony, by the existing provision of NRS 207.010. This revision is reflected by the deletion of language petty larceny/minor offense language from subsections (1) and (2) of **NRS 207.010**.

4) **Codify the rationale of Sessions v. State, 106 Nev. 186 (1990) by adding a staleness provision to NRS 207.010 which would eliminate those offenders with a demonstrated ability to follow the law for a significant amount of time (10 years) from habitual criminal consideration.**

Those people who have been trouble-free for an extended period of time are clearly not the "worst of the worst" recidivists. Simply put, staying essentially trouble-free for a significant period---for example, 10 years---is an important factor in determining whether someone should qualify as a habitual criminal, a point recognized in **Sessions v. State**, 106 Nev. 186 (1990) (holding that the use of old, non-violent, felony convictions to support a finding of habitual criminality was an abuse of discretion where the offender has been trouble free for a significant period of time).

Nevada's statutory scheme, specifically **NRS 50.095**, already provides a staleness provision which excludes the use for impeachment purposes those prior felony convictions which are older than 10 years. The provisions of that statute take into account a time period that starts running once the person is free and clear from the conviction (i.e. no longer in prison and has completed parole or probation). Rather than reinvent the wheel, the language which mirrors that of **NRS 50.095** has been added as subsection (4) of the proposed revision to **NRS 207.010**.

Recommended changes

Based upon the forgoing, the following revisions to **NRS 207.010** are tendered (a ~~strikethrough~~ indicates language suggested for deletion; *italics* indicate additional language added):

NRS 207.010 Habitual criminals: Definition; punishment.

1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:

(a) ~~Any crime of which fraud or intent to defraud is an element, or of petit larceny, or of~~ any felony, who has previously been two times convicted *of charges brought and tried separately*, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony, ~~or who has previously been three times convicted, whether in this State or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element,~~ is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.

(b) Any felony, who has previously been three times convicted *of charges brought and tried separately*, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony, ~~or who has previously been five times convicted, whether in this State or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element~~, is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

2. It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. The trial judge may, at his discretion, dismiss a count under this section which is included in any indictment or information.

3. *If a previous felony conviction resulted in a term of probation which has been completed without revocation, said conviction shall not be counted toward determining habitual criminal eligibility pursuant to this section. Such a conviction may, however, be considered by the district court in determining whether or not to exercise the discretion granted to said court by subsection 2.*

4. *A person is not eligible for habitual criminal treatment pursuant to this section if a period of more than 10 years has elapsed since:*
    a. *The date of release of the offender from incarceration for any felony conviction; or*
    b. *The expiration of the period of any parole, probation or sentence for any felony conviction*

    Whichever is the later date.

Leaving the revised version to therefore read:

NRS 207.010 Habitual criminals: Definition; punishment.

1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:

(a) any felony, who has previously been two times convicted of charges brought and tried separately, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.

(b) Any felony, who has previously been three times convicted of charges brought and tried separately, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

2. It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. The trial judge may, at his discretion, dismiss a count under this section which is included in any indictment or information.
3. If a previous felony conviction resulted in a term of probation which has been completed without revocation said conviction shall not be counted toward determining habitual criminal eligibility pursuant to this section. Such a conviction may, however, be considered by the district court in determining whether or not exercise the discretion granted to the said court by subsection 2.
4. A person is not eligible for habitual criminal treatment pursuant to this section if a period of more than 10 years has elapsed since:

a. The date of release of the offender from incarceration for any felony conviction; or

b. The expiration of the period of any parole, probation or sentence for any felony conviction

Whichever is the later date.