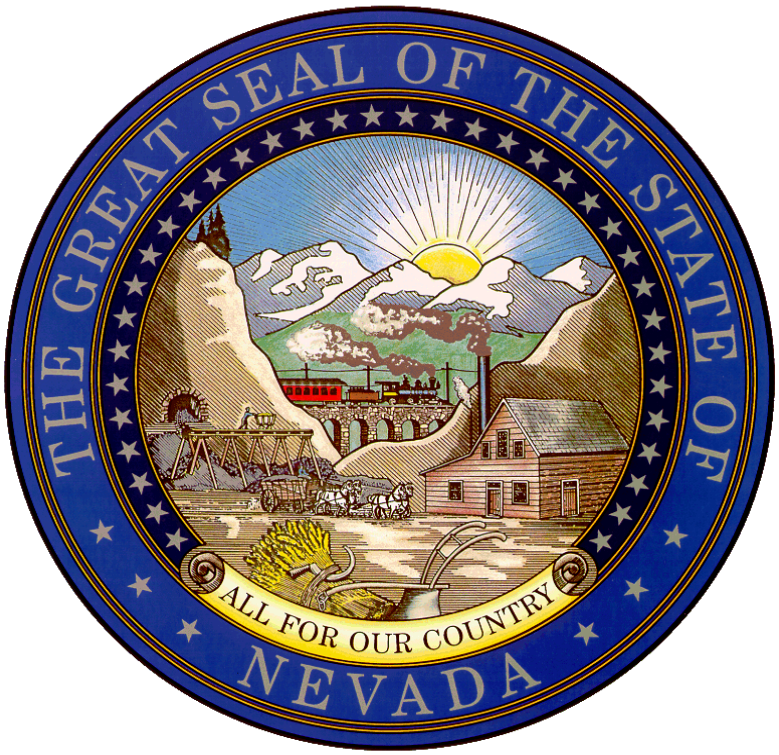
COMMITTEE TO CONDUCT AN INTERIM STUDY OF ISSUES RELATING TO PRETRIAL RELEASE OF DEFENDANTS IN CRIMINAL CASES

(Senate Concurrent Resolution No. 11 (2019))



FINAL REPORT

JANUARY 2021

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[Senate Concurrent Resolution No. 11 (2019)]

January 2021

Senate Concurrent Resolution No. 11 (2019) ("S.C.R. 11") (see **Appendix A**) directed the Legislative Commission to appoint the Committee to Conduct an Interim Study of Issues Relating to Pretrial Release of Defendants in Criminal Cases ("Committee") to examine issues relating to pretrial release and detention in Nevada. Pursuant to S.C.R. 11, the Committee is required to prepare and submit a comprehensive report to the 81st Session of the Nevada Legislature which includes the results of the study and any recommendations for proposed legislation.

This report is intended to provide a brief overview of the Committee's course of action during the 2019-2020 interim. It includes a summary of recommendations and a full report detailing each meeting held throughout the interim as well as the background discussion on the development of each final recommendation.

For purposes of this document, the final recommendations of the Committee have been organized by type of recommendation and are not listed in preferential order. By category, each recommendation falls within a request to: (1) draft legislation to amend the Nevada Revised Statutes; (2) draft a letter to the Supreme Court of Nevada; or (3) include a policy statement in the final report.

SUMMARY OF FINAL RECOMMENDATIONS

The Committee held a final work session on August 17, 2020. At the work session, the Committee considered nineteen total recommendations and voted to approve eleven recommendations (including subparts) for the drafting of legislation which will be combined into five bill draft requests for submittal to the 81st Session of the Nevada Legislature, four recommendations for the drafting of a letter and one recommendation to include a policy statement in the final report. A summary of each recommendation is identified below:

RECOMMENDATIONS TO DRAFT LEGISLATION

1. *Revises Provisions Relating to Pretrial Release (**BDR 374**)*
    a. Require bail hearings to be conducted within a reasonable time.
    b. Prohibit standardized bail schedules and require individualized bail hearings.
    c. Codify that a pretrial custody determination should be made in the following preferential order: (1) release without conditions; (2) release with conditions; (3) detention.
    d. Create a mechanism which brings a defendant back to court within 24 hours of when the defendant is unable to meet a condition of release.
        i. Draft a legislative declaration that includes language that: (1) unattainable conditions of release are disfavored; and (2) encourages courts to find ways to keep people out of jail simply because they cannot pay/find attainable conditions of release.
    e. Require the use of the federal poverty guidelines to determine the ability of a defendant to pay.
    f. Require the submittal of a financial affidavit by a defendant to aid the court in determining the ability of the defendant to pay.
    g. Require defendants to be afforded certain procedural protections.
        i. Require defendant be present at the bail hearing.
        ii. Require defendant to be afforded counsel.
        iii. Require defense to have access to all the records that are in the possession of the state and the court.
        iv. Authorize defense to present evidence.
        v. Authorize defense to cross-examine any witnesses.
    h. Require courts to make specific findings of fact.
        i. Findings as to why the defendant is being released or detained.
        ii. Findings as to why any conditions of pretrial release are necessary, including how such conditions relate to the individual defendant.
        iii. With regards to monetary conditions of release:
            1. Findings that the court has considered the ability of the defendant to pay.

2. If monetary bail is set in an amount that the defendant cannot pay, findings as to both the necessity and amount of monetary bail imposed by the court.

2. *Revises Provisions Relating to Criminal Procedure (**BDR 375**)*
    a. Repeal subsection 1 of NRS 178.4851.
    b. Codify burden of proof on state.
        i. Require the state to prove by clear and convincing evidence that detention/condition of release is the least restrictive means necessary to ensure community safety and the defendant's return to court.

3. *Revises Provisions Relating to Certain Traffic Offenses and Misdemeanors (**BDR 376**)*
    a. Require a citation in lieu of arrest for certain non-aggravated (non-aggregated) traffic offenses and certain non-violent misdemeanors.

4. *Revises Provisions Relating to Victims of Crime (**BDR 377**)*
    a. Create a mechanism allowing the victim or prosecutor to request a protection order in the pretrial release process and to allow the order to be immediately transmitted to law enforcement.

5. *Requires the Reporting of Certain Information Relating to Pretrial Release (**BDR 378**)*
    a. Require collection and reporting of data relating to pretrial release.
        i. Data collection should include:
            1. Who is in jail and why?
            2. How long defendants remain in jail for pretrial detention?
            3. What pretrial process are defendants afforded?
            4. How pretrial success is measured?
            5. Effectiveness of the various pretrial release conditions, such as GPS monitoring and prohibitions on the consumption of alcohol, as they relate to the safety of victims so that victims remain safe during pretrial processes.
        ii. Make reports available to the public.
        iii. Require reporting quarterly (4 times per year).
    b. Require jails to submit reports to courts concerning defendants held on bail of $2,500 or less for more than 7 days.

RECOMMENDATIONS TO DRAFT A LETTER

1. Draft a letter urging the Supreme Court of Nevada to revalidate the Nevada Pretrial Risk Assessment.

2. Draft a letter urging the Supreme Court of Nevada to: (1) study racial bias in criminal records in order to determine if racial bias permeates the Nevada Pretrial Risk Assessment; (2) submit a report to the Legislature concerning racial data correlated to the use of the Nevada Pretrial Risk Assessment; and (3) consider staffing resources and best practices for employees preparing pretrial risk assessments and case work.

3. Draft a letter urging the Supreme Court of Nevada to require the use of a risk assessment tool to assess the domestic violence risk of a defendant.

4. Draft a letter urging the Supreme Court of Nevada to permit electronic alternatives to in-person bail hearings.

RECOMMENDATION TO INCLUDE A POLICY STATEMENT IN FINAL REPORT

1. Include a policy statement in the final report encouraging education relating to risk factors for victims of domestic and sexual violence.

REPORT TO THE 81st SESSION OF THE NEVADA LEGISLATURE BY THE COMMITTEE TO CONDUCT AN INTERIM STUDY OF ISSUES RELATING TO PRETRIAL RELEASE OF DEFENDANTS IN CRIMINAL CASES

I. INTRODUCTION

The Nevada Constitution and existing Nevada law require all persons arrested for offenses other than first degree murder to be offered the opportunity to be released on bail unless certain circumstances apply. Such persons may be released with or without bail, and in either circumstance the court may impose additional conditions upon the person such as electronic monitoring. The objectives of the bail system are to ensure the safety of the community, including any victim of the crime, and to ensure that defendants appear in court, while safeguarding the liberty of defendants who remain innocent until proven guilty and minimizing the potentially life-altering disruptions that pretrial detention may bring, especially when defendants are held for a prolonged period.

Nevada courts are required by statute to consider a list of factors such as criminal history and employment to determine the terms of a person's release. The Supreme Court of Nevada requires Nevada courts to use the standard Nevada Pretrial Risk Assessment ("NPRA") questionnaire to assist in this determination. However, the procedures through which these factors are evaluated vary between courts and between individual judges and justices. Against this backdrop, the Supreme Court of Nevada recently held in Valdez-Jimenez v. Eighth Jud. Dist. Ct., 136 Nev. 155 (2020) that: (1) bail set in an amount greater than necessary to ensure the defendant's appearance and the safety of the community is unconstitutional; (2) an individualized bail hearing must be held within a reasonable time after arrest; and (3) heightened due process requirements apply when bail is set in an amount the defendant cannot afford.

The Committee was convened to investigate potential reforms to Nevada's bail system to address concerns about the fairness of detaining people based on ability to pay and the overcrowding of Nevada's detention facilities while at the same time protecting the community and public safety. A significant component of bail reform has been and will continue to be the collection of standard data from the many courts and jails across Nevada.

II. INTERIM STUDY COMMITTEE DUTIES

During the 2019 Legislative Session, the Nevada Legislature adopted S.C.R. 11, which directed the Legislative Commission to appoint a committee to thoroughly study issues relating to bail in an effort to address and reform the current bail system. During the 2019 Legislative Session, three bill reform measures (A.B. 125, A.B. 203 and A.B. 325) were introduced and considered, but ultimately did not pass. During those discussions, several members of the Legislature and other stakeholders identified the need for more extensive data on bail reform and the current state of the bail system in Nevada.

S.C.R. 11 directed the committee to study, without limitation, the following nine issues related to pretrial detention of defendants in criminal cases:

1. The timeliness and conduct of hearings to consider the pretrial release of defendants;

2. The circumstances under which defendants should be released on their own recognizance;

3. The imposition of monetary bail as a condition of pretrial release and the considerations relating to the setting of the amount of any monetary bail;

4. The imposition of appropriate conditions of pretrial release to ensure reasonably the safety of the community and the appearance of the defendant in court as required;

5. The circumstances under which the conditions of pretrial release of a defendant should be modified;

6. Effects of the statewide implementation of the NPRA;

7. The impact of race, gender and economic status as it pertains to the pretrial release of defendants, which must include taking testimony from affected communities and individuals;

8. The fiscal impact of any potential or recommended changes to the laws pertaining to pretrial release of defendants; and

9. Any other relevant matters pertaining to the pretrial release of defendants.

Lastly, S.C.R. 11 directed the committee to submit a report of the results of the study to the 81st Session of the Nevada Legislature.

III. INTERIM STUDY COMMITTEE MEMBERS

The ensuing members were appointed to and served on the Committee for the 2019-2020 interim:

Senator Dallas Harris, Chair
Assemblywoman Rochelle T. Nguyen, Vice Chair
Senator Scott T. Hammond
Senator Melanie Scheible
Assemblyman Edgar Flores
Assemblyman Tom Roberts

The Legislative Counsel Bureau staff services were provided by Nicolas Anthony, Senior Principal Deputy Legislative Counsel; Kathleen Norris, Deputy Legislative Counsel; Angela Hartzler, Secretary; and Jordan Haas, Secretary.

IV. COMMITTEE MEETINGS

During the 2019-2020 interim, the Committee held three substantive meetings and a work session. The Committee diligently and proficiently addressed each of the duties prescribed pursuant to S.C.R. 11. The Committee received formal presentations from interested stakeholders and national experts and also heard public testimony on a broad range of topics involving pretrial detention of defendants in criminal cases. Discussion topics included, but were not limited to: (1) a presentation on national trends in bail reform and bail reform measures enacted in other states by the National Conference of State Legislatures; (2) an overview of pretrial release in Nevada and the NPRA by the Administrative Office of the Courts; (3) a presentation on the pretrial release process in Justice Court and failure to appear for certain misdemeanor and low level offenses by Judge Diana Sullivan; (4) a presentation on the statistics and data used in developing the NPRA by JFA Institute, which developed the NPRA; (5) a presentation on pretrial jail populations by the Las Vegas Metropolitan Police Department ("LVMPD") and the Washoe County Sheriff's Office; (6) an overview of the Law Enforcement Assisted Diversion program in Clark County by LVMPD; (7) presentations on the operation of bail agencies and the bail bond industry by representatives from private bail bond firms; (8) presentations on possible reforms by district attorneys and public defenders; (9) presentations on the Valdez-Jimenez case; (10) a presentation on protecting the safety and rights of domestic violence survivors in the pretrial process; and (11) presentations on the community impacts of pretrial detention and release.

A. FIRST MEETING

Organizational Matters

At the first meeting of the Committee, held on January 21, 2020, the Committee members gave brief introductions and addressed organizational matters. Senator Dallas Harris was elected Chair and Assemblywoman Rochelle Nguyen was elected Vice Chair of the Committee.

Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, provided an overview of the nine duties prescribed by S.C.R. 11. Mr. Anthony explained that the Legislative Commission had allotted the Committee five bill draft requests ("BDRs") and that a majority of the members of the Committee from each house is required for the Committee to submit a BDR, and he noted and that the deadline for the submission of BDRs was September 1, 2020. Mr. Anthony noted that the Committee had a budget of approximately $6,000 which would likely allow for the introductory meeting, two substantive meetings and a work session. He explained that the Committee may choose to take action at the work session and that possible

actions include requesting the drafting of legislation, preparing a letter to an interested stakeholder or branch of government, and including a statement of policy in the final report.

Kathleen Norris, Deputy Legislative Counsel, Legislative Counsel Bureau, provided a synopsis of three bills relating to pretrial detention of defendants in criminal cases which were introduced during the 2019 Legislative Session but did not pass into law: A.B. 125, A.B. 203 and A.B. 325. Ms. Norris began by explaining A.B. 203. She said that the bill requires that a defendant released without seeing a magistrate be released on an unsecured bond, so long as the defendant was arrested for a non-violent misdemeanor or gross misdemeanor, was not arrested while released on bail for a different offense and does not have a history of failing to appear while released on bail or released without bail.

Ms. Norris then discussed A.B. 125. She noted that there are several provisions common to both A.B. 125 and A.B. 325 but the two bills remain distinct. She explained that A.B. 125 prohibits modification of an original determination of bail under certain circumstances and requires a prosecutor to file certain motions when seeking modification of bail. She then stated that A.B. 125 requires courts to adopt an administrative order for the release of certain defendants and that A.B. 125 covers the conditions of release for misdemeanors, gross misdemeanors and felonies, but that certain crimes, such as domestic violence, are not included in the scope of the automatic release process of the administrative order. She said that A.B. 125 creates a rebuttable presumption that defendants should be released on own recognizance and that monetary bail should not be imposed unless necessary, and she explained that the bill provides a prioritized hierarchy of release conditions. She said that A.B. 125 requires defendants to be seen within 48 hours of arrest. She then noted that both A.B. 125 and A.B. 325 specifically remove the current statutory amounts of monetary bail for certain domestic violence offenses and certain violations of orders of protection and instead require bail for those offenses to be determined in the pretrial custody hearing, and she added that revocation of bail would only be able to be imposed in certain circumstances such as certain domestic violence offenses and certain violations of orders of protection. She then said that A.B. 125 changes how magistrates interact with bail. She explained that the bill allows magistrates to modify bail and that monetary bail can only be imposed if no other conditions will ensure the appearance of the defendant, and she said that magistrates must make specific findings of fact on the financial resources of the defendant, community safety and the likelihood of the appearance of the defendant. She said that A.B. 125 prohibits the detention of a defendant solely because they cannot pay monetary bail.

Ms. Norris then explained the provisions of A.B. 325 which differ from A.B. 125. She testified that A.B. 325 requires pretrial release of constitutionally eligible defendants with the least restrictive conditions necessary to ensure the defendant's appearance. She said that the bill prohibits the imposition of financial conditions, arrest warrants or other contact with the criminal justice system beyond that of an unsecured bond or a secured bond if necessary. She then explained that A.B. 325 requires defendants charged with a misdemeanor to be released on own recognizance with no other conditions after the defendant gives the court certain personal information and agrees to stay away from the victim. She said that A.B. 325 requires a pretrial release hearing for felony defendants within 48 hours. She said that A.B. 325 specifies the

procedural posture of the pretrial custody hearing as well as the rights of the defendant and the duties of the prosecutor and the court. She also said that A.B. 325 permits law enforcement agencies to release a defendant prior to the pretrial custody hearing under certain conditions. She said that A.B. 325 requires persons arrested for offenses committed under the influence of alcohol or drugs to be detained for 4 hours instead of the 12-hour period currently required by statute. She stated that A.B. 325 requires courts to attempt to contact a defendant who fails to appear. Vice Chair Nguyen asked whether any of the three bills referenced the use of the NPRA. Ms. Norris replied that she did not believe that it was included.

Presentation by the National Conference of State Legislatures

Amber Widgery, Senior Policy Specialist, National Conference of State Legislatures ("NCSL"), presented on national trends in pretrial release of criminal defendants. Ms. Widgery began by introducing NCSL, which is a bipartisan organization for legislators and legislative staff which tracks policy developments across the U.S. states and territories. Ms. Widgery stated that she tracks pretrial policy developments in addition to other criminal justice matters. Ms. Widgery said that the Bureau of Justice Statistics estimates that approximately 65 percent of jail inmates are individuals awaiting court action or being held pretrial and that the Prison Policy Initiative estimates this figure to be approximately 76 percent.

Ms. Widgery explained that there have been over 1,000 pretrial detention enactments across the 50 states since NCSL began tracking pretrial legislation in 2012 and that successful legislation has been largely bipartisan. She described two main themes in pretrial legislation: (1) reducing the number of individuals who end up in the pretrial system through pre-booking alternatives, and (2) moving away from charge-based monetary bail schedules to individualized decision models.

Ms. Widgery then addressed the use of standard pretrial risk assessments. Twenty-nine states enacted laws pertaining to pretrial risk assessments between 2012 and 2018. Seven states have legislatively required courts to adopt or consider a pretrial risk assessment and eight states have legislatively authorized or encouraged but not required a pretrial risk assessment, while five states, including Nevada, have adopted a pretrial risk assessment by judicial action. Ms. Widgery stated that there have been findings that risk assessments should inform but not replace judicial discretion. She also stated that pretrial risk assessments depend substantially upon the data used to create and validate them and that some states have required regular empirical revalidation of the assessment as well as mechanisms to eliminate racial or gender bias from the assessment.

Ms. Widgery then addressed legislative limitations on the ability for courts to impose financial conditions of pretrial release. She said that all states currently authorize the use of financial conditions in some cases, even if financial conditions are infrequently used in practice. States have codified presumptions of release on recognizance or release on least restrictive conditions and have limited the use of financial conditions in certain cases. Nearly half of states have a codified presumption of release on nonfinancial conditions. Ms. Widgery also explained that

some states have legislatively required consideration of a defendant's ability to pay and some have prohibited conditions which result in detention due to inability to pay.

Ms. Widgery said that 30 states have enacted new laws addressing pretrial services programs between 2012 and 2018. Some states have created new pretrial services programs. Some states have implemented reminder call systems which have shown to be highly effective in increasing pretrial success rates. Ms. Widgery also explained that the role of victims in the pretrial process has been a matter of great concern. Several states have enacted Marsy's Law, which requires a court or releasing authority to consider a victim's safety when making a pretrial custody determination. Ms. Widgery then addressed programs aimed at keeping individuals outside of the pretrial process, such as citation in lieu of arrest programs and deflection programs. These programs have largely been developed at the local level but some states have begun to implement them statewide. Ms. Widgery stated that some states have pretrial diversion programs which serve specific populations, such as veterans, mental health and substance use programs.

Senator Scheible asked about the statistics regarding the percentage of the jail population being held in pretrial custody and Ms. Widgery clarified that both the overall number of people in jail and the percentage of people in jail awaiting trial have grown nationally. Vice Chair Nguyen asked whether there is data on the effectiveness of pretrial release conditions and Ms. Widgery replied that there is not a lot of data on that point, though there is some limited data showing that over-conditioning a defendant may be detrimental to their success. Assemblyman Roberts asked whether any states that have implemented pretrial detention reforms have later reversed them, and Ms. Widgery replied that the overall trend has not been to reverse them, though there are some examples of reversals such as in Alaska. Assemblyman Flores asked why the national jail population did not decrease in the year following the reforms in many states and Ms. Widgery stated that there is often a lag time between passage and implementation and that national statistics may not reflect the situations within individual states. Chair Harris asked about costs for participation in pretrial services programs administered by state agencies versus not, as well as whether costs of pretrial services are ever borne by the participants, and Ms. Widgery replied that NCSL does not have data on that point and that the financing of pretrial services varies by jurisdiction.

Presentation by the Administrative Office of the Courts

John McCormick, Assistant Court Administrator, Administrative Office of the Courts, presented on pretrial release and the bail process in Nevada. Mr. McCormick began by explaining that there is a presumption of the innocence of a criminal defendant which underpins the issue of pretrial release. Mr. McCormick said that bail serves two purposes: (1) to ensure the defendant's appearance in court, and (2) to protect public safety. Mr. McCormick explained that it is a violation of the Fourteenth Amendment to keep individuals in pretrial detention solely because they cannot pay for their release.

Mr. McCormick explained that Article 1, Section 7 of the Nevada Constitution requires a defendant to be admitted to bail unless the defendant is charged with first degree murder. He

said that there is another exception for a felony parolee or probationer who has been arrested for a new offense and that the bail statutes provide for mandatory 12-hour holds in certain cases and for certain mandatory bail amounts in domestic violence cases. There is a statutory list of considerations which must be used in pretrial custody determinations, and Marsy's Law, which can be found in Article I, Section 8A of the Nevada Constitution, requires the safety of the victim and their family to be considered in pretrial custody determinations.

Mr. McCormick testified that there are several types of bail in Nevada. Bail by surety or bond occurs when a defendant obtains the services of a bondsman who posts the money required by the court, whereas cash bail is when the defendant personally provides the money required by the court. The money is then remitted when the defendant appears at trial. Defendants may also be released on their own recognizance, meaning without financial conditions, though other conditions are frequently imposed. Mr. McCormick noted that several jurisdictions in Nevada (Clark, Washoe and Lyon Counties and Carson City) have pretrial services departments while others do not, which hinders their ability to monitor defendants, which may then dissuade some courts from releasing defendants on their own recognizance.

Mr. McCormick then explained that one of the issues in Nevada is that the court system is not unified, so different localities have different procedures for undertaking pretrial custody determinations, though there are some common elements. He said that Nevada's courts use misdemeanor bail schedule in Nevada and that the courts have worked to standardize those schedules for traffic offenses. Jurisdictions then have more general bail schedules based on the charge, but, ideally, a judge reviews the amount and sets bail in light of the defendant's individual conditions. He noted that the worst examples of people being held in pretrial detention solely due to inability to pay stem from rigid adherence to bail schedules with no review.

Mr. McCormick then presented statistics from the Arnold Foundation. He testified that defendants held in pretrial detention have less favorable outcomes than those who are not detained, regardless of charge or criminal history. He also stated that some defendants plead guilty to secure release. For example, someone charged with the felony of burglary who cannot be released on bail may agree to plead guilty to petty larceny in order to be released, even if they would likely have been acquitted of the burglary charge at trial. He also noted that spending time in jail increases the risk of later criminal activity for defendants considered to be at low to moderate risk of future criminal activity.

Mr. McCormick recounted that the National Conference of State Court Administrators issued a position paper encouraging state judiciaries to adopt evidence-based pretrial custody determination procedures. In 2015, following that paper, the Judicial Council endorsed the creation of a committee to study evidence-based pretrial release and the use of risk assessment tools in Nevada. The committee elected to create a risk assessment tool for Nevada and worked with Dr. James Austin of JFA Institute to develop one. The result was the NPRA which was then tested in a pilot program with favorable results. In August 2018, the committee voted to endorse the statewide adoption of the NPRA through judicial order, and in March 2019 the Supreme Court of Nevada issued an order requiring all courts in the state to implement the

NPRA within 18 months. The NPRA has an 8-question version and a 10-question version and the defendant's answers to the questions are scored to yield a numerical result where a low value indicates low risk of failure to appear or reoffending, thus indicating that the defendant could likely be released on their own recognizance. The judge may override factors and depart from the NPRA's suggested result.

Senator Scheible asked how the committee evaluated whether the NPRA was working during the pilot period and Mr. McCormick testified that there was a series of meetings held to discuss it, that the committee received feedback from judges and attorneys, and that Dr. Austin revalidated the NPRA using data from the pilot program. Chair Harris asked whether there were any statistics on potential disparities and biases associated with the NPRA and Mr. McCormick said that he lacked that particular information but that there may be an intrinsic bias due to the fact that people of color are disproportionally arrested and convicted, which increases their criminal history scores.

Additional Topics for Future Meetings

The Committee then discussed topics for future meetings. Chair Harris expressed a desire to hear presentations from more stakeholders such as the district attorney's office, the Office of the Attorney General, public defenders, private counsel, law enforcement, the ACLU, judges, the bail industry and individuals in affected communities. Assemblyman Roberts asked for data from jails. Senator Scheible asked for a presentation on co-responding programs wherein both mental health professionals and law enforcement arrive at the scene of a mental health crisis. Assemblyman Flores requested information on the existing failure to appear rates for misdemeanors where offenders are not placed in jail, as well as information on the practices of bail bonds firms and their relationship with their clients. Senator Hammond expressed a desire to hear more about states that have reversed their reforms.

B. SECOND MEETING

Organizational Matters

The Committee held its second meeting on March 3, 2020. Chair Harris acknowledged that many community groups would be invited to testify at the next meeting, including: the ACLU, Americans for Prosperity, Ivy Communications, the National Coalition of 100 Black Women, Nevada's Coalition to End Domestic and Sexual Violence, the Nevada Policy Research Institute, Nevada Student Power, PLAN and Unity Baptist Church.

Presentation by the Las Vegas Township Justice Court

Judge Diana Sullivan, Justice of the Peace, Las Vegas Township Justice Court, presented on failure to appear in court for certain misdemeanor and low level offenses and gave an overview of the pretrial release process in Las Vegas Justice Court. Judge Sullivan began by noting that

the limited jurisdiction courts in Nevada experience wide differences in the number and composition of arrestees and crimes as well as space constraints, and she stated that she can answer specific questions on the process in Las Vegas Justice Court.

Judge Sullivan then explained the arrest and bail process. She stated that arrests happen in three ways: probable cause arrests, arrest warrants and bench warrants. She explained that probable cause review must be done within 48 hours, which is done on paper in most jurisdictions, excluding Las Vegas Justice Court. If probable cause is found, the arrestee must be brought before a judge within 72 hours of arrest, exclusive of days when the court is not operating. She then explained that in Las Vegas Justice Court, arrestees have two opportunities for bail. First, arrestees are offered bail in an amount drawn from a charge-based bail schedule. If the arrestee cannot or chooses not to pay that amount, then the pretrial services department may determine that the arrestee is eligible for administrative release on own recognizance without requiring an appearance before a judge. If the arrestee is not eligible, then they are scheduled to appear in Initial Appearance Court. Eligibility for administrative release on own recognizance is prescribed by order from the chief judge of Las Vegas Justice Court and includes most misdemeanors and non-violent gross misdemeanors and felonies where the arrestee has a low risk score. Judge Sullivan noted that some misdemeanor offenders who are released administratively do have a relatively high rate of failure to appear.

Judge Sullivan then described Initial Appearance Court and began by noting that the implementation of Initial Appearance Court took a great deal of resources which may not be currently available in rural jurisdictions. She testified that hearings in Initial Appearance Court are public and adversarial, so people like defense counsel, family members, the victim and the district attorney may testify. The judge then makes a probable cause determination and a pretrial custody determination. Offenders may be released on their own recognizance without conditions, released on own recognizance but with check-ins at the court, released with more substantial conditions such as electronic monitoring supervised by the Metropolitan Police Department, or financial conditions may be set. If the arrestee continues to be detained, then they are given a court date of up to 2 days later for the filing of criminal charges.

Chair Harris asked who bears the cost of electronic monitoring when that is imposed as a condition and Judge Sullivan said that the county bears the cost. Assemblyman Roberts asked if Judge Sullivan had personally presided in Initial Appearance Court, whether offenders are being evaluated and released more quickly in Initial Appearance Court and whether the NPRA has been helpful. Judge Sullivan replied that she had presided over Initial Appearance Court, that many offenders who would not see a judge for 3 to 5 days are now seeing judges within 8 to 22 hours and that the NPRA is a useful tool to use alongside consideration of other factors. Judge Sullivan, Assemblyman Flores and Senator Scheible discussed data on failure to appear rates and Judge Sullivan stated that Initial Appearance Court has been keeping data and that Rich Suey may be able to present data later in the meeting.

Presentation by JFA Institute on the Development of the Nevada Pretrial Risk Assessment

Dr. James Austin, President, JFA Institute, presented on the statistics and data used in the development of the NPRA. Dr. Austin began by recounting that Justice Hardesty of the Supreme Court of Nevada convened a committee to study evidence-based pretrial release in 2015 and that it retained Dr. Austin to develop a risk instrument for Nevada after the committee secured some federal funding for it. The committee decided that developing a risk instrument for Nevada was preferable to using one of several standard risk instruments because an instrument developed using criminal justice data from the local population yields better results when used for that population. Dr. Austin testified that a prototype was developed after several small scale pilot tests and meetings to revise the factors used in the risk instrument. When a satisfactory prototype existed, it was tested on a larger sample of criminal defendants in Nevada. The sample consisted of 1,057 defendants from Clark, Washoe and White Pine Counties. Failures to appear and rearrests were tracked for these defendants and these results were checked against the predicted values based on the score generated by the risk instrument for those defendants.

Dr. Austin stated that the factors employed in the NPRA are as follows: (1) Age at first arrest; (2) number of failures to appear within the past 24 months; (3) prior felony convictions; (4) prior gross misdemeanor convictions; (5) cases pending; (6) repeat prior arrests for drug crimes; (7) employment history; and (8) residency in Nevada or outside Nevada. Dr. Austin testified that this version uses prior convictions instead of prior arrests because convictions have higher predictive power and because there is more potential for bias in data for prior arrests. Dr. Austin noted that there is a version in which the employment history and residency factors are ascertained in an interview and a version without an interview.

Dr. Austin testified that the result for the defendants in the sample of approximately 1,000 was a 25% combined rate of failure to appear or rearrest. Dr. Austin noted that this was a low base rate, so the risk level for higher scoring defendants should not be described as "high risk" but rather "higher risk." Defendants rated low risk had a 15% combined rate of failure to appear or rearrest, moderate risk defendants had a 31% rate and higher risk defendants had a 41% rate. Dr. Austin then testified that 39% of defendants received a low risk rating, 45% received a moderate risk rating and 15% received a higher risk rating.

Chair Harris asked about the use of prior arrest data in the age at first arrest and the prior arrests for drug offenses factors in light of the fact that Dr. Austin said that conviction data was preferable for the other factors, and Dr. Austin replied that age at first arrest has been empirically verified to predict recidivism accurately and that prior arrests for drug offenses was a means to ascertain whether someone has a substance use disorder without resorting to a time-intensive interview. Chair Harris then asked about potential ways to mitigate racial bias in arrest data. Dr. Austin replied that there is debate about racial bias in risk assessment tools over the extent to which the overall bias in the criminal justice system is reflected in the tools. He stated that African Americans score an average of one point higher than white and Hispanic people on the NPRA due to higher rates of prior convictions, and he suggested that eliminating certain prior convictions from consideration could reduce this disparity.

Senator Scheible asked whether the rearrest rates only reflected rearrests for new crimes or if arrests via bench warrants issued for failure to appear were also counted, and Dr. Austin replied that only new crimes are counted. Senator Scheible then asked if the NPRA has equally strong predictive power in predicting failure to appear and rearrest, and Dr. Austin replied that the NPRA does predict both metrics, though the rates for each are different. Senator Scheible and Dr. Austin then discussed the applicability of the NPRA to an individual case. Dr. Austin stated that a defendant should never be detained simply because of their score on the NPRA, but rather that the NPRA simply provided an empirical tool for the judge to use in addition to the information selectively presented by the prosecutor and defendant. Chair Harris asked where the information that is used to score a defendant comes from, and Dr. Austin replied that this is up to pretrial services agencies and that it would be acceptable to allow a defendant to review and contest their score. Senator Scheible and Dr. Austin then clarified that the NPRA has an override feature available to the person undertaking the evaluation. Chair Harris asked whether there is data on the rate at which judges follow the NPRA's suggested outcome, and Dr. Austin replied that he does not have this data but that it has been difficult to obtain widespread adoption of the NPRA in practice by judges.

Chair Harris asked whether the data used to develop the NPRA is publicly available, and Dr. Austin replied that the information is held by the U.S. Department of Justice. Assemblyman Roberts asked whether the NPRA has been assessed since its implementation, and Dr. Austin replied by suggesting that a revalidation study would be beneficial.

Assemblyman Flores, Chair Harris and Dr. Austin then discussed racial bias in the NPRA. Assemblyman Flores asked whether the NPRA was formulated to mitigate the bias found in the data which the NPRA relies upon, and Dr. Austin stated that the decision to use conviction rather than arrest data was motivated in part to reduce racial bias, though there is still racial bias in conviction data. Assemblyman Flores expressed concern that judges and other people using the NPRA in pretrial custody determinations would overly rely on the defendant's NPRA score without questioning the underlying convictions which led to the score, and Dr. Austin replied that this was a valid concern, but also noted that there were stakeholders, such as prosecutors, who argued that the use of only conviction data is underinclusive because arrests are significant even when they did not lead to a conviction. Chair Harris asked whether the use of a mathematical mitigating factor to reduce the weight of prior convictions for African American defendants was considered, and Dr. Austin replied that this would require a measurement of bias in the court process and that he was not paid to undertake that study.

Senator Hammond inquired as to how the employment and residency factors are verified. Senator Scheible also asked how failures to appear are ascertained when they may be originally recorded in different jurisdictions. Dr. Austin explained that these procedures are left to the pretrial services agencies which prepare the NPRA and that certain items may be verified by a phone call, such as employment status.

Presentation by the Las Vegas Metropolitan Police Department on Pretrial Jail Populations

Richard Suey, Retired Deputy Chief, Las Vegas Metropolitan Police Department ("LVMPD"), and Ta'mara Silver, Analyst, LVMPD, presented on pretrial jail populations. Mr. Suey began by addressing the question raised previously concerning the cost of electronic monitoring when it is imposed as a condition of pretrial release. He stated that the staffing costs are funded by the county and that the equipment is funded through the State Criminal Alien Assistance Program, a federal program under which Clark County Detention Center ("CCDC") is reimbursed for housing undocumented aliens. Mr. Suey then addressed the question raised previously concerning release of an intoxicated defendant and stated that they do a preliminary breath test and defendants must blow a reading of 0.04 BAC before they may be released, even if they are being administratively released on their own recognizance. He noted that many defendants are held above the statutory 12-hour minimum for certain offenses in order to reach 0.04 BAC.

Mr. Suey then testified that the average daily population of CCDC was 3,694 in 2018 and 3,706 in 2019. He said that the average length of stay decreased from 20 days in 2018 to 17.8 days in 2019, which he believed represented increased efficiency in the courts. Mr. Suey then stated that the total bookings in CCDC in 2018 was 68,222, which increased to 74,912 in 2019, and he testified that this increase can be traced to an influx of new police officers. He then said that LVMPD examined multiple bookings and discovered that 2,804 individuals account for approximately 23% of all bookings, and he said that many of these frequent repeat offenders qualify for administrative release on own recognizance. He stated that LVMPD has been trying to undertake needs assessments for offenders being released administratively and to direct them to social services, but has been limited by staffing constraints.

Mr. Suey stated that in 2019, the pretrial population had grown by 5.57% between 2018 and 2019. The percentages of bookings by race in 2019 were 2.6% Asian, 39.8% African American, 55.5% white and less than 1% Native American, with 20.5% Hispanic ethnicity and 79.5% non-Hispanic. Mr. Suey then moved to the percentages of the pretrial population by charge severity and stated that in 2019, 85.3% of the pretrial population was held on a felony charge, 1.7% gross misdemeanor and 13% misdemeanor. He said that the top five felonies of the pretrial population in 2019 were, from most to least offenders: (1) violation of conditions of probation; (2) possession of a controlled substance; (3) burglary; (4) arrest of a fugitive from another state; and (5) assault with a deadly weapon. For gross misdemeanors, the ranking was: (1) battery on protected person; (2) open and gross lewdness; (3) destroying property of another ($5k-$250k); (4) indecent or obscene exposure; and (5) injuring or tampering with a vehicle with damage of $250-$5k. For misdemeanors, the ranking was: (1) domestic battery; (2) contempt of court; (3) possession of drug not for interstate commerce; (4) trespass not amounting to burglary; and (5) DUI.

Mr. Suey then discussed persons held on bail of $2,500 or less for more than 7 days. In 2019, 569 people were held in that manner, and Mr. Suey testified that LVMPD would send a weekly report on these individuals to the Chief Judge, the district attorneys and the public defenders to see if those individuals could be placed on the calendar. Mr. Suey concluded by testifying that

the overall rate of incarceration for CCDC is 154 per 100,000, and when combined with North Las Vegas and Henderson the figure is 209 per 100,000. The national average is 223 per 100,000, so Mr. Suey opined that Nevada has a healthy criminal justice system, though there is a lot of room for improvement.

Chair Harris asked Mr. Suey what, in his opinion, the Legislature could do to more efficiently assess the offenders being held solely due to inability to pay, and Mr. Suey responded that jails could report on offenders being held solely due to inability to pay daily instead of weekly and that those cases would be judicially evaluated daily. Assemblyman Flores asked whether any part of the population of CCDC is being held pursuant to a hold issued by the U.S. Immigration and Customs Enforcement ("ICE"), and Mr. Suey replied that CCDC no longer operates the previous 287G screening program, but he does not know if ICE agents themselves come in to issue holds.

Presentation by the Washoe County Sheriff's Office on Pretrial Jail Populations

Jeff Clark, Chief Deputy of Detention, Washoe County Sheriff's Office, and Peter Petzing, Captain, Washoe County Sheriff's Office, presented on the pretrial jail population in Washoe County. Mr. Clark began by stating that they would be presenting data from the past 5 years, fiscal year 2014-2015 to 2018-2019, which is approximately the time since the NPRA was implemented in Washoe County. Captain Petzing then testified that the average annual bookings for that period was 20,682 and that this rate was steady during that period. Captain Petzing then stated that the inmate population by race is 55% Caucasian, 23% Hispanic, 10% African American, 2% Asian American, 1% Native American, 3% other and 6% undeclared, and he noted that this rate has also been consistent over the past 5 years.

Captain Petzing presented a figure showing that the level of the top charge for arrests has been approximately 73% felony or gross misdemeanor, with little annual deviation from that level since fiscal year 2015-2016. He then presented the top 5 arrest charges: (1) possession of a controlled substance with 10,942 arrests; (2) domestic battery with 10,015 arrests; (3) DUI with 9,456 arrests; (4) failure to appear warrants with 9,257 arrests; and (5) contempt of court with 5,247 arrests. He testified that the average daily population over the past 5 fiscal years is 1,083 inmates, 80% of which are male, and 15% of which are serving a sentence. He stated that the average length of stay has been relatively flat during that period. He said that in fiscal year 2015-2016 the average length of stay was 14.51 days and in 2019-2020 it was 15.1 days, and he noted that this small increase came after the bail reforms implemented in 2016.

Captain Petzing then presented a figure showing the bookings and releases from December 2015 to February 2020 broken into three-month intervals. He stated that bookings and releases have remained very close to one another since the bail reforms implemented in 2016 and that this is a sign of a well-functioning system. He then discussed the percentages of releases by release type. Before the reforms implemented in 2016, the percentages of releases by release type were 45% bail bonds, 17% court services release on own recognizance and 39% judicial release on own recognizance, and after the reforms the figures were approximately 20% bail bonds, 22% court

services release on own recognizance and 53% judicial release on own recognizance, and these figures have remained steady since then.

Captain Petzing then discussed movement time from the intake lobby to classified housing. He testified that the current average movement time from intake to housing is 9.43 hours. He presented a figure showing the number of inmates who were moved to classified housing the same day as arrest versus those moved the next day. Before the bail reforms implemented in 2016, those figures were approximately equal, and after the reforms those figures changed to an approximately 2:1 ratio between those moved the same day and those moved the next day, respectively. He testified that the greatest opportunity for improvement lies in the judicial bail review process where there have been periods of 10 to 14 hours of wait pending bail review.

Mr. Clark noted that the earlier figure presented showing average daily population showed a 5.4% decrease in jail population, and he testified that Washoe County Sheriff's Office has been working hard to develop programs for inmate release services and community programs. Chair Harris asked about the racial and ethnic makeup of the general population of Washoe County in order to contextualize the racial and ethnic makeup of the jail population, and Captain Petzing replied that Washoe County is roughly 62% Caucasian, 24.8% Hispanic, 2.7% African American, 5.8% Asian American and 2.2% Native American.

Presentation by the Las Vegas Metropolitan Police Department on the Law Enforcement Assisted Diversion Program

Lissette Ruiz, Officer, Las Vegas Metropolitan Police Department ("LVMPD"), and Sergeant Jason Santos, LVMPD, presented on the Law Enforcement Assisted Diversion ("LEAD") program in Clark County. Ms. Ruiz began by explaining that LEAD is a program which allows law enforcement officers to redirect low level offenders engaged in drug activity or prostitution to community-based services instead of jail or criminal prosecution. She said that LEAD aims to improve public safety by reducing criminal behavior and to prevent certain individuals from entering the criminal justice system. She noted that LEAD is not a get out of jail free card and that LEAD officers may file for an arrest warrant after 30 days of an offender's noncompliance with the program.

Ms. Ruiz elaborated on the origins and purposes of the LEAD program. She testified that the U.S. has the highest incarceration rate in the world and that substance use and mental health disorders are the driving forces behind criminal justice system involvement. Under the LEAD program, law enforcement officers may hold charges in abeyance and instead require an offender to complete a drug or mental health treatment program. She stated that the purposes of the LEAD program are to save lives, rebuild families, reduce the amount of time officers spend booking an offender, reduce the jail population, reduce the caseloads for the District Attorney and for narcotics testing labs, save tax dollars and protect public safety by reducing recidivism.

Ms. Ruiz explained that potential admittance into the LEAD program begins when an officer encounters an individual through a consensual stop, a Terry stop or a probable cause encounter.

Next, the officer determines whether the individual is a non-violent, low level offender with a current drug addiction. Alternatively, if the individual has not committed an offense, the individual may nonetheless request assistance from an officer. The officer then initiates the LEAD process by making a referral to a LEAD case manager, who determines the individual's eligibility for the program.

Ms. Ruiz then presented the eligibility criteria for participation in LEAD and the exceptions to eligibility. A person with a known history of drug use is eligible for LEAD for the following offenses: (1) non-violent misdemeanors; (2) non-violent drug-related felonies, not including possession of a controlled substance with intent to sell, sale or transport of a controlled substance, or trafficking; and (3) non-violent county and city code and ordinance violations committed in relation to the drug abuse and, in cases where a victim exists, the victim has indicated willingness to decline prosecution. Ms. Ruiz then stated that an individual is not eligible for LEAD if the person does not appear amiable to diversion; the individual is unable to give consent; the suspected drug activity includes the sale of drugs and it is believed to sell for profit above a subsistence level; the individual exploits minors or other individuals; there is probable cause to believe the individual committed a violent offense; there is probable cause to believe the individual violated an order of protection or they committed a domestic violence-related offense or were driving under the influence when contact was made; the individual is suspected of promoting prostitution; the individual is a registered sex offender; the individual needs acute emergency care due to being a danger to themselves or others; and the individual has been convicted of any of the following offenses: murder, arson, robbery, any form of assault or battery which would constitute a felony, any violent crime that would constitute a felony or any sex crime.

Ms. Ruiz then explained that once eligibility has been determined, there is an initial assessment in which basic information is gathered from the LEAD participant. The case manager or clinician conducting the assessment will identify immediate needs such as shelter, food and safety. A second meeting is scheduled as soon as possible. The LEAD case manager will design an individual intervention plan which may include assistance with housing, treatment, family reconnection, mental health care, education, job training and placement, child care and assistance obtaining birth certificates and state identification.

Vice Chair Nguyen asked what the metrics for the success of the LEAD program are and how the program has performed under those metrics. Ms. Ruiz noted that the program is in pilot phase so the numbers are currently small, that they have just hired their first case manager who will be able to implement data collection practices, and that the University of Nevada Las Vegas is also running statistics for the program. Ms. Ruiz then testified that in the pilot test, out of 320 encounters with eligible individuals who had a drug addiction, 50 elected to participate in the program, 25 continued through their third meeting and 12 remain in the program, with 2 individuals having achieved remarkable rehabilitation. Ms. Ruiz stated that jail costs were saved for each of the 50 individuals who were diverted from jail by their election to participate in LEAD and that lives may have been saved due to a reduction in accidental overdoses which are more likely to occur shortly after a drug user has been detained.

Assemblyman Flores asked where in Las Vegas the pilot program was conducted and whether the assessment officer was hired specifically for the position or if that person was an officer in the Department. Ms. Ruiz replied that the pilot was conducted in Southeast Area Command near the Boulder Highway/Flamingo/Tropicana area. She explained that there were two hubs to which officers would take the individuals whom they had assessed to be potentially eligible for LEAD: Centers for Behavioral Health and Bridge Counseling. A clinician there would assess their needs at that time. She stated that they plan to train every patrol officer to recognize LEAD-eligible individuals on the street and the officers would transport the participants to the clinician/case manager they have hired, who will make an assessment and make referrals.

Assemblyman Roberts asked about the timeline for the officers' goal of Department-wide implementation of the LEAD program. Ms. Ruiz replied that they hope to begin training Southeast Area Command within several weeks and that they will advance through each area command, and she noted that expansion of the program will require more money for case managers and clinicians. Senator Scheible asked who the LEAD participants meet with and whether the participants are required to have continuing contact with law enforcement officers. Ms. Ruiz stated that participants have intermittent contact with the case manager and attend their counseling or treatment appointments and programs and do not have contact with law enforcement unless the participant breaches the terms of their case plan.

Presentation by Triton Management Services, LLC

Marc Ebel, Director of Legislative Affairs, Triton Management Services, LLC, presented on the bail bonds industry and the operation of bail agencies in Nevada. Mr. Ebel introduced himself as the Director of Legislative Affairs for Triton Management, which is a holding company for Aladdin Bail Bonds and operates in Nevada as well as nine other states. Mr. Ebel testified that there are three solutions which he believed would accomplish the goals of the Committee: (1) integrated data systems for jail populations, pretrial release and performance; (2) ensure that the pretrial risk assessment tool is not exacerbating the current issues; and (3) codify certain presumptions for the court to operate on.

Mr. Ebel then gave an overview of the academic and peer-reviewed literature concerning pretrial risk assessments. He presented a list of studies and testified that these peer-reviewed studies done by respected institutions such as Georgetown University and the Yale Law Center yielded three conclusions regarding pretrial risk assessments: (1) they exacerbate racial disparities; (2) they drive up jail populations slightly by finding more detention than they were designed to find; and (3) they do not address recidivism and can make recidivism worse in some cases. Mr. Ebel then directed the Committee to a statement made to the Supreme Court of Missouri by 27 academic researchers when the Court was considering the adoption of a risk assessment tool that "these tools suffer from serious methodological flaws that undermine their accuracy and effectiveness." He said that the Pretrial Justice Institute had issued a statement reversing their position on pretrial risk assessments which stated that the assessments "can no longer be a part of our solution for building equitable pretrial justice systems," and he also pointed out a statement issued by over 100 civil rights groups calling for skepticism regarding pretrial risk assessments.

Mr. Ebel then discussed several jurisdictions which had implemented bail reforms but had subsequently reversed them, which, he noted, was partially in response to a request for this information voiced in the previous meeting of the Committee. Mr. Ebel testified that New York had implemented bail reforms which, according to the New York police department commissioner, led to near immediate increases of 31% in robbery, 15% in burglary, 5.6% in grand larceny and 67% in auto thefts; and which had been condemned by Mayor de Blasio for leading to these increases in crime. Mr. Ebel then testified that when Cook County, Illinois implemented a pretrial risk assessment tool, they undertook a study of their assessment tool and found that it did not increase crime or recidivism, but the University of Utah Law School later analyzed that same data and found that new crimes had increased by 45% and violent crimes by 33%. He also noted that Alaska had passed a large number of bail reforms and shortly repealed many of them after adverse consequences.

Mr. Ebel then stated that data collection is a critical area for reform both because data is used to make decisions in the system and because data is needed to evaluate the effectiveness of reforms. He said that Florida had recently passed a bill relating to criminal justice data and that Idaho and New York were considering adoption of integrated data systems. He then reiterated the importance of evaluating Nevada's pretrial risk assessment tool, the NPRA, to ensure it is not exacerbating any problems. Mr. Ebel then discussed the codification of presumptions. He testified that there are two presumptions which it would be beneficial to codify: (1) that individuals should be released on the least restrictive means possible while ensuring public safety and the effective operation of the criminal justice process, with the least restrictive conditions left to the judge to define; and (2) that a certain set of first time, low level, non-violent, non-sexual misdemeanor offenders should be released on own recognizance, with the judge able to overcome the presumption easily.

Mr. Ebel then concluded by briefly discussing bail conditions at Aladdin Bail Bonds, which, he noted, was responsive to a question raised earlier as to whether bail bonds agencies place conditions upon a defendant who is released on bail. He said that Aladdin Bail Bonds requires a defendant to meet with them in-person once they are released, requires a defendant to appear at all court dates, provide them with all court dates, update their contact information and employment status, and requires that the indemnitor and the defendant be equally liable for the full amount of the bond.

Chair Harris asked whether there had been any studies on the increase in crime in New York which showed that it was caused by the bail reform measures and not merely correlated with them. Mr. Ebel replied that the police commissioner stated that he believed there was causation based on the police department's internal data. Chair Harris asked if the figure for the increase in people released under the Cook County, Illinois program was available in order to contextualize the statement that violent crimes rose 33%, and Mr. Ebel replied that he did not have that figure and that the study itself was available.

Assemblyman Flores asked Mr. Ebel to expand upon the statement Mr. Ebel made in the beginning of the presentation that pretrial risk assessments result in more people being detained

than before their implementation. Mr. Ebel responded that the research indicates that judges use the risk assessment tools differently than intended and that the tools recommend more detention than intended. Assemblyman Flores asked whether Mr. Ebel has seen an increase in jail populations since the implementation of the NPRA from the standpoint of Aladdin Bail Bonds, and Mr. Ebel responded that Aladdin Bail Bonds does not collect data on jail populations. Assemblyman Flores then asked what impact these reforms would have on the bail industry and whether the industry would support these reforms if they caused financial loss to the industry. Mr. Ebel replied that his company wants to be a partner in this reform and that the company believes in these reforms even though they may ultimately result in some loss of business. He stated that the company advocates for a hybrid model in which judges use bail for cases in which the judge is not completely comfortable releasing the offender on own recognizance, but nonetheless wants to avoid detention, because the involvement of a surety reduces failures to appear. Senator Scheible then asked whether Aladdin Bail Bonds gives their clients reminder calls or texts, and Mr. Ebel replied that Aladdin Bail Bonds gives reminder calls and also provides an app which notifies clients about their court calendar.

Presentation by eBAIL Cheap Bail Bonds

Marc Gabriel, Manager & Proprietor, eBAIL Cheap Bail Bonds, also presented on the bail bonds industry and the operation of bail agencies in Nevada. Mr. Gabriel began by stating that there are three ways an offender may be released from jail within 12 or 72 hours of arrest: (1) bail or bail bond; (2) release on own recognizance without restrictions; or (3) release on own recognizance with restrictions. He explained that bail and bail bonds are based on the family and community coming together to post the bail amount, which puts them in charge of the offender's release, whereas if the offender is released on own recognizance with restrictions, the state or the house arrest officer will be the one to monitor the offender instead of the family or community.

Mr. Gabriel explained bail and bail bonds and the differences between them. He said the amount of bail is set within hours of arrest and that it is based on the offense charged. He explained that bail is cash or other value which is actually given to the court by the offender or the offender's family, whereas a bail bond is an insurance policy executed with the court which pays out to the court if there is a failure to appear which remains uncured for 180 days. The offender, one or more cosigners, and a bail agent all contractually agree to guarantee the amount of the bail bond to the court. If the offender misses their court date, notice of the failure to appear is sent to the cosigners and the bail agent, which triggers the 180-day period to cure the failure to appear. The failure to appear can be cured by: (1) the offender obtaining a new court date; or (2) the offender being surrendered back into custody. Mr. Gabriel testified that most of the time the offender has made an honest mistake and may obtain a new court date for free by filing a motion to quash, and he noted that bail agents may retrieve the offender if the offender absconds.

Mr. Gabriel then stated that the cost of a bail bond is fixed by Nevada statute at 15% of the bail amount or $50, whichever is greater. He said that $5,000 was the average bail amount as of the 2019 Legislative Session, which would result in a cost of $750 to the offender or the offender's

family. He said that offenders or their families often place down payments of $100 to $400 and then proceed with weekly, biweekly or monthly installment payments of $50 to $100. He stated that there is no finance charge and that there is a $0 down option available if collateral, such as a car valued at or above the bail amount, is put up by the offender or cosigner.

Mr. Gabriel testified that cosigners are typically relatives or close friends of the offender. He explained that his company conducts personal interviews with the cosigners regarding the characteristics and criminal history of the offender to determine whether the offender poses a flight risk, which impacts whether the company will take the offender as a client. The company also collects information about the cosigners and ensures that the cosigners understand and are capable of fulfilling their commitment to guarantee the bail amount. He then stated that under the bail bond agreement, cosigners are responsible for the observance of any court-ordered restrictions, such as rehabilitation, which are ordered by the court to accompany the release of the offender on bail bond, and he said that this allows families to decide to surrender an offender who does not comply with the conditions back into custody. He testified that this process creates third party accountability in the pretrial release process and that the offender may stay in jail when there are no willing cosigners for an offender. He noted that bail bonds do not cost the taxpayers and that bail bonds allow for the greatest liberty before trial.

Mr. Gabriel then discussed release on own recognizance with conditions. He provided materials describing the electronic monitoring program used by Clark County Detention Center. There are low, medium and high levels of monitoring. A GPS monitor must be worn by the offender which is monitored by an officer and costs the offender $400 per month unless the offender is indigent, in which case the offender may be required to wait in jail 2 to 7 days until a GPS monitor becomes available. Mr. Gabriel testified that GPS monitors are often degrading and uncomfortable and that law enforcement officers do not pursue offenders who cut off their GPS monitors. He expressed concern about the fact that offenders are required to waive their Fourth Amendment rights in order to participate in electronic monitoring, and he provided an article from the American Bar Association which posited that GPS monitors can call and record people without their consent in violation of the Fifth Amendment. He also stated that many offenders who were initially attracted to electronic monitoring instead of bail or a bail bond quickly became frustrated when they realized that they would be, for example, unable to get to work under the electronic monitoring program. He noted that there was often a problem with these offenders being able to return to court to post bail in order to lift the restrictions and he suggested that it would be beneficial to keep the ability to post bail available for the duration of the case.

Presentation by the Washoe County Public Defender's Office

Kendra Bertschy, Deputy Public Defender, Washoe County Public Defender's Office, and Evelyn Grosenick, Chief Deputy Public Defender, Washoe County Public Defender's Office, presented on the current pretrial release process and possible reforms. Ms. Grosenick began by noting that she supervises the team of attorneys who appear at the Washoe County jail to represent individuals who have been detained pretrial.

Ms. Grosenick testified that she joins with Clark County in emphasizing the need for a constitutional and statutorily enumerated process for determining which offenders should be presumptively detained pretrial and the conditions of release, if any, for those who are released. She stated that there are well-documented negative impacts of pretrial detention of low risk individuals and that many of her clients, who are indigent by definition, would be unable to pay rent or would lose their jobs as a result of missing one or two days of work, which often occurs when someone is detained pretrial. Ms. Bertschy then provided the example of a mother who was arrested while out on the river walk in Reno and detained for more than 2 weeks due to a clerical error which incorrectly noted that her blood alcohol content was 0.4, which resulted in her losing her job, as well as the example of a veteran who was detained while in the process of moving, which led the U-Haul company to report her rented U-Haul as stolen, which led to her being rearrested and ultimately losing her spot at an inpatient substance use treatment facility.

Ms. Grosenick explained that the Las Vegas Justice Courts have Initial Appearance Court whereby every detainee is given a hearing within 12 to 24 hours of arrest in which all stakeholders, such as the District Attorney's Office and public defenders, may participate. She noted that participants in the Las Vegas Justice Court's Initial Appearance Court have shown a reduction in new offenses committed while their cases are pending, which shows that releasing detainees more quickly often allows them to continue to work and support their families, reducing the likelihood they will reoffend. By contrast, in the Reno and Sparks Justice Courts, a judge will review probable cause and custody status within 12 to 24 hours of arrest but will do so without the involvement of those stakeholders. She explained that Reno Justice Court schedules initial appearances the first business day following the arrest, but defense counsel is only permitted to address pretrial custody if the judge at the initial appearance is the same judge who undertook the probable cause and pretrial custody determination earlier. In Sparks Justice Court, the detainee is heard on the third business day after arrest. She also stated that some judges in Washoe County will permit defense counsel to address pretrial status at any point in the case, while other judges will not, which leads to an unfair and random result for the defendant.

Ms. Grosenick then presented five legislative solutions. First, she testified that non-aggravated traffic offenses should be re-categorized as traffic citations not punishable by jail time. She stated that she has observed people detained for 3 or 4 days as a result of being arrested due to failure to appear in court for a speeding ticket. Second, she testified that citation in lieu of arrest should be mandatory for certain misdemeanor crimes. Third, Ms. Grosenick testified that there should be a presumption of release for arrestees, which would comport with the presumption of innocence. Fourth, she testified that the conditions of release should be required to be the least restrictive conditions necessary to reasonably prevent imminent threat of serious bodily harm and reasonably ensure appearance in court based on an individualized determination. She noted that there is a danger of converting from an incarceration state to a supervision state and that enhanced supervision and electronic monitoring are currently being overused for low and moderate risk defendants. Fifth, she testified that there should be a burden on the state to seek preventative detention where appropriate. She explained that the state should be required to establish that preventative detention is necessary at a full hearing, and she stated that there should be a hearing within 12 to 24 hours of arrest for all arrestees. These hearings should contain due

process protections such as assistance of counsel, the right to present evidence and the right to cross-examine witnesses. She also testified that there should be a 48-hour grace period after a missed court date to give the defendant an opportunity to contact the court and reschedule without a warrant being issued.

Presentation by the Clark County Public Defender's Office

Nancy Lemcke, Deputy Public Defender, Clark County Public Defender's Office, also presented on the pretrial release process and possible reforms. She began by noting that she had been involved in much of her office's litigation on the issue of monetary bail reform, and she directed the Committee to amicus briefs in several cases in the Supreme Court of Nevada in which law professors explained the constitutional basis for bail reform and social scientists explained the impact of incarcerating arrestees due to indigent status.

Ms. Lemcke testified that the issue of bail reform centers on the reform of monetary bail and that the type of reform sought by her office is one whereby the people who need to be incarcerated are incarcerated without detaining arrestees simply because they are too poor to pay to get out of jail. She presented three goals: (1) provide a prompt custody review after arrest; (2) provide a mechanism by which the government can detain individuals when necessary; and (3) end poverty-based detention. She stated bail reform is about providing a uniform process for all arrestees, since the current statutes provide a uniform list of factors but not a uniform process for evaluating those factors. She then stated that it is important to note that bail reform is not the wholesale elimination of monetary bail, nor the release of all detainees.

Ms. Lemcke then explained the arrest and pretrial detention process. She stated that bail will often be set by a judge alone in their chambers during probable cause review and that the amount of bail will often come from a charge-based bail schedule. Other times, bail is set at the return of an indictment by a grand jury when the prosecutor and judge are present but not the defendant or their counsel.

Ms. Lemcke elaborated on several additional problematic aspects of the current monetary bail system. She explained that the monetary bail system not only results in low risk offenders who cannot afford to pay being detained, but also results in some higher risk offenders who get released because they do have the ability to pay, notwithstanding the fact that they may be a danger to the community. She then explained that defendants who are detained pretrial due to inability to pay and who may be charged with a felony may agree to plead guilty to a lower level felony or gross misdemeanor and be released for time served, even when they may have a good defense to the crime originally charged.

Ms. Lemcke then discussed the costs associated with pretrial detention and the potential savings associated with reform. She said that her office used the figure of $170 per day to represent the cost of incarcerating a healthy person in jail, and she noted that this figure is uncertain and that the cost increases substantially for people who need medical or mental health treatment. She then said that Clark County Detention Center had 268 detainees being held for unpaid bail set at

$5,000 or lower when measured in fall of 2019. She explained that if monetary bail reforms eliminated 200 of these detainees, for example, and those detainees would have been held for 2 weeks until their preliminary hearings, the savings would amount to approximately $500,000 per month. If those detainees would have been held beyond their preliminary hearings, for one month total, the savings would amount to approximately $1 million per month.

Ms. Lemcke testified that wealth-based pretrial detention violates federal law. She related that she has argued before the Supreme Court of Nevada that the U.S. Constitution requires prompt custody determinations which avoid wealth-based distinctions and noted that federal courts have adjudicated that state protocols similar to those in Nevada are unconstitutional. She explained that the U.S. 5th and 11th Circuit Courts of Appeals have held that a custody determination must be made within 48 hours of arrest. Federal courts have also held that if there is a monetary bail option available earlier in the process, such as upon booking, then there must also be a non-financial path to a custody hearing within a commensurate timeframe for those who cannot pay.

She then described three aspects of a potential lawful process. First, she stated that there must be an adversarial hearing to determine pretrial custody. Second, she said that the prosecutor should bear the burden of showing that detention is necessary, rather than the defendant bearing the burden to show that release is warranted, and she said that this comports with the basic notion that the government cannot restrain liberty without stating its reasons for doing so on the record and a court adjudicating that the restraint is necessary. She said that the Committee has an opportunity to get a start on this issue before the Supreme Court of Nevada potentially holds that Nevada must change its system to align with the U.S. Constitution. Jason Frierson, Assistant Public Defender, Clark County Public Defender's Office, reiterated that they are not proposing to eliminate cash bail, but only to require the state to affirmatively state its reasons for seeking detention and for the court to make a determination.

Chair Harris then invited questions for both the Washoe County Public Defenders and the Clark County Public Defenders. Senator Scheible inquired about the protection of community safety under a reformed bail process and what factors would be used to evaluate the risk of an offender. Mr. Frierson replied that the factors would be the same factors, that the goal was to add new factors but rather to establish a uniform process for evaluating those factors in individual cases. Ms. Lemcke said that the risk factors are important and that the idea is for the state to apply those factors to each individual defendant and affirmatively state the appropriate level of restriction desired and for the judge to evaluate the application of those factors and make a custody determination, for which monetary bail could remain a potential tool for a defendant for whom the court seeks some additional guarantee of appearance, so long as it is set in an attainable amount.

Presentation by the Office of the Clark County District Attorney

John Jones, Chief Deputy District Attorney, Office of the Clark County District Attorney, presented on the pretrial release process and possible reforms. Mr. Jones began by stating that district attorneys throughout the state embrace criminal justice reforms that advance equity and

protect public safety, and he said that he agrees with the bail custody goals expressed by the public defenders. He then stated that, from his office's point of view, the reform which would most effectively fix the bail system would be the elimination of standard bail schedules, meaning that offenders would not be able to bail out before seeing a judge.

Mr. Jones related that the creation and implementation of Initial Appearance Court in the Las Vegas Justice Courts was the result of a collaborative effort beginning in the Criminal Justice Coordinating Council of Clark County. He testified that in his experience representing the District Attorney's Office at the Legislature he has observed a pattern in which people assume national issues are as bad in Nevada as they are in other places, and he stated that Nevada has a better pretrial detention system than many jurisdictions had prior to bail reforms.

Mr. Jones said that the current monetary bail system based on bail schedules allows those who may be at risk but who nonetheless have financial means to be released from custody before ever seeing a judge. He then explained that Marsy's Law has been incorporated into the Nevada Constitution and that it requires input from victims in release decisions, and he said that a process based on individualized assessment of risk would accomplish those aims.

Mr. Jones then testified that he joins with district attorneys and other stakeholders in jurisdictions which have undertaken bail reform in emphasizing the need for increased focus on and resources for pretrial services. He stated that it would be beneficial for nurses and career counselors to reach defendants earlier and direct them to social services. He also said that there has been a problem with actively monitoring defendants who have been placed in electronic monitoring programs. He then testified that unsuccessful bail reform efforts have often involved restrictions on the discretion available to a judge and reiterated that individualized risk assessments should be the goal. He concluded by testifying that the Office of the Clark County District Attorney experiences some of the highest caseloads in the country and emphasizing that a viable solution will require focus on resources.

Presentation by the Office of the Washoe County District Attorney

Adam Cate, Deputy District Attorney, Office of the Washoe County District Attorney, presented on the current pretrial release process and possible reforms. Mr. Cate began by noting that his office agrees with much of what has been said. He testified that Washoe County does not use a bail schedule and that each person arrested is given an individualized bail determination by a judge usually within 12 hours of arrest, 24 maximum, including weekends, though he noted that this does not occur through an in-court adversarial hearing. He explained that when a person is arrested, they are interviewed at the jail in order to score the person on the NPRA, which is then reviewed by a judge along with the probable cause sheet and a pretrial custody determination is made. He noted that judges undertake this process twice a day and that they are able to log in remotely on weekends to undertake this process. This process occurs before charges are filed by the District Attorney's Office, which typically occurs within 48 hours and must occur within 72 hours in most cases.

Mr. Cate explained that if a defendant wishes to contest the pretrial custody determination made by the judge, they may request a bail hearing. He said that the victim is notified of the hearing pursuant to Marsy's Law, which can result in some small delays. The hearing is contested and adversarial. He also stated that Washoe County has a robust pretrial services supervision program which allows more moderate risk offenders to be released.

Mr. Cate testified that because Article 1, Section 7 of the Nevada Constitution requires bail to be available to all defendants except in murder cases, judges cannot simply elect to detain a person without bail because they have determined they pose a risk. He then said that if allowing judges to detain high risk and dangerous offenders is to be a goal, then judges need to be able to set bail in an amount the defendant cannot afford.

Vice Chair Nguyen asked if Mr. Cate could speak about the efforts to improve wait times in the Henderson and North Las Vegas Justice Courts. Mr. Cate replied that those jurisdictions are working to expedite their pretrial release decisions but that they do not have the level of resources that the Las Vegas Justice Court has, and he noted that there are jurisdictions in Nevada with only a single district attorney while Las Vegas has hundreds. He stated that he believes that bail reform should consist of certain uniform statewide parameters which also allow for flexibility for individual jurisdictions to implement processes that work for them.

Presentation by the Henderson City Attorney's Office

Marc Schifalacqua, Senior Assistant City Attorney, City of Henderson, presented on the current pretrial release process and possible reforms. Mr. Schifalacqua began by explaining that there are a lot of things to weigh on both sides of the issue of bail reform and he noted that the rights of both defendants and victims are enshrined by the Nevada Constitution. He then stated that the current system yields both the injustice of low risk offenders being held in jail for small amounts of monetary bail as well as the injustice of relatively high risk offenders being able to obtain release quickly after being arrested by posting monetary bail.

Mr. Schifalacqua testified that New York eliminated cash bail for most misdemeanor and some felony offenses such that judges were unable to order bail in those cases no matter the offender's background and support for these reforms dropped from 55% to 38% shortly after implementation, according to the New York Post. He then testified that although Marsy's Law is now present in the Nevada Constitution, Nevada lacks a statutory scheme to give effect to Marsy's Law and properly involve victims in the pretrial custody determination process. He stated that victims lack a mechanism for requesting no-contact orders from judges. He related a story about a time a witness in one of his cases became upset and approached Mr. Schifalacqua and a coworker during lunch after the trial and made threats of violence and racial slurs, and although the witness was arrested, he was able to post bail very quickly. Mr. Schifalacqua stated that it took him 2 weeks to get a no-contact order for himself and his coworker regarding this person, and he said that this suggests that a member of the general public would have much difficulty obtaining one.

Mr. Schifalacqua then stated that he believes that the reforms implemented in New Jersey provide a good model for Nevada. The reforms in New Jersey required amending their constitution, which previously resembled the Nevada Constitution in that bail was required in almost all cases except murder, and he stated that he would support an amendment to the Nevada Constitution to allow for pretrial detention of dangerous individuals while releasing more low level offenders. He said that he believes pretrial custody determinations should be made more quickly and that the NPRA should be used, and he emphasized the importance of criminal history in these decisions. He stated that certain crimes labeled as low level misdemeanors are actually very important to the community, such as stalking, violations of temporary protection orders, domestic violence and assault, and he suggested that the victim could be contacted earlier in the process, such as when the NPRA is being prepared for the offender, and the victim could have an opportunity to request a no-contact order and provide other information to the court such as the offender's history.

Vice Chair Nguyen asked about Henderson's implementation of the NPRA and why the city has not yet implemented it, and Mr. Schifalacqua replied that the court and the Henderson Police Department are working together to implement it and that it will be implemented by the deadline set by the Supreme Court of Nevada. Vice Chair Nguyen then asked about the wait times between arrest and a contested hearing in Henderson, and Mr. Schifalacqua replied that if someone is arrested before 9 p.m., they will have a hearing the next day, except that on Thursdays the hearings will be scheduled for the following Monday. Vice Chair Nguyen then asked how many people are being held in Henderson for not posting bail set at $650 or lower. Mr. Schifalacqua provided figures which showed that on March 11, 2020, the Henderson Detention Center was holding 377 detainees, of which 225 were being held for the City of Henderson. Of those 225 detainees, 67 had a bail amount, meaning the others were either serving a sentence or being held without bail, and the average bail amount was $16,142 and 51 of the 67 inmates were being held on bail of $5,000 or less.

Presentation by Robert L. Langford & Associates

Robert L. Langford, Robert L. Langford & Associates, presented on possible reforms to the pretrial detention process. Mr. Langford began by discussing the wait time from arrest to a pretrial custody hearing. He testified that once a person is incarcerated for 3 days, there is a large chance that they will lose their home and their job, so the fact that a person arrested in Henderson on a Thursday will not have a hearing until Monday needs reform. He further stated that even if a hearing is held at 48 hours after arrest, there is still often an extra day after the hearing before the person is actually released, so the goal should be hearings within 12 to 24 hours, as is now done in Las Vegas Justice Court.

Mr. Langford said that bail reform should aim towards uniform standards throughout Nevada and that offenders should not have to wait due only to the jurisdiction they were arrested in, and he suggested that technology can be used to conduct hearings remotely. He cautioned against undue concern over resources and said that the clear potential for savings of the costs of pretrial incarceration compensates for additional resource use.

Mr. Langford testified that there is no fair way to implement a cash bail system. He said that cash bail systems violate the constitution and that bail schedules should be eliminated, and he noted that bail schedules allow offenders with a lot of money to get released with little consequences. He then stated that the backlash against bail reform in New York has been exaggerated and that the story of the backlash has been driven by cherry-picked cases from a very short period of time from a statistical perspective, and he noted that the bail industry has been campaigning against bail reform. He suggested the Pretrial Justice Institute as a resource for statistics.

C. THIRD MEETING

Organizational Matters

The Committee held its third meeting on June 3, 2020.

Presentation by the Legislative Counsel Bureau on Valdez-Jimenez

Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, presented on the Supreme Court of Nevada case Valdez-Jimenez. Mr. Anthony began by noting that this case was the result of the combination of two factually similar cases and that Christy Craig and Nancy Lemcke, Clark County Public Defender's Office, who litigated the case, would also present their insights on the case to the Committee. He said that the case was decided in April 2020, which is timely given its relevance to the work of the Committee.

Mr. Anthony described the facts of the combined cases. He said that the defendant Mr. Valdez-Jimenez was charged with a felony and had bail set at $40,000 and that defendant Mr. Frye was charged with a felony and had bail set at $250,000. He explained that neither defendant could afford to post this monetary bail and that they filed a motion in the district court for a reduction in bail. When the court did not approve the reduction, both petitioners filed a writ of mandamus in the Supreme Court of Nevada.

Mr. Anthony stated that the central issue in the case was what process is constitutionally required when the court sets bail at an amount the defendant cannot afford. He noted that the Court considered whether the petitioners' claims were moot due to the fact that the petitioners had already been convicted and pled guilty, and he said that the Court decided that the issue was not moot because it was a matter of public importance and that it was capable of repetition. Because the issue was not moot, the Court considered and decided the central issue on the merits.

Mr. Anthony said that the Court examined Article 1, Section 7 of the Nevada Constitution and held that the petitioners had a right to bail in a reasonable amount. He explained that the Court noted that the fundamental liberty interests enshrined by the Nevada Constitution create substantive due process considerations, and he said that the Court held that an individualized bail hearing must be held within a reasonable time after arrests for defendants who remain in custody.

Because there is no statutory time period for when an initial appearance or arraignment occurs, where bail is typically discussed, the Court emphasized the need for the promptness of the pretrial custody hearing. He said that the Court stated that heightened due process considerations apply when bail is set in an amount the defendant cannot afford.

Mr. Anthony explained the Court's holdings on bail and pretrial custody determinations. He said that the Court stated that the factors for courts to evaluate when making a pretrial custody determination are found in NRS 178.498, which includes the financial ability of the defendant as a factor. Mr. Anthony then summarized the Court's five holdings on this issue: (1) Bail may only be imposed when necessary to ensure the defendant's appearance in court and to protect the safety of the community and the victim; (2) if the state requests bail, then the defendant is entitled to an individualized hearing promptly after arrest; (3) the state must prove by clear and convincing evidence that no less restrictive alternatives will satisfy the state interests of ensuring the appearance of the defendant and protecting public safety; (4) a district court must make findings of fact and state its reasons for setting the bail amount; and (5) subsection 1 of NRS 178.4851, which provides that a defendant must show good cause before they may be released without bail, is unconstitutional.

Chair Harris asked if the Court provided a particular section of NRS or otherwise provided guidance as to what a reasonable time after arrest would be. Mr. Anthony replied that the Court did not specifically state what a reasonable time would be and that Ms. Craig and Ms. Lemcke may be able to provide research on the issue from other states. Vice Chair Nguyen asked whether the case would alter existing statutes such that the Legislature would want to codify the case into statute and whether the holding was equally applicable to justice courts and municipal courts. Mr. Anthony replied that the case is binding authority on the citizens of Nevada without being codified, but that the Court invited the Legislature to change or eliminate subsection 1 of NRS 178.4851, which was ruled unconstitutional. The Legislature may choose to codify other aspects of the case such as the timing requirements.

Presentation by the Clark County Public Defender's Office on Valdez-Jimenez

Christy Craig and Nancy Lemcke, Deputy Public Defenders, Clark County Public Defender's Office, presented on the Supreme Court of Nevada case Valdez-Jimenez. Ms. Craig began by stating that the case applies equally to all the courts of the state because the holding is based on the Nevada Constitution, which was responsive to the question posed previously during Mr. Anthony's presentation. Ms. Craig then testified that Valdez-Jimenez sets forth three basic requirements: (1) that a person arrested for a criminal offense be given a prompt detention hearing; (2) that the court may detain arrestees when necessary and that the court needs to make a determination of necessity to do so; and (3) that poverty-based detention be eliminated, meaning that people who are too poor to pay cannot languish in custody until they are given a hearing.

Ms. Craig elaborated on what a prompt hearing would be. She testified that 48 hours is likely the constitutional maximum amount of time an arrested person should wait before a hearing. She also said that because bail schedules in use in Nevada allow offenders with the ability to pay to

be released shortly after arrest, it is likely constitutionally required that offenders without the ability to pay be given an opportunity to obtain release in a similar amount of time. Ms. Lemcke explained that the 48-hour maximum came from two U.S. Court of Appeals cases which held that a hearing within 48 hours was required in Alabama and Georgia, respectively, and she noted that these jurisdictions did not have bail schedules which allowed for earlier release of offenders with the ability to pay. O'Donnell v. Harris County, 892 F.3d 147 (5th Cir. 2018); Walker v. City of Calhoun, Georgia, 901 F.3d 1245 (11th Cir. 2018).

Ms. Lemcke then said that while 48 hours is the maximum under these cases, if cash bail is made available immediately upon booking for offenders with the ability to pay, then a hearing must be given to an offender without the ability to pay within a maximum of 24 hours. She explained that this is to ensure equal protection and that this standard comes from the U.S. District Court case Pierce v. City of Velda City, 2015 WL 10013006 (E.D. Mo. 2015). Ms. Craig then urged the Legislature to codify the time frame for a prompt hearing as required by the Nevada Constitution.

Ms. Craig then discussed the processes for making pretrial custody determinations which the Supreme Court of Nevada held were constitutionally required. She stated that the pretrial custody hearing must be counseled and adversarial. She noted that many judges were making pretrial custody determinations outside the presence of the defendant or counsel and that this will not be permitted. She said that both the defendant and the state will be entitled to counsel and to the opportunity to present evidence.

Ms. Craig then explained that the Court held that the state carries the burden of proving that pretrial detention is necessary. The Court ruled that subsection 1 of NRS 178.4851, which requires a defendant to show good cause in order to be released without bail, is unconstitutional and unenforceable. She said that the state will be required to show the court why the state wants the person in custody. She testified that the evidentiary standard will be for the state to show by clear and convincing evidence that there are no less restrictive means to assure the safety of the community and the appearance of the offender in court. She said that this means that courts must make specific findings on why monetary bail is necessary as opposed to other conditions should the court choose to impose monetary bail as a condition of release. She said the Court stated that unattainable release conditions are a de facto detention order and thus require heightened due process scrutiny.

Ms. Lemcke stated that an important part of the holding is that courts must expressly acknowledge when bail is set in an amount the offender cannot afford. This requires courts to make an inquiry into the financial status of the offender. She explained that it is not enough for a judge merely to make findings as to why monetary bail is appropriate. Rather, the court must make findings as to why the amount of monetary bail is appropriate in light of the offender's ability to pay. In other words, if the court sets monetary bail in an amount the offender cannot afford, the court must acknowledge that the order will result in the pretrial detention of the offender and must articulate reasons why this is necessary.

Ms. Craig said that the holding is not limited to monetary bail but rather applies to all conditions of release which may be unattainable for an offender. For example, if the court orders an offender placed on mid-level electronic monitoring, which requires a cell phone, and the offender does not have a cell phone, that would be an unattainable release condition which would result in detention, so the court would have to articulate its reasons for issuing the order with that result.

Chair Harris asked about the reasons why a judge would order monetary bail set at an unattainable amount versus simply issuing a transparent order of detention of the defendant. Ms. Craig replied that the issue is complex because the Nevada Constitution requires all offenders to be bailable except in murder cases. She said that her office's position is that courts should be able to set no-bail holds if the state has met its burden to show that there are no less restrictive alternatives that would ensure community safety and appearance in court. Ms. Lemcke stated that there should be a statutory mechanism by which courts can enter transparent detention orders. Chair Harris stated that she agrees with the goal of eliminating the artificial distinction between unattainable bail and detention and supports the requirement that courts state their reasons for detaining someone if they decide to detain them.

Ms. Craig then elaborated on her office's recommendations to the Legislature. She recommended that the Legislature define what a prompt pretrial custody hearing would be. She recommended codifying the requirement that pretrial custody hearings be counseled and adversarial. She then recommended codification of the process for considering the pretrial detention of an offender and the burden of proof required by the Nevada Constitution. The default is that an offender is released. An offender is released unless the state can meet its burden of showing by clear and convincing evidence that the offender is a danger to the community or a flight risk, and the court must make findings in order to impose express detention or an unattainable condition. She also stated that the Legislature should codify the requirement that courts inquire about the financial status of the defendant and set bail in an amount which relates to the defendant's ability to pay.

Ms. Craig noted that certain cases favor detention, such as someone on parole hold, someone arrested while on release from another case and someone with a fugitive hold outstanding. She stated that the burden of proof would remain with the state but that the state should be able to seek clear, transparent detention orders in these cases. Ms. Lemcke noted that even if there was a statutory presumption in favor of detention in these cases, the burden of persuasion would always remain with the state.

Ms. Craig and Ms. Lemcke then emphasized that the end of wealth-based detention is the central point of the Valdez-Jimenez holding. Ms. Craig stated that it is no longer allowable for the courts to issue a bail amount of $50,000, for example, simply because the court describes the charges as serious. Rather, the state must be clear that they want the defendant detained. Ms. Lemcke related that the typical process has been for the prosecutor to look at the charge against the defendant and ask for a certain amount of monetary bail, which may have then triggered a negotiation process but which has been unrelated to the ability of the defendant to pay. She then reiterated the three pretrial custody options—detention, release with conditions and release without conditions—and said that the state should come in with one of these three options instead

of a monetary value and make their showing as to why their request is the least restrictive means of ensuring public safety and appearance in court. Ms. Craig concluded by stating that she looked at the Clark County Detention Center roster the day before and noted that there were 25 individuals being held on bail of $2,000 or less, with several being held for $250 or less.

Senator Scheible stated that in her experience she has noted that individuals with the financial ability to pay bail often do so before their initial arraignment, and she asked whether Ms. Craig and Ms. Lemcke also found this to be true and whether there could be a mechanism for ensuring that people arrested on serious charges do not bail out before ever seeing a judge. Ms. Lemcke explained that in the Las Vegas Initial Appearance Court in Clark County, individuals who are able to pay the scheduled bail amount may do so but that a hearing is held within 12 to 24 hours for those who cannot pay, and she explained that this is done in two session per day of 20 to 40 individuals per session. Ms. Craig testified that it was a problem that individuals were able to bail out before seeing a judge and that certain jurisdictions, such as Wisconsin, had eliminated bail release prior to seeing a judge, but that they also implemented a much faster process for seeing a judge. She said that some jurisdictions implemented a process where there are district attorneys present at jails who are available to make decisions regarding whether to seek detention and to be present before a judge for a hearing shortly after arrest.

Senator Scheible asked about release with conditions such as location and alcohol monitoring ankle bracelets and what should occur if the court orders such a condition but finds that there is no ankle bracelet available or that the defendant is unable to meet the condition. Ms. Lemcke replied that if the court sets a release condition and the defendant is unable to attain it, then, if the state desires detention, the state would have to affirmatively state that they seek detention and make the required findings. She also noted that the court should pay for the costs of electronic monitoring. Ms. Craig said that she expects more ankle bracelets to be available in the wake of Valdez-Jimenez because more individuals will be released without conditions. She also noted that some other jurisdictions have a statutory mechanism by which individuals who cannot attain a release condition are automatically brought back to court and she testified that it is important to include this mechanism.

Vice Chair Nguyen asked whether any of the jurisdictions Ms. Craig and Ms. Lemcke examined had exceptions for misdemeanors or non-violent misdemeanors, and Ms. Lemcke replied that there were no exceptions. Vice Chair Nguyen then asked how the court makes a determination that an offender is unable to pay a certain amount and whether formulas or cutoffs are used. Ms. Craig replied that her office has used federal poverty guidelines when litigating this issue and has asked for bail set at 1% of the offender's annual salary. She said that some jurisdictions require a defendant to fill out an affidavit on their financial ability, and Ms. Lemcke noted that affidavits are statements made under oath, which gives courts redress if the defendant makes any misrepresentations. She testified that financial affidavits are a good tool and that she has seen judges use financial affidavits to set bail in amounts that defendants can pay, such as $250 and $500, for defendants they are comfortable releasing with that financial condition.

Ms. Craig said that some jurisdictions have an agency tasked with ascertaining defendants' abilities to pay, but she noted that this is costly and the process can create time-consuming delays which work against the intentions of the reforms. She also recommended examining the processes in Arizona and New Mexico. She said that New Mexico utilizes promissory notes which allow the court to obtain security without the defendant providing money up front for the court to hold, and she also said that New Mexico has a mechanism whereby defendants may post 15% of the bail amount with the court, which is the amount that a bail bondsman would charge, and then the defendant gets the 15% back when they appear.

Vice Chair Nguyen said that certain municipal courts do not have the ability to set up and run electronic monitoring programs on their own, and she asked whether, in a case where the prosecutor believes some supervision is required but the jails or police departments have no available ankle bracelets, the prosecutor would then be forced to seek detention and whether this would be a large-scale issue given the presumption of release on own recognizance. Ms. Craig said that 15 years ago in Nevada, most criminal defendants in front of justice court judges were released with no conditions and that it has only been within the past 4 years that jails allowed the courts the ability to use the jail's monitors. She testified that courts have since come to impose electronic monitoring more frequently as a default decision because it allows judges to avoid choosing between either detention or release on own recognizance. She also noted that detaining someone of low or moderate risk because there is no available ankle bracelet would potentially give rise to litigation and that the state would likely face difficulty showing that detention was the least restrictive alternative.

Assemblyman Roberts asked whether bail would still be available from arrest until jail under Ms. Lemcke and Ms. Craig's recommendations. Ms. Lemcke replied that the Legislature may choose to continue to have a bail schedule, but that the previously discussed problem of high risk offenders with the ability to pay being quickly released with no other conditions would still exist. Assemblyman Roberts then asked whether there could be situations where there would not be a presumption of release or where there could be a presumption of detention, such as if the offender was already on release for another offense. Ms. Craig replied that under the current system, if an offender is on probation and commits an offense, they will be held, and that there are current sections of NRS which provide that a person arrested for a new offense while released on bail can be held without bail. Ms. Craig stated that these sections of statute are very interconnected and intertwined and that the Legislature could streamline them. Ms. Lemcke reiterated that the Legislature could eliminate bail schedules and instead move all offenders through individualized hearings, as is currently practiced in the Las Vegas Initial Appearance Court.

Senator Scheible stated that she would like the Committee to be aware of the fact that under the current system, no-contact orders exist only in the court records, not those of the police departments, so if the perpetrator of a crime is subject to a no-contact order and violates it, the victim's only redress is to contact the prosecutor and schedule a hearing in court for the violation, i.e. the victim cannot get the police department to come arrest the person. Ms. Lemcke stated that this is generally correct but that offenders on electronic monitoring may be ordered to refrain from certain addresses and the police can actively monitor the offender for violations. Senator

Scheible emphasized the fact that many offenders are not placed under electronic monitoring, and Ms. Lemcke testified that it would be good for the Legislature to provide a rapid police remedy for no-contact orders similar to what exists for temporary restraining orders. Ms. Lemcke also noted that the process for bringing a defendant back into court would be sped up alongside the acceleration of initial pretrial custody hearings.

Assemblyman Flores asked what Nevada has been doing well. Ms. Craig replied that the Las Vegas Initial Appearance Court is a good, transparent, efficient and appropriate process which accomplished the prescriptions of Valdez-Jimenez before the case was decided, and Ms. Lemcke agreed that the Initial Appearance Court is very good.

Chair Harris asked whether a prosecutor who seeks an intermediate level of restriction such as release with electronic monitoring will have to prove by clear and convincing evidence that no less restrictive alternative is available or if that evidentiary standard will only be used when the prosecutor argues for detention. Ms. Craig replied that Valdez-Jimenez provided, at minimum, that the clear and convincing standard applies to orders resulting in detention versus non-detention, but she said that the case did not specifically address the evidentiary standard for decisions between lower, non-detention levels of restriction. Ms. Lemcke stated that the Legislature would be free to codify the clear and convincing evidentiary standard for all levels of restriction since the Legislature is generally free to provide more protections than the Nevada Constitution requires as a minimum.

Chair Harris asked what resources of the state would be strained if the Valdez-Jimenez decision was properly implemented through the state and whether there are enough judges, district attorneys and public defenders to provide everyone the rights afforded to them. Ms. Craig replied that the hearings described in Valdez-Jimenez are constitutionally required and should have been occurring since the opinion was released on April 9, 2020. She said that achieving this may require the state to investigate alternatives to in-person hearings, such as telephonic or Zoom hearings, and may have to implement a mechanism for providing defense attorneys and defendants access to the information they need for the hearings. She said that some jurisdictions do not keep complete statistics on their daily number of arraignments and that the Legislature can investigate and decide whether to add judges, prosecutors and public defenders.

Presentation on Pretrial Risk Assessments

Holly Welborn, Policy Director, American Civil Liberties Union ("ACLU"), Kristian Lum, Assistant Research Professor of Computer and Information Science, University of Pennsylvania, and Logan Koepke, Senior Policy Analyst, Upturn, presented on the use of pretrial risk assessments. Ms. Welborn began by testifying that pretrial risk assessments should not be based on arrests and arbitrary demographics which serve to substitute one form of wealth-based detention for another, and she recounted that she had testified against the administrative docket which required the statewide use of the NPRA. She stated that it is important for lawmakers to demand transparency and oversight regarding the use of the NPRA and she also recommended

that the Committee submit a bill draft request which would require courts to report racial data with respect to the use and effects of the NPRA.

Kristian Lum began her presentation by noting that the Committee has already heard testimony in favor of the use of pretrial risk assessments and that she aims to present concerns and arguments against the use of pretrial risk assessments. Ms. Lum testified that although risk assessments are thought to be beneficial because of their objectivity, risk assessments are only as objective as the data used to build and validate them. She stated that there is racial bias in policing which creates racial bias in the data on past criminal history. She quoted an article in which Sandra Mason wrote that if an African American man has three arrests on his record, it suggests only that he had been living in New Orleans, whereas if a white man has three past arrests, it suggests that he is bad news. Ms. Lum explained that prior arrest data is not an objective measure of past behavior if you accept that there has been racial bias in policing. She said that the correlation between past criminal history and future arrests, which risk assessment tools are based on, may be driven by the fact that police will likely target in the future the same people targeted in the past, so even if a statistical correlation exists, the tools do not provide insight as to the cause of the correlation. She said that even when a model does not expressly note whether a person is a certain race or gender or other demographic, the model can still preserve and replicate disparities along those demographics if the data used in the model's inputs is biased.

Ms. Lum pointed out that the NPRA penalizes individuals for being homeless by giving them three additional points if they are homeless, which increases their likelihood of being labelled a moderate or high risk individual and subsequently detained. She said that although there may be a statistical correlation between homelessness and rearrest, the NPRA does not provide insight as to why this correlation exists. She explained that the correlation could be driven by disproportionate police targeting of homeless people or by the fact that homeless people may receive less court date reminders or notices of court date changes.

Ms. Lum testified that even if a risk assessment tool does provide some objective measure of a person's risk, science and statistics do not provide insight as to what should happen with these individuals. She concluded by stating that it is important to monitor the effects of the NPRA in Nevada and whether there are actual reductions in racial disparities going forwards, and she said that if the NPRA does not result in reductions in disparities, then the Legislature should rethink the factors which go into the NPRA and whether a risk assessment is an appropriate tool for pretrial custody determinations.

Logan Koepke began his presentation by presenting two questions: (1) Do pretrial risk assessments help advance the goals of bail reform; and (2) if pretrial risk assessments must be used, what controls and policies should be in place to protect civil rights. Mr. Koepke explained that research on the first question can be divided into two topics: research on the predictiveness of the tools themselves and research on the practical effects of the tools on decision making and pretrial outcomes. He said that the vast majority of the research has focused on the predictiveness of the tools themselves and that there have been few rigorous methodological reviews of the

impacts of risk assessment tools in practice. He stated that the impact of pretrial risk assessments is unclear at best and worth reconsidering at worst.

Mr. Koepke testified that his review of the research yielded no evidence that the use of pretrial risk assessment tools decreases public safety. He then said, however, that it is unclear whether adoption of the tools has reduced rates of incarceration and jailing. He discussed the example of Kentucky, which introduced a public safety assessment in 2013 which resulted in an increase in pretrial release and especially non-financial pretrial release for several years, but then the effects eroded and the rate of pretrial release became lower than before implementation of the tool, as indicated in a study by Megan Stevenson. He also referred to a study of Kentucky's risk assessment tool by Alex Albright which reported that judges were more likely to override the risk assessment's recommendation in a punitive way for moderate risk African American defendants than similarly situated moderate risk white defendants.

Mr. Koepke discussed the example of New Jersey, which reformed its pretrial detention system through constitutional amendments passed in 2014 and put into effect in 2017 and included the use of a pretrial risk assessment tool. He stated that New Jersey saw the positive effect of an overall reduction in pretrial jail population from approximately 9,000 in 2015 to 5,000 in 2018, but he stated that the reduction was present in the data before the reforms were enacted, so it is difficult to attribute the reduction to the risk assessment tool. He said that New Jersey has not seen as many individuals released on own recognizance or on the lowest level of monitoring as originally projected, and he noted that there was an increase in electronic monitoring and the highest level of supervision before electronic monitoring. He also said that racial and ethnic disparities still persist in the New Jersey jail population, with African American defendants making up 54% of the jail population when measured both in 2012 and in 2018. He then discussed the example of Charlotte, North Carolina, where the county adopted a large number of reforms including a pretrial risk assessment tool, and he said that most of the successes were determined to be caused by reforms in processes occurring before the use of the pretrial risk assessment.

Mr. Koepke concluded by emphasizing the importance of ongoing assessment of the observed impacts of pretrial risk assessment tools. He said that there is no way to know whether the NPRA is accurately predicting risk without keeping data and regularly evaluating the data. Chair Harris then invited questions for Ms. Welborn, Ms. Lum and Mr. Koepke but there were none.

Presentation on Community Issues Relating to Pretrial Detention

M.J. Ivy, Pastor, Kinship Community Church, presented on community issues relating to pretrial detention. Pastor Ivy began by introducing himself as a communications expert who has had his own company, Ivy's Communications Group, for 11 years and been in public relations communications for 20 years. He said that he is the pastor of the Pentecostal Church of God in Christ and that he has been involved in civic organizations in Clark County for many years.

Pastor Ivy discussed his experience with the criminal justice system as an African American. He testified that he was first arrested at 16 years of age for driving his father's car and that there have been instances where he was required to post bail but did not receive the money back after his case was dismissed. He said that the cash bail system affects people's careers and marriages and gives people personal trauma. He said that he has been pulled over and detained by police officers and that this was a humiliating and dehumanizing experience where officers put handcuffs around his ankles and talked to him in an unacceptable way.

Pastor Ivy said that the ankle bracelets come from the Parole and Probation Division and that they are always out of them. He said that people released on parole and probation can easily get arrested for a new charge because they live in areas that are highly policed. He then said that most often, people from his community could not afford to bail out of jail and prepare their legal defense, and he said that they cannot afford attorneys to defeat the state's charges. He explained that the state often charges multiple offenses which drives up the bail amounts via the charge-based bail schedule, and because people cannot afford either to post the full amount or to pay and lose the 15% a bail bondsman would charge, they often choose a plea deal in order to be released. However, this often means parole or probation, so if they get arrested again, the consequences compound, he said. He noted that if a person cannot get out within 24 to 48 hours, it can often cost them their minimum wage job.

Pastor Ivy explained that there is an experience of a them-versus-us mentality with police officers. He said that police officers seem to taunt them, and he noted the disparate treatment of the police officers who were charge with the death of George Floyd in Minneapolis but who were never arrested and instead were allowed to return directly to their homes. He said that the them-versus-us dynamic also involves whether someone is poor or if they can afford to pay. He testified that it is wrong for the system to take a person's money in order for the system to be assured that the person would show up and that in his experience, he was never asked about his service in Desert Storm and Desert Shield, his college degree, his white-collar job, but was only asked if he could pay. He noted that the money goes to bail bondsmen and to the counties and the state in order to pay the law enforcement officials who perpetuate this cycle.

Pastor Ivy said that when the state examines whether an arrested person is a danger to society, the state examines records of past arrests and detentions, and he explained that these records may contain notes from a police officer stating that the person had a bad demeanor or may contain erroneously marked charges. He stated that racial discrimination and classism is reinforced because people at the top of society do not look like the people at the bottom. He said that police officers feel threatened because of the color of his skin and that the cash bail system affects people of color disproportionately, especially African American men. He concluded by saying that he hopes the Committee can come up with a system that is fair to everyone.

Presentation by the Nevada Coalition to End Domestic and Sexual Violence

Serena Evans, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence ("NCEDSV"), presented on community issues regarding pretrial detention and the safety of

survivors of domestic violence. Ms. Evans began by stating that it is important to consider the safety of survivors as the Committee considers pretrial release because the most lethal time in an abusive relationship is after the survivor leaves or after there is an intervention such as an arrest. She noted that 70% of domestic violence murders occur after the victim has gotten out of the home and attempted to end the relationship. She related the story of Christina Franklin, who was shot and killed by her estranged husband after he had been released from detention on domestic violence charges. Ms. Franklin had applied for a protection order which was not granted.

Ms. Evans stated that NCEDSV produces a yearly report on domestic violence and intimate partner homicides within Nevada. She testified that in 2016 there were 24 domestic violence instances which resulted in a total of 33 deaths, and she said that in 2019 there were 19 incidents which resulted in a total of 28 deaths. She said that in 2017, a report listed Nevada as the fourth-highest state for women murdered by men.

Ms. Evans then discussed the history of the legislation designed to protect survivors of domestic violence. She said that the Legislature introduced temporary protection orders in 1979 and expanded the statute to include emergency temporary protection orders which a survivor may obtain after hours over the phone while the perpetrator is in custody. She said that the Legislature added a mandatory 12-hour hold for individuals arrested on domestic violence charges in 1985, and she noted that when the 1999 bail schedule was introduced, bail for domestic violence was set to convey that it would be treated as a serious crime.

Ms. Evans testified that the recent Supreme Court of Nevada case Andersen v. Eighth Jud. Dist. Ct., 135 Nev. 321 (2019), which held that defendants in all domestic violence cases are entitled to a jury trial, has greatly lengthened the time between release and trial, which makes consideration of survivor safety in the pretrial period even more important because perpetrators have more time to threaten and harass the survivors, which may deter them from participating in the trial or pressing charges. She said that part of the solution will be to educate court staff and those making pretrial custody determinations about the dynamics of domestic violence. She said that additional conditions of release, such as ankle bracelets, location monitoring, and drug and alcohol monitoring may effectively protect survivor safety.

Ms. Evans then discussed risk assessment tools designed specifically to predict domestic violence risk. She provided the Committee with materials on the Ontario Domestic Assault Risk Assessment ("ODARA") and the Jackie Campbell Danger Assessment. ODARA is used to predict re-assault by the offender and takes 5-10 minutes to administer, while the Jackie Campbell Danger Assessment predicts femicide and takes over an hour to administer. Ms. Evans said that Maine recently implemented the ODARA tool and that ODARA is widely used by advocates and healthcare professionals. She concluded by stating that all stakeholders in the criminal justice system, including survivors and law enforcement, need to have a say in what the system will look like.

Assemblyman Flores referred to the figure stated by Ms. Evans that 70% of domestic violence murders happen after the victim has attempted to end the relationship and asked whether there was information about whether there was a difference when the offender was released after a 12-hour hold or a period of several days or a week, and Ms. Evans replied that she did not have that information available.

Presentation by the Progressive Leadership Alliance of Nevada

Leslie Turner, Progressive Leadership Alliance of Nevada ("PLAN"), presented on community issues regarding pretrial detention. Ms. Turner began by saying that she hopes to bring the perspective of those impacted by the criminal justice system into the conversation about reform, and she noted that many of those who are defendants in the criminal justice system have also been victims and survivors of crimes.

Ms. Turner testified that the Covid-19 crisis has exposed the hardships which disproportionately fall on the most vulnerable in society. She noted the contradictions inherent in ordering people to shelter in place when there are people with no home or shelter, for example, and between the orders to remain socially distant from others and the fact that sick and healthy incarcerated people are placed together in the same cells. She then discussed the order by Judge Bell to release certain incarcerated people amounting to 10% of the jail population. She said that the 10% cap on releases means that there are people being held pretrial who fit the criteria for release but are being held simply because of the 10% cap, and she said that this discretionary release power introduces bias into the pretrial detention system.

Ms. Turner stated that Clark County Detention Center has a policy which excludes people living in weekly housing from eligibility for house arrest or monitoring options. She said that this type of housing is often the only option for vulnerable people, but they are nonetheless required to sit in jail because they cannot be released with those conditions, even if their housing bills are fully paid. She then testified that bail has been set in amounts greater than defendants can afford even after the Valdez-Jimenez decision on April 9, and she reiterated that a key part of the requirements set forth in the case is for the courts to inquire as to the financial condition of the defendant when setting bail.

Ms. Turner said that many people who do post bail find themselves with nowhere to go, and she said that the Legislature should consider ways to get people back into their communities and resolve any outstanding issues which are preventing them from working, such as investment in rehabilitation services. She reminded the Committee that the long-term goal should be to pursue true rehabilitation and reduce recidivism and ultimately decrease our societal reliance on imprisonment, and she stated that the current system inflicts more trauma than it rehabilitates.

Ms. Turner testified that mechanisms for transparency, data accountability and community feedback need to be included in the implementation of Valdez-Jimenez. She suggested quarterly reports of pretrial detention data. She then said that it is important to ensure that the NPRA does not result in higher levels of supervision and she emphasized the need to contextualize the

information used in the NPRA, such as criminal history, as previously discussed. She also said that it is important to avoid a large increase of supervisory conditions of release because continued surveillance further criminalizes communities. Ms. Turner concluded by noting that many aspects of the Valdez-Jimenez case were present in Assembly Bill 325 (2019), which Ms. Craig helped draft, and she suggested that the Committee examine that bill.

V. DISCUSSION OF ISSUES AND FINAL RECOMMENDATIONS

The Committee held its fourth and final meeting as a work session on August 17, 2020. At that work session, the Committee considered 19 total recommendations and voted to approve 16 recommendations. The approved recommendations consist of 11 recommendations for the drafting of legislation, 4 recommendations for the drafting of a letter, and 1 recommendation to include a policy statement in the final report. The 11 recommendations for the drafting of legislation were combined into 5 bill draft requests for submittal to the 2021 Legislature. A summary of each recommendation approved by the Committee is identified below:

A. RECOMMENDATIONS TO DRAFT LEGISLATION

1. *Recommendation on the Timing of Bail Hearings*

During the Committee meeting held on March 3, 2020, Kendra Bertschy and Evelyn Grosenick of the Washoe County Public Defender's Office presented on current pretrial releases processes across Nevada. The pair testified that significant differences in the pretrial process exist across the counties in this state. Counties are not uniform on when bail hearings must occur, nor are judges within the same court uniform on when the defense is permitted to address custody. Consequently, Ms. Bertschy and Ms. Grosenick testified that even low risk detainees may spend unnecessary time in pretrial detention and may spend longer in jail in one county versus another. For example, at the same meeting, Adam Cate, Deputy District Attorney, Washoe County District Attorney's Office, testified that unlike Clark County, Washoe County does not use standardized bail schedules, a procedural distinction which affords certain pretrial detainees the opportunity to be immediately released in Clark County whereas the same individual would be detained until his or her pretrial detention hearing in Washoe County.

Additionally, at the Committee meeting on June 3, 2020, Christy Craig and Nancy Lemcke of the Clark County Public Defender's Office discussed the Supreme Court of Nevada's decision in Valdez-Jimenez, in which the Court held that a bail hearing must occur within a reasonable time after arrest.

The following recommendations for legislation embody various avenues to implement pretrial detention hearings within a reasonable amount of time after the arrest of a defendant:

Policy A: At the Committee meeting held on March 3, 2020, Ms. Bertschy and Ms. Grosenick proposed legislation requiring a bail hearing within 12 to 24 hours after arrest, or within 48

hours if the state seeks preventive detention measures for individuals who pose a danger to the community.

Policy B: At the Committee meeting held on June 3, 2020, Ms. Craig and Ms. Lemcke, in light of Valdez-Jimenez and based in part on nonbinding case law, suggested legislative reforms which include mandating a prompt bail hearing within a maximum of 48 hours of arrest, but not later than 24 hours after arrest if bail is offered on a standardized bail schedule.

Policy C: During the March 3, 2020 meeting, John Jones of the Clark County District Attorney's Office suggested permitting local jurisdictions to individually implement procedures which would facilitate prompt bail hearings. Mr. Jones utilized Clark County's Initial Appearance Court as an example of a local jurisdiction implementing pretrial release procedures that embody prompt bail hearings.

At the August 17, 2020 work session, Kendra Bertschy, Deputy Public Defender, Washoe County Public Defender's Office, testified in the public comment at the beginning of the work session that her office would prefer to see this recommendation rearticulated to state a specific amount of time, such as 12 or 24 hours, instead of stating a reasonable amount of time. During the Committee's discussion of the recommendation, Senator Hammond asked whether there was a specific time frame in mind from the Committee's discussion at earlier meetings. Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, explained that the language of "reasonable time" is the language the Supreme Court of Nevada used in the Valdez-Jimenez case and that the Committee discussed several options which were summarized for the Committee as Policy A, B and C, above. Senator Hammond replied that the language will be determined in the bill drafting process. The motion to pass the recommendation passed unanimously.

> **RECOMMENDATION NO. 1 —** Draft legislation to require bail hearings to be conducted within a reasonable time. **(BDR 374)**

2. *Recommendation on Standardized Bail Schedules*

During the March 3, 2020 Committee meeting, Kendra Bertschy and Evelyn Grosenick of the Washoe County Public Defender's Office testified that Nevada needs an individualized hearing for all detainees in order to properly determine if detention is necessary. At the same meeting, John Jones of the Clark County District Attorney's Office agreed that individualized bail hearings should be the norm, rather than standardized bail. Moreover, at this meeting, Robert Langford, a private defense attorney in Clark County, recommended eliminating standardized bail schedules. He testified that standardized cash bail is unconstitutional, asserting that it is a violation of the Equal Protection Clause of the U.S. Constitution because it does not take into account one defendant's ability to pay while another defendant may be able to afford the standard cost.

At the August 17, 2020 work session, Vice Chair Nguyen asked whether there was information presented to the Committee about the elimination of standardized bail schedules from the Administrative Office of the Courts, and Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, replied that there was discussion. Assemblyman Roberts asked whether this recommendation would end the ability for defendants to be released on bail prior to a bail hearing or arraignment. Mr. Anthony explained that this recommendation would work alongside the recommendation that bail hearings occur within a reasonable time, so the bail hearing would substitute for the bail schedule. Vice Chair Nguyen said that the Committee had discussed concerns about defendants who had financial resources being able to post bail without conditions or monitoring pursuant to a bail schedule. Assemblyman Roberts expressed concern with removing standardized bail but stated that he would vote yes to move forward with the new scheme encompassed by the simultaneous bills. Senator Hammond said that he shared Assemblyman Roberts's concern about eliminating the ability to be released early but that he would vote yes in order to move forward with it. The motion on the recommendation passed unanimously.

> **RECOMMENDATION NO. 2 —** Draft legislation to prohibit standardized bail schedules and require individualized bail hearings. **(BDR 374)**

3. *Recommendation on the Burden of Proof*

During the meeting held on June 3, 2020, Christy Craig and Nancy Lemcke of the Clark County Public Defender's Office testified that Valdez-Jimenez clarifies that it is the state that bears the burden of proving the necessity of bail, and that the state cannot constitutionally be relieved of that burden. Moreover, the Supreme Court of Nevada held in Valdez-Jimenez that subsection 1 of NRS 178.4851 was unconstitutional, as it placed the burden on the defendant to show good cause before being released without bail. Ms. Craig and Ms. Lemcke proposed adopting legislation repealing the current good cause requirement and codifying the state's burden of proof in pretrial detention matters.

At the August 17, 2020 work session, Senator Scheible said that repealing subsection 1 of NRS 178.4851 makes sense because that subsection was held unconstitutional by the Supreme Court of Nevada in Valdez-Jimenez, and she asked whether the legislation drafted in response to this recommendation would codify that the burden on the state would be clear and convincing evidence, as suggested in Valdez-Jimenez, or another evidentiary standard. Chair Harris asked if Valdez-Jimenez required clear and convincing evidence, and Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, replied that Valdez-Jimenez is clear in its holding that subsection 1 of NRS 178.4851 is unconstitutional and that the state must show by clear and convincing evidence that the release conditions sought are the least restrictive necessary. He then said that it was a policy choice for the Committee as to whether to codify the burden of proof on the state and as to the evidentiary standard for that codified burden.

Senator Scheible asked for clarification on what it is the state needs to prove to satisfy its burden, i.e. whether the state must prove that it is requesting the least restrictive means possible, that the defendant is a danger to the community and/or that the defendant is a flight risk. Vice Chair Nguyen said that all interested parties are considering how to interpret the Valdez-Jimenez decision and that there is ongoing litigation on those issues, and she raised the question of whether this should be defined legislatively or left to the courts. Senator Scheible said that there is also an open question regarding whether the state is required to articulate on the record all the points relevant to this burden or if judges are permitted to draw inferences on their own.

Chair Harris stated that it may not be practical for the Committee to resolve all these fine points in its recommendation and that the legislative process will address these points, and she suggested that this recommendation be brought forward outside of a large omnibus bill so that these points can be addressed effectively. She said that the question at hand is whether the Committee would like to draft legislation that somehow places the burden of proof on the state, in line with the Valdez-Jimenez decision. Senator Scheible stated that she is not comfortable supporting this request without addressing these questions first. She explained that she believes the burden is on the state to show by clear and convincing evidence that the state has requested the least restrictive means necessary for a defendant's release, and she said that the Committee should answer questions about the burden of proof before legislation is requested.

The motion on the recommendation passed. Assemblyman Flores, Assemblyman Roberts, Senator Hammond, Vice Chair Nguyen and Chair Harris voted yes, and Senator Scheible voted no.

> **RECOMMENDATION NO. 3 —** Draft legislation to repeal subsection 1 of NRS 178.4851 and to codify the burden of proof on the state. **(BDR 375)**

4. *Recommendation on Pretrial Release Conditions*

Policy A: At the March 3, 2020 meeting, Nancy Lemcke of the Clark County Public Defender's Office proposed that the state should have three options regarding the defendant's custody during the pretrial process. She specified that a court should consider these options in the following order: (1) release without conditions; (2) release with conditions; (3) and detention. Under that framework, Ms. Lemcke argued that the state can make a transparent request and proceed to a hearing if it is seeking conditional release or detention.

Also, during the Committee meeting held on June 3, 2020, Christy Craig and Nancy Lemcke of the Clark County Public Defender's Office discussed the Valdez-Jimenez case. The pair premised that Valdez-Jimenez clarifies that the default during the pretrial process is to release the defendant, and that bail would be excessive for anyone not a danger to the community or who presents a low risk of failing to appear. Detention would accordingly be appropriate only when necessary. In conclusion, Ms. Craig and Ms. Lemcke stated that Valdez-Jimenez requires the state to prove by clear and convincing evidence that detention, as opposed to release or less restrictive nonmonetary conditions, is necessary to ensure community safety and the defendant's

return to court. That standard would apply whether the state seeks conditioned release or detention of a defendant.

Ms. Bertschy and Ms. Grosenick of the Washoe County Public Defender's Office testified similarly at the March 3, 2020 meeting, stating that, constitutionally, conditions of release must be the least restrictive means necessary to prevent imminent threat of serious bodily harm and ensure a defendant's future appearance.

During the same Committee meeting, Marc Ebel of Triton Management Services recommended two presumptions, the first of which was a presumption that the maximum number of people should be released under the least restrictive means possible while also ensuring community safety and defendants' appearance in court.

Policy B: At the March 3, 2020 meeting, John Jones of the Clark County District Attorney's Office agreed that defendants should not be detained unnecessarily, but that the court must consider whether a defendant is a risk to the public or the victim (which must be accounted for under Article 1, Section 8A of the Nevada Constitution) in determining whether bail is necessary. Specifically, Mr. Jones recommended codifying Marsy's Law (Article 1, Section 8A of the Nevada Constitution) into the pretrial release statutes which would codify the rights of victims to have input into pretrial release decisions, arguing that the safety of victims and the victims' families must be considered such decisions. In conclusion, Mr. Jones argued that, in considering the necessity of pretrial detention, a court should consider: (1) the safety of the community, including the safety of a victim, if applicable; (2) whether the defendant will interfere in the prosecution; and (3) whether the defendant is a flight risk.

At the August 17, 2020 work session, Assemblyman Roberts asked if the legal staff could summarize the differences between Policy A and B. Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, replied that Policy A and B are compatible and could be passed alone or together. He explained that Policy A concerns release and the order the court should proceed in and Policy B concerns the rights of victims and codifying that victims would have the opportunity to be heard in the pretrial process. Chair Harris explained that her plan was for the Committee to discuss and vote on Policy A, then consider and vote on Policy B. There was no further discussion on Policy A.

The motion on the recommendation described by Policy A passed. Assemblyman Flores, Assemblyman Roberts, Senator Scheible, Vice Chair Nguyen and Chair Harris voted yes, and Senator Hammond voted no.

The Committee then addressed Policy B. Chair Harris asked Mr. Anthony whether it was common for the Legislature to codify things that are already in the Nevada Constitution, noting that Marsy's Law, which concerns the rights of crime victims, is already in the Nevada Constitution. Mr. Anthony replied that the Legislature could codify the same and that it may serve the function of making the point more visible to victims and litigants. Chair Harris asked whether this recommendation would specify whether a victim would be required to testify in

person or if they could submit information for consideration in writing, and Mr. Anthony replied that Policy B is open-ended as it stands. Chair Harris then asked whether this recommendation would have an impact on the requirement that bail hearings occur within a reasonable time, and Mr. Anthony replied that he did not recall testimony on that specific point.

Vice Chair Nguyen stated that she does not believe it necessary to further codify this recommendation, given that it is already present in the Nevada Constitution, the strongest legal document in the state, and Chair Harris concurred. Senator Hammond said that he sees no reason not to reiterate the recommendation in statute. Assemblyman Roberts concurred and stated that this would send a statement to victims that they will be considered during pretrial process.

The motion to pass the recommendation described by Policy B did not pass. Assemblyman Flores, Vice Chair Nguyen and Chair Harris voted no, and Assemblyman Roberts, Senator Hammond and Senator Scheible voted yes.

> **RECOMMENDATION NO. 4 —** Draft legislation to codify that pretrial custody determinations be made in the following preferential order: (1) release without conditions; (2) release with conditions; and (3) detention. Draft legislation to require the state to prove by clear and convincing evidence that detention or release with conditions is the least restrictive means necessary to ensure community safety and the defendant's return to court. **(BDR 374; 375)**

5. *Recommendation on Review of Unattainable Conditions of Release*

Policy A: During the Committee meeting held on March 3, 2020, Richard Suey of the MacArthur Foundation and Ta'mara Silver of Clark County Detention Center ("CCDC") discussed statistics relating to the CCDC jail population. The discussion included statistics on persons held at CCDC on bail of less than $2,500 for more than seven days. Mr. Suey and Ms. Silver posited that despite efforts to increase services to jail populations, such as sending bail reports on individuals held longer than seven days to judges and attorneys, that typically if a defendant cannot afford to pay the $2,500 they will not be released. Chair Harris asked what could be done to help and assess persons who do not have the means to post bail. Mr. Suey and Ms. Silver suggested a mechanism, such as a population manager as used in Clark County, through which jails themselves can more frequently assess and report on individuals without financial means so that the individual can be placed on a court calendar for a reassessment of his or her bail.

Policy B: At the June 3, 2020 meeting, Christy Craig and Nancy Lemcke of the Clark County Public Defender's Office discussed unattainable bail conditions and cited the example of New Mexico, which has a mechanism that brings defendants back to court if a bail condition keeps him or her held longer than 24 hours after the court ordered them to be released. The pair proposed that Nevada adopt a similar mechanism that would automatically bring defendants back into court should some condition of pretrial release, with which they cannot comply, keeps them in detention.

At the August 17, 2020 work session, the Committee discussed a recommendation to draft legislation prohibiting unattainable conditions of pretrial release. This recommendation was ultimately modified and moved to be included within Recommendation No. 5. Senator Scheible expressed concern that this recommendation would effectively prevent the state from detaining somebody pretrial, even if the state meets its burden of showing by clear and convincing evidence that a person is a danger to the community or a flight risk. Chair Harris said that she is open to modifying the recommendation to state that heightened due process procedures would apply when unattainable conditions are imposed. Senator Scheible stated that this modified recommendation would nonetheless conflict with the right to bail guaranteed by the Nevada Constitution in the sense that when the state desires to detain someone pretrial, the court must impose unattainable conditions, so this recommendation would be tantamount to implementing a heightened level of scrutiny for pretrial detention generally. Chair Harris said that the recommendation would require the state to provide additional proof when a defendant is unable to attain a condition of release and the state then seeks to increase the conditions of release. Senator Scheible said that she cannot support a recommendation that requires a court to go back and forth in that manner. Vice Chair Nguyen noted that many jurisdictions do not have options like house arrest available, and she said that the intent behind this recommendation could be incorporated into another recommendation. There was a motion to table this recommendation which passed. Assemblyman Roberts, Senator Hammond, Senator Scheible, Vice Chair Nguyen and Chair Harris voted yes, and Assemblyman Flores voted no.

The Committee then turned to Recommendation No. 5, described by Policy A and B, above. Chair Harris noted that Policy B does not address whether the court should increase or decrease the conditions placed on a defendant when a defendant is ordered released with conditions but is unable to meet those conditions, but that it would allow a defendant to get back in front of a judge. Senator Scheible said that often when a defendant is ordered released with conditions but is not able to be actually released, it is because the defendant has another case going on, e.g. they are subject to a city detainer or have a warrant outstanding from a different county. She said that the problem is complex because defendants can have such varied reasons for being unable to meet conditions of release. For example, a defendant may tell their attorney that they are eligible for house arrest but they may not actually be because they do not have a cell phone with internet, which presents a different set of issues than a defendant who tells their attorney they are eligible but are actually not because there is another outstanding case against them. She said that she does not want to tie the hands of judges when responding to these situations, but she stated that she supports this recommendation for bringing defendants back in front of a judge to resolve these issues. Chair Harris agreed and stated that she wanted to record the Committee's intention that judges use factors when reevaluating defendants brought back to court in this manner similar to the factors used when making initial determinations.

Chair Harris then turned the Committee's attention to Policy A and stated that it is possible for the Committee to recommend both Policy A and B. Chair Harris and Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, explained that this recommendation would require jails to keep track of their inmate population and report to the courts on the number of persons held longer than seven days, and they noted that this would not

require defendants to be physically brought back to court. Senator Scheible stated that she did not see the value in this reporting recommendation, given that many defendants in Clark County Detention Center, for example, are being held on high bail for murder and would therefore show up on the report every time it is issued. Vice Chair Nguyen stated that she views the recommendation as being for defendants held on bail of $2,500 or less, and she noted that she has never seen a murder client for whom bail was set that low. Senator Scheible noted that the recommendation did not specify the $2,500 figure at that point and that she only wanted to tighten up the recommendation.

Chair Harris invited the Committee to vote on a version of Policy A amended to reflect the $2,500 cutoff figure for reporting. The motion on the recommendation passed. Assemblyman Flores, Senator Scheible, Vice Chair Nguyen and Chair Harris voted yes, and Senator Hammond and Assemblyman Roberts voted no.

The Committee then turned to Policy B. Vice Chair Nguyen and Chair Harris discussed the previously tabled recommendation and said that the recommendation could be included with Policy B as a statement of legislative intent, i.e. there is a preference for attainable release conditions. The motion on this recommendation passed. Assemblyman Flores, Senator Scheible, Vice Chair Nguyen and Chair Harris voted yes, and Assemblyman Roberts and Senator Hammond voted no.

> **RECOMMENDATION NO. 5 —** Draft legislation to create a mechanism which brings a defendant back to court within 24 hours of when the defendant is unable to meet a condition of his or her release. Draft a legislative declaration that includes language that: (1) unattainable conditions of release are disfavored; and (2) encourages courts to find ways to keep people out of jail simply because they cannot pay and to find attainable conditions of release. Draft legislation to require jails to submit reports concerning defendants held on bail of $2,500 or less for more than 7 days. **(BDR 374; 378)**

6. *Recommendation on Determining Ability to Pay*

During the June 3, 2020 meeting, Vice Chair Nguyen asked Ms. Craig and Ms. Lemcke about appropriate methods for determining the ability of a defendant to afford a monetary condition of pretrial release. Ms. Craig testified as to two options for determining the ability of a defendant to pay:

Policy A: Ms. Craig and Ms. Lemcke testified that the Clark County Public Defender's Office often uses the federal poverty guidelines to determine a defendant's ability to pay. The guidelines help to determine indigency and the guidelines further provide a method for requesting a fair percentage of the income of the defendant. Ms. Craig recommended using the federal poverty guidelines because they are established by the federal government and are easy to understand.

Policy B: Ms. Craig and Ms. Lemcke also testified that some jurisdictions use financial affidavits containing relevant information from a defendant to determine his or her ability to pay a monetary condition of pretrial release.

At the August 17, 2020 work session, Chair Harris stated that Policy A and B are compatible and could be passed together. Vice Chair Nguyen stated that the recommendation is appropriate because it gives judges and all parties more information to determine indigency, and she noted that Clark County already requires individuals to complete financial affidavits as part of the Initial Appearance Court process. Senator Hammond said that he was wondering when judges get all the information that will be required of them, and he said that he supports this recommendation so that everyone can get information in a timely manner. The motion to pass this recommendation passed unanimously among those present for the vote.

> **RECOMMENDATION NO. 6 —** Draft legislation to require the use of federal poverty guidelines to determine the ability of a defendant to pay. Draft legislation to require the submittal of a financial affidavit by a defendant to aid the court in determining the ability of a defendant to pay. **(BDR 374)**

7. *Recommendation on Procedural Protections*

During the June 3, 2020 Committee meeting, Christy Craig and Nancy Lemcke testified that Valdez-Jimenez requires procedural protections that are not presently uniform across Nevada. Namely, an individualized, adversarial hearing determining the pretrial release conditions of a defendant. Ms. Craig proposed that the Legislature statutorily mandate that the defendant: (1) be present at the hearing; (2) have counsel; and (3) have access to all the records that are in the possession of the state and the court.

At the March 3, 2020 meeting, Kendra Bertschy and Evelyn Grosenick testified to additional procedural protections. Specifically, they suggested that defendants be afforded counsel, the right to present evidence and the right to cross-examine witnesses against them. During an individualized hearing, the state may present its evidence that the defendant should be released with conditions or that, by clear and convincing evidence, the defendant should be detained.

At the August 17, 2020, work session, Chair Harris invited discussion on this recommendation but there was none. The motion to pass this recommendation passed unanimously among those present for the vote.

> **RECOMMENDATION NO. 7 —** Draft legislation to: (1) require the defendant be present at the bail hearing; (2) require that the defendant be afforded counsel; (3) require the defense to have access to all the records that are in the possession of the state and the court; (4) authorize the defense to present evidence; and (5) authorize the defense to cross-examine any witnesses. **(BDR 374)**

8. *Recommendation on Specific Findings of Fact*

During the June 3, 2020 Committee meeting, Christy Craig and Nancy Lemcke of the Clark County Public Defender's Office proposed that the Legislature should statutorily require courts to make specific findings as to the imposition of pretrial release or detention. They posited that Valdez-Jimenez requires a court to make findings when it makes a pretrial custody determination. The pair posed that the court must make findings on: (1) why the defendant is being released or detained; and (2) why any conditions of pretrial release are necessary, including how such conditions relate to the individual defendant. Specifically in regards to the imposition of a monetary condition of pretrial release, the court must make specific findings: (1) that the court has considered the ability of the defendant to pay; and (2) if monetary bail is set in an amount that the pretrial detainee cannot pay, findings as to both the necessity and amount of monetary bail imposed by the court.

Kendra Bertschy and Evelyn Grosenick of the Washoe County Public Defender's Office proposed the same responsibility for the court, stating that the court must make specific findings justifying pretrial detention.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 8 —** Draft legislation to require courts to make specific findings of fact: (1) as to why the defendant is being released or detained; (2) as to why any conditions of pretrial release are necessary, including how such conditions relate to the individual defendant; and (3) with regard to monetary conditions of release, that the court has considered the ability of the defendant to pay and, if monetary bail is set in an amount that the pretrial detainee cannot pay, as to both the necessity and amount of monetary bail imposed by the court. **(BDR 374)**

9. *Recommendation on Data Collection and Reporting*

At the March 3, 2020 Committee meeting, Mr. Ebel of Triton Management Services recommended that the Legislature require robust data collection on the pretrial process. Mr. Ebel proposed that "bad data" (e.g., potentially racially biased data) is being used to set bail, which introduces flaws into the bail system. Accordingly, an area for reform is data collection so that the Legislature knows who is in jail and why, how long defendants are in jail, what pretrial process are defendants afforded and how pretrial success is measured.

Similarly, Leslie Turner of PLAN recommended at the June 3, 2020 meeting that the Legislature require collection and reporting of pretrial detention statistics that can be compiled into reports for public consumption. She proposed quarterly reports.

Moreover, during the June 3, 2020 meeting, Serena Evans, Policy Specialist with NCEDSV, emphasized the safety of victims of crime, noting the most dangerous period for victims of

domestic violence is after they have left the home or there has been an intervention, such as arrest of the defendant. She accordingly recommended researching the effectiveness of the various pretrial release conditions, such as GPS monitoring and prohibitions on the consumption of alcohol, as they relate to the safety of victims so that victims remain safe during pretrial processes.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 9 —** Draft legislation to require collection and reporting of data relating to pretrial release. Data collection should include: (1) who is in jail and why; (2) how long defendants remain in jail for pretrial detention; (3) the pretrial processes defendants are afforded; (4) how pretrial success is measured; and (5) the effectiveness of the various pretrial release conditions, such as GPS monitoring and prohibitions on the consumption of alcohol, as they relate to the safety of victims so that victims remain safe during pretrial process. Make reports available to the public and require reporting quarterly. **(BDR 378)**

10. *Recommendation on Citations in Lieu of Arrest*

At the March 3, 2020 Committee meeting, Kendra Bertschy and Evelyn Grosenick of the Washoe County Public Defender's Office proposed that the Legislature reclassify non-aggravated traffic offenses as citations not punishable by jail time in order to mitigate the consequences of detaining low risk defendants. The pair testified that they often see defendants who have unnecessarily spent several days in jail on traffic citations. Ms. Bertschy and Ms. Grosenick also proposed that the Legislature require mandatory citation in lieu of jail time for certain misdemeanors.

At the August 17, 2020 work session, Senator Hammond asked for clarification on which misdemeanors are included in the scope of this recommendation. Nicolas Anthony, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, stated that the presenters on this issue referenced non-violent misdemeanors. Senator Hammond then asked whether, if someone is trespassing and refuses to leave, this recommendation would prevent police from arresting the person. Mr. Anthony noted that the offense of trespass does not include instances where force is used or threatened, and he stated that yes, this would be an offense where a citation is issued. Senator Hammond stated that he would support this recommendation as applied to traffic offenses, but does not support it if it encompasses all misdemeanor offenses. Vice Chair Nguyen said that she would like this recommendation to be to draft legislation to reclassify certain non-aggravated traffic offenses and certain misdemeanors as citations not punishable by jail time. Mr. Anthony stated that it is possible to draft the recommendation so that subsequent offenses become aggravated offenses eligible for arrest, which could address Senator Hammond's concerns. Vice Chair Nguyen stated that she believes that courts would still be able to issue a bench warrant for failure to appear for a citation, and Mr. Anthony said that this was correct. Assemblyman Flores stated that the recommendation is broad and explained that the

Legislature can and will specify the specific traffic offenses and misdemeanors which would be included, and he noted that the Legislature could leave out trespassing.

The motion on the recommendation passed. Assemblyman Flores, Senator Scheible, Vice Chair Nguyen and Chair Harris voted yes, and Assemblyman Roberts and Senator Hammond voted no.

> **RECOMMENDATION NO. 10 —** Draft legislation to require a citation in lieu of arrest for certain non-aggravated traffic offenses and certain non-violent misdemeanors. **(BDR 376)**

11. *Recommendation on Protection Orders*

During the Committee meeting held on March 3, 2020, Marc Schifalacqua recommended that the Legislature adopt a mechanism that would allow victims or prosecutors, during the pretrial risk assessment process, to request a protection order to ensure the victim's safety. Mr. Schifalacqua proposed that pretrial release should not be permitted until the victim or prosecutor has the opportunity to make such a request.

Additionally, at the June 3, 2020 Committee meeting, Senator Scheible asked Christy Craig and Nancy Lemcke of the Clark County Public Defender's Office about delays in enforcing release orders when an offender contacts a victim after having been directed not to have such contact. The pair responded by proposing that more immediate ramifications for violating no-contact orders could be appropriately codified. They specifically proposed making release orders operate in the way a TRO/TPO would, in that it is communicated to the police so that the order is in the police database and is immediately enforceable upon a victim's 911 call.

At the August 17 2020, work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 11 —** Draft legislation to create a mechanism allowing the victim or prosecutor to request a protection order in the pretrial release process and to allow the order to be immediately transmitted to law enforcement. **(BDR 377)**

B. RECOMMENDATIONS TO DRAFT LETTERS

12. *Recommendation on Revalidation of the Nevada Pretrial Risk Assessment*

The NPRA is an evidence-based risk assessment tool used to assess the likelihood that a criminal defendant will appear for future court proceedings, as well as the likelihood that a defendant will be a danger to the community if released. During the Committee meeting held on January 21, 2020, John McCormick, Assistant Court Administrator for the Administrative Office of the Courts, testified that in March 2019, the Supreme Court of Nevada ordered all judicial districts in Nevada to adopt the NPRA. The order came after successful completion of a study and pilot

program which implemented the evidence-based risk assessment. During the Committee meeting on March 3, 2020, Dr. Austin of the JFA Institute, who was involved in the creation of the NPRA, discussed the testing and prototype of the NPRA, which scores defendants based on estimated risk. He discussed factors that the NPRA accounts for (e.g., prior convictions) and statistical data (e.g., failures to appear) gleaned from implementation of the NPRA. Assemblyman Roberts asked Dr. Austin when the NPRA was last assessed to ensure it is operating correctly. Dr. Austin suggested that, because the NPRA has been in use and criminal defendants have been scored by the NPRA, the revalidation of the NPRA would be useful.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 12 —** Draft a letter urging the Supreme Court of Nevada to revalidate the Nevada Pretrial Risk Assessment.

Attached as **Appendix B** is a letter dated December 9, 2020 from the Committee to the Supreme Court of Nevada.

13. *Recommendation on Racial Bias and the Nevada Pretrial Risk Assessment*

During the Committee meeting held on March 3, 2020, Dr. Austin of the JFA Institute indicated that the NPRA is statistically valid and was tested for racial and ethnic bias. Chair Harris asked whether there was any way to mitigate the effect of racial bias in the data used by the NPRA. Dr. Austin conceded that there is a debate surrounding racial bias in evidence-based risk assessment tools because of racial bias based in society and the criminal justice system. Dr. Austin indicated that the question, then, is how severe is the racial bias? He also indicated that, in the data collected through the NPRA study, African Americans scored a point higher (indicating a higher risk level) than whites and Hispanics based on the use of prior convictions by the NPRA in its calculation of risk. Accordingly, Dr. Austin opined that if there is racial bias in the conviction process, there is racial bias in the NPRA. The NPRA attempts to control for racial bias by using only prior convictions, instead of prior arrests, which would introduce additional racial bias. Chair Harris and Assemblyman Flores expressed concern that the NPRA does not sufficiently account for such bias in the factors that the NPRA considers, such as racial bias resulting in African Americans' higher prior conviction rates. Dr. Austin proposed that racial bias does not extend from the NPRA itself, but rather the underlying data. Dr. Austin stated that racial bias is introduced into the NPRA via factors like racial bias in conviction rates produced by courts, bias which could be studied and accounted for. Chair Harris suggested that the NPRA could employ mitigating factors (e.g., giving less weight to prior convictions) to offset racial bias. Dr. Austin again indicated that racial bias in the court process would have to be studied in order to properly account for the effect of the racial bias in the NPRA.

During the March 3, 2020 Committee meeting, Marc Ebel, Director of Legislative Affairs for Triton Management Services, also suggested racial bias is present in pretrial risk assessment tools. Citing several studies, Mr. Ebel indicated that risk assessment tools exacerbate recidivism

and existing racial disparities in the criminal justice system by finding in favor of more detention. He concluded that the NPRA should be reexamined to ensure it is not exacerbating problems it was meant to solve.

During the Committee meeting held on June 3, 2020, Holly Welborn, Policy Director for the ACLU, further discussed the issue of racial bias in pretrial risk assessments. Kristian Lum of the Human Rights Data Analysis Group, speaking on behalf of the ACLU, suggested that risk assessment tools are only as objective as the data they collect which presents problems because of racial bias in data in criminal history records. Ms. Lum suggested that the data suffers from racial bias because of external factors like racial bias in policing which skew criminal history data (e.g., minorities disproportionately targeted by police for arrest are more likely to be targeted again in the future). She also stated that risk assessment tools may not account for correlations between criminal history (e.g., rearrests) and living in a location that is disproportionately policed. Finally, Ms. Lum posed that, in those cases, unfairness and bias is introduced into the risk assessment tools because they do not account for correlations which skew the data, meaning the people whom the risk assessment tools were designed to help are disproportionately harmed, for example by falling into a higher risk group. Moreover, Mr. Koepke of Upturn, also speaking on behalf of the ACLU, deduced that racial and ethnic disparities largely remained the same even in states that implemented the risk assessment tools.

Arguing that racial bias permeates criminal history data, Ms. Welborn proposed that the courts report data concerning race in criminal records so that lawmakers can monitor racial bias in the pretrial system.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 13 —** Draft a letter urging the Supreme Court of Nevada to: (1) study racial bias in criminal records in order to determine if racial bias permeates the Nevada Pretrial Risk Assessment; (2) submit a report to the Legislature concerning racial data correlated to the use of the Nevada Pretrial Risk Assessment; and (3) consider staffing resources and best practices for employees preparing pretrial risk assessments and case work.

Attached as **Appendix B** is a letter dated December 9, 2020 from the Committee to the Supreme Court of Nevada.

14. *Recommendation on Domestic Violence Risk Assessment*

At the Committee meeting held on June 3, 2020, Serena Evans of NCEDSV recommended the adoption of specific danger assessment tools which assess a defendant's domestic violence risks. Specifically, Ms. Evans cited the Ontario Domestic Assault Risk Assessment ("ODARA") and the Jackie Campbell Danger Assessment tools. The risk assessment tools could be used in release decisions as an additional measure to more accurately evaluate a defendant's risk to a victim.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 14 —** Draft a letter urging the Supreme Court of Nevada to require the use of a risk assessment tool to assess the domestic violence risk of a defendant.

Attached as **Appendix B** is a letter dated December 9, 2020 from the Committee to the Supreme Court of Nevada.

15. *Recommendation on Electronic Alternatives to In-Person Bail Hearings*

At the Committee meeting on June 3, 2020, Chair Harris asked if Nevada has sufficient resources (e.g., judges, public defenders) to comply with Valdez- Jimenez. Christy Craig and Nancy Lemcke recommended adoption of electronic processes to facilitate hearings, especially in Northern Nevada where justice courts may be separated by hundreds of miles. Videoconference (e.g., Zoom, Skype) or telephonic hearings could be used to allow bail and detention hearings to occur remotely, and attorneys could have digital access to their client and that client's information without having to always have an in-person hearing.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 15 —** Draft a letter urging the Supreme Court of Nevada to permit electronic alternatives to in-person bail hearings.

Attached as **Appendix B** is a letter dated December 9, 2020 from the Committee to the Supreme Court of Nevada.

C. RECOMMENDATION TO INCLUDE A STATEMENT

16. *Recommendation on Education Relating to Risk Factors for Domestic Violence*

At the June 3, 2020 meeting, Serena Evans, Policy Specialist with NCEDSV, recognized the need for pretrial release reform, but emphasized the violence that survivors of domestic and sexual violence face from offenders. She raised the concern that the pretrial process can be a particularly dangerous time because the most dangerous period for domestic violence victims is after they have left the home or there has been an intervention, such as arrest of the defendant. Ms. Evans noted that 70% of domestic violence murders occur after the victim has left the home/ended the relationship. Ms. Evans recommended enhancing education on the risk factors victims face at various stages of the pretrial process, specifically educating court staff who make risk and bail decisions on how to access domestic violence information and on what domestic violence risks look like.

At the August 17, 2020 work session, this recommendation was one of eight recommendations passed by unanimous vote at the beginning of the work session without further discussion.

> **RECOMMENDATION NO. 16 —** Include a policy statement in the final report encouraging education relating to risk factors for victims of domestic and sexual violence.

Thus, the Committee now includes this statement of support for providing greater education and awareness on the risks victims of domestic violence may face at various stages of the pretrial process.

VI. CONCLUSION

During the 2019-2020 interim, the Committee thoroughly studied, discussed and debated the issues relating to pretrial release in Nevada enumerated in S.C.R. 11. The Committee accomplished the goals of S.C.R. 11 through numerous resources including national, state and local experts and concerned members of the public. The Committee generated meaningful discussion and now proposes significant policy recommendations to make the pretrial system more fair and efficient and to protect the safety of victims and the public. The Committee wishes to thank all of the individuals who attended and testified throughout the interim.

APPENDICES

APPENDIX A

EMERGENCY REQUEST of Senate Majority Leader

Senate Concurrent Resolution No. 11–
Senator Cannizzaro

Joint Sponsors: Assemblymen Neal, Fumo; Benitez-Thompson and Yeager

FILE NUMBER.....

SENATE CONCURRENT RESOLUTION—Directing the Legislative Commission to appoint a committee to conduct an interim study of issues relating to pretrial release of defendants in criminal cases.

WHEREAS, The Nevada Constitution and existing Nevada law require all persons arrested for offenses other than murder of the first degree to be admitted to bail unless certain circumstances apply; and

WHEREAS, It would be beneficial to conduct a thorough examination of issues relating to pretrial release of defendants in criminal cases; now, therefore, be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, THE ASSEMBLY CONCURRING, That the Legislative Commission is hereby directed to appoint, as soon as practicable after July 1, 2019, a committee to conduct an interim study relating to pretrial release of defendants in criminal cases; and be it further

RESOLVED, That the interim committee must be composed of six Legislators selected as follows:

1. Two members of the Senate appointed by the Majority Leader of the Senate;
2. Two members of the Assembly appointed by the Speaker of the Assembly;
3. One member of the Senate appointed by the Minority Leader of the Senate; and
4. One member of the Assembly appointed by the Minority Leader of the Assembly; and be it further

RESOLVED, That the study must include, without limitation, an examination of the following issues relating to the pretrial release of defendants in criminal cases:

1. The timeliness and conduct of hearings to consider the pretrial release of defendants;
2. The circumstances under which defendants should be released on their own recognizance;

3. The imposition of monetary bail as a condition of pretrial release and the considerations relating to the setting of the amount of any monetary bail;

4. The imposition of appropriate conditions of pretrial release to ensure reasonably the safety of the community and the appearance of the defendant in court as required;

5. The circumstances under which the conditions of pretrial release of a defendant should be modified;

6. Effects of the statewide implementation of the Nevada Pretrial Risk Assessment tool;

7. The impact of race, gender and economic status as it pertains to the pretrial release of defendants, which must include taking testimony from affected communities and individuals;

8. The fiscal impact of any potential or recommended changes to the laws pertaining to pretrial release of defendants; and

9. Any other relevant matters pertaining to the pretrial release of defendants; and be it further

RESOLVED, That any recommended legislation proposed by the committee must be approved by a majority of the members of the Senate and a majority of the members of the Assembly appointed to the committee; and be it further

RESOLVED, That the Legislative Commission shall submit a report of the results of the study and any recommendations for legislation to the 81st Session of the Nevada Legislature; and be it further

RESOLVED, That this resolution becomes effective upon passage.

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APPENDIX B

DALLAS HARRIS
SENATOR
District No. 11

COMMITTEES:
Vice Chair
Judiciary
Member
Education
Natural Resources

State of Nevada
Senate

Eightieth Session

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December 9, 2020

The Honorable Chief Justice Kristina Pickering
Supreme Court of Nevada
201 South Carson Street
Carson City, Nevada 89701

Dear Chief Justice Pickering:

I write to you today on behalf of the Committee to Conduct an Interim Study of Issues Relating to Pretrial Release of Defendants in Criminal Cases ("Committee"). As you may be aware, Senate Concurrent Resolution No. 11 (2019) (copy enclosed) directed the Legislative Commission to establish the Committee.

During the 2019-20 interim, the Committee heard testimony from numerous stakeholders and thoroughly considered the policies, procedures, effectiveness, and costs of pretrial release and detention of defendants in this State. As a result of a work session held earlier this interim, and in order to facilitate fair and efficient pretrial custody determinations in this State, the Committee voted unanimously to draft this letter respectfully seeking the assistance of the Supreme Court of Nevada. As a Committee, we urge the Supreme Court of Nevada to consider the following four items relating to pretrial practices.

First, the Committee encourages the Supreme Court of Nevada to revalidate the Nevada Pretrial Risk Assessment ("NPRA"). The NPRA was developed and validated using a sample of data collected from pretrial releases in Clark, Washoe, and White Pine Counties in 2014. Dr. James Austin of JFA Institute, who was commissioned to develop the NPRA, testified to the Committee that defendants in the sample who scored low on the NPRA showed low rates of re-arrest and failure to appear within a year of their pretrial release, which demonstrated the validity of the NPRA at that time. However, Dr. Austin testified that the NPRA would benefit from revalidation using data on defendants collected since its operationalization. Such evidence may be useful in determining the effectiveness and ongoing need for the NPRA.

Second, the Committee urges the Supreme Court of Nevada to investigate the overall objectivity of the NPRA and to examine the best practices for the administration of pretrial risk assessments. As the Committee learned, several scoring items used in the NPRA relate to the criminal history of a defendant. For instance, Dr. Austin testified to the Committee that the possibility of racial bias in the criminal justice system likely impacts whether a given defendant has a prior criminal history. Thus, if there is the potential for racial bias from the moment a person comes in contact with the criminal justice system, it may then permeate the NPRA. The Committee also believes that the Supreme Court of Nevada may be well-positioned to recommend the best practices and training methods for employees in preparing pretrial risk assessments.

Third, the Committee encourages the Supreme Court of Nevada to review the use of a risk assessment tool during the pretrial custody determination to assess a defendant's risk for committing domestic violence. The Committee recognizes the serious danger that perpetrators of domestic violence pose to survivors particularly in the wake of an arrest or other intervention. Serena Evans of the Nevada Coalition to End Domestic and Sexual Violence testified to the Committee that more than 70% of domestic violence murders occur shortly following the release of a perpetrator after an arrest. A risk assessment tool such as or similar to the Ontario Domestic Assault Risk Assessment (ODARA) or the Jackie Campbell Danger Assessment may efficiently provide information necessary to protect survivors to courts and employees making pretrial custody assessments and determinations.

Finally, the Committee requests the Supreme Court of Nevada to facilitate electronic alternatives to in-person bail hearings. Because a defendant must be brought before a court within a reasonable amount of time for his or her custody status, alternatives to in-person pretrial custody determinations may be beneficial to the process. This is especially true in rural counties where there is oftentimes hundreds of miles between courts. The Committee believes that videoconference or telephonic hearings would ease the burden on all parties and permit bail hearings to occur in the prompt fashion required by the Constitution of the State of Nevada.

Thank you for your time and consideration of these important pretrial release issues which are intended to safeguard the constitutional protections afforded to all involved in the criminal justice system and to ultimately ensure the safety of our citizens. It is my hope that the Supreme Court of Nevada will continue to review and address pretrial efficiencies. As Chair of the Committee, I look forward to working with and continuing to discuss these recommendations with you.

Very truly yours,

Dallas Harris

Senator Dallas Harris, Chair
Committee to Conduct an Interim Study of
Issues Relating to Pretrial Release of
Defendants in Criminal Cases (S.C.R. 11)

On behalf of members:

Assemblywoman Rochelle T. Nguyen, Vice Chair
Senator Scott T. Hammond
Senator Melanie Scheible
Assemblyman Edgar Flores
Assemblyman Tom Roberts

Enc.