MINUTES OF MEETING - JOINT HEARING - ASSEMBLY & SENATE COMMITTEES ON JUDICIARY
54th Session, Feb. 9, 1967

The hearing was called to order at 2:00 P.M.

Assembly Committee members present: Wooster, White, Lowman, Kean, Dungan, Swackhamer, Hilbrecht, Torvinen, Schouweiler

Mr. Clinton Wooster conducted the joint hearing. He commented in his opening remarks that anyone who speaks should put their comments in writing to be submitted to him for study by the committees.

AB 71:

RICHARD O'BRIEN: Clark County Public Defender. It is unique for the defense attorney to agree with the prosecutor but I have to disagree with the determinate sentence embodied in 71. The present indeterminate sentence was enacted into law in 1912. Why would we think that all knowledge is of the last decade?

The law library discusses the change to indeterminate sentencing. I read from this: "The imposition of determinate sentences imposes many inequalities". We should have indeterminate sentences so the judges can exercise judgment about whether a sentence should be light or heavy.

The function of both the defense attorney and the prosecuting attorney is to bargain for the plea. By enacting 71 we are going to have the potential of an inequality of sentencing. Same type of crime and all but different sentences. The sentencing should be left to those who are in a position to gain knowledge and data about the offender.

I would like to comment on a couple of other items. 1. On page 2, line 39 "where the loss is $5,0000 or more, etc., not less than 1 year nor more than 6, etc." The scope is too broad. Suppose a drunken driver collided with a telephone pole. Would this apply?

On page 141, section 470, I think the statute as presently drafted works considerable hardship. The law now provides that the law has no discretion for a second offense. The time may be 25-30 years. It works an obvious hardship; there should be a period of limitation on this. There should be some kind of an escape provision for one who is dependant on driving to earn his livelihood.

On page 11 Section 44, the change would eliminate a gross misdemeanor option which is presently available. If involuntary manslaughter, the resulting fatality is not intended. Does the committee wish to attach a felony to this? Now the presiding judge has the authority to decide this.

Section 440, page 131, on the narcotics penalties: It seems that the committee ought to consider at this time whether or not they want to continue to equate criminal offenses of the possession of marijuana and heroin. I suggest, most strongly, that the penalty should be equated with the social conduct involved. Heroin is an addictive narcotic and should be worse. There should be a distinction in the penalties. A different classification should be made for the sentencing and treatment of the addict who sells it himself.

A further change that should be considered - page 5 - deals with obstruction of police investigative activity. Line 28, section 20--this would make this offense a gross misdemeanor. Rather obviously, under Nevada law, the man is now entitled to counsel. His case must be handled in the District Court. With this in mind, turn to page 9, section 36. Isn't this overlapping?

A criminal substantive change which should be considered is the wire tapping thing. Under Nevada law wire tapping may be done under certain circumstances if you obtain the proper permits. I suggest most strongly the committee eliminate provisos for wire tapping save in those cases where it involves national security.

SENATOR MONROE: Where is this in 71?

O'BRIEN: It isn't in there at all but I think it should be.

WOOSTER: AB 98 which deals with this will be considered this coming Monday.

MONROE: You believe in indeterminate sentencing, placing the fate of the prisoner in the hands of the prison?

O'BRIEN: Yes, to some extent.

MONROE: If we had indeterminate sentencing then we would have to have good programs in our prisons.

O'BRIEN: Yes, and I am very much in favor of any legislation favoring more rehabilitation.

KEAN: Are there any circumstances where we might violate state statutes in favor of national security?

O'BRIEN: I would not think so.

FRANK DAYKIN: With reference to your comment on section 7: This section is simply a definition. It is not a penal section.

PAUL TOLAND: Chief of Department of Probation and Parole in the State of Nevada. I suggest that we approach this somewhat in the way California does, in that we would set definite sentences. The prisoner should serve one year and then come before the board and have a definite sentence set. On more serious crimes we need more definite minimum terms.

First degree burglary - this is one of the biggest problems and yet it has always been dealt with leniently. I am going to show by graph a comparison of time served by prisoners in the State of Nevada and the State of California in the different categories. In the first category Nevada prisoners served 110.4 months while California prisoners served 144 to 180. This was on murder, the period of 1960-64. Murder second, Nevada served 63 months, California 84 months. Robbery Nevada 29 months, California 46.2. Burglary first Nevada 23.3 months, California 41.1. Forgery Nevada 18 months, California 21.2 months. Rapes, Nevada 64, California 43.9. Grand Larceny, Nevada 22.7, California 21.6. Narcotics, Nevada 30.7, California 39.8. All other crimes, Nevada 23 months, California 31.5.

We have a 24-hour operation in the State of Nevada. We have a large tourist business

which brings in many people. For years Nevada has been looked on as an easy state by the criminals. I think that is what we ought to change because of our operation and the influx of people coming into the state. We should be the toughest state in the U.S. Part of that responsibility lies in your hands when you review this act and accept the sentence structure.

Setting a minimum sentence and then letting the Parole Board review at that time and set the definite sentence is, I think, the correct way to do this. The parole authority will have available additional information that the District Court does not. When the prisoner appears before the board, we will have the benefit of the classification and the counseling record, his attitude, background, and progress. Our determination, we feel, would be close to the realistic time that the prisoner should serve. Reviewing these cases would be six people on the parole board, compared to putting this whole thing on one person.

We want the habitual criminal to hear, coming out of our state, that John Jones was sentenced to 20 years. He will see that if he follows this same course of conduct, this much could be taken out of his life. I think this would be a strong deterrent to the habitual criminal offender.

If parole eligibility is left as it is in 71, whether ½, ¼, or 1/3, we will get to the same situation we are in today. If it is ¼ the judges will boost the sentences and divide by 4 to get the same time we have now. If it is ½, the same thing. This would indicate that the legislature could put in a lot of time and effort on this and we would end up right where we are today. Our responsibility is to deter the criminal and provide the D.A. with the tools to combat crime in this state. For the last decade Nevada has led the nation in crime and also averaged above the crime rate of states like New York, Michigan, Illinois, and other states with tremendous populations. Something has to be done about this situation. Much can be done by realistically approaching 71 and providing proper criminal punishment.

MONROE: Are prisoners taken care of properly now to protect the public?

TOLAND: We have a lot to do.

MONROE: Can we provide you with better services?

TOLAND: Yes, that is out of my department, but I am sure you could.

MONROE: What needs to be added to the prison staff?

TOLAND: The prison counselor should tell you about that.

MONROE: How about your parole staff - is it adequate?

TOLAND: Yes, if we get the four additional men we have asked for in our budget.

MONROE: Indeterminate sentences would be better because prison sources have information that is more adequate?

TOLAND: Yes.

JUDGE BARRETT: Determinate sentences were intended to achieve a cooperative effort between the three branches of government involved in fixing sentences. First, fix the limit, then the judiciary for a definite maximum, then the consideration of parole.

Question: You have said your board would be in a better position to determine what sentence should be given a prisoner because you would have available to you additional information. Is the sentence to be imposed on someone for a certain crime to be determined by factors that might enter into his life after the commission of the crime and after the decision of the court? What information would have that would be differen

TOLAND: We would have information gathered at the prison about his attitudes, whether they can be changed, more about his background.

BARRETT: The attitudes which you mention should be used in connection with parole, rather than with sentencing. Obviously his attitude in jail would not be known to the trial jury. Doesn't this eligibility for parole given the parole and the prison boards and the public, isn't this a fair break? He could be sentenced to 10 years and be let out on parole at 2½ years, with the one-fourth provision.

TOLAND: My philosophy is a little of both the indeterminate and the determinate sentence.

BARRETT: How soon he is going to be paroled is the first interest of any man sentenced to prison. I fail to see how your method would furnish any better solution. At any rate, we agree basically. Criminals are no good but they must be treated fairly.

TOLAND: I think what I am proposing is just a little bit tougher than AB 71. After assuming this position, I visited all the prisons and I got the impression from the inmates that because Nevada is going to get tough that when they get out they will leave the state.

WOOSTER: The judge will have no discretion about setting a sentence?

MEL CLOSE: One purpose of this bill is to permit the judge to set a sentence. Mr. Toland, you say that your system is tougher, yet you say every man, except for the more serious cases, is eligible for parole after one year.

TOLAND: No, he would not be considered for parole at that time. That is when it would be decided definitely what his term would be.

CLOSE: Rather than having the judge set the time for the sentence, you say the parole board should set it?

TOLAND: Yes.

BARRETT: Doesn't the indeterminate system tend to take away from both the judicial and legislative departments?

TOLAND: Yes, I would have to agree with you.

BARRETT: In this bill we get what we are trying to achieve--the cooperative effort of all three branches of the government.

CLOSE: How do you explain how your system is tougher? Surely you can see that one-fourth of the maximum is more than one-third of the minimum?

MONROE: I would like to call D.A. Raggio to the stand. Isn't it true that when we sentence a man to prison he is sometimes released after serving his maximum and is still not fit to be out in society? Didn't you have a case of this kind recently? Would he have been in prison longer under the indeterminate sentence?

RAGGIO: In that particular case, the sentence was just not long enough.

MONROE: Under a determinate sentence he would have to be released when he finished his maximum sentence?

RAGGIO: Yes, there was nothing anyone could do because he had served his confinement period. Most crimes come under one to six years. One-fourth the maximum comes down to about one year. Robbery goes to twenty. If everyone concerned could be used to determine the sentence it would be the best we could do. But we have to decide where the best informed judge can be reached. I have suggested following California's system because they have reached where they are today after much time and work and study. The legislature could still set the determinate sentence for each crime or type of crime.

CLIFF YOUNG: How many cases would come before the Parole Board in a year? Would the Parole Board have to see them all?

RAGGIO: Yes, but there would be only the one appearance after the minimum had been served.

YOUNG: How many felonies would we have in a year?

RAGGIO: Washoe County would have about 70 prisoners committed to the State Prison. I don't see that this would amount to any more consideration. Everything concerning one prisoner could be done at one time--setting the sentence, release date, etc.

BARRETT: The one-fourth period that must be served before parole can be considered doesn't mean that a person will be put on parole at that time, he will just be eligible.

AB 81:

RICHARD O'BRIEN: The pre-sentence report is certainly a very important part of the penal system. A majority of people charged never go to trial. I believe the pre-sentence report should be made available to both the D.A. and defense attorney. It doesn't serve the best purpose of justice to keep these two ignorant of the pre-sentence report. I am referring, of course, to page 38, section 244.

Page 12, section 83: This indicates the grand jury "must". This should be changed to "may".

Page 13, section 90: Same change should be made making it discretionary.

Withholding a grand jury indictment is not valid. Names can be obtained from other sources.

Page 37, section 235: If a man is sentenced to both fine and imprisonment, and he is an indigent person, he may be sentenced to an additional day for each $4 that he can't pay. I believe this is unconstitutional. We should not penalize persons for not having any money. I think this violates the 14th section of the constitution. The fine should be continued by attachment, as any normal debt. This, of course, should not apply where he has money to pay the fine.

Page 17, section 112: I suggest that the adoption of this particular change you are going to build into every case is reversable error. No two lawyers could agree on what constitutes the same scheme. Present law calls for multiple convictions. We ought to get away from common scheme or plan because it is too ill-defined.

Page 31, subsection 189: This says the judge shall charge if requested by either party. I think this is ill-advised. I think this will be subject to innocent abuse. We should not give the judge the right to comment upon the testimony.

Page 5, section 39: I think this legislation is too broad. Do you want your judge to serve as both judge and witness? This legislation should be changed.

Page 9, section 66: I am concerned with subsection 2, which says the preliminary should be held within 6 days. This is not fair. "Reasonable time" is too indefinite. I would like to see a particular time set, such as 15 days.

Page 9, section 67: The preliminary is not to be used for discovery. This should be left to the discretion of the magistrate. Cross examination is in itself discovery, so this section could be abused. We should be able to call witnesses.

Page 37, section 233: We ought to at least give the judge discretion as to whether sentences can be run concurrently.

CLOSE: I believe that he does have this discretion.

O'BRIEN: Page 22. A deposition ought to be admissable where absence of witness is unavoidable, but this eliminates the possibility of cross examination. Should require diligence in getting witnesses there.

Page 32, section 200: Subsection 7. An expert witness ought not to be excluded from the court during the testimony of other witnesses or let to stay. This should be at the discretion of the District Court. This statute is not sufficiently clear as to when the expert witness has the right to be in the courtroom.

Section 204: This might very well violate double jeopardy for offenses. We ought to consider this.

Page 23, section 145: The problem is the discovery portion of the bill. I think this section, through 151, is bad. From the defendant's point of view, it is worse than no statute at all.

Section 146, line 33: The defendant doesn't have the right to statements of witnesses until it reaches the Supreme Court. I cannot see the reason for the limiting legislation on this.

Section 147: The committee should study whether this infringes on self-incrimination. This is worse than no statute in my own candid opinion.

Page 22, section 138: Subsection 2. This is not in the best interests of justice. Counsel can best inform the judge if it knows what the judge has before him. This is bad and should be stricken, or re-drafted.

Page 21, subsection 136: I would like to see a limiting time that a man can be held in custody without a charge being made against him. This is not in the best interests of criminal justice. The prosecutor should have to file or turn him loose.

Page 34, section 208: This again talks about the defendant being held for a reasonable time. This should have some protective provision.

Clark County provides for a public defender. This is taken care of in 260.030 and 260.050. I would ask that the committee provide that the public defender may represent misdemeanor offenses. There should be discretion in the court to provide public defender help for some misdemeanors. There would be no extra cost involved because the public defender is on salary.

QUESTION: Where you objected to time limits not being set, propose that the act as at present is better, because the court has a better idea of each of these, the work involved, etc.

O'BRIEN: I feel, from the defendant's point of view, that it is better to set a certain time, a definitive period of time, unless good cause be shown. I don't like the act as it is at present. It gives the right to hold a man indefinitely without filing a charge.

JUDGE COLLINS: It is a slow process to find what the rules of discovery are; therefore, it was thought to be better to set one down in accordance with definite rules so that it would be standard throughout the state. All law would be guided and bound by the same general rule. We can evolve these in time but having it set definitely is better.

O'Brien: In fairness, I will have to say that these are the federal regulations.

PAUL TOLAND: Section 244: I agree with Judge Barrett on what he said yesterday. This could be amended and added to for the defense, with the stipulation that it pertain only to factual information. Our officers have to deal with these people and it could destroy the rapport.

Section 254: Official information obtained by the parole officer is to be privileged. This is not entirely realistic. Many times a parole officer will receive information from one of his parolees about an anticipated criminal action and not to be allowed to forward this would be making us almost culpable. They should be able to exchange this information with all other law enforcement officers.

MONROE: Wouldn't the parole officer need to tell some of this information in his attempt to place the man in a position of employment?

TOLAND: Yes, that is right. The prospective employer may ask some very pointed questions before he can make a decision about whether to hire a man.

SECTIONS 266-269: Under the heinous crimes the court may, at its discretion, permit the sentence to be delayed 20 days in order for some kind of appeal to Board of Pardons. This would allow parole before the man was even in prison. It also would create some administrative problems as these cases were being handled.

FRANK DAYKIN: This is an instance of an unfortunate reproduction from the existing statutes that is so old it has whiskers on it. The court thinks it should be revised. Since this state has a Board of Pardons rather than executive clemency this seemed almost necessary.

BEKO: I have some comments on both bills together. Many of the legislators have come to agree with the District Attorneys Association. There is a great deal of very necessary and essential legislation in both these bills. It is a very ambitious task

you have undertaken. If you stayed in session from now until two years from now you could not please everybody. Under no circumstances should you take the position that it just impossible to work this out. Mel and his committee have done a tremendous piece of work. All this should not go out the window, for example, the nolo plea.

There are two views on discovery and you cannot possibly reconcile them.

MONROE: It is my intention to process this legislation and put it into effect, then if we miss some corrections this time we can take care of them two years from now.

BEKO: Many district attorneys are just giving up because the law is so indefinite for the prosecution. If there is some definiteness put into some of them, it may encourage some of the D.A.'s to stay with it.

Mr. Wooster again encouraged all those who had spoken to put their comments in writing and turn them in to him for study by the committee.

The joint hearing was adjourned at 4:30 P.M.