

**MINUTES OF THE
ADVISORY COMMISSION ON THE
ADMINISTRATION OF JUSTICE'S
SUBCOMMITTEE TO STUDY MANDATORY DRUG SENTENCING STATUTES
AND THE SUBSTANTIAL ASSISTANCE STATUTE**

July 1, 2008

The meeting of the Advisory Commission on the Administration of Justice's Subcommittee to Study Mandatory Drug Sentencing Statutes and the Substantial Assistance Statute was called to order by Douglas W. Herndon, Chair, at 1:34 p.m. on July 1, 2008, at the Grant Sawyer State Office Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada, and via simultaneous videoconference at the Legislative Building, Room 3137, 401 South Carson Street, Carson City, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT (LAS VEGAS):

Douglas Herndon, Judge, Eighth Judicial District Court, Chair
Thomas M. Carroll, Chief Deputy District Attorney, Clark County
David Z. Chesnoff, Criminal Defense Lawyer, Las Vegas
Brett Zimmerman, Captain, Vice/Narcotics Bureau, Las Vegas Metropolitan Police Department

SUBCOMMITTEE MEMBERS PRESENT (CARSON CITY):

Scott Freeman, Attorney, Reno
Gerald J. Gardner, Assistant District Attorney, Criminal Division, Carson City
Gregory W. Smith, Correctional Classification and Planning Specialist, Department of Corrections

COMMISSION MEMBERS ABSENT:

Assemblyman John C. Carpenter, District 33

STAFF MEMBERS PRESENT:

Angela Clark, Deputy Administrator, Legal Division, Legislative Counsel Bureau
Sandra K. Small, Interim Secretary

OTHERS PRESENT:

Rex R. Reed, Administrator, Offender Management Division and Chief of Classification and Planning, Department of Corrections

Chris Bund, Las Vegas Metropolitan Police Department
Bruce Gentner, Detective, Las Vegas Metropolitan Police Department

CHAIR HERNDON:

The Subcommittee has received statistical graphs which will be described by Mr. Reed.

REX R. REED (Administrator, Offender Management Division, Department of Corrections):
The Subcommittee has received a 5-page document, Characteristics of Drug Offenders. ([Exhibit C](#)) The first two pages are a recap of the statistics provided at the last meeting. The Gender and Age Group table indicates drug offenders are evenly distributed among age groups. The Gender and Ethnicity table shows the largest number of inmates in the system for drug offenses are white, next are African Americans, then Hispanic, which mirrors the State's population. The Gender and County table shows the counties with the largest populations produce the most inmates with drug offenses: Clark, Washoe and Carson City. As shown in the Gender and Current Custody table, most drug offenders in the system are at medium custody. They are approximately 44.5 percent of the inmate drug offender population. The minimum custody inmates with drug offenses are 33.6 percent of the drug offender population. Gender and Prior Felony Convictions indicates 38 percent are serving a single sentence and have no priors; conversely, 62 percent of the drug offenders do have prior felony convictions. Most of the drug offenders (56 percent) arrive as new commitments as shown in the Commit Type table, followed by probation violators (36 percent). Parole violators make up a small percentage of drug offenders. The U.S. Citizenship table is self-explanatory.

Page 3 of [Exhibit C](#) provides new statistics regarding the total correctional population. The in-house population is the number of inmates in institutions, facilities, jails and hospitals. The in-house population does not include individuals on an interstate correction's compact, escapees and those in residential confinement. The total in-house population as of June 2007 was 13,117 individuals. The current population, June 30, 2008, is 13,001 inmates. The total population includes all those under Nevada's jurisdiction, which includes those out-of-state under escape status and those in residential confinement. The population as of June 2007 was 13,481; a year later the population was 13,469 inmates. Drug Offenders by Gender and Type are listed on page 3; most drug offenders are male. There were 532 traffickers included in the 1,857 drug offenders in June 2007. The current population of drug offenders includes 815 traffickers, about 13.5 percent of the total population. A year ago about 13.77 percent of the correctional population were drug offenders.

Sentencing Statistics are also shown. As of June 2007, there were 532 drug offenders incarcerated and charged with trafficking. Of these, 530 were charged with trafficking Schedule I substances. We are attempting to determine what the other two offenders were

charged with. A drug trafficker's average minimum sentence is calculated by looking at all sentences, there may be several offenses, and adding them together. The trafficker may have a 5.07 year minimum sentence and 14.05 year maximum sentence. The drug trafficker could have more than one minimum sentence. The average of all minimum sentences for each drug offender for a specific case or conviction is 3.13 years, with a maximum of 8.66 years.

CHAIR HERNDON:

I understand the last sentence on page 3 is referring to the average minimum and maximum sentence for all drug offenders, regardless of reason for incarceration.

MR. REED:

We looked at all drug offenders, collected all of their minimum sentences and averaged all the minimum sentences, not per drug offender but by minimum sentence.

CHAIR HERNDON:

The averages include all drug offenders whether they are in on a possession charge, trafficking, sale, etc.

MR. REED:

That is correct.

CHAIR HERNDON:

The average includes a sentence for burglary as well as narcotics to calculate the average minimum.

MR. REED:

That is correct.

CHAIR HERNDON:

The average sentence dealing specifically with traffickers is not based on any and all sentences being served.

MR. REED:

Yes. It is difficult to pull out only the drug sentences, which is why we looked at a drug trafficker's entire sentence structure.

Page 4 of [Exhibit C](#) has statistics for Releases by Offense Group for June 1, 2006, to May 31, 2007. Approximately 25 percent of the inmates released were drug offenders. For comparison purposes, other offense groups are also shown. The Released Drug Offenders with Trafficking Charges statistics are also shown.

At the last meeting, the Subcommittee requested information on drug traffickers' other sentences. This was a difficult task as the DOC is converting to a new computer system. The Drug Offenders and Offenses table provides the Nevada Offense Codes (NOC) in a drug offender's sentence structure. The table indicates 58.61 percent of males have one NOC; those individuals have only a drug offense. The next line in the table indicates two NOCs; we know one is a drug offense; we cannot tell you what the other offense is. There are a number of inmates with more than one NOC in their sentence structure. The last table on page 4 provides statistics on drug traffickers only.

Page 5 of [Exhibit C](#) was provided at the Subcommittee's last meeting. The first table recaps the number of drug felons admitted in calendar years 2004, 2005 and 2006. The second table gives a range of the minimum and maximum sentences by Nevada Revised Statutes for various drug and traffic offenses evaluated.

CHAIR HERNDON:

Is there a way to tell whether a multiple sentence an inmate is serving arises from one case or multiple cases or is the DOC documenting the crimes and sentences regardless of the number of jurisdictions and cases involved?

MR. REED:

The tables list both examples you mention. There could be someone incarcerated on a single case with multiple sentences attached. Or, for example, it could be a parole violator incarcerated on multiple cases with multiple sentences attached to each of the cases. There could be all sorts of complexity in sentence structures. You may have an inmate in the system with one case who commits another felony while in the system; now he has two case numbers.

CHAIR HERNDON:

Many times, not so much with traffickers because they have mandatory sentences, but with other drug offenders, when looking at incarceration rates, there have been occasions when someone comes in front of me for sentencing which normally I would give consideration to putting them on probation, but they have already been sentenced by someone else to prison because it was, for example, a violent crime. They are asking for a concurrent sentence as opposed to being placed on probation.

MR. CARROLL:

Are the placements in a category based on the charge pled to or the original charges in the case? For example, if a person was originally arrested with 100 grams of cocaine and pled down to low-level trafficking, then sentenced on the lower level, how would the person be designated on this chart?

MR. REED:

The DOC uses the judgment in the conviction.

MR. GARDNER:

The sentencing statistics averages surprise me in that they are high at the minimum level. Is that because there is more involved in terms of what the statistic means? Mr. Tom Carroll's statistics for trafficking cases in Clark County, [Exhibit D](#), indicates one sentence more than 5 years. Every sentence is 42 months or less except the one habitual criminal.

CHAIR HERNDON:

Part of the problem with the DOC statistics is a lot of drug traffickers are incarcerated for more than the trafficking conviction. They may have had probated sentences in other cases which were revoked. The 5.07 to 14.05 years includes every crime the trafficker is in prison for right now, not just the trafficking sentence.

MR. REED:

That is correct; page 4 of [Exhibit C](#) indicates the multiple offenses. A drug trafficker's average minimum sentence includes every minimum sentence, whether or not it was a drug offense. A violent offense lends itself to a larger minimum sentence.

CHAIR HERNDON:

For instance, an individual with two NOCs at part of a sentencing structure could be someone arrested on a trafficking charge, was out on bail and picked up a theft or forgery charge, was prosecuted and convicted on both charges and went to prison. Both of those codes would show and the sentences considered in determining the minimum and maximum sentences.

MR. REED:

That is correct.

CHAIR HERNDON:

Assuming that same scenario happens and that person is convicted of a homicide. How is a life sentence placed into the statistics for a minimum and maximum? If it is a parolable sentence, the 10 or 20 years could be included in the DOC statistics.

MR. REED:

Life sentences are typically not in the DOC computer system. The computer system divides inmates into offense groups. Those who receive life sentences are typically in the violent offense group. They are not listed as a drug offender but as a violent offender because it is a more severe offense. The violent offender would not be included in the drug offender

statistical analysis. The reason some of these sentences are long is because some drug offenders have enhancements tied to their sentences.

MR. FREEMAN:

I have had traffickers who receive life sentences with possibility of parole. Would these people be categorized as a violent offender?

MR. REED:

That trafficker would be included. The DOC typically will drop out a life sentence when calculating because it is hard to average. If there is a specified minimum, for instance life with a minimum of 20 years, we can use the 20 years to calculate averages.

CHAIR HERNDON:

Could there be drug offenders in other offense groups but the other offense is primary to why the individual is in the prison system resulting in the drug offender not appearing in the drug groups?

MR. REED:

That is correct. For example, they would either fall into a sex offense category or a violent offense category, not a drug offender's category. Those two offenses are considered more severe than drug offenders.

MR. GARDNER:

We need to emphasize the 5-to 14-year average does not reflect the sentencing average of drug traffickers for the drug traffic conviction. As I read the information, it appears the average drug trafficker does a sentence of 5 to 14 years for drug trafficking which is clearly not the case. Is there some way to show what the average sentence is for trafficking? This statistic indicates the drug trafficker is placing a more significant burden on the prison system than it probably is.

MR. CHESNOFF:

I would first look at the Drug Offender and Offenses table with the NOC 1 and determine what the minimum and mandatory sentences are for those individuals with only the drug offense, then go to the Drug Traffickers and Offenses table with the NOC 1 and determine what the minimum and maximum is for those two categories. That will give us a statistic on a relevant group to the question of the impact of minimum and maximum sentences.

CHAIR HERNDON:

Is that something the DOC can provide?

MR. REED:

We can do that because we have the data for the population with single offenses.

CHAIR HERNDON:

Can the same be done with the drug trafficker population with a single offense code?

MR. REED:

Yes.

CHAIR HERNDON:

That will give us the average maximum and minimums for drug offenses only for the Subcommittee's next meeting. Any recommendations or reports the Subcommittee makes will need to state there are people serving sentences in other offense categories which would not be encompassed.

The Subcommittee will move to Agenda Item III.

MR. CARROLL:

At the last meeting Judge Herndon had taken statistics from his Department and extrapolated to make some conclusions as to the number of trafficking cases which appear to be prosecuted in Clark County. I was able to get some raw data from the Clark County IT people regarding the number of trafficking charges filed during calendar year 2007. The summary of that information has been provided to the Subcommittee, "2007 Clark County Trafficking in Controlled Substance Charges." ([Exhibit D](#)) There were 950 trafficking charges filed in Clark County during calendar year 2007. Of those, 280 charges are still outstanding, either in warrants or working their way through the system. During calendar year 2007, 672 charges were resolved. The types of resolutions to those charges are shown. Many cases were reduced to offenses less than trafficking. Frequently that is done because an offender may provide substantial assistance to law enforcement. Other times the charges are reduced based on the merits of the case or the lack of substantial prior criminal record of the offender. The statistics show 37 percent of the trafficking charges filed in Clark County during calendar year 2007 were resolved to a felony offense, drug-related, but something short of trafficking, which would be a probationable felony offenses. Only 11 percent of the trafficking charges resulted in a trafficking conviction. Some cases were resolved to gross misdemeanors, misdemeanors or felony offense other than drug. Forty-one percent of the trafficking charges were dismissed. The vast majority are probably dismissed when an offender or a defendant has multiple charges or cases pending in the system and a plea bargain is struck in return for dismissal of the other charges. The piechart depicts the breakdown of the trafficking cases. Sentences for the 72 trafficking convictions, 11 percent of the filed charges, are also shown. The vast majority received minimum sentences. The

mandatory minimum sentence for a low-level trafficking offense is 1 to 6 years in the Nevada State Prison. A judge can give the lowest sentence of 12 to 30 months. The highest possible sentence is 28 to 72 months. There do not appear to be any maximum sentences imposed for low level trafficking. There were 23 cases resulting in the minimum sentence of 12 months, the minimum mandatory sentence. The mandatory sentence for mid-level trafficking is 2 to 15 years which means the minimum mandatory would be 24 months. It appears 22 of the cases received the minimum mandatory for mid-level trafficking. The only sentence during this period resulting in a life sentence was not for a high-level trafficking conviction, but at time of sentencing, the defendant was adjudicated guilty as a habitual criminal. That person received a sentence of 5 years to life. One case had a trafficking conviction, yet the person received probation pursuant to the substantial assistance provision of the NRS. That was the only case in calendar year 2007 where reliance was placed on the substantial assistance provision of the statute. The practice in Clark County is to resolve cases in which substantial assistance has been provided by dealing the case to something less than the trafficking conviction to a probationable offense. These statistics support that statement.

MR. FREEMAN:

Washoe County does it absolutely the opposite of Clark County. It would be valuable to get from Washoe County the same type of statistics Mr. Carroll used, to show the contrast in how the trafficking statute is worked. Washoe County routinely requires pleas to trafficking. The negotiations for high-level trafficking go as follows: Washoe County will allow a plea to Level 2, free to argue; if there is substantial assistance, a plea to Level 3 is possible. I appreciate the approach Clark County takes because it protects the substantial assister; if he pleads to a lesser offense there is no indication he has done substantial assistance. There are a number of reasons someone could plea to a lesser offense. In Washoe County we have done contested hearings pursuant to statute for a court to make a determination if there is substantial assistance. In addition, some courts do not give straight probation for substantial assistance; they may reduce the mandatory minimum offense. Clark County had one case where someone did substantial assistance and received probation. It is done routinely in Washoe County; it is their policy. It would be interesting, especially for those incarcerated who do not get substantial assistance awarded to them.

CHAIR HERNDON:

I have been trying to get those statistics, as have others, from Washoe County. Having those statistics to gauge what is being done throughout the State is necessary. Clark County's numbers, reflecting the totality of the Eighth Judicial District Court, give some validity to my Department's numbers. When we discussed my numbers at the last meeting, about 9.1 percent of all of my criminal filings involved a trafficking charge as one of the original charges. Using the 950 total trafficking cases in Clark County and apply that to the 10,069

total Eighth Judicial District Court filings, results in 9.4 percent. The Carson City 2007 statistics ([Exhibit E](#)) indicate 9.4 percent of the total filings had trafficking as one of the original charges. Does that seem to jive with what Washoe County might be?

MR. FREEMAN:

It would be difficult for me to address that question because it depends upon the mentality of law enforcement in terms of what they are looking for when they make an arrest, how they charge and what the district attorney decides to do once he sees what the police have done. For someone arrested with a number of drug related felonies, the deputy district attorney may decide to charge trafficking and not charge for possession for purposes of sale or conspiracy to violate the controlled substance act or unlawful offer, etc.

The Washoe County judges could give us the information from their own docket. Some of the Washoe County judges have seen the law change to mandatory minimums, evaluation of substantial assistance hearings, etc.

CHAIR HERNDON:

I spoke with Judge Berry to see if she had access to the same data I have. She does not have the ability to pull her Department statistics; it would have to come from the Chief Judge. She believes there is a problem with how trafficking cases and substantial assistance is being approached. She agrees there needs to be some statutory changes regarding substantial assistance.

MR. CHESNOFF:

Could Mr. Carroll provide his procedures to gather and use the Clark County data? Someone could send a letter to Washoe County requesting the same information using Mr. Carroll's procedures.

MR. CARROLL:

I have no problem calling Washoe County to see if they would cooperate. The ability to retrieve the information depends upon the type of computer information Washoe County has. It was labor intensive for me to break down the raw data I was provided by Clark County.

CHAIR HERNDON:

Mr. Lalli and Mr. Helser have had a number of communications about a variety of these issues. Perhaps Mr. Carroll could get in touch with these two people to determine Washoe County's capabilities.

I went through all of the sentences included and removed the habitual criminal life sentence because it does not relate just to narcotics. I then calculated an average minimum of 19.1 months and an average maximum sentence of 54.9 months. In my Department, the average

minimum was 17 months and average maximum was 58 months. The number we use to give meaning to whether or not the statutes are out of whack needs to identify the actual narcotic sentences rather than the overall reasons for incarceration.

MR. FREEMAN:

We need to make things uniform so that everyone throughout the State understands how things are being done and to see if we need to correct or change what we have. I thought jurisdictions with the serious trafficking charges were being treated the same throughout the State. Clark County uses its discretion and the statute in a specific way. Washoe County looks at the statute; if there is a Level 3 quantity, the plea is trafficking. Washoe County's statistics would be much different than other jurisdictions.

CHAIR HERNDON:

Clark County's 72 trafficking convictions represents approximately 10.7 percent of the total trafficking cases. Mr. Freeman is saying Washoe County would have a significantly higher percentage of trafficking convictions and a higher rate of probation with a trafficking conviction.

MR. FREEMAN:

Yes, that is what I am saying. In addition, Washoe County would have a statistic related to the utilization of the substantial assistance statute resulting in probation or a lesser sentence much higher than the one in Clark County.

CHAIR HERNDON:

Nevada's statute speaks specifically to substantial assistance for co-conspirators, accomplices, accessories, etc., related to narcotics offenses. Does Washoe County utilize the statute in that specific fashion or do they allow substantial assistance for other crimes?

MR. FREEMAN:

Generally, unless a deputy has a bent opposing a substantial assistance grant, it has been expanded to allow other types of substantial assistance. We have state narcotics officers and federal narcotics officers. Sometimes the federal narcotics officer will come to state court and testify when an individual has done substantial assistance pursuant to state statute even though it is a federal case. The statute is broad enough to include other crimes even though the statute specifically talks about drug crimes.

CHAIR HERNDON:

Does it apply when someone pleads guilty to a trafficking charge who provides substantial assistance pursuant to the statute to get probation? Are there occasions when people provide

substantial assistance but not on narcotics offenses such that they never plead to the trafficking or is it always a case of pleading to the trafficking first?

MR. FREEMAN:

It is traditionally done the way you stated.

MR. CARROLL:

The trafficking statute was proposed by Senator Raggio in 1983, S.B. 7. Many of this Subcommittee's issues were discussed in the March 10, 1983, meeting. The minutes are clear; the trafficking statutes would be getting the mules. The idea was to have the mules and encourage them to provide information to law enforcement regarding others in the drug trade. The only people law enforcement generally comes in contact with are the mules. Under the old drug trafficking statute, subsection 5 allowed the substantial assistance probation grant to a trafficker. Nevada now has a separate statute for that. In the March 10, 1983, meeting Senator Raggio said:

The whole thrust of the bill is to increase penalties so they are so great there will be an impetus or incentive to the convicted individual to furnish information to enable law enforcement to reach the higher ups involved in the wholesaling of large amounts, heavy trafficking of drugs. That is the thrust of this bill.

Later Senator Raggio said in reply to a different question:

The amounts listed, for example controlled substances, are large amounts even though they are only grams. It was noted that cocaine is cut down into sixteenths of a gram. The amounts listed have retail value up into the hundreds of thousands and millions of dollars. This bill tracks the same language in the present statutes.

Some of the arguments being made here today, that the levels of trafficking are too low because it is not really getting the higher ups in the drug trades, were discussed. Whether it would substantially impact the prison population was discussed in 1983. My reading of the 1983, minutes indicates that Washoe County is probably following the intent of the legislation more closely than Clark County. Both counties are using the trafficking statute to encourage individuals to provide substantial assistance, but when the statute was first enacted in 1983 it appears the idea was to require a guilty plea to trafficking and then provide probation. Clark County uses the spirit of the legislation by using the statute to get substantial assistance, but implements it differently.

CHAIR HERNDON:

Please provide the Subcommittee with copies of the legislative information you researched.

MR. CHESNOFF:

Are people in Washoe County getting probation or are they getting time?

MR. FREEMAN:

By and large, they are getting probation. In a rare occurrence where a judge will give time after substantial assistance, it will be someone with a horrendous prior record. Traditionally, if someone does substantial assistance they will get probation. Many times it will be by stipulation; there will not be a contested hearing; it will be understood. It is interesting because the Probation Department, which does the report sometimes followed by the courts, as a matter of policy will not take into consideration someone who has done substantial assistance. The probation report will have the mandatory prison penalties. When the judge grants probation, the Probation Department will have an alternative recommendation for someone who gets probation.

MR. CHESNOFF:

[Exhibit D](#) indicates real fairness in Clark County. Are Washoe County drug offenders being treated fairly who do not have the ability to give substantial assistance or choose not to give substantial assistance in relation to minimum mandatories? The impact of minimum mandatories, from the defense perspective, it is a concern.

MR. FREEMAN:

For an individual who chooses not to or cannot do substantial assistance, if it is high level trafficking, it is reduced to Level 2; sometimes there is a cap of 2 to 5; sometimes it is free to argue 2 to 15. I am not aware of a written policy. Washoe County's District Attorney knows 10 to 25 or a 25 to life is a difficult sentence for someone who cannot do substantial assistance. I have seen it other ways; someone who commits a Level 3, is out on bail, commits another offense, gets 25 to life. The statute is being used in Washoe County the way Mr. Carroll has described the legislative history.

MR. CHESNOFF:

I would like to know what law enforcement people think about the application of substantial assistance since 1983. Do they think the intent has been followed and do they believe it has been helpful? Washoe County should give us the statistics to make a comparison.

CHAIR HERNDON:

There are some logical reasons not to have someone convicted of a crime before they provide substantial assistance. Are there other reasons to provide substantial assistance before conviction or a plea as opposed to after a plea?

CAPTAIN ZIMMERMAN:

Substantial assistance before a plea results in value on the street. Many times we build trust with the informants. When we take people into custody, we want them to work charges off as confidential informants (CI). It will take three to five deals for a CI to work off charges.

CHRIS BUND (Las Vegas Metropolitan Police Department):

I worked with the Narcotics Bureau in Las Vegas for 12 years. Since 2000, I worked with a federal task force doing both federal and state prosecutions. During the time I spent in the Narcotics Bureau, I used substantial assistance for developing informants. One of the main ways we use this provision of the statute, once an individual is in custody, we ask, in terms of substantial assistance, for three other individuals at the same level or a higher level. We would not go forward with the criminal complaint. We also entered into written agreements. We build a level of trust. Oftentimes, after they have worked off their charges, they became a paid informant. I had people working for me in excess of 10 years. With the advent of Blackstone and technology, they would simply run other individuals in their circle through Blackstone, get access to court documents and identify individuals with cases filed against them. If they know the person is out, it means the individual is a safety risk. Technology has made it possible for co-conspirators to check on members of the circle they sell to and understand where the person is in a criminal proceeding.

CHAIR HERNDON:

It is rare, if at all, I can remember needing someone to testify in court about substantial assistance. Law enforcement was good about providing confidential reports or memos outlining what was being done with respect to substantial assistance. Is that not the case in Washoe County? Is live testimony required?

MR. FREEMAN:

If there is an open hearing, it is sealed. In Washoe County, unless there is a stipulation, if the motion is made by the defense and is opposed, there will be a hearing in court according to statute. The arresting agency must be given an opportunity before the motion is granted. They can testify that the person did or did not provide substantial assistance. Most law enforcement will say what the defendant did but hoped he could do more. This is done routinely in Washoe County when there is a contested hearing.

CHAIR HERNDON:

The federal substantial assistance rule refers to a motion by the government. Can you make a motion as a defense attorney in federal court on substantial assistance or does it have to be brought by the U.S. Attorney's Office?

MR. FREEMAN:

It must be brought by the U.S. Attorney's Office. Nevada has a Substantial Assistance Committee. The AUSA goes to the Substantial Assistance Committee, says what assistance was provided and proposes a point-level departure. That is not the case in state court. The motion can be made by the defense for substantial assistance.

CHAIR HERNDON:

In federal court can the defense attorney ask the judge for assistance?

MR. FREEMAN:

Judge Reed will find a way to allow the defense attorney to make the argument. As a matter of federal law, the answer is no.

CHAIR HERNDON:

In state court the defense attorney can file the motion. Are there a lot of oppositions in Washoe County?

MR. FREEMAN:

There are not a lot of oppositions, but they do occur. Usually law enforcement, if asked, will show up in court. When it occurs, we look to the statute for guidance and case law in terms of possible discretion. There is one Supreme Court guidance. It is a fruitful area of the law without a lot of development. There is a lot of discretion for the court. There is no objective test which says how many deals will result in probation.

MR. CARROLL:

The Legislative history indicates the original bill draft in Nevada would have been like the federal statute which would have required the motion for substantial assistance to be made by the State. It was amended for the motion to be made by either of the parties. The submitting law enforcement agency is allowed to have input before the judge makes a decision.

MR. CHESNOFF:

In a plea bargain containing an agreement to assist, if the federal prosecutor does not make the motion, you could be in the position of withdrawing the plea agreement or have the agreement enforced. The motion must be made. The big argument is how many points they will depart under the guidelines, not so much that they do not follow through and ask the judge to do something.

CHAIR HERNDON:

Next on the agenda, Item IV, is a discussion regarding some of the numbers generated regarding case loads in Judicial Districts in Nevada. The 2008 numbers for the Eighth

Judicial District Court, provided the last time this Subcommittee met, have increased by one. An individual who entered a plea to a trafficking charge some time ago was deferred to complete the drug court program, he was terminated from the drug court program and sentenced.

The Carson City numbers were received from Mr. Gardner. I used those numbers to develop "The Criminal Caseload Statistics for Carson City, Nevada." ([Exhibit E](#)) For 2007, Carson City had 554 criminal defendants charged. There were more than 554 charges. Fifty-two of those cases (9.4 percent) involved trafficking as an original charge. Eleven of those cases (1.9 percent) resulted in a trafficking conviction. Those percentages are close to what we have seen in my Department and in Clark County. Because there are many cases unresolved, it is hard to give any meaning to the statistics. Of the resolved cases, 0.7 percent resulted in a conviction for a trafficking-related defense. Based upon our discussions, Washoe County will have a significantly different percentage. Carson City had 296 criminal cases filed through June 4, 2008. Of the total cases, 14 or 4.7 percent, have trafficking as an original charge. There have been two cases so far with a conviction for trafficking.

MR. GARDNER:

In 2008, there was a concentration of high-level trafficking investigations which may be why the overall numbers are low.

CHAIR HERNDON:

Are we able to ascertain from the identified trafficking cases if any number of those involve purely trafficking by transportation? That question was directed to me as it pertains to the rural counties. I contacted Mr. Mallory, the District Attorney in Churchill County, who stated his approximately seven cases involved sales resulting in trafficking charges. Mr. Mallory does not believe any of those cases were transportation trafficking offenses. The concern is if the rural areas have a lot of people transporting large amounts of narcotics who are being picked up by the Highway Patrol. In my Department, the vast majority of cases during the last 1.5 years involve multiple counts to begin with, multiple narcotics and/or multiple sales. Only in one or two cases did it appear someone may have been arrested based upon the search of a vehicle. It seems there are very few trafficking convictions for mules. The mules were the reason for substantial assistance, but it seems over the years substantial assistance has moved away from the pure mules to encompassing anyone with information involving trafficking arrests or investigations.

MR. FREEMAN:

In Washoe County there is probably a mix because we have I-80 and US 395. There were three new district attorneys elected: Douglas County, Lyon County and Carson City. One of the platforms was a chorus of taking drug trafficking seriously. They have similar law

enforcement making those types of arrests. They have Tri-Net and NDI. Would the numbers for Lyon and Douglas Counties be similar to Carson City? In northern Nevada, Mineral County would have transportation cases going to Las Vegas. Elko County would have a combination of transportation cases going through I-80 to Salt Lake City. If the Highway Patrol makes an arrest in Washoe County, it will be a transportation case; if it is a DEA task force, it will be a sales case.

CHAIR HERNDON:

I am trying to determine if there is a difference in who is coming up with a trafficking conviction. Are we ending up with mules doing 10 to life? I am not saying there isn't a lot of transportation trafficking situations in the rural counties. Does Washoe County treat the pure mule trafficking cases differently from an active sales trafficking case?

MR. FREEMAN:

They do not treat them differently. There is the same need for substantial assistance.

CHAIR HERNDON:

Have you any experience with transportation cases in the rurals?

MR. FREEMAN:

I have done a lot of rural cases. They do things completely different. Some rurals require three to five deals for substantial assistance. It is a type of Nevada Division of Investigation law enforcement in the rurals. They have certain policies for substantial assistance. Some other rurals, specifically Elko County, are more apt to reduce a trafficking charge similar to the way Clark County handles them.

MR. CHESNOFF:

Most of my experience with substantial assistance has been in cross-examining the substantial assister. I have done larger cases from Tonopah, Beatty and Washoe County. The rural district attorneys have been fair with the transporters. However, if they perceive the person apprehended is transporting his load, there is a different perspective. I am interested in seeing the application of the minimum mandatory to major traffickers. I am concerned that people who are first-time offenders or are transporters are getting burned with the minimum mandatory. I can understand a major trafficker being held responsible.

CHAIR HERNDON:

The Subcommittee will move to Agenda Item V.

MR. BUND:

Our contention is an individual in possession of a multi-million dollars' worth of commodity is not a mule. There is an organization structure. What is a significant amount of drugs and is it worth maintaining that level for trafficking? I will be talking about pure product, not cut levels otherwise it becomes too complicated. An average dose for a beginning user of heroine is one milligram. An average dosage of methamphetamine or cocaine, regardless if it is in a powder or rock form, is one-tenth of a gram. An individual in possession of four grams of methamphetamine has 40 dosage units. If he breaks it down into complete street level, which would be single dosage units, the average is \$10 per unit (a baggie or rock). That individual is capable of making \$400 with four grams. If the individual is selling 14 grams, he has 140 single dosage units. The trend today is for the organization to bring in multi-pound quantities or kilo quantities of hard drugs, breaking them down into street level and putting runners on the street to sell. That means a product costing \$10,000 to \$12,000, for a pure pound of methamphetamine, can be broken down into 454 grams to a pound, or 4,540 dosage units, selling at \$45,000 per pound. The profit margin is significant. An individual with an ounce, which is 28 grams or 280 dosage units, if paying \$1,000 for that ounce, can make \$2,800; a profit of \$1,800. If he moves even an ounce a week with a \$1,800 profit, he can afford to live. Moving one ounce is a significant weekly income. Someone with four grams is defined by the State as beyond a single dosage user. It is easy to support this definition when you look at the individuals working the streets: prostitution for a minimal amount of money (\$4 to \$5), street crimes, picking up cans. They are supporting a habit and are unable to put together large quantities of money to live and survive so they buy \$10 dosage units. The individuals selling are typically supporting their own habit; they may buy a half-ounce, break it down to single dosage units and be the source of supply for a trailer park or a two-block section of a street. These individuals selling single-dosages are then capable of supporting themselves, pay their own rent, utilizing a portion of the product for themselves and pay all their bills. We see this typically in the Tam area, along Fremont Street, the Sunrise area and the Tropicana corridor. We see people who buy mid-level quantities (14 grams to an ounce) who break it into single dosage units; if they cut it, the numbers are significant. They can make a very good living on a single-ounce product. The majority of the low-level product is seen by the patrol division, which will book an individual for two grams. That takes the person off the street for a period of time. That is the officer's task, as well as the street team's task. Street teams, originated in 1995, were designed to respond to the community who are reporting individuals standing on the street corner selling drugs. When we started making those arrests, we did not care if there was a rock, two rocks, an ounce or two pounds; we booked. We were responding to the community need to have their children able to play in the street. The low-level people booked for four grams or less are typically out of the patrol unit. Low-level and mid-level trafficking is taking place out of our patrol division. Most narcotics cases are probably not single-ounce but multi-ounce or three or four buys out of a single individual before they are taken into custody. Informants are used extensively through

substantial assistance. We use it because it is rapid. The drug world is rapid and fluid. Individuals move quickly. They understand their chances and the risk involved in selling to multiple individuals. If the individual buying an ounce breaks it into 280 dosage units, there is more risk in selling all of those units. That individual will roll on his source of supply who then rolls on his source of supply; that is how we move up the chain. One of the changing trends is we have seen large quantities. We were making arrests of 25 to 30 pound loads of pure methamphetamine coming to Las Vegas to be distributed in Las Vegas. We are no longer a pass-through corridor. This community now takes shipments of this quantity. The majority of those cases are filed and prosecuted at the federal level because of the minimum/mandatory sentences existing in the federal statutes. In terms of dosage units, four grams is actually enough for an individual to support himself. How many times do you have more than one month's supply of any medication?

The numbers do change somewhat with marijuana, one-half gram for a joint. Individuals come in today and put up marijuana groves in houses. Marijuana can sell for over \$6,000 a pound depending upon the THC level. We are seeing quantities of marijuana being sold in excess of \$1,000 to \$3,000. We do not address marijuana in the laws in terms of setting quantities, but marijuana is having a significant impact on our communities. Most individuals coming before the court have a drug history or dependency as a by-product of whatever crime they have committed. They claim the drug habit caused the crime. From a law enforcement investigative standpoint, if an individual is taking stolen property for narcotics, it is easier for us to do a narcotics purchase out of the location than serve a search warrant. It is the easiest way for law enforcement to get into the residence to get to the other part of our job in terms of the stolen property.

CHAIR HERNDON:

That is borne out by Mr. Carroll's numbers. I agree people are in court for crimes as a result of drug issues. The 281 resolved trafficking charges of the 672 total trafficking charges in 2007 were resolved by way of being dismissed because of a plea to something else. There is more going on with these people than just the drug charges, a fact which cannot be forgotten when we try to give meaning to the number of people incarcerated on trafficking charges. There are many being charged with trafficking who will not go to prison due to pleas for something else.

MR. BUND:

In one particular case when we were dealing with methamphetamine laboratories on a regular basis in our community – which has been curbed – an individual was arrested six times on manufacturing charges and released six times within 8 weeks while waiting for everything to catch up with the individual. When we booked him on possession of methamphetamine, we were able to finally hold the individual. The application of the law gives us another tool in

terms of different federal offenses which may occur. It is easy to book the individual because he does have methamphetamine, cocaine or something else in his possession at the time. I recently arrested an individual for a homicide. He was originally arrested because he threw down a bag of cocaine (.2 grams) in front of us. He was held in custody until we could catch up with the murder charges. Both cases are continuing through the court today. It is not a trafficking case but a PCS case. The drug statutes are a tool utilized to help law enforcement hold individuals until other criminal offenses can be supported.

CAPTAIN ZIMMERMAN:

The narcotics unit has squads assigned to high-intensity drug trafficking (interdiction and upper-level cases with the DEA), administrative and intel squads and five street teams. The street teams look at narcotics activity in neighborhoods. The street teams were set up so a case would go from the start of a shift until the end of the shift. An arrest is made on a street corner, and they are in custody by the end of the evening. Having the lower levels in trafficking and the differing lower amounts and weights does affect our patrol division which addresses the hot spot areas (Fremont Street, Tropicana corridor, Boulder Highway, Clark High School at Pennwood Avenue and Arville Street). They are not bad neighborhoods; there is a large concentration of people in these areas. We are able to take the lower level offenders off the street.

CHAIR HERNDON:

Does the mandatory nature of trafficking charges play greatly into substantial assistance being available prior to charge or conviction? I understand a person who pleads guilty knows he will mandatorily go to prison if he does not provide assistance.

MR. BUND:

Yes, because we explain the mandatory minimum sentence based upon the amount in possession and what substantial assistance can mitigate.

CHAIR HERNDON:

Did the legislative history, in terms of substantial assistance, describe weight designations?

MR. CARROLL:

There is no explanation in the legislative history as to how the weights were arrived at other than Senator Raggio's comments in the March 10, 1983, minutes. Senator Raggio remarked that cocaine is cut down to sixteenths of a gram and the amounts have an extremely high retail value. The point being that anyone possessing that amount of drugs must have information law enforcement can use. There is no legislative history for the four grams or any other designations.

MR. BUND:

When looking at intent to sell, in terms of paraphernalia, an individual who has an ounce probably does not have packaging material or a scale. Sales substantiated by looking at the paraphernalia present and the amount in possession supports the intent crime. Changing the language to interpret that we need an intent crime, in other words packaging material or other items to identify an individual is involved in the sale of product, would become burdensome on law enforcement. There are those individuals clearly involved in sales. The individual who buys a pound and breaks it down into sixteen ounces may be carrying the ounce to do a single sale to a distributor. The individual in possession of an ounce quantity, without the scales or packaging material in the car, is still involved in the sale of product. Showing intent only through paraphernalia to support a sales charge would be difficult in some cases. In his home he may have the paraphernalia present, but not in his car at the time of arrest.

MR. CHESNOFF:

I can understand explaining a trafficking statute with significant penalties to get assistance. I can understand how seeing the effects of meth on a community would lead anyone to want a supplier punished. Utilizing minimum mandatories and utilizing trafficking, have you seen a decrease in the actual use and effects of the drugs in the community? Are you seeing fewer people using? I am not negating the idea of using it to get assistance. I am not negating the idea of the public having an interest in punishing people.

MR. BUND:

When I first came here 16 years ago, I worked the northeast area command (Charleston north from Pecos east to the mountains). Basically every car I stopped resulted in the arrest of somebody in possession of drugs. Today that is not true. We do not see it as pervasive as we used to. It is more underground due to the increase in the number of individuals in our narcotics bureau. There is an increase in the burden to the court due to arrests. There is an incredible blossom in this area's population, so the use and abuse will also increase. We are also seeing a trend of methamphetamine being less abused. There are a number of reasons for that; there was a major drug lab taken off in Mexico resulting in the arrest of an individual who was providing chemicals for the manufacture of methamphetamine; the source of supply has dried up significantly; the cost has gone through the roof just like every other commodity in the community; the quality has plummeted. We are seeing people shift to other drugs, heroine and cocaine. Heroine has probably doubled or tripled in use over the last 5 years. We used to have a significant problem with the domestic manufacture of methamphetamine, especially in our communities. At one point we were doing a lab each day in Las Vegas. We do not see that today. Last year we had three labs.

MR. ZIMMERMAN:

Last year we had nine labs but we went from 300 labs in 1999. Year-to-date we are at three or four.

MR. BUND:

We do not have a domestic production of methamphetamine occurring in Nevada any longer. We were probably the first state in the country to see a decrease in methamphetamine laboratories. We did see a huge backfill of Mexican methamphetamine being flooded into our communities, but with the source dried up in Mexico, we see the number of those abuses decreasing. Unfortunately, there is a shift to other drugs. We started with two six-man street teams in 1995; today we have five teams with six or seven officers on each team. The program has been a major success in our communities. The police department is involved in community awareness programs; we do the DARE program; we teach and are involved in school programs. We have entered into agreements with the federal government in terms of DEA and have set up task forces to deal with large organizations. We have dealt with organizations bringing in excess of 100 pounds of methamphetamine in a 6 to 6 month time period.

MR. CHESNOFF:

You must be doing a better job because I do not get cases anymore.

CHAIR HERNDON:

Assuming there are people being convicted of trafficking charges, but there is not anything other than the amount to give credence to the person being a trafficker, how would law enforcement feel if the substantial assistance statute was somehow amended to approve a provision for suspending the sentence for a person who enters and completes a drug treatment program, for instance. Some type of discretion for the court with law enforcement still having input. Perhaps the person cannot provide substantial assistance but is not the drug trafficker others are; maybe he is a hard-core user.

MR. BUND:

I do not know if law enforcement would be opposed. It probably occurs today anyway. If an individual came in with five grams, he may be charged by law enforcement with trafficking, I doubt the district attorney's office would follow with a trafficking charge. Drug court was originally designed for an addict. Over the years I have seen people sent to drug court who were in possession of over one ounce, drug dealers sent to drug court. People who were manufacturing, at the time we were getting a lot of drug labs, were sent to drug court with the attitude the person would never complete the program and we will be able to institute a negotiated sentence and send the individual to prison. I do not know how you would craft language within substantial assistance, or within the law itself, which would give credence or

a solid foundation to say the individual with five grams would not necessarily be treated but given an alternative sentencing program and, if he completed it, there would be some negotiation. It probably happens fairly significantly now. Four grams is over a month's supply for an individual and is probably why that level was chosen. It is probably the district attorney's discretion as well as the court's to make that decision, with the input from the defense who actually deals with the individual on probably a more honest basis than law enforcement. Collaboratively they may be able to determine to best serve the community through alternative sentencing programs. People in drug court know every other individual in the room was a doper. They know they could either buy or sell dope in that environment. I do not want to say drug court was a bad thing, but it was not used as the tool it was designed to be.

MR. FREEMAN:

As a matter of policy, in Washoe County, if you are originally charged with trafficking, you are not eligible for diversion court.

CHAIR HERNDON:

That is from the prosecutor's discretion?

MR. FREEMAN:

That is correct.

CHAIR HERNDON:

They are saying you must plead to a trafficking charge?

MR. FREEMAN:

No. If originally charged in trafficking, even if the charge is later reduced to possession for purpose of sale, you are not diversion eligible.

CHAIR HERNDON:

Is that the policy of the drug court program?

MR. FREEMAN:

It is the policy of the Washoe County District Attorney's Office. Mr. Helzer is the drug court representative for the District Attorney's Office.

CHAIR HERNDON:

In Clark County, if I sentence somebody and a condition of probation is they go to drug court, the District Attorney does not get the end-all say as to whether the person is accepted in drug court. The judge decides whether or not to accept the person into the program.

MR. FREEMAN:

It is different in Washoe County. The request to go to drug court from an originally charged trafficker would be opposed by the district attorney even though the judge gave drug court as a special condition of probation. You can give drug court as a special condition of probation, but that presupposes that they do not get the benefits of diversion; they do not get the felony diverted at the completion of drug court. It is a special condition of probation. They remain convicted. I agree with the way Mr. Bund described it. I am not on this committee because I am a defense attorney and want to disagree with law enforcement. The way Mr. Bund described it is the way it is supposed to work. Someone with five grams should be charged by the street-level officer with trafficking. In discussion with the district attorney, there should be the ability to do a program and use some discretion. I had a soccer mom who came from California, went to John Ascuaga's Nugget, forgot her purse with seven grams of methamphetamine in the restroom. She had to take a trafficking conviction; she had no priors. The best we could do was ask where she got the dope, which barely qualified for substantial assistance. She got probation and could go back to California. It is appropriate to give the court more discretion; the court could look at the totality of the person with the ability to use its discretion for a suspended sentence.

CHAIR HERNDON:

We have had discussion with the Commission on a variety of laws where the complaint seems to be more of a prosecutorial or judicial discretion complaint than that the law is bad. Folks have come before the court to talk about how burglary charges are being used for petty larceny related offenses; how habitual criminal adjudications are handed down by the court involving old or stale convictions. I do not advocate changing good laws because someone has complaints about a particular jurisdiction. That is the age-old argument between defense attorneys, district attorneys, judges and law enforcement. On the other hand, when dealing with a mandatory prison sentence, mechanisms to provide input as to whether the court should exercise discretion or not is not a bad thing. There are very good reasons for trafficking having mandatory sentences. The Legislature probably will not have a great appetite for turning trafficking into discretionary sentences as opposed to mandatory sentences. I have been trying to look at ways we can either expand or clarify or give more specificity to the courts' ability to impart discretion separate and apart from what is done at the charging level.

MR. CARROLL:

Clark County does not have a specific policy to prohibit someone originally charged with trafficking to drug court. However, once every 6 months we receive a memo from our representatives in the drug court to remind us the judge in drug court does not want drug traffickers sent to drug court. They have limited space in the program. They want the program used for addicts who will benefit from the program. They have had significant

problems with traffickers getting into the program and using the other drug court attendees as clients and purchasers. If we propose a change to the trafficking statutes which allows anyone to attempt to obtain diversion from prison by claiming to be an addict willing to go through a program, who would not offer to go to drug court or some similar program in lieu of going to prison? I do not know if our drug treatment programs are equipped to deal with that. Exceptions are made in Clark County. Someone like the soccer mom with a trafficking charge would probably be allowed into the program; the charge would be negotiated to something less so the sentencing judge has the full discretion to structure a probation sentence.

MR. CHESNOFF:

That is similar to what they do with sex offender cases where there must be some type of evaluation to verify the person is addictive or in need of counseling. There needs to be the ability to understand the law enforcement perspective that certain gram weights equate in many instances to trafficking but there are people with those weights who are chronic users; maybe they have more money; maybe their needs are higher after extended use. We need to figure a way to construct a criteria or formula so a person who is truly an addict, but carries the amount concerning law enforcement, can get the benefit of judicial discretion.

CHAIR HERNDON:

I envision my suggestion as a rare thing. If we make suggestions to the Legislature, changing trafficking from mandatory to discretion is not likely. There is a reason for the amount-based crimes as a higher impetus to people to avoid engaging in narcotics distribution. However, there are exceptions to every rule; a user versus trafficker.

MR. FREEMAN:

The Subcommittee seems to be interested in adding a subpart to the statute to include law enforcement substantial assistance with some type of creative discretion by the court to suspend a sentence. I am not advocating drug traffickers go to diversion court. I am suggesting there is discretion in the current statutory scheme which would not be offensive to the Legislators: the court has the discretion to rule whether or not a person has done substantial assistance, then the court has the discretion to determine what the sentence is outside the mandatory minimum. There are some cases which fall through the cracks where a person cannot do substantial assistance, maybe an addict or there may be some good cause reason where the court is loathe to put the person in prison.

CHAIR HERNDON:

The Subcommittee has received "Proposed Amendments to NRS 453.3405, Sub-Section 2." ([Exhibit F](#)) I used the United States Sentencing Guidelines 5K1.1 regarding substantial assistance and added language to make it a state statute rather than a federal statute. One of

the reasons I brought up whether state law enforcement would have qualms about having the discretion with the court is I believe it is included in the federal substantial assistance statute. I do not know if they use it federally, but it is part of what it speaks to. Obviously, it gives more specificity and direction to the court than our state statute does. It encompasses more of what law enforcement is telling me is of value to them, which is substantial assistance in anything, not just narcotic offenses. The federal guideline speaks to any offense in the first paragraph. The federal sentencing guideline in subpart (a):

The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

That means the judge can consider any and everything needed to determine any type of suspension or reduction to a sentence. The judge does not have to consider only the five items listed; the judge can also consider any number of things to determine if reduction or suspension of the sentence is appropriate. The person must provide substantial assistance prior to applying the balance of the guidelines. I doubt there would be any disagreement from law enforcement. If someone begins to provide substantial assistance and something happens so they are unable to provide more (everyone knows the person has been arrested, for example), the court still has discretion in deciding whether to reduce or suspend a sentence.

MR. FREEMAN:

It is being used in the federal system. The government makes a motion pursuant to 5K1.1 to identify each one of the five factors. It will be like a sentencing memorandum. The motion, in a sealed document, will state what the substantial assister has done under each of the topics. For example, the timeliness of the defendant's assistance may say the defendant started immediately to work with law enforcement; or this defendant decided to do substantial assistance after the motion to suppress was denied. The defense will do a counter report if there is disagreement. Even though the government makes a recommendation of how many points will be lowered on the sentencing guidelines, the defense is free to argue, for example, for an 8-level departure even though the government asks for three.

CHAIR HERNDON:

I am not asking everyone today to agree to send the proposed amendment to the Legislature. It is a thought for providing more specificity to Nevada's substantial assistance statute. The government guideline is a good idea in that there is such state/federal task force involvement with narcotics trafficking that having similar substantial assistance related laws would be a good idea. In the first paragraph of the amendment, Mr. Freeman is proposing there should be more language to say "or for any other good cause shown" so it is not just crime-based substantial assistance which gives discretion to the court.

MR. FREEMAN:
Absolutely.

MR. CARROLL:

Based upon my experience and the figures I have provided which show the sentences imposed in Clark County for trafficking convictions, the vast majority of the judges exercised the discretion they already have to give the minimum mandatory sentence. If a clause is added to allow the judge for any cause the judge deems to be a good cause, the judge can deviate from the mandatory sentence, suspend the sentence and place the person on probation. The judges will exercise that ability to suspend and give probation. The burden is being shifted. Currently, the mandatory minimums have teeth because they are "mandatory." Everyone knows, if a conviction results, the judge must send the person to prison. The whole thing would be turned upside down if a clause is inserted to allow a judge for any good cause given to suspend sentence. A person can come in saying he is afraid to give assistance because he would have a snitch jacket and does not want a target on his back. The judge says he understands the defendant might be afraid; he wanted to provide assistance; the judge will suspend. Such a broad clause deviates from the original intent of the legislation which was to address drug trafficking by putting pressure on people to provide the information they have. There may be occasions, such as the soccer mom, where a prosecutor is holding out for the trafficking conviction. In Clark County, it would be the exception to squeeze that person for a trafficking conviction rather than pleading it down to something probationable which, in so doing, gives the sentencing judge full discretion to impose a reasonable sentence. We may be taking unique cases which are an aberration and trying to deviate and change a statute where it is not needed. Clark County does not see people making motions in court to find they have provided substantial assistance. Law enforcement, the defense and the defendants are generally in agreement when they have provided substantial assistance for plea bargaining the case to the satisfaction of the defense. If we were not, they would be taking a deal or go to trial and then file motions to have the court suspend sentence. I do not see a huge problem with the way Clark County has implemented substantial assistance. The proposed amendment is not a problem because it further explains how the substantial assistance statute should be implemented which might result in more uniformity throughout the State. I do have a problem with converting a mandatory minimum sentence to complete discretion of the judge.

CHAIR HERNDON:

Would the way the federal substantial assistance statute reads, assuming there is not a good cause shown caveat, have a great affect on how substantial assistance and probation would be doled out in Washoe County? Have the judges expressed frustration?

MR. FREEMAN:

It would be a great improvement. There is no guidance for judges who start out in civil practice to figure out what substantial assistance is. I am not against defining what good cause would be. It need not be completely broad. We should continue to think about defining what the potential good cause could be in unique cases to give courts some guidance. Following the letter of the law, as in Washoe County, does not breed uniformity and agreements. You do not see the arguments in Clark County because you are following the spirit of the law, a reasonable approach.

MR. BUND:

When law enforcement looks at the application of the law and at differing sentences, it causes frustration. Similar cases have differing sentences. Federal courts have gone to minimum mandatory guidelines or sentencing guidelines because there is such a disparity between districts as to the application of sentencing for specific crimes. There was a truth-in-sentencing push several years ago to set minimum mandatory sentencing guidelines so the court would be similar wherever in the State you were prosecuted. We burden the district attorney's office here with 70,000-75,000 cases annually. Narcotics short circuits the system by offering substantial assistance and does not file 5,000- plus cases annually which would burden the district attorney's office that much more. I see the language in substantial assistance giving a clearer guideline, but opening it to total discretion on the part of the court might go back to the previous truth in sentencing disparities experienced previously. What would the defense be required to show, for instance, that the soccer mom is not a habitual user with the potential to abuse her children? We need to help the person similar to the soccer mom as opposed to the person with 13 or 14 grams.

CHAIR HERNDON:

It is worth debate not only to figure out, in terms of discussion, whether we need to revise the mandatory nature of trafficking, but if there is discretion built in or recommended, does it apply across the board, is it a low level thing, or does it apply to every level? There are good arguments for it not being the same at every level. The guy with 4 grams is different from the person who can sell 140 dosage units. Mr. Freeman, could you come up with some type of proposal for the Subcommittee to debate at the next meeting, language to address the issue of whether or not the statute should be amended, or if the Subcommittee should make any kind of recommendations?

Whatever report I decide to give to the Advisory Commission, I will try to include the ideas we have discussed, what ideas have been proposed and where the majority of thoughts were on certain items.

Are there any other topics the Subcommittee members want to put on our next agenda? We have a few main items we are dealing with: the discussion of weights; discussions of mandatory versus discretionary; and substantial assistance statutes. Part of any discussion must encompass the prison system. A future discussion will require more information on the numbers of individuals incarcerated solely for drug offenses and trafficking offenses and the average sentences for those people.

Tentatively, the Subcommittee will meet July 21, 2008, at 9 a.m.

MR. GARDNER:

The discussion today regarding the balance between interdiction cases versus drug sales cases was interesting. There used to be a lot of interdiction cases in Clark County through the Highway Patrol and METRO at the bus station, airport, etc. Carson City sees almost no interdiction cases; almost every drug trafficking case we prosecute is the result of an investigation, a number of control buys and a search warrant. I would like to see statistics on interdiction versus sales from the Department of Public Safety or METRO narcotics. It goes to the issue of how many mules are really being prosecuted for passing through Nevada.

MR. CARROLL:

The Clark County statistics I was given would not provide an answer to your question. I could give some anecdotal information. I would have to read each case file to get the information you are interested in. The court system and the District Attorney's Office do not have the ability to pull that number.

MR. BUND:

The Metropolitan Police Department does have the number of cases handled. We have established, through the High Intensity Drug Trafficking Areas (HIDTA) setup, quarterly stats as to the number of interdiction cases handled and probably which ones are going to State and which ones are going federally. Probably 80 percent are being handled by federal prosecutions, not the state court systems, which is why you do not see a lot of information.

CHAIR HERNDON:

Are you defining interdiction as solely the guy transporting through the State?

MR. BUND:

Those are handled by our interdiction task force, which does incorporate the highway patrol officers, METRO and DEA personnel. Other task forces do the wire tap and high level investigations. Multi-pound dealers are prosecuted federally, not through the state system.

CHAIR HERNDON:

Do those statistics include NDI?

MR. BUND:

It would include NDI. An HIDTA task force has been established in Reno; it may be interdiction or a single major case investigative unit.

CHAIR HERNDON:

Are the statistics for Clark County or statewide?

MR. BUND:

It would be for the HIDTA program which is primarily Clark County.

MR. GARDNER:

I am aware that northern Nevada has received HIDTA designation. It does not impact Carson City where we use Tri-Net. I could probably get in touch with the people who could help with that information.

MR. FREEMAN:

The northern Nevada Highway Patrol keeps track of interdiction arrests, both dog searches and teams in Humboldt County and Winnemucca.

BRUCE GENTNER (Detective, Las Vegas Metropolitan Police Department):

The Department of Public Safety puts out a quarterly report from the Byrne/Justice Assistance Grants. We can provide those numbers to the Subcommittee.

At the last Subcommittee meeting we discussed funding for law enforcement to purchase narcotics. Most of the northern Nevada counties are funded by Byrne/Justice Assistance Grants. Those funds have been cut in the Omnibus Bill. We will go from direct grants to the State of \$2,948,000 to \$1,080,000. Direct grants to locals will be cut by \$1,137,564. This will have an impact on law enforcement in the northern Nevada counties who receive federal funding to fight narcotics.

CHAIR HERNDON:

Was that over \$1,000,000 in northern Nevada and over \$1,000,000 in southern Nevada?

MR. GENTNER:

Yes. The direct impact for the State is \$4,744,555 in FY 2007 to \$1,739,370 in FY 2008; a difference of \$3,005,185.

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CHAIR HERNDON:

If anyone has anything to add to the next agenda, let me know 1 week prior to the meeting.
Any other proposals, with specificity, should be available at the next meeting.

No members of the public have come forth to present testimony. There being no further
business to come before this Subcommittee, this meeting is adjourned at 4:23 p.m.

RESPECTFULLY SUBMITTED:

Sandra K. Small, Interim Secretary

APPROVED BY:

Douglas W. Herndon, Chair

DATE: _____

EXHIBITS

**Subcommittee to Study Mandatory Drug Sentencing Statutes and the
Substantial Assistance Statute**

Date: July 1, 2008

Meeting time: 1:34 – 4:23 p.m.

	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
	C	Rex R. Reed, Department of Corrections	Characteristics of Drug Offenders, June 2007
	D	Thomas M. Carroll, Office of the Clark County District Attorney	2007 Clark County Trafficking in Controlled Substance Charges
	E	Douglas Herndon, Judge, Eighth Judicial District Court	Criminal Caseload Statistics for Carson City, Nevada
	F	Douglas Herndon, Judge, Eighth Judicial District Court	Proposed Amendments to NRS 453.3405, sub-section 2