

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

June 4, 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 1:29 p.m. on June 4, 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 3138, 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
Lynn Hendricks, Interim Secretary

OTHERS PRESENT:

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

Advisory Commission on the Administration of Justice's Subcommittee to Study
Mandatory Drug Sentencing Statutes and the Substantial Assistance Statute
June 4, 2008
Page 2

Martin Lehtinen, Lieutenant, Vice/Narcotics Bureau, Las Vegas Metropolitan Police Department

CHAIR HERNDON:

This is the first meeting of the Advisory Commission on the Administration of Justice's Subcommittee to Study Mandatory Drug Sentencing Statutes and the Substantial Assistance Statute. I hoped to receive statistics from a variety of agencies. We have not received Washoe County's statistics. I would like each member of the Subcommittee to give us a brief introduction.

I am an Eighth Judicial District Court Judge, appointed 3.5 years ago. Prior to that, I spent 14 years in the Clark County District Attorney's Office as a criminal prosecutor. I am the Nevada District Judges Association's appointee to the Advisory Commission on the Administration of Justice. Justice Hardesty, the Chairman of the Commission, appointed me to put together this Subcommittee.

MR. CHESNOFF:

I am a partner in the firm Chesnoff and Schonfeld. Previously I was a partner in the firm of Goodman and Chesnoff. I have been practicing criminal law for approximately 29 years. I have had cases involving controlled substances in 25 of the 50 states and have federal experience. I have seen minimum mandatory sentencing come into play and before it was in play. I have spoken at length with people who have been affected by it.

MR. CARROLL:

I have been with the Clark County District Attorney's Office for 18 years and currently serve as Chief Deputy District Attorney, supervising 10 other attorneys handling three different district courts in the Eighth Judicial District as well as a variety of justice courts. We handle a large section of the drug cases coming through the court system in Clark County.

MR. ZIMMERMAN:

I have been with the Las Vegas Metropolitan Police Department 18 years. I currently command the Vice/Narcotics Bureau which handles all of the vice-and narcotic- related crime in the Valley. I previously worked in the Patrol Division for 16 years and am familiar with street narcotics from that experience.

MR. SMITH:

I am a classification analyst with the Department of Corrections (DOC). I manage the classification section for the Offender Management Division. I have been with the DOC about 22 years. A lot of my work deals with sending inmates to drug court and residential confinement programs.

MR. FREEMAN:

I am a criminal defense attorney in private practice. I have been practicing in northern Nevada for 24 years. The majority of my practice is narcotic-related offenses. I practice in both state and federal courts. I am familiar with the Subcommittee's topics, having tried these cases and dealt with individuals affected by them, both pro and con. I have an open mind in different areas even though I am a criminal defense attorney.

MR. GARDNER:

I am the Assistant District Attorney for Carson City. I have been in Carson City since January 2007. Previously I was with the Nevada Attorney General's Office for 4.5 years as the Las Vegas Office Chief and Chief of the Criminal Justice Division. Before that I served as a prosecutor in the Clark County District Attorney's Office handling general felony crimes as well as special victim crimes. Carson City is fortunate enough not to have a large number of high-level trafficking cases, but we do have a significant amount of street- and mid-level drug trafficking cases.

CHAIR HERNDON:

Assemblyman John Carpenter, Elko, is also a member of this Subcommittee and a member of the Commission. He will be a good voice in the Legislature for whatever recommendations or ideas we spur and bring before the Advisory Commission.

It is obvious why the members of this Subcommittee have been asked to participate. This Subcommittee will not operate in the formal way the Advisory Commission does. We will operate as a round table discussion group or think tank to see what we can come up with to build ideas and recommendations I can then take back to the Commission. The Advisory Commission will develop a report and recommendations to the Legislature as to what, if anything, needs to be done in regard to a variety of subjects. The Advisory Commission was established by legislation and has been in effect for a long time. There have been some Commissions in the past. This particular Commission began July 2007 and involves myself; Attorney General Cortez-Masto; Justice Hardesty; Senator Amodei; Assemblyman Carpenter; Senator Horsford; Assemblyman Parks; Larry Digesti, a State Bar representative from northern Nevada; a victims' rights advocate; the chief of the Division of Parole and Probation; Mr. Mallory, Churchill County District Attorney; Mr. Miller, Storey County Sheriff; Ms. Salling, Board of Parole Commissioners; the president of the ACLU of Nevada, Richard Siegel; Director Skolnik from the DOC; Ray Flynn, Assistant Sheriff for METRO; and Phil Kohn, Clark County Public Defender. The Commission is a large group with diverse background and experience. The Commission is looking at many things, not just narcotics. We are tracking trends for arrests: probation violation arrests and normal arrests; detention center statistics; and we have toured the High Desert State Prison. This Subcommittee will look at the mandatory drug sentencing statutes to determine if there are an inordinate number

of people in the DOC for mandatory sentencing. Are the sentences proportionate or does there need to be more discretion within the courts on some of those mandatory sentences? The fear was first-time offenders doing ten to life in the DOC for trafficking offenses. I do not know if the statistics will bear out that fear. It is not inappropriate to take a look at the laws, such as the weights in trafficking which are dictating the sentences, to see if the area needs to be readdressed in front of the Legislature.

Does everyone have a copy of "Nevada's Primary Narcotics Statutes and Corresponding Sentencing Guidelines?" ([Exhibit C](#)) These are the main narcotics offense statutes utilized in criminal prosecutions.

How do some of our mandatory sentences, particularly for trafficking, compare with similar situations within the federal courts? Do the federal courts have traditional trafficking offenses? Do they have weight designations and sentences similar to Nevada's? How do the federal guidelines work?

MR. FREEMAN:

The federal system's sentencing scheme is completely different from Nevada's. In 1986 the U.S. Congress put together the U. S. Sentencing Guidelines. Every conceivable crime in the federal system is assigned a value. A couple of years ago, in U.S. vs. Booker, the U.S. Supreme Court made the U.S. Sentencing Guidelines, used in the federal system, advisory. As a consequence, they were found to be unconstitutional for a variety of reasons. Some judges in the federal system are following the guidelines as though they are mandatory and some as advisory. It is difficult to compare the federal system to Nevada's system because of the way it is set up. Generally, as far as mandatory minimums are concerned, the federal system is trying to move away from mandatory minimums and move back into a discretionary sort of analysis because the federal judges were being dictated to in terms of a sentencing range once a calculation had been reached. In the Nevada court system the District Attorneys (DA) make a discretionary call in terms of how a particular case will be charged in the State court system. Twenty-five to life for a first-time offender may have the most conservative DA in a particular case looking for a way to work with the defense to avoid that type of result. There are mandatory minimums in the federal system. We do not see them often; however, there are different ways of avoiding mandatory minimums by utilizing a guideline analysis, by declaring the guidelines in the federal system as advisory as opposed to mandatory. Usually the mandatory minimums kick in based upon a weight level. There is a marijuana equivalency table. A certain amount of drugs related to cocaine, methamphetamine and heroin can be looked at in the marijuana equivalency table of the federal sentencing guidelines to find what the guideline will be. The guideline is what a person's prior record is; what level the U.S. Congress has assigned to the crime; the information is put on a graph to determine the prison time. Defense lawyers try to do a

downward departure from that level and the prosecutor sometimes will do an upward departure. I do not know how helpful it would be to us other than it can be used as a comparison in terms of substantial assistance issues. There is a safety valve in the federal system which allows deviation from guidelines in narcotics cases.

CHAIR HERNDON:

When you talk about the mandatory minimums in federal law within the guidelines and making departures up or down, are you talking about mandatory prison sentence years or the years which may or may not be probationable?

MR. FREEMAN:

No; probation is rare in the federal system once you get to those types of levels. Mandatory minimums are prison sentences related to amounts of drugs and the type of crime. First you look at the statutory scheme in the federal system, then you look at the guideline to do sentencing in the federal system.

CHAIR HERNDON:

When you are dealing with narcotics in the federal system equivalent to Nevada's Schedule I controlled substance and weights commensurate with Nevada's trafficking weights (4-14, 14-28, 28 or more), what are the federal statutory guidelines for those types of offenses?

MR. FREEMAN:

Those are minimum possession offenses in the federal system. The federal system deals with kilos and multiple pounds. The U.S. Department of Justice has guidelines where they will leave a case state rather than go federal because the state sentencing is attractive to federal law enforcement. There are combination task forces of state and federal people. Consequently, they sometimes like to prosecute in the state system because the sentencing time is significant for trafficking. The quantity is greater in the federal system to reach mandatory minimums. The state system gives a lot of time for a little bit of drugs when compared to the federal system.

MR. CHESNOFF:

The levels for the minimum mandatory in the federal system are usually 5 years, 10 years; the next minimum level jumps to 20 years; then to 40 years; all depending upon weight. Before we had the State minimum mandatories, the authorities would often use the federal system against a particular defendant because the minimum mandatories were so rigid the only way you could get below the minimum mandatories was either by a 5K1 (a cooperation agreement) or a safety valve which required no prior convictions or crimes of violence. It was often used to get the law enforcement result required. As a result of the severity of some of the minimum mandatories in the federal system, there is an organization called Families

Against Mandatory Minimums (FAMM). Many times people were not getting the safety valve or cooperation; a 20-22 year old person could get a 10 or 20 year mandatory. I spoke with Mary Price, who is the vice president and general counsel of FAMM, to get information as to whether they have factual statistics about Nevada and national statistics to share with us. FAMM has done a lot of studies on the impact of minimum mandatory sentencing as it applies to the families affected, the defendant and prison overcrowding. She will share that information as we proceed. The federal system can be very rigid. Only recently more flexibility has been given to federal judges with respect to the guidelines. There are still substantial penalties for quantity in the federal system. Nevada's minimum mandatories are much lower. I am interested in finding out how many people end up with what could be called a Draconian sentence. The minimum mandatory schemes are frightening to the people affected and understandably important to law enforcement. On the other, when it actually comes into play, it goes beyond frightening and becomes over-the-top.

CHAIR HERNDON:

Do you recall a time when trafficking-type offenses were not mandatory sentence offenses?

MR. FREEMAN:

No, I do not. The trafficking charge always had a mandatory penalty. First offenders would go to prison absent substantial assistance. When the law related to trafficking was changed, it became part of the narcotics sentencing scheme. Trafficking meant mandatory penalties. It used to be different. They were modified several years ago to try to make it more workable in practice.

MR. CARROLL:

The federal system frequently gets cases with larger quantities of narcotics. There will be the occasion where, on federal property, someone is in possession of a smaller amount, for example 14 grams of cocaine or methamphetamine. We call that a mid-level trafficking. How would this be treated federally?

MR. FREEMAN:

It would be like a possession offense similar to the State's. It would be dealt with on the quantity table. The 14 grams would equal a sentencing level. Looking at the graph, take the sentencing level, look at the top of the graph, which is the defendant's prior record or lack thereof, take that level to tell you what the sentence would be. I cannot give you a specific answer because the sentencing guideline is a variable practice. Not only do you take into consideration the prior record, but the characteristics of the offense, relevant conduct, etc. These things move the guidelines up or down. A small amount of narcotics and an ex-felon in possession of a firearm is two separate felonies in the State court system. The federal system may or may not charge ex-felon in possession. They may charge a firearm

enhancement, which is a mandatory minimum additional five-year penalty. The types of penalties in the federal system for 14 grams are less than the State's mid-level trafficking which is 2-15 years in prison. The guidelines make the levels move up and down because of the various factors. Nevada does not have a factor analysis sentencing scheme.

CHAIR HERNDON:

The federal system looks at personal use differently than Nevada. Many of the State's trafficking offenses may be argued on the reality of how much someone might possess for personal use which may not be the same as before.

MARTIN LEHTINEN (Lieutenant, Las Vegas Metropolitan Police Department):

I have been on the Police Department for 29 years including four years in narcotics. I do not know of any time we have prosecuted someone on 14 grams as a trafficking weight. We do not have the time to expend the effort to investigate that weight. Most of the weights we are going for in trafficking are much higher. A 14 grams trafficking case would probably be pled down to possession of controlled substance, possibly with intent to sell.

MR. FREEMAN:

In Washoe County we frequently see 14 gram prosecutions as well as 4 gram prosecutions as trafficking with first-time offenders facing 1-6 years mandatory minimums. Recently the Consolidated Narcotics Unit in northern Nevada was disbanded in favor of two separate narcotics law enforcement agencies. One is the Street Enforcement Team (SET), which does low-level street amounts. A big day for SET is trafficking quantities. They see it through to the DA's office. The other agency is a joint task force with the DEA which has State officers, local law enforcement and DEA. Those are the ones we see federally with large quantities. There seems to be a demarcation between street-level and mid-level dealers prosecuted in the State system. Much larger offenders with the Department of Justice guidelines in northern Nevada are prosecuted federally.

MR. CARROLL:

Clark County will prosecute low-level and mid-level amounts of controlled substances. Clark County does not target, investigate or do sting operations, etc. for small amounts. The cases in Clark County with small amounts are, generally, when a patrol officer has had contact with an individual, discovered the narcotics and makes the arrest. When METRO does search warrants and controlled buys, it is usually focused on larger amounts.

LIEUTENANT LEHTINEN:

Clark County does not normally prosecute those small amounts as trafficking cases. It is usually possession of a controlled substance or possession of a controlled substance with intent to sell.

CHAIR HERNDON:

The statistics we will be discussing from Clark County, Carson City, and Churchill County will show differences in priorities. Even though there are not a lot of cases in Churchill County, it looks as though everyone charged with trafficking is convicted of trafficking. In Clark County, 10-12 percent of the persons charged with trafficking are convicted of trafficking. Are the concerns based upon the statutory sentencing guidelines or problems of the discretionary acts of prosecutors or judges in prosecuting and/or sentencing?

The DOC is going to provide information about inmate population based on mandatory sentencing.

REX REED (Administrator, Offender Management and Chief of Classification and Planning, Department of Corrections):

I oversee the statistics generated by the DOC. The Subcommittee has received copies of "Nevada Department of Corrections Characteristics of Drug Offenders as of June 2007." ([Exhibit D](#)) The DOC computer system is fairly new; we do not have calendar year end 2007 statistics. Admissions of drug offenders for calendar years 2004, 2005 and 2006 are shown. The second page of [Exhibit D](#) is a picture in time of all drug offenders in the DOC system. This page contains an error: Weight 4 should read Weight 3; there is no Weight 4.

The available minimum and maximum sentence for each crime when a judge sentences an inmate is shown on the second table.

The tables list statistics showing characteristics of the drug offenders in the DOC at a specific time: ethnicity, prior felony convictions, gender, county and whether or not a U.S. citizen. The Gender and Age Group table indicates an even distribution across ages. Each age group listed has approximately 300 to 400 people with the exception of the ends (the very young and the very old). The Gender and Ethnicity table shows whites are 47 percent of the drug offender population; African-Americans are 30.9 percent; and Hispanics make up 18.7 percent of the population. The Gender and Prior Felony Convictions table shows most inmates (37.9 percent) had no prior felony convictions. There is quite a range (from 1 to 20) of inmates with prior convictions. The Gender and County table indicates the county of commitment, not residence, with most inmates coming from Clark County (51.4 percent) followed by Washoe County (30.2 percent). The Gender and Current Custody table shows custody level. Most female drug offenders are at the minimum custody level. Most of the

male drug offender population is housed in medium custody. Overall, 44.6 percent of the drug offender inmate population is in medium custody; 33.6 percent are in minimum custody. The U.S. Citizenship table indicates 83.9 percent of the DOC inmates are U.S. citizens.

CHAIR HERNDON:

As of June 2007, what was the total inmate population in Nevada?

MR. REED:

The population is about 12,000 in-house. There is a larger total population which includes inmates outside the State's system and some in residential confinement, county jails and hospitals. In-house refers to people actually inside the fence.

CHAIR HERNDON:

Is there any way to correspond the 1,857 in the gender and age group table with the admissions per drug offense so we can determine the offense?

MR. REED:

I can do that, however some of the inmates will have multiple offenses. The DOC chooses the most serious offense to develop statistics.

CHAIR HERNDON:

If anyone is in on a trafficking offense, it will be the most serious of the narcotics offenses. If you are talking about jury verdicts versus negotiations, they may have convictions for several non-trafficking weight hand-to-hand sales prior to being arrested. I am trying to keep us focused on the trafficking convictions, to see how much of the prison population is there due to mandatory sentences. For the three trafficking offense statutes shown which deal with Schedule I, marijuana, and Schedule II, it appears the numbers of admission by calendar year are 333 inmates in calendar year 2004; 319 inmates in calendar year 05 and 314 inmates in calendar year 06.

MR. REED:

That is correct.

CHAIR HERNDON:

If we assume, for discussion purposes, the 966 are still in custody on those trafficking charges as of June 2007, we are dealing with approximately 50 percent of the drug offender population in on mandatory trafficking offenses.

Advisory Commission on the Administration of Justice's Subcommittee to Study
Mandatory Drug Sentencing Statutes and the Substantial Assistance Statute
June 4, 2008
Page 10

MR. REED:

I will get the actual percentage. Because inmates come and go, I would not say 966 are still there as of June 30, 2007.

CHAIR HERNDON:

Assuming they are still there, the remaining are in on non-trafficking offenses.

MR. REED:

That is correct.

CHAIR HERNDON:

A large number of those people may have been paroled or released. There may have been others who have entered the DOC. Can you provide updated statistics and some statistics to help the Subcommittee give meaning to the 1,857 number in terms of who is in on trafficking offenses?

MR. REED:

I will do that.

MR. CHESNOFF:

Has the DOC done prison population growth projections for the next decade based on the State's population growth?

MR. REED:

Yes, a population projection is done every biennium. The DOC has just received a draft projection, not ready to be released. There were two scenarios: a one percent per year growth over ten years and the other shows a four percent per year increase over ten years.

CHAIR HERNDON:

We are dealing with similar projection issues in the Advisory Commission, including where the population is going if we keep doing business as we do now versus any proactive approaches to affect change.

MR. REED:

The biennium projection is a cycle. We get three projections: one for the DOC to build its budget, one for the State Budget Division and one for the Legislature. When we get the next installment of the population projection cycle, the number may change.

CHAIR HERNDON:

When the DOC receives further statistics relating to the 1,857 number, can you also get statistics on the average sentence these folks are serving?

MR. REED:

I can get what is called "length of stay." The "length of stay" of those discharged in a specific year would not necessarily be the 1,857. Some of those people will still be in the system. We look at the discharges for a full year. The statistics I gave you today are at a point in time, June 30, 2007. All of the discharges from January to December are used to calculate "length of stay." I could not give you a "length of stay" for the 1,857 because they are still serving time. I cannot say he was sentenced to one to five and calculate it somewhere in there because he can earn credits and get out early or pick up disciplinaries and leave later.

CHAIR HERNDON:

Are you saying if 500 people, for instance, are discharged in calendar year 2007 you can look at those 500 and provide an average "length of stay?"

MR. REED:

Yes, that is correct.

CHAIR HERNDON:

More specifically, I want to know what the actual sentences were, not trying to figure out when they may get out prison. If we have 500 people in prison on 12-36 month sentences and some 24-60 months take those aggregate sentences and average them to say the average sentence of a drug offender in the DOC is 36-120 months, for example. Can that be done?

MR. REED:

I will let you know if I can do that.

MR. CHESNOFF:

Is there any way to break down the difference between in-prison disciplinary problems for people in prison for drug convictions versus other offenders so we can see if there are more or fewer problems? If there are fewer problems for drug offenders, perhaps they are more apt to be rehabilitated. Perhaps that information will have impact on whether we think there should be minimum mandatories for people who conform their behavior better than other criminals in the system.

MR. REED:

I do not think that is possible.

CHAIR HERNDON:

It would require taking a random sample of, for instance, 500 inmate drug offenders and manually review them to a sampling of other offenders.

MR. REED:

Yes, it would be a manual process. With the budget crunch, I have lost one-third of the research and planning staff who would do something like you are suggesting.

MR. FREEMAN:

The prison has done an excellent job of trying to program some of the offenders and cycle them out. If a judge, for example, gives an offender two to six, do you see the two years served given there is no record of escape, no prior domestic violence? The inmate is programmable. Do the narcotics offenders receiving a mandatory minimum actually serve the minimum sentence? Are narcotics offenders released early due to the DOC's innovative programs?

MR. REED:

If a person has a small range in sentence, for example 1 to 2.5, goes through programs, does not have any disciplinaries and is not difficult to manage, the person is usually paroled the first time before the Board.

MR. FREEMAN:

This Subcommittee is dealing with narcotic offenses. Is the minimum being served as a result of a drug offense or can they program out?

MR. REED:

We do not let anyone out before they finish the minimum sentence.

CHAIR HERNDON:

What about the changes resulting from A.B. 510 and other things? I know they do not affect Category A or B felonies, but the other felonies' mandatory minimums are being reduced.

MR. REED:

If we are taking time off the front end of the sentence because they are behaving or getting statutory good time, by definition, that is their minimum; it is a new minimum.

CHAIR HERNDON:

It isn't that they do not serve their minimum; the minimum is a moving target.

MR. REED:
That is correct.

MR. FREEMAN:
The mandatory minimum is a moving target which is necessary for us to know to properly evaluate whether these types of statutes work in Nevada.

MR. SMITH:
Anything that is not a Category A or B is equating to about half time. The Category A and B credits off the front of a sentence were not affected by A.B. 510. Those offenders are doing the minimum. Categories C, D and E are not; the credits come off the front end.

CHAIR HERNDON:
Anyone going into prison for Category C, D or E offenses, whether it is a second offense, possession with intent to sell or probation revocation on a possession of a controlled substance, etc., if the sentence is 12 to 36, the time served may be six months before being eligible to go before the Parole Board.

MR. SMITH:
That is correct.

CHAIR HERNDON:
The Category A and B offenders will serve the statutory minimum.

MR. SMITH:
That is correct. Category B offenders are not eligible for residential confinement.

CHAIR HERNDON:
Do you know the rate of drug offender success the first time before the Parole Board versus other classification of inmates?

MR. REED:
The DOC may have that statistic. The Parole Board tracks that information. The statistic I hear is an overall one.

CHAIR HERNDON:
For the Subcommittee's next meeting I want the definitive in-house population as of June 2007, a breakdown of the 1,857 in terms of those incarcerated for drug trafficking offenses as well as the average sentences has been requested. You are also trying to get the length of stay for releases for the calendar years.

MR. REED:
I will provide that information.

CHAIR HERNDON:

The Subcommittee has received four pages containing criminal caseload statistics for Clark County (2007-08) ([Exhibit E](#)), Churchill County (2007) ([Exhibit F](#)) and Carson City (2007) ([Exhibit G](#)). I am responsible for the Clark County statistics. Art Mallory provided the Churchill County statistics and Mr. Gardner provided the Carson City statistics. Mr. Lalli and Mr. Carroll, from the Clark County DA's Office, were asked to provide some statistics. It is probably easier for the courts to generate statistics which will be meaningful to this Subcommittee rather than the DA's offices because the Subcommittee's primary concern is the number of people going through the court system, being prosecuted and convicted with mandatory sentences as opposed to the number of cases submitted to the DA's offices and/or approved for prosecution but never result in a trafficking offense being part of the conviction.

The total number of criminal cases filed in Clark County's Eighth Judicial Court for 2007 was 10,069. I used my Department, Department 3, as a representative sample of that number. Department 3 had 517 criminal cases assigned last year. Of those cases, 47 (9.1 percent) involved trafficking and a controlled substance as one of the original charges either in the criminal complaint filed in justice court or in the issued indictment. Of the 47 cases, only 7 (1.4 percent of the total cases or 16.3 percent of the original trafficking cases) resulted in convictions for a trafficking offense. All seven involved high-level trafficking as at least one of the original charges. The vast majority of the seven involved multiple charges, usually hand-to-hand type sales cases or other transaction cases usually involving trafficking amounts, ultimately resulting in an arrest involving a high-level trafficking amount. All seven involved Schedule I substances, guilty pleas and all but one involved convictions for low level trafficking. The high-level trafficking charge was over 50 grams, if not over 100 grams for all seven cases. The average range of sentencing for those seven cases was a minimum of 17 months and maximum of 58 months. Extrapolating Department 3's numbers to the Eighth Judicial Court, there would be 916 original trafficking charges (9.1 percent of the total 10,069 cases) and 149 cases resulting in a trafficking conviction (16.3 percent of the 916 trafficking charges). Although the percentage is low, this is a significant number of folks taking up space in the DOC, which is not to say they do not deserve to be there. This Subcommittee is trying to determine if the State is catching the right people. When there are cases with multiple charges involving a lot of sales, we are not just sending the mules to prison but people involved in sales and distribution.

MR. CARROLL:

The reason the Clark County DA's Office is unable to provide statistics is related to the lack of a case management system. The DA's Office is in the process of implementing a new

system. We use an old IBM system. I have requested some statistics. I was given a list of all trafficking and controlled substance cases filed in Clark County during calendar year 2007. To figure out what charges were filed, how they resolved, if there was a conviction and the sentence, would be labor intensive. I will go through as many of those cases as I can to see if Judge Herndon's statistics correlate to the statistics provided by the County. The 149 trafficking convictions surprises me. I do not see that many cases resulting in trafficking convictions. Looking at these numbers will help us determine who is going to prison for drug crimes.

MR. FREEMAN:

The seven convictions have an average range of sentence of 17 to 58 months. Did any of those sentences end up in probation as a result of the defendant taking advantage of the substantial assistance statute? It would be an aid to law enforcement.

MR. CARROLL:

In Clark County the most frequent way consideration is given to a defendant for substantial assistance is by plea bargaining the case down to something probationable rather than making the defendant plead to a trafficking offense. It is unusual to have a defendant plead guilty to trafficking and then ask the district court judge to provide probation because of substantial assistance. Do other parts of the State do it similarly? Do they use the substantial assistance statute? In Clark County in 2007, there were probably zero defendants given probation after pleading guilty to trafficking, under the substantial assistance statute; but there were probably many defendants who received probation through substantial assistance plea bargaining.

CHAIR HERNDON:

None of the seven cases in Department 3 involved probation being revoked due to substantial assistance; they were all pleas of guilty straight to mandatory sentencing.

CHAIR HERNDON:

The 149 for 2007 is not a hard and fast number and did surprise me. When I went through all of my cases, there did not seem to be a large number resulting in trafficking convictions. There are 24 district courts in southern Nevada with a lot of cases. If there are about 12,000 people in prison, and we add approximately 149 from Clark County each year to the prison population for mandatory drug sentencing, we would be adding 1 percent per year. The first quarter of 2008 appears to be consistent with the 2007 numbers when I use Department 3 as a representative sample. Approximately 9 percent of the total cases are trafficking in controlled substances as an original charge; 1.3 percent of those have resulted in a conviction for trafficking. Only two people have been sentenced so far in 2008 with the average sentence being 12 to 48 months which compares to the 2007 statistics.

Churchill County has fewer cases than Clark County as shown in "The Criminal Caseload Statistics for Churchill County, Nevada." ([Exhibit F](#)) Fewer cases had trafficking as one of the original charges (0.3 percent in 2007 and 0.4 percent through April 2008). Eighty percent of the total trafficking cases resulted in trafficking convictions. Counties prioritize their prosecutions in different ways. I do not know if this is something to effectuate a legislative change.

"Criminal Caseload Statistics for Carson City, Nevada" ([Exhibit G](#)) does not include the total number of criminal cases filed for 2007 or 2008.

MR. GARDNER:

I am waiting for that information. We are trying to match up information from the DA's Office, justice court and district court to provide an accurate view of what is happening in Carson City. We should have the information in the next few weeks. There are probably 700-800 felony cases each year. Of those, a percentage make it to district court. Trafficking cases constitute between five and ten percent of total felony cases prosecuted. The units of sale determine the trafficking crime. In Carson City, the most common units of sale are one-half to two ounces. The suppliers sell that amount to undercover operatives and street-level dealers. It is uncommon to see halfpounds or more of methamphetamine or cocaine although there are currently a couple of pending cases. There were about 60 cases falling into the 14-28 gram amounts; one-fifth of those cases were adjudicated as trafficking convictions.

LIEUTENANT LEHTINER:

The Las Vegas Metropolitan Police Department is strapped for money. The reason you see half-ounce cases is because we do not want to spend the money on pounds and kilos when we can get the weights we need to get the search warrants needed to get pounds and kilos. Those cases are usually based on the fact we spend as little money as possible to get a case together showing the suspect is involved in trafficking.

MR. GARDNER:

That is consistent with the strategy used in Carson City.

CHAIR HERNDON:

Carson City's statistics indicate the percentage of cases resulting in trafficking convictions versus the number of cases involving an original charge of trafficking are much closer to the Clark County numbers than the Churchill County numbers.

MR. GARDNER:

I agree.

MR. CHESNOFF:

Do the rural trafficking cases involve either manufacturing or transportation? My experience has been those cases are from people driving through.

MR. GARDNER:

Not in Carson City. We are on two major state routes; not on any major interstate route. Most of our trafficking cases have been the result of stings, sales leading to search warrants which lead to caches of drugs.

CHAIR HERNDON:

I will ask Churchill County to provide information on the original basis for their trafficking charges.

The Agenda Topic VIII, substantial assistance, is next. The Subcommittee has received a copy of "Nevada's Substantial Assistance Statute" ([Exhibit H](#)) and a copy of "United States Sentencing Guidelines 5K1.1 Re: Substantial Assistance" ([Exhibit I](#)). Department 3 has had some cases dealing with substantial assistance issues but, generally, they have been before a plea was entered and before any sentencing took place. Even if someone had plead to trafficking, there had not been an adjudication sentencing with stay; they had completed certain things and were then allowed to plead to a lesser offense and sentenced on that. I have not had any cases in which a person has plead and been sentenced to probation that was somehow revoked later.

MR. FREEMAN:

In Washoe County a person is charged with trafficking, Level 3 for example. The prosecutor, without substantial assistance, takes into consideration the background and nature of the offender. For the first-time offender, purely from a generosity standpoint, the offer will be reduced from a Level 3 to a Level 2. Then there is discussion about substantial assistance. It is extremely common to have someone plead to trafficking with a stipulation for substantial assistance. In addition, if there is not a stipulation for substantial assistance, there will be a hearing as prescribed by statute, where the law enforcement agent comes to district court in a sealed proceeding to say why or why not an individual should receive benefit of substantial assistance. A judge is not automatically going to give a suspended sentence. Judges in Washoe County have interpreted the substantial assistance statute to mean that they are free from the mandatory minimums. I have had judges give a prison sentence in an extreme case but not give the mandatory sentence because they believe the defendant has done substantial assistance to a certain degree which that judge believes allows probation and any sentence within a sentencing range not confined to the mandatory penalties. There are a lot of defendants who plead to a trafficking conviction with substantial assistance benefits more than a defendant originally charged with trafficking and as a plea bargaining tool will get

possession for purpose of sale or sales, a much easier probationable type of offense. They have earned the benefit of a straight probationable type of offense as opposed to being convicted and not doing substantial assistance and receiving a mandatory sentence. Washoe County's DA does it completely different than Clark County. An individual originally charged with trafficking, if they do substantial assistance, even if they are eligible for probation, is not eligible for diversion programs. That is the DA's policy. If someone is originally charged with trafficking and there is some weakness in the case, merely on the merits, the DA will go to possession for purpose of sale or sales, not eligible for drug court or other diversion program. In Washoe County the belief is trafficking is trafficking; a reduction must be earned or substantial assistance provided. I practice all over northern Nevada. Substantial assistance, from a law enforcement standpoint, is not consistent. Theoretically, a law enforcement officer in a trafficking scenario could turn his back on a particular defendant, not allow him to do substantial assistance by way of cooperating with law enforcement; they would be facing the mandatory minimums. Alternatively, in some jurisdictions, law enforcement requires an equal amount of "busts" for what that individual was arrested for; sometimes, giving names qualifies as identifying traffickers.

CHAIR HERNDON:

Does the Federal 5K1 give more specificity to what it should be, so Nevada law enforcement agencies would have more understanding of substantial assistance?

MR. FREEMAN:

It would be helpful. I have had federal cases in Kentucky where substantial assisters receive an automatic three-level decrease in the level of where you will be at the end of the day. In Nevada, there is a 5K committee consisting of the U.S. Attorney, the Assistant U.S. Attorney and other members of the U.S. Attorney's Office. A line prosecutor in the federal system will say, "this is what I have," "this is the assistance given," "this is the amount of level decrease I would like for the defendant," "what does the 5K committee think?" The 5K committee, based upon policy decisions in other matters, will say "we will allow you to give a 3-level decrease for that work" or "we disagree" and provides an alternate departure. It is a discretionary function for law enforcement; a determination is made at the district attorney level; the court level makes a determination if it is of value to a suspended sentence or something greater. Substantial assistance is alive and well in Washoe County in terms of how it is used within the trafficking scheme.

MR. CHESNOFF:

The federal system does have committees which are consistent with what departures are in drug cases. The 5K1 allows the judge to go below the U.S. Attorney's departure recommendation. The 5K1 was set up to eliminate the minimum mandatory. If someone makes a decision not to cooperate or law enforcement decides the cooperation was not

substantial, we are stuck with the minimum mandatory. It has been used as a harsh tool in the federal system. With the safety valve you basically have to debrief. Ninth Circuit case law interpretation suggests debriefing does not require implication of others or testifying against others. That is a distinction existing in the federal system between the two forms of assistance. The safety valve is for someone who is a new offender and has no violence in his past as a way to get around the minimum mandatories. There were many young people getting caught in drug cases with amounts putting them at five or ten years and no way for the judge to go below it; it was statutorily barred.

MR. CARROLL:

The rural counties may consider just providing a couple names to be substantial assistance. The dynamics in rural counties must be very different than the urban environments of Las Vegas or Reno. When a defendant is arrested in a rural area, his name spreads quickly throughout the drug community. The dynamics of him being able to get back into the drug culture and provide more than just names may be difficult. We do have some rural parts of Clark County, such as Mesquite or the Laughlin area, which may have a similar dynamic. It may be helpful to ask the rural DAs how they implement substantial assistance.

MR. FREEMAN:

There are task forces which combine the rurals.

MR. CHESNOFF:

Often there are a lot of people facing minimum mandatories who have to choose if they want to cooperate but have concerns about their safety. Not everyone gets to go into the Witness Protection Program, for example. There are all sorts of implications about cooperation that law enforcement is not as concerned with as the defendant's attorney, the defendant and his family may be.

MR. FREEMAN:

There is also the individual arrested with a large quantity who does not have information. The big fish may have information to save himself; the little fish may not, yet they are facing the same minimum mandatories.

CHAIR HERNDON:

How does Carson City utilize the substantial assistance statutes? I have never been asked to have a hearing to decide whether substantial assistance has occurred or not. I do not recall having had such a hearing as a district attorney. Those who did not receive it did nothing and even their attorneys were not contesting.

MR. GARDNER:

Carson City is similar to the process in Clark County. Most of the cases where the defendant receives a substantial assistance benefit are negotiated up-front. It is usually a situation where the defendant immediately tells the investigating officer he wants to help. By the time it gets to the DA, we are already of the mind we will charge the person with a lower offense or ultimately allow him to plea to a lower offense, permitting him the opportunity for probation as opposed to mandatory prison. We may have someone who pleads guilty to trafficking, the best offer we are giving him. That person may decide to offer his services. Of the three substantial assistance hearings I have seen in the last 1.5 years, two were completely driven by defense counsel. The person did no work; the DA nor the law enforcement agency agreed to any kind of substantial assistance. They were trying to snitch out other people because of circumstances, they were not able to work because people knew who they were, the police did not trust them, etc. Yet they tried to get substantial assistance and went through a full-blown hearing; in both cases they were denied substantial assistance.

MR. ZIMMERMAN:

When we work our offenders and they cooperate, we will ask for leniency in sentencing. In regard to the other issues, our sentences are all over the maps. Within our agency, when we deal with the higher weights in trafficking, we have attachments to those task forces. Our teams work those higher quantities of narcotics. The street teams go after the lower-level offenders for the smaller amounts of narcotics. When we get involved with someone with a larger amount of narcotics, we usually turn it over to a task force unless one of our lower-level teams stumble across it. Most of the cases which go forward are either at the state level or the federal level.

CHAIR HERNDON:

Are most of the substantial assistance situations prior to arrest detained and going to be arrested but allowed to be free while trying to work off charges?

MR. ZIMMERMAN:

That is correct. Some of the upper-level offenders are arrested. A lot of the street-level offenders are signed up as an informant to work a certain amount of cases to work off their charge.

CHAIR HERNDON:

Do you ask them to sign off on any kind of agreement?

MR. ZIMMERMAN:

Yes; we have a Department policy on confidential informants. The policy keeps their identity on signups to an actual name and number. Most informants do it to work off charges. They want to give up those people selling the higher level, distributors or runners.

CHAIR HERNDON:

Does the agreement you execute with the informer state what is expected in terms of weight or number of names needed?

MR. ZIMMERMAN:

It is more strict on their guidelines; they are working for us under their own free will. If we are going to drop charges on certain lower offenses, we need at least two or three other attachments. There is no guideline. They help us take more narcotics off the street to make the State or county safer, and go after the people distributing. After we signed them up as a CI we are going to run into them again; they are frequent offenders.

CHAIR HERNDON:

Substantial assistance is somewhat inconsistent in application. If it was a black letter stating what things needed to be done for substantial assistance, a lot of people would be unavailable to do that. There must be discretion to fashion substantial assistance so a person can qualify. You may have people who are intelligent but got wrapped up in a bad thing and may be a good witness in court, if it ever comes to that, and you are willing to work with them more than someone you know has more information but is hard and will not cooperate.

MR. ZIMMERMAN:

Yes. We have strict guidelines such as not signing up a person with sexual offenses, crimes of moral turpitude or violent offenses such as violent felons discharging fire arms, murder or arson.

MR. CHESNOFF:

That is laudable because, unfortunately, in the federal system that approach is not taken. They use people for informants with criminal records you are referring to on a regular basis. Sometimes it is shocking, the levels to which cooperation is afforded to people with murders and other egregious crimes.

CHAIR HERNDON:

Mr. Chesnoff and Mr. Freeman are no longer in attendance.

Do the narcotics trafficking statutes need to be changed with regard to specific drugs as opposed to a general change? Is methamphetamine so bad that it needs to be singled out as

marijuana was some years ago? Does methamphetamine need to stand alone because of the perception of the meth use and what a scourge it is or is that an archaic notion? Methamphetamine use has been going down in Clark County. Ten to 15 years ago it was the largest problem we had in Clark County.

MR. LEHTINEN:

Due to laws regulating precursor chemicals and the Mexican government reducing the amount of precursor chemicals, specifically pseudoephedrine, methamphetamine is harder to come by in Clark County. Based on discussions with other agencies in other states, they are seeing the same thing. We are seeing the purity levels go down while the prices go up. The rarity of meth makes the prices go up. In my opinion, we should not separate methamphetamine from other Schedule I drugs due to the fact today it is meth, in the 1980s it was Quaaludes. If you try to take individual drugs out of Schedule I and separate it, pretty soon we will have an NRS which is a nightmare to understand.

MR. ZIMMERMAN:

Last year there was a large cache seizure in Mexico in regards to a Chinese national who had over \$200 million in cash in his residence. The speculation is that a lot of the stuff coming in from Mexico is from China. Recently, our government gave a \$400 billion package in aid to the Mexican government to combat methamphetamine in Mexico. Once the U.S. set up laws, such as making it harder to get pseudoephedrine and all of the precursors which were available off the internet, the labs have gone from 300 in Las Vegas ten years ago to nine meth labs last year. We are not cooking meth here; it was coming from Mexican super labs. This past year the methamphetamine seizures at the U.S. borders have gone down; seizures in the U.S. have gone down. The purity level has gone from almost 60 percent down to 37 percent with a doubled price here and across the U.S.

CHAIR HERNDON:

In northern Nevada, is meth use problematic?

MR. GARDNER:

Carson City is seeing a decrease in meth cases as an overall percentage of drug cases; virtually no meth labs. There is a fair amount of street-level meth dealings; lots of meth users; a couple of cases of ounce/couple ounce meth sales in the last year. As opposed to being 90 percent of the Schedule I cases we dealt with last year, it is 50 percent now with use of heroin increased. There is no reason to single out methamphetamine for especially harsh treatment; it is fine where it is now. Where does heroin fit? A salable dose of heroin is a lot smaller than methamphetamine. We are not seeing multiple ounces of heroin, but four or five grams of heroin is sold in little balloons of a tenth of a gram or less; very small amounts. It seems more significant with a heroine case where someone has 48 balloons of heroin which

only adds up to 5 grams; obviously it is being sold and is not for personal possession. That amount of methamphetamine could be a small party for the weekend.

MR. ZIMMERMAN:

Las Vegas has seen an increase in heroin. For instance, one of the task forces attached to the DEA, working mid-level, started drug testing at Green Valley High School due to a lot of heroin use and operation. The City of Henderson was getting complaints. The DEA has a task force attached with Henderson; our detectives assisted with the task force. A large amount of heroin was sold to students by runners; a car pulls in the students knew was selling heroin. It was not being marketed as heroin. Last year, about five percent of our cases involved heroin. I will see if the number has increased.

MR. GARDNER:

In this area it was sold as opium because it does not have the stigma heroin does.

LIEUTENANT LEHTINEN:

That is correct. We are seeing an increase in heroin. Most of the organizations we are dealing with are poly-drug organizations dealing meth, coke, heroin or whatever you want. The heroin dosage unit is much smaller than a dosage unit of cocaine or methamphetamine. That was the intent of the trafficking control substance schedule for Schedule I drugs.

CHAIR HERNDON:

The general consensus of the Subcommittee is, despite what is publicized about certain drugs, there does not seem to be a need to seek change to carve out methamphetamine, heroine or anything else. They should stay in the schedules they are in right now.

Since Mr. Chesnoff and Mr. Freeman are gone, I am going to defer some of Agenda Item VII. We have already discussed some of the issues in Item VII. Are there any topic suggestions for future meetings? The Advisory Commission has meetings set for June 9, July 7 and two in August. The first report to the Legislature will be made August 25.

MR. GARDNER:

Sentencing-type statistics from the DOC, giving the percentage of drug offenders imprisoned due to probation revocation or commission of a new felony which caused probation revocation might be of interest to the Subcommittee.

CHAIR HERNDON:

That is a good point. One of the things the Advisory Commission is looking at is what can be done to keep offenders put on probation from having probation revoked and what can be done to transition inmates back into society in the hope they do not continue to reoffend.

People go into prison; that is not going to change. We hope the justice system can figure a way to keep probationers from ever going to prison and, when people are released from prison, have money for programs and transitional things to assimilate them back into society without reoffending. I have tried to convince the Commission we are not going to eliminate prison as a reality within the justice system; it is how do we keep those out of the prison system who do not need to be there. That would require a lot of money at the front end which we will not get out of government, especially at this budget time. Money spent on the front end on those type things would save us a lot of money down the road. I would be interested in knowing how many of the 1,857 are in on an original sentence or are in because they had a probated sentence revoked. If they are in on a revoked sentence, it will not be a trafficking charge because they are not getting probation on trafficking unless they provided substantial assistance.

Is there a way the DOC can determine how many of the 1,857 drug offenders are serving a sentence in addition to the drug offense which would have them in prison anyway? If we are looking at the impact of mandatory drug sentences on the prison population, we need to separate those people out. I have had cases with trafficking arrests as a part of a sexual assault of a minor investigation, child pornography, etc.

MR. REED:

I will put together information on the commit codes of drug offenders and for the additional sentences that are part of the drug offender's sentence structure.

CHAIR HERNDON:

I will gather the statistics from more of the Clark County courts to determine a truer number of trafficking offenses rather than extrapolating from Department 3. I will also try to get statistics from Washoe County.

No members of the public have come forth to present testimony.

How long will it take the DOC to provide the statistics the Subcommittee has requested? Would you be able to e-mail me the statistics?

MR. REED:

I would like to have two weeks and will e-mail the information to you.

Advisory Commission on the Administration of Justice's Subcommittee to Study
Mandatory Drug Sentencing Statutes and the Substantial Assistance Statute
June 4, 2008
Page 25

CHAIR HERNDON:

The Subcommittee will meet again Tuesday, July 1, 2008, at 1:30 p.m. Let me know if there are agenda items the Subcommittee members would like on the next agenda and if there are presentations you would like for that meeting. There being no further business to come before this Subcommittee, this meeting is adjourned at 4:05 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: June 4, 2008

Meeting time: 1:29 – 4:05 p.m.

	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
	C	Douglas Herndon, Judge, Eighth Judicial District Court	Nevada's Primary Narcotics Statutes and Corresponding Sentencing Guidelines
	D	Rex R. Reed, Department of Corrections	Nevada Department of Corrections Characteristics of Drug Offenders as of June 2007
	E	Douglas Herndon, Judge, Eighth Judicial District Court	Criminal Caseload Statistics for Clark County, Nevada
	F	Douglas Herndon, Judge, Eighth Judicial District Court	Criminal Caseload Statistics for Churchill County, Nevada
	G	Douglas Herndon, Judge, Eighth Judicial District Court	Criminal Caseload Statistics for Carson City, Nevada
	H	Douglas Herndon, Judge, Eighth Judicial District Court	Nevada's Substantial Assistance Statute
	I	Douglas Herndon, Judge, Eighth Judicial District Court	United States Sentencing Guidelines 5K1.1 Re: Substantial Assistance