

Proposal #2:
Amendments to Substantial Assistance Statute,
NRS 453.3405, Sub-Section 2, Including An Additional New Sub-Section 3

(Based on United State Sentencing Guideline 5K1.1, The Federal Substantial Assistance Guideline, and incorporating elements and theories of United States Sentencing Guideline 5C1.2, The Federal "Safety Valve" Guideline)

2. Upon an appropriate motion stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may reduce or suspend the sentence of any person convicted of violating any of the provisions of NRS 453.3385, 453.339 and/ or 453.3395.

(a) The appropriate reduction and/or conditions of suspension shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

(b) The arresting agency must be given an opportunity to be heard before the motion is granted.

(c) Upon good cause shown, the motion may be heard in camera.

3. Upon an appropriate motion, the judge may reduce or suspend the sentence of any person convicted of violating any of the provisions of NRS 453.3385, 453.339, and 453.3395, if he finds that (1) substantial assistance as defined in Subsection 2 was not available to defendant and (2) the legislative purpose of punishing and preventing the commercial enterprise of drug trafficking would not be furthered by the mandatory minimum prison sentence set forth in Subsection 1.

a. The court shall make a finding whether the failure to perform substantial assistance was attributable to defendant's conduct or for some other reason. The considerations for the court's determination may include, but are not limited to, the following:

- i. Whether the defendant was offered a meaningful opportunity to perform substantial assistance;
- ii. Whether the defendant possessed information that was of benefit to law enforcement;
- iii. Whether the defendant was capable of performing any assistance to law enforcement.

b. The court shall determine whether the legislative intent would be furthered by applying the mandatory minimum sentence to defendant. The reasons for the court's determination may include, but are not limited to, the following:

- i. The age of the defendant;
- ii. The criminal record, if any, of the defendant;
- iii. The level of participation, if any, in the planning or preparatory stages of the crime;
- iv. The level of participation of the defendant in the crime, including, but not limited to, whether the defendant was wholesaling or retailing the controlled substances; whether the defendant was selling or possessing the controlled substances; whether the defendant was actually or constructively possessing the controlled substances; whether the defendant played a significant or minimal role in the business of selling controlled substances; and, under each circumstance, determine if applicable.
- v. The drug addiction, if any, of the defendant;
- vi. The defendant's motive for committing the crime, including whether the primary purpose was to support a personal drug addiction.

Commentary On Language In Proposed Sub-Section 3:

1. In order to for the good cause exception to apply, the defendant must first show that (1) substantial assistance was not available and then (2) the mandatory minimum prison sentence would not serve the legislative purpose of curtailing the commercial enterprise of controlled substances. These two predicates should close the exception for the individual who just refuses to cooperate with the police. The first requirement ensures that the police retain their power to "encourage" substantial assistance. The second precludes the defendant from trying to take advantage of the exception for an improper purpose. The defendant has the affirmative duty to establish that a lesser sentence or probation would not thwart the legislative policy of punishing and curtailing commercial drug enterprise. Although narrowly defined, these two requirements should be enough to argue for a lesser sentence for the defendant who for specific reason is otherwise willing but cannot perform substantial assistance.
2. Subsection 3(a)(I) is designed to cover those situations where the defendant is unable to assist law enforcement or who, for whatever reason, are not offered the opportunity of substantial assistance in a timely manner. There are defendants with whom law enforcement refuse to work. This section allows the court, not law enforcement, to evaluate the defendant in terms of the mandatory sentencing provisions.
3. Subsection 3(a)(ii) covers those situations where the defendant legitimately does not have any information. For example, this section would apply to the user who was turned in by his only source. Because law enforcement already knows the identity of the user's source, and because the user does not have any other sources, the user is not able to perform substantial assistance.
4. Subsection 3(a)(iii) would apply to those situations where the defendant has information, but is unable to act on that information to complete the substantial assistance. For example, if the California soccer Mom comes to Reno for a weekend of gambling and is found with a trafficking amount of controlled substances in her purse, she would not be able to perform any meaningful substantial assistance for Reno law enforcement. The California soccer Mom should fall within the 3(a)(iii) subsection.
5. Subsection 3(b) limits the judge's sentencing discretion to only those defendants whose discretionary sentences would not thwart the legislative intent of the statute. For example, the king pin wholesaler who was not given a change for substantial assistance would not satisfy the 3(b) requirement. The purpose of the statute is to do justice to those individual cases that, although technically falling within the confines of the mandatory minimum, are not within the spirit of the trafficking statute. The judge must always focus on effectuating the legislative intent.

6. The factors listed under Subsection 3(b) focus on those characteristics that are not as likely to be present in the serious trafficking statute that is the legislative target of the mandatory minimum sentences. For example, a youthful defendant without any criminal record with a serious drug addiction who purchased a trafficking amount of controlled substances with his economic stimulus check should meet the 3(b) exception. The enumerated factors, along with any others deemed relevant for the particular defendant, will have to be balanced according to each individual case. No one factor is dispositive either for or against finding a 3(b) exception.