

**MEMO TO: ADVISORY COMMISSION ON THE ADMINISTRATION OF
JUSTICE**
FROM: WASHOE COUNTY PUBLIC DEFENDER'S OFFICE
RE: NEVADA TRAFFICKING STATUTES

INTRODUCTION

The Nevada trafficking statutes¹ were first passed in 1983 in order to “increase the penalties so that they are so great that there will be an impetus, or incentive, to the convicted individual to furnish information to enable law enforcement to reach the higher ups who are involved in the wholesaling of large amounts – heavy trafficking – of drugs.”² Other Nevada statutes ostensibly address the issue of the individual user: Possession of a Controlled Substance Not for Sale,³ Possession of a Controlled Substance for Sale,⁴ Offer, Attempt or Commission of Unauthorized Act Relating to Controlled Substances.⁵ Because of the broad language of the trafficking statutes, however, it is possible to bypass the statutes aimed specifically at the individual and charge people who do not fit the stereotypical definition of “trafficker.” This memorandum analyzes the scope of the Nevada trafficking statutes and highlights the areas that need amending in order to honor the original intent of the drafters – targeting the “wholesalers and the wholesale dealers.”

¹ NRS 453.3385 through .3395.

² Senate Comm. On Human Resources & Facilities, 2/10/83, p. 4, quoting Senator Raggio.

³ NRS 453.336.

⁴ NRS 453.337.

⁵ NRS 453.321.

I. OVERVIEW OF NEVADA TRAFFICKING STATUTES

The three Nevada trafficking statutes share a common structure; the only difference is in the proscribed substances.⁶ In order to be found guilty of trafficking, a person must either (1) knowingly or intentionally sell, manufacture, deliver or bring into Nevada the controlled substance, OR (2) knowingly or intentionally be in actual or constructive possession of the controlled substance. The punishment for trafficking depends entirely on the amount of controlled substance involved in either the transaction or the possession. For example, possession of 5 grams⁷ of a Schedule I controlled substance, carries a mandatory minimum sentence of 1 year to a maximum of 6 years in the state penitentiary; possession of 15 grams carries a mandatory minimum of 2 years to a maximum of 15 years; and possession of an ounce carries a mandatory minimum of 10 years.⁸

Although labeled “trafficking,” the statute does not require the stereotypical activity normally associated with “trafficking.” Mere possession over a specified amount alone satisfies the definition. Furthermore, one may be found guilty without being in “actual” possession; the statute is also satisfied with “constructive possession,” defined as “the power and intention at a given time to exercise dominion and control of an object,

⁶ NRS 453.3385 Trafficking in Schedule I controlled substances, not marijuana; NRS 453.339 Trafficking in Marijuana; and NRS 453.3395 Trafficking in Schedule II controlled substances.

⁷ A gram is approximately the amount in a single serving sugar packet. When asked how much a user would buy at a time, a known user indicated “it depends on how much money I had.” He also indicated that a heavy user could go through an “eight-ball”, an eighth of an ounce, or approximately 3.5 grams a day. Personal interview with a DUI defendant who used methamphetamine. The amounts are different for cocaine where a line of coke is around 50-75 mg, about 5% of a gram.

<http://www.thegooddrugsguide.com/cocaine/faq.htm>.

⁸ See NRS 453.3385.

either directly or through others.”⁹ In other words the statute does not differentiate between the possession of 28 grams of methamphetamine and the manufacture of 28 grams of the same drug. For example, under this statute the drug dealer who stores more than 28 grams of methamphetamine at his girlfriend’s house and his girlfriend who knew of the drugs’ location are both guilty of Trafficking in the Third Degree with a mandatory minimum of 10 years in prison. The law does not distinguish between the active producer/seller, the boyfriend, and the passive observer, the girlfriend, who has access to the drug.

Nevada currently mandates the imposition of the prison sentence, i.e., probation is not an option for the judge, unless the defendant performs “substantial assistance in the identification, arrest or conviction of ... any other person involved in trafficking in a controlled substance.”¹⁰ Although “substantial assistance” must be determined by the judge, “[t]he arresting agency must be given an opportunity to be heard.”¹¹ Upon finding the defendant performed substantial assistance, the judge “*may* reduce or suspend the sentence.”¹² If there is no evidence of “substantial assistance,” then the judge must impose the minimum 10 year prison sentence.

The ramifications of this provision for our hypothetical drug dealer who stores more than an ounce, approximately the size of a golfball, with his girlfriend may result in disparate sentences. If the drug dealer turns over his list of buyers to the police, then the drug dealer may be able to satisfy the “substantial assistance” requirement, becoming eligible for probation. If the non-user girlfriend is apprehended after the dope-dealer

⁹ *United States v. Kitchen*, 57 F.3d 516,520 (7th Cir.1995) (CHECK CITE)

¹⁰ NRS 453.3405 (2).

¹¹ *Id.*

¹² *Id.* (emphasis added).

boyfriend and does not have any new contacts to turn over to the police, then the girlfriend must spend a minimum of 10 years in prison. She cannot satisfy “substantial assistance” by turning in her boyfriend, as her information did not lead to his “identification, arrest or conviction.” Her boyfriend, who actively engages in the sales of the controlled substance and therefore has the current contacts to perform substantial assistance, is free on probation, but she has to serve a minimum of 10 years because she had constructive possession of the methamphetamine stored in her house.

II. INTERPLAY OF NEVADA TRAFFICKING STATUTES WITH POSSESSION AND SALES STATUTES

The Nevada statutory scheme has two parallel sets of statutes dealing with controlled substances. In the statutes denominated “trafficking,” the penalties increase according to the amount of controlled substance involved. In the non-trafficking statutes, the penalties increase with number of times the individual has been convicted of a drug-related offense. See the attached exhibit, which gives the penalties for crimes involving a Schedule I drug.

As a practical matter this means that any possession of less than 4 grams is filed as a Possession without Intent to Sell, which carries a mandatory probation for first timers, and anything over 4 grams is filed as trafficking with a mandatory prison sentence, regardless of the individual's prior criminal history.

III. ISSUES IN THE CURRENT TRAFFICKING STATUTES

A. "Knowingly or Intentionally in Actual or Constructive Possession"

i. **Problem:** The inclusion of actual or constructive possession in the trafficking statutes eliminates the lay notions of "trafficking" from the legal definition. It is indisputable that producing and selling of a controlled substance, the traditional notions of "trafficking", harms society more than the mere possession. The current penalties do not reflect this inherent difference.

ii. **Other jurisdictions:** Other jurisdictions add a specific intent requirement to the possession included under the trafficking statutes. For example, the federal law makes it "unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or *possess with intent* to manufacture, distribute, or dispense, a controlled substance."¹³ Florida, a jurisdiction with a serious drug importation problem and a jurisdiction that was specifically and positively cited in the legislative history of the Nevada trafficking statute,¹⁴ also requires a person "sell, manufacture, or deliver, or *possess with intent* to sell, manufacture, or deliver, a

¹³ 21 U.S.C.A. Sec. 841(1) (emphasis added).

¹⁴ E.g., Sen. Comm. On Human Res. & Fac., Mar. 10, 1983, Ex. B.

controlled substance.”¹⁵ California specifically states that “[t]rafficking . . . *does not include simple possession* or drug use.”¹⁶

iii. Suggested Solutions: Nevada can address this issue in two ways. First, Nevada could follow the federal or Florida schemes and add a scienter requirement to the actual or constructive possession. If this route is taken, care should be taken in how the “intent to sell” element can be proved. In other words, the State would argue that the scienter element is met by the large amount of controlled substance. In essence, district attorneys could circumvent the restriction by claiming intent is shown by the large amount, e.g., a person with 28 grams must be a seller because that amount is more than one person would use. Intent should require a fact independent of the large amount.

The second approach would be to remove possession from the trafficking statute entirely and therefore tie the trafficking penalties to the “true” trafficker who is operating on the wholesale level. This does not mean, however, that possession of 1 gram of controlled substance need be punished at the same level as 5 grams. If the element of possession were removed from the trafficking statutes, then one might want to amend the possession statute to include a graduated level of incarceration depending on the amount of controlled substance actually possessed.

B. Weight Levels Required for Mandatory Minimum Sentencing

i. Problem: Nevada currently uses three weight levels to determine the mandatory minimum sentence: 4-14 grams, 14-28 grams, and over 28 grams. These weights are not commensurate with the penalties Nevada imposes. Twenty-eight grams

¹⁵ F.S.A. Sec. 893.13 (emphasis added).

¹⁶ Cal. Health & Safety Code Sec. 11380.7(d)(4) (emphasis added).

is approximately an ounce¹⁷, the approximate size of a golf ball. These statutory cut-offs apply to all Schedule I controlled substances, regardless of the usage. For example, a single line of cocaine is approximately 50-75 mg, or 5% of a gram.¹⁸ One methamphetamine user stated she used 3 grams a day.¹⁹ In another transaction, the trafficker gave a user/retailer “one ounce of methamphetamine ... for his personal use” in exchange for the user helping distribute the rest of the drugs.²⁰ Yet possession of 4-14 grams of cocaine carries the same punishment as 4-14 grams of methamphetamine, despite the difference in the personal use amounts. The cut-off limits should consider the average usage. Also, many times, a user will finance his own habit by buying slightly more than he needs then reselling the rest.²¹ In these cases, the State of Nevada is punishing the small time addicts as traffickers.

The mandatory minimum prison term for a trafficker of 4-14 grams of methamphetamine is one year in prison, for 14-28 grams is two years, and for over 28 grams the mandatory minimum is 10 years.

The trafficking mandatory minimums are triggered by the weight of the controlled substance. Simple possession and possession for sale do not carry any mandatory minimums. Because Nevada is penalizing the individual for the amount of controlled substances, rather than the actual act of manufacturing or selling, the actual trigger amounts should be adjusted to more accurately reflect the actual use. For example, a user who sells to finance his own drug habit is closer to the drug user/possessor than to the underworld wholesaler for whom controlled substances are a business. By setting the

¹⁷ One ounce equals 28.3495231 grams.

¹⁸ <http://www.thegooddrugsguide.com/cocaine/faq.ht>.

¹⁹ *United States v. Almaguer*, 2007 WL 81931, 82932 (D. Neb. 2007).

²⁰ *United States v. Barth*, 424 F.3d 752, 758 (8th Cir. 2005).

²¹ *See, e.g., id.*

threshold amount low enough to label the user financing his own habit as a trafficker, then Nevada is not utilizing its law enforcement resources in an optimum manner. This is not to say there is no crime. Quite the contrary, possession of a controlled substance should be illegal and punishable as a felony, but there are other more economical means of addressing the problem of drug addicts without imposing a mandatory minimum prison term. The consequences of institutionalizing first time drug abusers with 10 years of prison may cost the state more than if judges were given the option of probation or sentencing to a lesser amount of time.

ii. Other jurisdictions: The Nevada mandatory minimums are not comparable to other jurisdictions. For example, Florida distinguishes between the amount of cocaine and that of methamphetamine in its trafficking statute.²² Possession of cocaine with a weight of more than 28 grams but less than 200 grams carries a mandatory minimum 3 year prison term; more than 200 grams but less than 400 grams carries a mandatory minimum 7 years; more than 400 grams but less than 150 kilograms carries a mandatory minimum 15 year prison term.²³ More than 150 kilograms carries a life sentence. For methamphetamine, the Florida cut-offs are 14-28 grams (mandatory minimum 3 year sentence); 28-200 grams (mandatory minimum 7 year sentence), and more than 200 grams (mandatory minimum 15 year sentence). As noted above, Florida does not define “trafficking” as simple possession; to trigger the mandatory minimum Florida sentence one must **possess with the specific intent** to sell.

²² F.S.A. Sec. 893.135. The Florida statutory scheme, unlike the federal and other states, also applies to those who merely possess the required amount of controlled substance. The amounts are so high that anyone in possession is presumed to be selling.

²³ F.S.A. Sec. 893.135 (1)(b).

The federal statutory cut-offs for cocaine or methamphetamine are 5 and 50 grams, almost twice the Nevada statutory amount.²⁴ A person with 50 grams of either methamphetamine or cocaine faces a mandatory prison sentence of 10 years; the person with 5-50 grams faces a mandatory prison sentence of 5 years.²⁵

iii. Suggested solutions: A lengthy mandatory minimum prison sentence is warranted for repeat drug offenders, for those who introduce controlled substances to children, for those who clearly are dealing at the wholesale level. But Nevada's 10 year mandatory minimum is triggered by actual or constructive possession of approximately a golf ball size amount of controlled substance. Without the State's agreement to offer substantial assistance and then the actual accomplishment of that substantial assistance, a first time user possessing slightly more than an ounce of controlled substance must serve 10 years in Nevada prison.

C. Substantial Assistance Requirement for Probation

i. Problem: Nevada requires an individual charged with a trafficking offense to perform "substantial assistance" before becoming eligible for probation. The theory behind this requirement is to coerce the individual to give up his sources, to give "the something additional which will help law enforcement get the higher ups who shield themselves from the vulnerability, usually, of any arrest of apprehension."²⁶

There is, however, no statutory definition of "substantial assistance." Some law enforcement personnel, undoubtedly with the legislative purpose in mind, require

²⁴ 21 U.S.C.A.841

²⁵ These sentences are also subject to the Federal Sentencing Guidelines, a complicated formula that adjusts the actual sentence according to a series of factors. In one case involving trafficking in over 5 grams, the defendant's federal guideline range was 37 to 46 months. *United States v. Almaguer*, 2007 WL 81931 (D. Neb.), at 2.

²⁶ Sen. Comm. On Human Resources & Facilities, 3/10/83, p. 3 ("this bill gives the something additional which will help law enforcement get the higher ups who shield themselves from the vulnerability, usually, of any arrest of apprehension.")

substantial assistance to involve the same amount or more of controlled substance that formed the basis of the original arrest. So, to be eligible for substantial assistance, a person arrested with 5 grams must turn in enough people so that the aggregate amount totals 5 grams or more. Theoretically, that individual could achieve substantial assistance by performing 5 controlled buys of 1 gram each, but as a practical matter, law enforcement will insist on controlled buys of more than 4 grams, preferably an ounce, in order to trigger the mandatory minimums. Law enforcement has no leverage unless a person is caught with more than 4 grams.

Because there is no statutory definition of “substantial assistance,” there is a great deal of room for prosecutorial and police discretion. A prosecutor or drug detective might be adamant in insisting that substantial assistance matches gram for gram the amount of the original arrest. Other prosecutors might agree to reduce a level 3 trafficking to a level 2 if substantial assistance is not possible; others still might agree that “substantial assistance” can be accomplished with less than the original amount. These decisions are made by the prosecutor, not by the judge. Once the prosecutor decides on the level of trafficking, the judge’s hands are tied.

“Substantial assistance” also depends on timing. The assistance must be made before the contacts become aware of the law enforcement involvement. For example, a less experienced individual may not realize the importance of helping law enforcement until it is too late. After the individual has spent time in jail on a drug charge before being abruptly released back into the community, the more savvy criminal mind would realize that the individual is attempting to buy probation with substantial assistance. It

has happened that an individual is released to perform substantial assistance, but his contacts, knowing of his drug charges and abrupt release from jail, turn a cold shoulder.

ii. Comments: Both Florida and the federal statutes require substantial assistance for probation. There are strong theoretical reasons for the requirement. As Senator Raggio said during the initial passage of this bill, a purpose of the bill is to give “the something additional which will help law enforcement get to the higher ups who shield themselves from the vulnerability, usually, of any arrest of apprehension. . . . [E]ven if there were only one case where they were able to utilize this measure to reach the higher ups----the wholesalers, and the wholesale dealers in these types of substances – it would have benefit.”²⁷ But if “substantial assistance” is not catching those “heavy traffickers”, then perhaps the requirement should be reconsidered. Instead of substantial assistance being a prerequisite for probation, perhaps it should one factor in the sentencing. As it stands now, mandatory minimum prison time is required for the first time offender who possessed a trafficking amount but whose contacts are already arrested. But the street smart scoundrel who knows how to work the system is eligible for probation. At the very least, judges should be given more discretion in the determination of when leniency in sentencing is appropriate.

D. Mandatory Minimum Sentencing Requirements

i. Problem: Nevada requires mandatory minimum sentences when the predicate trafficking amounts are present. Mandatory minimum sentences are an attempt to remove discretion from the sentencing process. But it is not possible to remove that discretion, one merely shifts the use of that discretion to another entity. Essentially this requirement transfers heretofore judicial discretion to the district attorney.

²⁷ Sen. Comm. On Hum. Res & Fac. 3/10/83, p. 3.

ii. Comments: Mandatory minimum sentencing requirements are common in trafficking statutes. Nevada, however, is facing a serious shortage of prison beds. Mandatory minimum sentencing schemes only exacerbates the pressure on an already over-crowded prison system. Not all first time possessors of a controlled substance need a mandatory prison sentence to realize the importance of ceasing drug use. Mandatory sentences also incarcerate people who have addressed their problems after their arrest but before the sentencing. The judges have no discretion to reward such behavior. And indeed, a person who has taken positive steps toward recovery may suffer a setback if forced into the prison environment.

The power mandatory minimum sentencing can give an overzealous prosecutor is exemplified by *United States v. Almaguer*, 2007 WL 81931 (D. Neb.). In that case, the government charged Ms. Almaguer with an offense that required a mandatory minimum sentence, while her “more culpable” codefendant was allowed to plead to a probationable offense.²⁸ The government claimed that Ms. Almaguer “had not done all she could do to help the government,”²⁹ even though she claimed “we didn’t have anyone to tell on.”³⁰ The government never established that Ms. Almaguer had any information to provide law enforcement.³¹ In other words, because Ms. Almaguer claimed she did not have any information to help law enforcement and because the government did not believe her, she was prosecuted for a more serious offense than she would have if the government thought

²⁸ 2007 WL slip copy, 819131, at 7.

²⁹ *Id.* at 3

³⁰ *Id.* at 2.

³¹ *Id.*

she had cooperated.³² Even the judge noted that the circumstances of the case “could be interpreted as exhibiting some elements of a vindictive prosecution.”³³

While waiting for her sentencing, Ms. Almaguer could not afford the in-patient treatment recommended, so instead she undertook her own independent rehabilitation, conquering a severe drug addiction on her own. The court praised her tenacity in her exceptional recovery³⁴ and noted her recent marriage, employment, daily attendance at NA and “her truthfulness and cooperation to the government to the extent of her ability to do so.”³⁵ The court also noted the government’s “exceedingly thin case”: Ms. Almaguer was charged with possession with intent to distribute over 5 grams of methamphetamine, an amount the court noted “amounted to little more than a one week supply of methamphetamine for her personal use.”³⁶ Because of the government’s charging decision, however, the court was forced to impose a mandatory minimum prison sentence.

The *Almaguer* case highlights the potential problems with mandatory minimum sentences. The power rests exclusively with the prosecutor. In *Almaguer*, the co-defendant who had to serve the mandatory prison sentence was the one least culpable. Her crime was intending to share, or in legal parlance to distribute, her more than 5 grams of methamphetamine.

CONCLUSION

Nevada trafficking statutes provide a solid backbone for a comprehensive statutory scheme addressing the drug problem. Those statutes, however, can be improved

³² *Id.* at 3.

³³ *Id.* at 7.

³⁴ *Id.* at 6.

³⁵ *Id.* at 8.

³⁶ *Id.*

by defining trafficking as more than mere actual or constructive possession, by raising the weight levels, by reconsidering the mandatory minimum prison terms, and by returning to the judges the discretion to consider the individual circumstances in sentencing.