

**MINUTES OF THE SUBCOMMITTEE OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Eighth Session
May 13, 2015**

The subcommittee of the Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:38 p.m. on Wednesday, May 13, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, 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:

Senator Greg Brower, Chair
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Aaron D. Ford

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Julia Barker, Committee Secretary

OTHERS PRESENT:

John T. Jones, Jr., Nevada District Attorneys Association
A.J. Delap, Las Vegas Metropolitan Police Department
Ailee Burnett, Sergeant, Las Vegas Metropolitan Police Department
Eric Spratley, Lieutenant, Sheriff's Office, Washoe County
Bob Roshak, Nevada Sheriffs' and Chiefs' Association
Brett Kandt, Special Assistant Attorney General, Office of the Attorney General
Steve Yeager, Office of the Public Defender, Clark County; Nevada Attorneys
for Criminal Justice
Sean B. Sullivan, Office of the Public Defender, Washoe County
Vanessa Spinazola, American Civil Liberties Union of Nevada
Stacey Shinn, Progressive Leadership Alliance of Nevada

Chair Brower:

I open the meeting of the subcommittee of the Senate Committee on Judiciary with the hearing on Assembly Bill (A.B.) 297.

ASSEMBLY BILL 297 (1st Reprint): Revises provisions governing trafficking in controlled substances. (BDR 40-586)

John T. Jones, Jr. (Nevada District Attorneys Association):

Distribution of controlled substances has reached epidemic levels in Nevada communities, especially schedule II controlled substances which are highly addictive controlled substances with medical purposes. Assembly Bill 297 brings statutes in line with what law enforcement is seeing on the streets.

We are going to use the word "trafficking." The colloquial definition of trafficking is thought of as interstate or international persons moving drugs through large pipelines. In Nevada criminal statutes, trafficking is the possession of a large quantity of drugs. In this case, we are referring to trafficking schedule II controlled substance drugs.

Section 1 of A.B. 297 adds the number of dosage units. Dosage units are defined in section 2, subsection 3, paragraph (c).

Section 2 updates quantities needed for various levels of classification of trafficking. Nevada has three levels of trafficking: low, medium and high. This bill lowers the threshold needed for weight of a schedule II controlled substance and adds a new category called "dosage units." A dosage unit is defined as a tablet, pill or anything designed or packaged to be ingested.

Low-level trafficking is anywhere from 28 grams to 200 grams of a schedule II controlled substance and is one controlled substance. If you have multiple schedule II controlled substances, even though they add up to 28 grams, each controlled substance is weighed individually. This bill lowers the threshold for weight to charge a person with low-level trafficking—a Category C felony—to 20 grams to 40 grams and adds a dosage unit of 100 to 200 pills.

For a medium-level trafficking charge—a Category B felony—A.B. 297 decreases the amount from 200 to 400 grams to 40 to 80 grams or 200 to 400 dosage units.

The bill lowers the high-level trafficking charge—a Category A felony—from 400 or more grams to anything above 80 grams or possession of more than 400 dosage units.

The last part of the bill defines aggregate number and aggregate weight to mean you add up all schedule II controlled substances in a person's possession.

A.J. Delap (Las Vegas Metropolitan Police Department):

The Las Vegas Metropolitan Police Department was approached by a unit in our agency with a systemic issue, mainly through the High Intensity Drug Trafficking Team. This issue dealt with prescribed medications in pill form and difficulties in reaching levels necessary to file trafficking charges. Even though large pill counts were involved, *Nevada Revised Statutes* (NRS) did not allow for a trafficking charge to be applied in a manner thought appropriate. That is the genesis of A.B. 297. I have submitted a cover letter and pictures for the Committee's reference ([Exhibit C](#)).

Ailee Burnett, Sergeant (Las Vegas Metropolitan Police Department):

This bill deals with trafficking for schedule II controlled substances. We are bringing the significant problem we have with people diverting these substances from their original purpose and selling them on the black market to the attention of this Committee. To file a trafficking charge, the person in question must possess 28 grams or more. Some of these pills are very small. Getting to that limit will cost a detective unit anywhere from \$4,000 to \$5,000, depending on pill size and the specific pill being purchased. If you have a 10 milligram oxycodone pill—one of the most trafficked schedule II controlled substance—300 or more pills would be needed to file a trafficking charge. That would cost anywhere from \$4,000 to \$5,000 for us to purchase.

We want to charge people with trafficking because it has the most bite. It makes the person face consequences for his or her actions. If a person is not charged with trafficking a controlled substance, the other charges have no real consequences. With other charges, a person gets probation and pays a fine before he or she is back out on the street engaging in the same behavior. It is difficult to apply appropriate consequences. We want more dire consequences so people know this is something they should not get involved in. A lot of people get involved in trafficking for financial reasons and we want them to see that negative consequences outweigh positive financial gains. We want

consequences people must face if they chose to get into the business of diverting controlled substances to the black market.

Eric Spratley, Lieutenant (Sheriff's Office, Washoe County):

The Washoe County Sheriff's Office supports A.B. 297. The crime and forensic lab at the Washoe County Sheriff's Office opposes the potential amendment proposed by the Clark County Public Defender's Office ([Exhibit D](#)) removing the word "aggregate." The lab sent an email from Kerri T. Heward, Supervising Criminalist, saying:

We are not in favor of this language as it would require that drug samples be quantitatively analyzed. We do not have the ability to analyze substances quantitatively currently. To do so would take time and money to set up and validate methods, plus more time to analyze drugs in our current method we use, thus affecting our productivity and backlog negatively.

Bob Roshak (Nevada Sheriffs' and Chiefs' Association):

The Nevada Sheriffs' and Chiefs' Association supports A.B. 297.

Brett Kandt (Special Assistant Attorney General, Office of the Attorney General):

Attorney General Adam Paul Laxalt supports A.B. 297. High Intensity Drug Trafficking Areas is a joint federal, state and local program focusing on high-volume trafficking. This will help the program in Nevada.

Steve Yeager (Office of the Public Defender, Clark County; Nevada Attorneys for Criminal Justice):

The Clark County Public Defenders and Nevada Attorneys for Criminal Justice oppose A.B. 297. I understand what this bill is getting at, but we have concerns with its drafting. I have submitted a proposed amendment, [Exhibit D](#), detailing our concerns.

Section 1 says someone can be prosecuted if he or she claims to have a certain quantity or number of pills. If I tell a police officer I have 50 pills for sale but only have 20, I can be prosecuted for 50 pills. The representation made by the individual is problematic. That is how the statute reads in terms of weight, but this bill adds dosage units, which seems unfair. Why should some be prosecuted for what they say they have versus what they actually have?

Chair Brower:

You are acknowledging that language in statute allows for that representation as evidence for charging purposes as based on weight. This bill adds weight or quantity to that statute. Are you suggesting that is unfair?

Mr. Yeager:

Yes. I object to weight being in the law. I do not know if this statute has ever been challenged. It seems there may be a constitutional challenge. The addition of the declaration of quantities is an issue. If someone says, "I have 300 pills," but he or she only has 20, we should not be able to charge for 300 pills even though that is in the law with respect to weight.

Chair Brower:

Is the scheme in section 1 contemplated with an undercover buy?

Mr. Yeager:

I am not sure. Normally, that is how we get to these prosecutions, but I do not know if that is specific.

Chair Brower:

I do not know who else would testify to witnessing the alleged seller represented a certain quantity. It would be the undercover officer.

Mr. Yeager:

That is one possibility. Another is if an officer witnesses a hand-to-hand sale and the buyer cooperates with the officer, saying the seller told him or her the number of pills being bought.

Section 2 is problematic for a number of reasons. The first change includes a 90-day period where any pills possessed within that time period can be aggregated. If the goal is public safety and not wanting controlled substances in commerce, why would we not have the requirement that an arrest be made right away? This 90-day provision allows undercover buys from an individual over 90 days until an aggregate trafficking level is reached. If we are trying to fix a problem, we should not allow an importer or seller to continue making sales over a 90-day period because that person will be selling drugs and bringing in drugs from other directions. If this is about public safety, the 90-day aggregate does not serve that purpose.

There is a double whammy in this bill. Gram levels are being reduced, and each pill will now be counted. We are talking about 20 grams as the threshold. According to the U.S. Mint Website, a penny is 2.5 grams. The weight of eight pennies would be needed to trigger a trafficking charge. Trafficking charges are nonprobational offenses under NRS 453.3405. We are talking about mandatory prison time. A paper clip is 1 gram, so the weight of 20 paper clips would result in a trafficking charge.

Almost no other state handles this problem this way. Two states use dosage levels or pills. The federal government and other states do not do it that way. They typically go by the weight of a drug. We want to go after the seller, not the user or addict. When A.B. 237 was heard in the Assembly, the question posed was how many pills a real drug addict would ingest on a daily basis. The answer was somewhere between 50 to 80 pills. A 7-week supply for an addict would be 140 pills, which is enough to incur a mandatory trafficking charge under the law.

Cases with a large number of pills involve prison time, not probation. We have statutes on the books dealing with sellers. Possession of a controlled substance with the intent to sell is a Category D felony if a person has drugs, money and a customer list. Sale of a controlled substance is a Category B felony, and a charge can be brought for each sale. Seven or eight undercover buys are seven or eight Category B felonies. Conspiracy to violate the Uniform Controlled Substances Act is another charge. I disagree that it is not a substantial penalty. It is a substantial penalty anytime someone is looking at a felony with potential prison time. Those statutes are aimed at sellers, not users. This is a strict liability crime. It is possession and quantity. There is no requirement that a person be selling or importing controlled substances.

The aggregate amount of the substance is weighed in the way the bill is worded. If I have 100 OxyContin pills of 5 milligrams each and another person has 100 OxyContin pills of 30 milligrams each, we are treated the same way under this bill. No distinction is made for the fact that one pill is six times stronger. We should not be doing it based on aggregate weight. We should be looking at the content of the controlled substance. That is not without precedent because the federal government does that. About 10 years ago, it looked at the drug trafficking laws and decided it was not fair to punish different strength pills in the same way. Under the federal rule, the substance has to be segregated and weighed. Our proposal is to include that in statute and

make a difference between 5 milligram and 30 milligram pills because one is six times stronger than the other.

The proposed amendment, [Exhibit D](#), limits the specific numbers of grams. We looked at the federal statute and guidelines, which can be confusing because they are tied to marijuana. We looked for consistency between federal and state laws. We did that at the lowest levels. At the higher levels, the punishment under the proposed amendment would remain greater than the punishment under federal law.

We are worried about incarcerating drug users. We do not want to do that. We want to get after people importing and selling controlled substances. This bill goes too far and will catch too many drug addicts versus drug sellers.

Sean B. Sullivan (Office of the Public Defender, Washoe County):

The Washoe County Public Defender's Office opposes [A.B. 297](#). I disagree with Sergeant Burnett when she stated drug laws under NRS 453 are not adequate to combat the problem this bill targets. Mr. Yeager talked about possession of a controlled substance and possession of a controlled substance for the purpose of sale. Those are Category E and D felonies with mandatory 1 to 4 years of prison time. We also have conspiracy to violate the Uniform Controlled Substances Act. These crimes have escalating penalties. It can go from a first-time offense with a 1- to 5-year prison sentence to a second offense Category B felony with a 2- to 10-year prison sentence to a third offense with a 3- to 15-year prison sentence. The laws are strong for combating the issue.

This bill will have unintended consequences and capture persons lawfully keeping a supply of drugs. We are talking about actual versus constructive possession. Actual possession means in your hand or on your person. Constructive possession within the law means if you exercise immediate dominion or control over a substance, even though it is not on your person, but you have it in your pill cabinet. Those theories carry equal weight. This is where our concern is. Prescription drug abuse is on the rise and prolific, but [A.B. 297](#) is not the way to combat this. We support the proposed amendment, [Exhibit D](#).

Chair Brower:

Did you say either actual or constructive lawful possession would be a crime?

Mr. Sullivan:

Actual or constructive possession as it is written in the law. There is no carveout to lawfully possess a prescription. The law applies if you actually or constructively possess a controlled substance.

Chair Brower:

Is it not contemplated that the possession, whether actual or constructive, has to be unlawful?

Mr. Sullivan:

Yes, but I still do not see a carveout for a person legally carrying a prescription for a controlled substance.

Chair Brower:

We will dig into that.

Vanessa Spinazola (American Civil Liberties Union of Nevada):

The ACLU of Nevada opposes A.B. 297. Absent harm to other people, drug users should not be punished for what they put into their bodies. Drug possession laws criminalize drug users posing no threat to public safety at the expense of taxpayer dollars. A public health approach to treating addicts may be more efficient and effective. Passing this bill places obstacles in the paths of recovering drug users. The collateral consequences from convictions include the inability to access student loans, obtain certain types of employment, exercise voting rights and qualify for public housing. We would take people suffering from addiction, provide a criminal conviction, put obstacles in their way to prevent recovery and risk our own public safety.

Bipartisan consensus across the Country is that the war on drugs has not increased public safety but has cost millions of dollars in criminal justice system resources. It has broken up families. Statistics show that women have been specifically impacted by the war on drugs. Many single mothers and caregivers send children into foster care or care of relatives while incarcerated, experiencing severe trauma while separated from their children. At a time when many states are considering drug possession law reform, changing the law as presented in A.B. 297 will put Nevada in the minority of states moving backwards. We support the proposed amendment, [Exhibit D](#).

Senator Ford:

That is the concern I have. Looking at the war on drugs, we should take the approach of creating opportunities for diversion programs and treat this issue as opposed to incarcerating people. This is a controversial issue. It barely passed the Assembly with the vote 22 to 20. We should spend more time talking about this. There are valid arguments on the other side, but generally speaking, what Ms. Spinazola said articulates the reason I will be voting "no" on this bill if it comes up for a work session.

Stacey Shinn (Progressive Leadership Alliance of Nevada):

The Progressive Leadership Alliance of Nevada opposes A.B. 297. Why are we talking about contributing to mass incarceration when we should be talking about decreasing the numbers of people in prison? I am a licensed social worker who worked in a rehabilitation center for people with addiction issues. These people do not need to be spending more time in jails and prisons. We need to get addicts into rehab programs. In the example given about people prescribed medication: I had clients who hoarded their medications. They did so for fear of losing Medicaid eligibility or their doctor or being wait-listed. We should not be spending State money to increase the prison population. We should spend this money on rehabilitation, education, social services and the like.

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Chair Brower:

I close the hearing on A.B. 297 and adjourn the subcommittee of the Senate Committee on Judiciary at 2:05 p.m.

RESPECTFULLY SUBMITTED:

Julia Barker,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit / # of pages		Witness / Entity	Description
	A	1		Agenda
	B	5		Attendance Roster
A.B. 297	C	3	A.J. Delap / Las Vegas Metropolitan Police Department	Cover Letter and Photographs
A.B. 297	D	5	Steve Yeager / Clark County Public Defenders Office	Proposed Amendment