



**Written Statement of
Jeralyn E. Merritt**

**on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**before the
Judiciary Committee of the United States House of Representatives
Subcommittee on Crime**

Re: Federal Marihuana Sentencing

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Jeralyn E. Merritt is a criminal defense lawyer in private practice in Denver, Colorado. She primarily represents persons accused of complex federal drug and white collar crimes, and in related forfeiture actions. She is a member of the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL), and serves as a Chair of the NACDL Legislative Committee. She is a Fellow of the American Board of Criminal Lawyers(ABCL) as well as a member of its Board of Governors.

Ms. Merritt was appointed by Chief Judge Richard P. Matsch of the U.S. District Court for the District of Colorado to serve on (1994) and to chair (1995) the Court's Standing Committee on the Criminal Justice Act. She was also selected by Chief Judge Matsch in 1995 to serve as the first District Panel Attorney Representative for the District of Colorado to the National Conference of Panel Attorneys.

Ms. Merritt is a graduate of the University of Michigan, Ann Arbor, MI (Bachelor of Arts, Political Science) and the University of Denver College of Law (Juris Doctorate).

Mr. Chairman and members of the Committee:

Thank you for providing me with this opportunity to testify on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL) in opposition to HR 2507 and in support of the 1995 amendment to United States Sentencing Guideline USSG 2D1.1 respecting marihuana plant equivalency ratios.

The almost 9,000 direct and almost 30,000 state and local affiliate members of the National Association of Criminal Defense Lawyers are private defense lawyers, public defenders and law professors. They have devoted their lives to protecting the many provisions of the Bill of Rights concerned with fairness in the criminal justice system. NACDL's interest in, and special qualifications for understanding H.R. 2507 are keen. I am here today to explain why we stand in firm opposition to H.R. 2507.

I. A HISTORY OF THE ISSUE

As you know, the United States Sentencing Guidelines became effective on November 1, 1987. The congressional authority for the creation of federal sentencing guidelines in criminal cases is found in The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984). This legislation was enacted to further the basic purposes of sentencing in criminal cases: rehabilitation, just punishment, deterrence and incapacitation.

To implement the above objectives, Congress established the United States Sentencing Commission ("Commission") as an independent agency in the judicial branch. 28 U.S.C. §991. The Commission's principal purpose is to "establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." United States Sentencing Commission, Guidelines Manual, ("USSG"), Ch.1, Pt.A, Intro., (Nov. 1995). These guidelines are to serve the further purpose of providing certainty and fairness in meeting the goals of sentencing and avoiding unwarranted sentencing disparities. 28 U.S.C. §991 (b).

In developing the federal sentencing guidelines for drug offenses, the Commission used drug quantity as the primary measurement for the seriousness of the offense. This was undoubtedly a result of the Anti-Drug Abuse Act of 1986, which targeted drug kingpins and middle level managers and supervisors for stiff penalties. In so doing, unexpected consequences resulted, principally the trapping of low-level, non-violent drug offenders. Nowhere is this better illustrated than in the sentencing guidelines established for offenses pertaining to cultivation of marihuana.

The statutory penalty scheme for drug offenses is set forth in Title 21 of the United States Code. In 1986, with the enactment of the Anti-Drug Abuse Act of 1986, mandatory minimum penalties for marihuana offenses were established under 21 U.S.C.

§841(b)(1)(A) and (b)(1)(B). These penalties provided for a five year mandatory minimum sentence for offenses involving more than 100 kilograms of marihuana and a ten year mandatory minimum sentence for offenses involving more than 1,000 kilograms of marihuana.¹

Marihuana plants were not specifically addressed or included in the 1986 mandatory minimum penalty schemes. The Sentencing Guidelines, as originally enacted in 1987, provided that for offenses involving marihuana plants, each plant was to be treated as the equivalent of 100 grams of marihuana. USSG §2D1.1, comment. (n. 10).

In 1988, however, the Anti-Drug Abuse Act of 1988 was enacted, which amended the mandatory minimum provisions of 21 U.S.C. §841 (b)(1)(A) and (B) to provide for mandatory minimum five and ten year sentences for offenses involving 100 or more and 1,000 or more marihuana plants, respectively. USSG, Appendix C, (Amendment 125).

In 1989, to comport with the new mandatory minimum sentences for offenses involving marijuana plants, the Commission promulgated amendments to the marihuana guidelines which became effective on November 1, 1989. The new guideline provided an equivalency ratio of one plant equals 100 grams of marihuana in cases involving less than fifty plants, and one plant equals one kilogram of marihuana in cases of fifty or more plants. It is clear that these amendments were designed to mirror the changes to the drug sentencing statutes which became effective in 1988 with the enactment of the Anti-Drug Abuse Act of 1988.²

It appears that there is no support for and little reference to the 1988 and 1989 revised marihuana plant equivalency ratio of one plant equals one kilogram of marihuana in the statute, sentencing guideline, or even in the Congressional Record. In *United States v. Marshall*, 998 F.2d 634, 635 (8th Cir. 1993), for example, the Court noted that the Commission's "Background" statement on page 89 of the 1991 Guidelines Manual reflects that the source of the marihuana plant conversion ratio appeared to be derived

¹ 21 U.S.C. §841(a)(1)(B)(vii) and (b)(1)(A)(vii). A kilogram of marijuana contains 1,000 grams.

² Amendment 125 to the Guidelines, effective November 1, 1989, states that a purpose of the amendment is "to reflect the statutory change with respect to fifty or more marihuana plants (Section 6479 of the Anti-Drug Abuse Act of 1988)..." USSG, Appendix C, p. 116 (Nov.1995).

from the mandatory minimum sentencing penalties in 21 U.S.C. §841 (b)(1)(A), (B) and (D). The Court in *Marshall* further noted that it was aware of only a single line in the Congressional Record pertaining to the mandatory minimum marihuana plant sentencing statute conversion ratio -- one by Senator Joseph Biden (D-Delaware), which was not particularly indicative of Congress' rationale or intent in setting the ratio.

“Senator Biden explained that the Congressional action was designed to curtail ‘unnecessary debate’ between prosecutors and defendants, and stated, without explanation, that ‘[T]he bill uses 1,000 plants as the equivalent of 1,000 kilograms.’ 134 Cong.Rec. S17368 (daily ed. Nov. 10, 1988).”

Id., at 636.

The Court in *Marshall* also recognized that the 1991 edition of the Guidelines Manual (page 89) contained the Sentencing Commission's then published statement that “the average yield from a mature marihuana plant equals 100 grams of marihuana.”

Id., at 636.

Until the Commission submitted proposed Amendment Number 8 to Section 2D1.1 [c] of the Sentencing Guidelines to Congress on May 1, 1995, which became effective on November 1, 1995, the sentencing guideline offense levels for marihuana plants remained illogically anchored to the mandatory minimum sentencing scheme contained in 21 U.S.C. §841 (b)(1)(A) and (B): for fifty or more plants, one plant equals one kilogram of marihuana and for fewer than fifty plants, one plant equals one hundred grams of marihuana.

II. THE REASONS FOR THE 1995 MARIHUANA SENTENCING GUIDELINE AMENDMENT ARE VALID.

The most compelling argument for the amendment to the marihuana plant equivalency ratio is very simple: it is an *accurate* assessment of the average yield of a marihuana plant and promotes truth in sentencing. The *prior* ratio of one plant equals one kilogram of marihuana was inaccurate, lacking in rational basis, divorced from reality and without foundational support, scientific or otherwise.

In proposing the amendment, the Sentencing Commission stated that its reason for doing so was:

"In actuality, a marihuana plant does not produce a yield of one kilogram of marihuana. The one plant = 100 grams of marihuana equivalency used by the Commission for offenses involving fewer than 50 marihuana plants was selected as a reasonable approximation of the actual average yield of marihuana plants taking into account (1) studies reporting the actual yield of marihuana plants (37.5 to 412 grams depending on growing conditions); (2) that all plants regardless of size are counted for guideline purposes while, in actuality, not all plants will produce useable marihuana (e.g., some plants may die of disease before maturity, and when plants are grown outdoors some plants may be consumed by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. **To enhance fairness and consistency, this amendment adopts the equivalency of 100 grams per marihuana plant for all guideline determinations.** (emphasis supplied). Vol. 60, Federal Register, No. 90, May 10, 1995, Notices, 25078.

The Sentencing Commission considered several scientific studies and experts in arriving at the above conclusion. This material was gathered in part as preparation for the 1989 amendment precipitated by the changes in the mandatory minimum penalties of 21 U.S.C. §841.

Joseph Antognini of the Tropical Plant Research section of the Department of Agriculture provided data establishing that a marihuana plant could be expected to yield between 37.5 and 151 grams of dry, leafy (smokeable) material.

James Urbanek at the University of Mississippi conducted government-sponsored research involving the actual growing of marihuana plants. His scientifically based estimate of dry, smokeable material from an outdoor plant was between 295 and 412 grams. For an indoor plant, his estimate was between 118 and 177 grams.³

³ James E. Urbanek, B.B.A., Research Professor and Assistant Director, Research Institute of Pharmaceutical Sciences, School of Pharmacy, University of Mississippi, University, MS 38667.

The U.S. Parole Commission's Rules and Procedures Manual used a ratio of one plant equals one quarter pound of useable marihuana (four ounces amounting to 112 grams). 28 C.F.R. 2.20. This grading was adopted by the Parole Commission after receiving and evaluating extensive comments from organizations such as the DEA and NORML (National Organization for the Reform of Marijuana Laws). As is the case with all Parole Commission regulations, this regulation was published for public comment under the Administrative Procedures Act before final enactment.

In 1990, Dr. Mahmoud A. ElSohly, Research Professor and Program Coordinator of the Drug Abuse Research Program from the Research Institute of Pharmaceutical Sciences, School of Pharmacy, University of Mississippi located in Oxford, Mississippi testified in a federal court trial in Georgia. The judicial opinion outlining his findings and studies is contained in *United States v. Osborn*, 756 F.Supp. 571 (N.D. Ga. 1991). In this opinion, the Court identifies Dr. ElSohly as having been involved in growing marihuana since 1976 and as being the only person with a contract with the government to grow marihuana. He has a Ph.D in pharmacognosy, and at that point had published over one hundred research papers, and had testified in more than sixty trials involving controlled substances.

According to Dr. ElSohly's trial testimony in *Osborn*, based upon his experiments, studies and research aimed at determining the average weight of usable marihuana produced by a marihuana plant, he would not expect a plant to yield a kilogram of marihuana. He had never seen nor grown such a plant. His testimony was that a sentencing scheme of 1 plant equals 100 grams of marihuana would be reasonable, but that one based on 1 plant equals 1 kilogram would be unreasonable. *Id.*, at 573.

The Drug Enforcement Administration utilized Dr. ElSohly's research in its 1992 publication entitled "Domestic Cannabis Eradication Suppression Program".

In light of the evidence from scientific studies that the average yield of marihuana plants is 100 grams, not one kilogram of marihuana per plant, the kilogram-per-plant ratio is irrational, arbitrary, and unreasonable. And it can no longer be overlooked or denied that the ratio resulted in unfair and economically inefficient long prison sentences.

III. ARTIFICIAL MANIPULATION OF THE MARIHUANA PLANT SENTENCING GUIDELINE RATIO IS NEITHER APPROPRIATE NOR NECESSARY AS A MEANS BY WHICH TO PUNISH DRUG OFFENDERS.

The Sentencing Commission has included the following as background commentary to the amendment to USSG§ 2D1.1 respecting marihuana plant equivalency ratios in the 1995 Guidelines Manual:⁴

“The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking.....[H]owever, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions....

For marihuana plants, the Commission has adopted an equivalency ratio of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. **The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana.**” (emphasis supplied).

The federal sentencing guidelines for drug offenses have been based on the quantity of the substance at issue since their inception in 1987. The quantities must not be artificially manipulated to increase punishment for drug offenders.

The Sentencing Guidelines currently in effect more than amply allow for increased terms of incarceration and punishment in appropriate cases, without resorting to irrational and inaccurate drug equivalency ratios.

For example, under USSG §1B1.3, the Court can consider uncharged relevant conduct to increase the offender's base offense level. Thus, if the defendant was only charged with one marihuana grow, but evidence at trial or sentencing established by a

⁴ USSG §2D1.1, comment. (n. 18), (backg'd) (November, 1995), p. 97

preponderance of the evidence that he or she had participated in four prior related grows, the defendant is to be sentenced for the total number of plants in all five grows.

If the defendant had a managerial or supervisory role in the offense, his or her base offense level can be increased anywhere between two and four levels. USSG §3B1.1.

If a dangerous weapon or firearm was possessed in relation to the offense, a two point upward adjustment to offense level is allowed in USSG §2D1.1 (b)(1). If the plants were to be distributed in a prison, a two point increase is provided for. USSG §2D1.1 (b)(3). Similar increases to the base offense levels are provided for in cases involving obstruction of justice, abuse of position of trust or use of a special skill, using a minor to commit a crime, personal injury, or reckless endangerment during flight.

There are increases in guideline offense levels that must be applied if the offense occurs near a protected location, or involves a pregnant woman or an underage person. USSG §2D1.2 (a).

If the offender has an egregious prior record, the Court can depart upward and impose a greater sentence under USSG §4A1.3. If the defendant is on probation, parole or under a criminal justice sentence at the time of the commission of the instant offense, the Court must add two points to the defendant's criminal history points under USSG §4A1.1(d).

There is simply no justifiable or excusable rationale for using an invalid, outdated and artificially created yardstick such as the continued equation of one marihuana plant equals one kilogram of marihuana instead of the true ratio of one plant equals 100 grams of marihuana to increase prison and other penalties solely in offenses involving the cultivation of marihuana. Notwithstanding the perceived ills associated with marihuana cultivation, the infliction of more severe punishment of individuals found guilty of marihuana cultivation than on those convicted of marihuana distribution and importation offenses -- in the absence of clear and rational congressional intent, and in the face of direct scientific evidence that the ratio utilized to accomplish such increased punishment is wrong -- results in an egregious and unjustifiable deprivation of constitutional due process rights as guaranteed by the Fifth Amendment to the United States Constitution.

IV. CONCLUSION

In its enabling legislation to the United States Sentencing Commission (28 U.S.C. §994 (o)), Congress specifically directed the Commission to periodically review and revise the sentencing guidelines "in consideration of comments and data coming to its attention...". The Commission is to accomplish its review and revision process by consultation with other individual and institutional representatives of various criminal justice agencies.

28 U.S.C. §994(p) directs the Sentencing Commission to submit proposed guideline amendments to Congress on the first day of May of each calendar year, along with a statement of the reason for any proposed amendment. In 1995, the Sentencing Commission followed its Congressional directive with respect to the equivalency ratio of marihuana plant used to determine sentencing guideline levels for marihuana cultivation offenses. Congress agreed with this well-studied, proposed amendment. For Congress to step in now and reverse that judgment, which has already become law, *in the absence of new and compelling evidence that the amendment is scientifically unsound or otherwise irrational*, flies in the face of the authority granted to the Sentencing Commission.

The amended marihuana equivalency ratio of one plant/100 grams contained in USSG §2D1.1, effective November 1, 1995 is accurate, sound, valid and supported by the clear weight of scientific evidence. It should not be disturbed by Congress.

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