Federal Marijuana Offenses: Vaporizing the Sentencing Guidelines[1]

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I. Introduction

Even though as of this writing twenty-five states and the District of Columbia have enacted medical or recreational marijuana programs, it remains federally illegal to possess marijuana for personal use, 21 U.S.C. 844, or with the intent to distribute it. 21 U.S.C. 841.

According to the most recent marijuana arrest data, see *http://norml.org/news/2016/09/29/fbi-marijuana-arrests-decline-significantly-in-2015*, the FBI reports that 643,122 Americans were arrested on marijuana charges in 2015, 89 percent of which were for mere possession. The remaining 11 percent—70,743 individuals—were arrested for cultivation or trafficking offenses. Although this is the lowest number of marijuana arrests reported since 1996, it remains true that a vast number of people still have their lives destroyed unfairly by our marijuana laws.

The following discussion is directed towards helping that part of the 11 percent arrested for marijuana cultivation or trafficking offenses who are unfortunate enough to find themselves the subject of a federal marijuana sentencing.

II. A Federal Marijuana Case

Your federal marijuana client has almost certainly been charged with a trafficking or cultivation offense. Otherwise, they wouldn't be in federal court.

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Title 21 U.S.C 841(b)(1)(A) criminalizes possession with the intent to distribute 1000 kilograms or more of marijuana, and carries a ten-year mandatory minimum sentence and a maximum term of life imprisonment. Section 841(b)(1)(B) makes it a violation, punishable by a five-year mandatory minimum sentence and a maximum term of forty years, to possess with the intent to distribute 100 kilograms or more of marijuana, while section 841(b)(1)(C) applies to lesser offenses and carries no mandatory minimum term of imprisonment and a maximum of twenty years. Offenses below 50 kilograms of marijuana are governed by section 841(B)(1)(d), which carries no minimum and only a five year maximum sentence.

In addition to the marijuana charges, your client may be charged with money laundering and/or a criminal forfeiture allegation. It is statistically far more likely that your client will not wish to proceed to a trial. Even if they do, unless they prevail, they will ultimately be sentenced. Your principal mandate is to get them out of their predicament as soon as possible.

A. Negotiating a Plea Agreement

According to recent official data, more than ninety percent of all federal defendants plead guilty rather than go to trial. See *http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases*. In the course of negotiating a "plea bargain" for a federal marijuana client, there are several offense-specific considerations.

Of paramount importance is avoiding a mandatory minimum prison sentence. Notwithstanding the mandatory-minimum ten and five-year sentencing provisions of 21 U.S.C 841(b)(1)(A) and (B), on August 12, 2013, then-Attorney General Eric Holder

issued a memorandum changing DOJ policy on charging mandatory minimum sentences and recidivist enhancements in some drug cases. (See *https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf*.)

Under this policy, prosecutors are instructed to decline to charge a drug quantity necessary to trigger a mandatory minimum sentence, if each of the following criterion are met: (1) The defendant's behavior did not involve violence, threats of violence, possession of a weapon, trafficking to minors, or the death or serious bodily injury of any person; (2) The defendant was not a leader, organizer or supervisor of others; (3) The defendant does not have significant ties to large-scale drug organizations or gangs; and (4) The defendant does not have a significant criminal history. Id. In every federal marijuana plea negotiation, you should attempt to avoid the limitations of any mandatory minimum. This will free the court to properly account for the changing and evolving treatment of marijuana under state and federal laws, discussed infra.

Since the advisory Guidelines continue to calculate a defendant's sentencing range based principally upon drug quantity, U.S.S.G. 2D1.1, role in the offense, U.S.S.G. 3B1.1 and 3B1.2, and acceptance of responsibility, U.S.S.G. 3E1.1, it is important to attempt to negotiate the lowest drug quantity possible under the circumstances and little or no increase for role in the offense. Generally, pleading guilty publicly constitutes acceptance of responsibility, but this may vary from jurisdiction to jurisdiction, with certain courts requiring an additional affirmative statement of guilt before extending the three-level Guidelines reduction for acceptance of responsibility to a defendant.

In negotiating drug quantity, a client's behavior may fall close to the cusp of a quantity that triggers a mandatory minimum sentence. In some cases, their conduct may be part of a separate conspiracy, while in other cases their co-defendant's conduct is not properly attributable to them. Whatever the circumstance, it is essential to have your client held liable only for the government can prove they personally did, or which was reasonably foreseeable to them and in furtherance of the conspiracy charged. For example, where there exists a gap in the physical evidence, such as seizure of only some but not other packages sent by mail, or no records and only extrapolations of drug quantity, it may be possible to push successfully for a reduced offense level. Indeed, it is easier to obtain a time-served or probationary sentence if your client starts the sentencing process from a lower Guidelines level.

Applying these principles—negotiating away from the mandatory minimum and for a reduced drug quantity—along with arguing the other marijuana-specific sentencing factors that we will discuss below, helped me to obtain a 70-87 month Guidelines range and no mandatory minimum for a client arrested with over 2,000 marijuana plants under cultivation, who was deemed to be the leader of an extensive marijuana cultivation conspiracy. From that range, and given the statutory factors that we will discuss infra, the court granted a downward variance to 36 months imprisonment. After successfully completing drug treatment, the client will serve only roughly 16 months of this term.

B. Recovering from a Guilty Verdict

In the event that your client has proceeded to trial and been convicted, all is not lost. Depending on the strength of the appellate issues, and the sentencing history of the bench, a favorable sentencing outcome may still be obtained.

If your client has little chance of success on appeal, and satisfies the criterion for relief from any applicable mandatory minimum sentence under 18 U.S.C. 3553(f)(1)-(5), the so-called "safety valve" provisions of the Mandatory Minimum Sentencing Reform Act, she or he may consider meeting with the Government in an effort to qualify for relief from the minimum sentence. Even though ineligible to receive a reduction for acceptance of responsibility, your client will still be in a position to receive a shortened sentence in light of the 3553(a) factors as applied to marijuana offenses, discussed infra, without the intervening bar of a mandatory minimum term.

Applying this principle—winning relief from the mandatory minimum sentence even after losing trial—enabled me to win a client convicted of over six tons of marijuana distribution an advisory Guidelines range of 97-121 months imprisonment with no mandatory minimum. From that range, and given the statutory factors that we will discuss below, the court imposed a downward variance to a 15 month sentence.

III. A Federal Marijuana Sentencing

A. The General Sentencing Framework

Every client who is facing federal sentencing will go through a relatively uniform process. First, after either entering a guilty plea or being convicted at a jury trial, the court will order a Pre-Sentence Investigation (PSI) by the United States Probation Office

(USPO), and that a Pre-Sentence Report (PSR) be prepared. This report will be issued to the parties in draft form, and an opportunity to make objections and propose corrections provided to each side. The final report will be sent to the court. The defendant and the government will be allowed to file memoranda in aid of sentencing, and to respond to each other's submissions. A defendant routinely presents letters of support from friends and family, evidence of family and medical circumstances, and any other information that may be beneficial to their case. At the time of sentencing, the parties, including the defendant personally, will be allowed to speak, before the court imposes judgment.

At the outset of the sentencing hearing, the district court will start by calculating the advisory Sentencing Guidelines range, based largely upon drug quantity, role in the offense, and acceptance of responsibility, and then move to consideration of the factors set forth in 18 U.S.C. 3553(a), in determining what constitutes a sentence "no greater than necessary."

As background, in 1997, when the United States Sentencing Guidelines first went into effect, they provided a rigid grid-like calculation of a range of imprisonment. The grid's *Y* axis represented a defendant's calculated "offense level" for a given crime, while the *X* axis represented their criminal background. The end product was, absent an extraordinary circumstance, a mandatory sentencing range.

In United States v. Booker, 543 U.S. 220 (2005), however, the Supreme Court held the Sentencing Guidelines to be advisory and serve only as the starting point in a court's sentencing analysis. In addition to the Guidelines' advisory nature, the sentencing court is required to consider specific statutory factors:

> The Court shall impose a sentence sufficient, but not greater than necessary . . . [and] shall consider—
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> 1. The nature and circumstances of the offense and the history and characteristics of the defendant;
> 2. The need for the sentence imposed—
>   a. To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>   b. To afford adequate deterrence to criminal conduct;
>   c. To protect the public from further crimes of the defendant;
>   d. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> 3. The kinds of sentences available;
> 4. The kinds of sentence and the sentencing range established . . . [by the Sentencing Guidelines];
> 5. Any pertinent policy statement . . .
> 6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> 7. The need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (some minor alterations not noted).

Although the Guidelines remain important to the sentencing calculus, since they are now advisory a court is free to impose a non-Guidelines sentence. Gall v. United States, 552 U.S. 38 (2007); Booker, 543 U.S. 220. "The sentencing judge should decide, after considering the Guidelines and all the other factors set forth in section 3553(a), whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable Guidelines range or within permissible departure authority, or (ii) to impose a non-Guidelines sentence." United States v. Crosby, 397 F.3d

103, 113 (2d Cir. 2005); see also United States v. Castillo, 460 F.3d 337, 352 (2d Cir. 2006).

In United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc), the Second Circuit made clear that a district court has broad discretion in making sentencing determinations and imposing a non-Guidelines sentence:

> The Guidelines provide the "starting point and the initial benchmark" for sentencing, Gall, 128 S. Ct. at 596, and district courts must "remain cognizant of them throughout the sentencing process," id. at 596 n. 6. It is now, however, emphatically clear that the Guidelines are guidelines—that is, they are truly advisory. A district court may not presume that a Guidelines sentence is reasonable; it must instead conduct its own independent review of the sentencing factors, aided by the arguments of the prosecution and defense. District judges are, as a result, generally free to impose sentences outside the recommended range. When they do so, however, they "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." Id. at 597. In this way, the district court reaches an informed and individualized judgment in each case as to what is "sufficient, but not greater than necessary" to fulfill the purposes of sentencing. 18 U.S.C. § 3553(a).

Cavera, 550 F.3d at 189 (emphasis added) (footnotes omitted).

The Supreme Court explicitly validated this reasoning in Nelson v. United States, 555 U.S. __ (2009); 129 S.Ct. 890 (2009), and Spears v. United States, 555 U.S. __ (2009); 129 S.Ct. 840 (2009). In Nelson, the Court instructed, "[t]he Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." Nelson, 555 U.S. at __; 129 S. Ct. at 892 (emphasis in original). In Spears, the Court reaffirmed it's holding in Kimbrough v. United States, 552 U.S. 85 (2007), that a district court may vary from the Guidelines based on a *policy* disagreement with the Guidelines even in an ordinary case. Spears, 555 U.S. at __; 129 S. Ct. at 842-44.

Today, a range of sentences can appropriately be deemed reasonable in any particular case. United States v. Jones, 531 F.3d 163, 174 (2d Cir. 2008). In addition, a court can exercise wide discretion in the sources and types of evidence it utilizes to determine the kind and extent of punishment to be imposed, including the most complete information obtainable concerning a defendant's personal characteristics:

> "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." Koon v. United States, 518 U.S. 81, 113 . . . (1996). Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime." Williams, 337 U.S. at 247 . . . .

Pepper v. United States, 131 S. Ct. 1229, 1239-40 (2011) (emphasis supplied).

There is also a rapidly growing consensus that incarceration of non-violent drug offenders is counterproductive. As President Obama recently noted:

> Thirty years ago, there were 500,000 people behind bars in America. Today, there are 2.2 million. The United States is home to 5 percent of the world's population, but 25 percent of the world's prisoners. Every year, we spend $80 billion to keep people locked up.
>
> Now, many of the folks in prison absolutely belong there — our streets are safer thanks to the brave police officers and dedicated prosecutors who put violent criminals behind bars. But over the last few decades, we've also locked up more non-violent offenders than ever before, for longer than ever before. That's the real reason our prison population is so high.

(See *https://www.whitehouse.gov/the-press-office/2015/10/17/weekly-address-working-meaningful-criminal-justice-reform*.)

B. Federal Marijuana Defendant-Specific Arguments

In addition to your client's personal and family characteristics, medical conditions, employment, or need for rehabilitation or drug counseling, there are recurring legal issues in marijuana cases, which are relevant to a court's analysis of the 3553(a) sentencing factors.

To start, even though your client was trafficking a federally controlled substance, it was only marijuana. This is an emergent, but valid argument. It means that their criminal behavior was consciously limited to a substance that is lawful in one form or another in half the United States, better for public health than alcohol and tobacco,[2] and which most Americans believe should be legalized and even more believe should not result in a prison sentence.

These recent changes in state and federal law enforcement policy regarding marijuana are particularly relevant to the court's statutory duty to consider, first, the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," under 3553(a)(2)(A), and, second, the "need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct" under 3553(a)(6).

In Kimbrough v. United States, 552 U.S. 85 (1987), the Supreme Court acknowledged the "district courts' authority to vary from the crack cocaine Guidelines based upon *policy* disagreement with them, and not simply based upon an individualized

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[2] Regarding alcohol, a 2014 Pew Research Center Study found that 69% of all Americans believe that alcohol is more harmful than marijuana. (See http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/.)

determination that they yield an excessive sentence in a particular case," id. at 85, in holding that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve 3553(a)'s purposes, even in a mine-run case." Id. at 109. This premise is equally applicable to marijuana cases today.

Even though the marijuana Guidelines have remained virtually unchanged since their inception in 1987, since then state and federal marijuana laws have changed dramatically. Today, twenty-five states and the District of Columbia have legalized either medical or recreational marijuana or both. Among these, Colorado, Washington, Oregon and Alaska have passed ballot initiatives allowing for the regulation, production, processing and sale of marijuana for recreational purposes. In November 2016, five other states—Arizona, California, Maine, Massachusetts, and Nevada—have the question of legalizing recreational cannabis on their ballots. In each instance, the initiative is expected to pass. (See *http://blog.norml.org/2016/10/03/adult-use-ballot-initiatives-leading-in-latest-polls/*.)

This dramatic evolution in marijuana's treatment under so many states' laws is relevant to the federal sentencing analysis, as it reflects the way the public currently views marijuana. Imprisoning marijuana offenders, particularly for lengthy periods, no longer promotes public respect for the law. Moreover, the evolving trend in recent years of Department of Justice (DOJ) policy towards non-enforcement of federal marijuana laws in response to state legislative enactments, is a radical divergence from policy at the time the Guidelines went into effect in 1987.

On August 29, 2013, Deputy Attorney General James Cole provided "Guidance Regarding Marijuana Enforcement" to federal prosecutors. See *https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf*. In summary, under the terms of the "Cole Memo," while still retaining discretion to prosecute federal marijuana violations, DOJ would no longer prosecute those individuals who were operating in compliance with their state's marijuana regulatory scheme and laws.

Although these federal policy and enforcement shifts may not be relevant to the question of guilt under federal drug law, nor a basis to attack marijuana's continued Schedule I status under the Controlled Substance Act (CSA), 21 U.S.C. 812(b)(1), they are plainly relevant to the 3553(a) sentencing factors. At least one court has relied upon these circumstances in granting downward variance from the Guidelines to several marijuana defendants. See United States v. Kerem Dayi, et. al., JKB-13-0012 (D.Md., 11/1/13) (Decision and Order applying two-level downward variance to 22 marijuana defendants because of shift in policy and to avoid unwarranted disparities in sentencing).

As to the need for a sentence to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," 3553(a)(2)(A), it can effectively be argued that the gravity of marijuana crimes has been undercut by recent state laws decriminalizing, legalizing and regulating the cultivation, processing, possession and dispensing of marijuana, and, particularly, by the federal government's expanding policy of non-enforcement. Multiple states have demonstrated an interest in marijuana regulation over enforcement, and the DOJ's enforcement policy towards these states appears to reflect that the federal government intends to honor this paradigm shift. In the

end, federal marijuana prosecutions today do not involve offenses that are viewed as seriously as they were in years past.

Further relevant to the question of just punishment, these recent shifts in the state and federal marijuana landscape move marijuana offenses away from traditional drug trafficking offenses and closer to the realm of black market activity. For example, the unlawful distribution of alcohol, tobacco, or other commercial goods remain criminal activities, punishable by law. However, these offenses are not as serious as illegal drug trafficking.

Where a sentence is excessive because it overstates the gravity of the offense conduct, it fails to "reflect the seriousness of the offense," "promote respect for the law," or "provide just punishment for the offense," as required under 3553(a)(2)(A).

A court must also "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 3553(a)(6). This factor is one that can fairly be understood as requiring equal justice for all. Given that the Justice Department has opted not to prosecute tens of thousands of individuals, who are yearly conducting billions of dollars in marijuana business pursuant to their various states' laws, including large-scale commercial cultivators, processors, extractors, distributors, and retail outlets, it is entirely appropriate for a court to consider this policy and its effects in mitigating the disparate impact of prosecutorial enforcement priorities.

C. Coalescence of the Other Statutory Factors

The court is required to consider other factors, which may not militate in favor of your client, of course. You need to be prepared to address and admit that their behavior

was undeniably illegal, may have been protracted, blatant, sophisticated, organized or large-scale. It may have involved acts of violence or weapons possessed in furtherance of the marijuana offenses. In many instances, these counterbalancing factors will thwart your efforts for a non-prison sentence.

On the other hand, your client is a person. They are scared and about to suffer the long-term collateral consequences of a felony conviction. In many instances, marijuana defendants are exemplary people. They may have a family who rely upon them for financial and emotional support, significant medical issues, employees who will lose their jobs if a prison sentence is imposed, or a charitable, professional or military background that otherwise favors a reduced sentence, even before consideration of the nature of marijuana offenses today and the need to avoid sentencing disparities.

Every single favorable fact should be included in the client's sentencing submission to the court. In addition to distinguishing the marijuana offense from other offenses, you should distinguish your client and attempt to place them in the most favorable light. Inclusion of character letters written by friends, family and co-workers, along with family pictures, accolades, awards, and relevant records, provides the court with a variety of potentially valid 3553(a) bases upon which to render a conclusion that a non-prison sentence is sufficient. These factors often combine and coalesce, to provide a whole that is greater than the sum of any one part.

IV. Conclusion

Although not attainable at every client's federal marijuana sentencing, counsel should always request a sentence of probation, with a term of home confinement and any

other special conditions deemed appropriate, in lieu of imprisonment. Given the increasing recognition of marijuana as an often legal, relatively benign substance, with redeeming social, medical, cultural and economic values, many more federal courts than ever before appear willing to grant such a request as "no greater than necessary."

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