



**Written Statement of the American Civil Liberties Union
Before the United States Senate Judiciary Committee**

Hearing on

Conflicts Between State and Federal Marijuana Laws

*Tuesday, September 10, 2013
at 2:30pm*

**Submitted by the
ACLU Washington Legislative Office,
The ACLU Criminal Law Reform Project
The ACLU of Washington**

**For further information contact Jesselyn McCurdy, Senior Legislative Counsel at
jmccurdy@dcacclu.org**

The American Civil Liberties Union (ACLU) welcomes this opportunity to submit testimony to the Senate Judiciary Committee for its hearing on the “Conflicts Between State and Federal Marijuana Laws.” We urge the Committee and its members to take action to protect states’ ability to move forward with public safety-focused alternatives to marijuana prohibition. In addition, we call on the Committee and its members to assume a leading role in re-focusing our nation’s drug policies towards a model premised on the understanding that drug abuse and addiction are health problems which should be primarily addressed through public health solutions rather than the over-criminalization and over-incarceration of our citizens, or the creation of violent and profiteering black markets.

The ACLU is a nationwide, nonprofit, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. Consistent with that mission, the ACLU established the Criminal Law Reform Project (formerly the Drug Law Reform Project) in 1998 to focus on the front end of the criminal justice system, from policing to sentencing, with an emphasis on ending our nation’s punitive drug policies, which have failed to achieve public safety and health while putting unprecedented numbers of people behind bars and eroding constitutional rights. Through public education, advocacy, and litigation, the Project has challenged government overreaches of this country’s failed War on Drugs. The Project has worked extensively on marijuana reform. This work has included defending the rights of medical marijuana patients to access the medicine that most effectively alleviates their ailments, challenging the Drug Enforcement Agency’s refusal to permit scientific research about the medicinal value of marijuana, vindicating doctors’ First Amendment rights to discuss medical marijuana with their patients, establishing new limits on search and seizure law where marijuana has been decriminalized under state law, and publishing an unprecedented nationwide study on the significant and widespread racial disparities in marijuana arrests from 2001-2010. The Project has extensive expertise regarding the interaction of state and federal marijuana laws with a focus on the reach and limitations of federal preemption.

I. August 29, 2013 Deputy Attorney General Cole Memorandum.

Shortly after Senator Leahy scheduled this Hearing, the Department of Justice (“DOJ”) issued a “Memorandum for All United States Attorneys,” which provides “Guidance Regarding Marijuana Enforcement.”¹ The ACLU joins Senator Leahy in welcoming this guidance and applauds DOJ’s decision not to interfere with states that legalize and strictly regulate marijuana use and possession for adults as long as certain DOJ enforcement priorities are not interfered with.

Respecting the circumscribed marijuana legalization laws in Washington and Colorado is an ideal way to accumulate evidence about how we can dismantle our unnecessarily punitive drug policies and realize economic and civil rights rewards without sacrificing public safety. The Washington and Colorado laws represent the best of the experimental opportunities federalism was designed to promote. As Justice Brandeis explained, “[d]enial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²

Indeed, our constitution is structured to ensure that Congress cannot force its own policies upon the states and states have the flexibility to experiment. The reason for this separation between federal and state policy is compelling: “Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”³ The Supreme Court has explained that, in light of the Tenth Amendment, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”⁴ Simply put, this anti-commandeering principle means that “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”⁵ Accordingly, Congress cannot force the states to enact their own wholesale criminalization of marijuana to complement federal policy. Regardless of federal criminal law, states have always been free to decriminalize marijuana under their own criminal codes. As Judge Kozinski has explained in reference to state medical marijuana laws, “[i]f the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.”⁶ Thus, Washington and Colorado’s decision to take a different path than the federal government on marijuana policy is consistent with

our constitutional structure.

The 40-year War on Drugs, waged on our own citizens, has been a deeply flawed and failed effort.⁷ A key component of its failure has been the total prohibition of marijuana, which has resulted in the expenditure of vast amounts of money prosecuting and incarcerating countless people whose potential is decimated by wasted time behind bars and complex webs of collateral consequences that obstruct their ability to succeed in society.⁸ Worse still, the burden of marijuana prohibition falls disproportionately on Black Americans who, across the country, are arrested, prosecuted, and convicted of nonviolent marijuana offenses at rates that far exceed their rates of offending behavior as compared to whites.⁹

Recognizing the harms associated with the criminalization of marijuana, the people of Washington and Colorado voted to regulate marijuana comprehensively instead of prohibiting it—a decision similar to the passage of the 21st Amendment, which repealed the nation’s failed experiment with alcohol prohibition. Washington and Colorado’s new marijuana laws complement federal efforts to minimize the public safety and public health impacts of the cultivation, distribution, and use of marijuana in our society by seeking to reduce and prevent substance abuse, reduce minors’ access to marijuana, eliminate the violence associated with illegal drug dealing, and channel revenue to under-funded and socially constructive institutions like public health and education. Washington’s Initiative 502, for example, features not only a tight regulatory system and restrictions on advertising, but also dedication of new revenues to prevention, treatment, public health education, intervention programs for at-risk youth, research, and independent cost-benefit evaluation. Moreover, by creating regulated, legal competition, Washington’s new law will begin separating consumer dollars from the criminal organizations currently profiting from marijuana at the point of sale.

Indeed, the ultimate goals of any law that regulates marijuana should be the reduction of black market-driven violence and profiteering, and the reduction of drug abuse. We are pleased, therefore, that DOJ’s August 29, 2013 Memorandum recognizes that “a robust system may affirmatively address [DOJ] priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulating market in which revenues are tracked and accounted for.”¹⁰ Further, the Memorandum states explicitly that “in exercising prosecutorial

discretion, prosecutors should not consider the size or commercial natures of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implications [DOJ's] enforcement priorities....”¹¹ Accordingly, the ACLU supports DOJ's Memorandum outlining its policy of non-interference with these state laws serving as laboratories for innovative public policy.

To ensure that U.S. Attorneys' decisions are aligned with DOJ objectives as delineated by the Memorandum, we call on DOJ to monitor implementation of its non-interference policy.

The August 29 Memorandum is a significant and reassuring step, but it is not sufficient. First, it does not address major impediments presented by federal law to safe and successful operating of the regulatory system, including the inability of the banking industry to provide financial services to licensees. If marijuana commerce remains a cash-only proposition, the risk of armed robbery will remain high, which in turn reduces the incentive to participate in the newly legal, regulated market, increasing the likelihood that the industry will continue to be dominated by those who pay little heed to laws and regulations. Congress should therefore pass legislation that protects entities in compliance with state marijuana laws from federal interference and provides clarity about such protected activity to law enforcement, businesses, the banking industry, states, and the nation as a whole.

Second, the exercise of prosecutorial discretion is only a temporary and partial solution, as demonstrated by the Memorandum's express limitations that “[i]f state enforcement efforts are not sufficiently robust . . . the federal government may seek to challenge the regulatory structure itself” and that “nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances”¹²

This Committee and its members have an indispensable role to play in providing more reliable and permanent protection of states' ability to explore public-safety focused alternatives to marijuana prohibition, and more broadly in ending the U.S. government's costly and counterproductive policies towards marijuana more generally. Accordingly, in the pages that follow, we provide a roadmap for Congressional reform and we urge this Committee and its members to spearhead the effort.

II. This Committee Should Spearhead a Congressional Effort to Re-Focus Drug Policy Towards a Public Health Model and Away from our Current Over-Criminalization and Over-Incarceration Model.

The ACLU urges this Committee and its members to take on a leading role in reshaping our national drug policy rather than continuing to wait for individual states to partially lead us out of the failed War on Drugs. Among the many reasons to do so, three are paramount: first, marijuana prohibition is disproportionately enforced against Blacks at the state level; second, marijuana prohibition is expensive but ineffective; and third, marijuana prohibition prevents research into the medicinal qualities of marijuana and obstructs seriously ill Americans from accessing a treatment that does or may provide them with much-needed relief.

A. Report Finds Staggering Racial Disparities in Marijuana Possession Arrests Nationwide Despite Comparable Usage Rates Among Blacks and Whites.

The ACLU recently published a comprehensive report (“the Report”) that, for the first time, documents arrest rates for marijuana possession by race for all 50 states (and the District of Columbia) and their respective counties.¹³ The Report analyzed data from 2001 to 2010 and found that Blacks are 3.73 times more likely than whites to be arrested for marijuana possession offenses despite using marijuana at comparable rates.¹⁴ These racial disparities in marijuana possession arrests exist in all pockets of the country, in counties large and small, in rural and urban areas, in counties with high, medium, and low family incomes, and irrespective of the Black percentage of the overall population. In addition, the costs of these racially disproportionate arrests are hefty at a time of budget crises: in 2010, states spent over an estimated \$3.6 billion on marijuana possession enforcement.¹⁵

i. Methodology

To document arrest rates per 100,000 for marijuana possession by race, the Report relies on arrest data from the Federal Bureau of Investigation’s Uniform Crime Reporting Program (“FBI/UCR Program”), which compiles data voluntarily reported by more than 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies,¹⁶ and the United States Census, which publishes annual county population estimates by age, sex, race, and ethnicity.¹⁷

To document marijuana use, the Report relies on data from the Substance Abuse and Mental health Services Administration's National Survey on Drug Use and Health ("NSDUH"), which is the primary source of information on the use of illicit drugs, alcohol, and tobacco in the civilian, non-institutionalized population of the United States aged 12 years old or older.¹⁸

ii. Key Findings

1. Marijuana arrests have risen since 2001 and accounted for more than half of all drug arrests in the United States in 2010.

In 2010, there were 1,717,064 drug arrests in the United States, and more than half—889,133, or 52%—were for marijuana related offenses.¹⁹ Put another way, someone was arrested for marijuana every 37 seconds in 2010.²⁰

In fact, in 2010 there were 300,000 more marijuana arrests than arrests for all violent crimes combined.²¹

There were 140,000 more marijuana arrests in 2010 (a total of 889,133) than there were in 2001.²² In fact, while overall drug arrests started to drop in 2006, marijuana arrests deviated from the general trend and instead remained at roughly the same level through 2010 (above 845,00 per year).²³

Most marijuana arrests are not for sale or large-scale trafficking, but instead for low-level possession. In 2010, 784,021, or 88%, of marijuana arrests were for possession.²⁴

2. Racial disparities in marijuana possession arrests nationwide: Blacks are 3.73 times more likely than whites to be arrested for marijuana possession.

Most disturbingly, the FBI/UCR Program data revealed that Blacks are disproportionately targeted for marijuana enforcement. In 2010, the Black arrest rate for marijuana possession was 716 per 100,000, while the white arrest rate was 192 per 100,000.²⁵ In other words, nationally Blacks are 3.73 times more likely than whites to be arrested for marijuana possession.

Furthermore, racial disparities exist in every part of the country: Blacks are over four times more likely to be arrested for marijuana possession than whites in

the Northeast and Midwest; in the South, Blacks are over three times more likely, and in the West, they are twice as likely to be arrested.²⁶ In over one-third of the states, Blacks are more than four times likelier to be arrested for marijuana possession than whites.²⁷ In Iowa, Minnesota, Illinois and the District of Columbia, Blacks are 8 times more likely to be arrested.²⁸

3. Racial disparities in marijuana arrests have grown worse over the past decade.

As marijuana arrests increased over the past decade, so did the disparity between Black and white arrest rates — by 32.7% between 2001 and 2010.²⁹ The white arrest rate remained constant at around 192 per 100,000, while the Black arrest rate rose from 537 per 100,000 in 2001 (and 521 per 100,000 in 2002) to 716 per 100,000 in 2010.³⁰

Additionally, the increase in racial disparities in marijuana possession arrests has been a nationwide trend: disparities increased in 38 of the 50 states (and in the District of Columbia) from 2001 to 2010. For example, in Alaska, racial disparities increased by 384%, in Minnesota by 231%, in Wisconsin by 153%, and in Michigan by 149%.³¹

4. Blacks and whites use marijuana at similar rates.

The 2010 NSDUH survey data found that Blacks and whites use marijuana at roughly similar rates. In 2010, 34% of whites and 27% of Blacks reported having last used marijuana more than one year ago — a constant trend over the past decade.³² In the same year, 59% of Blacks and 54% of whites reported having never used marijuana.³³ Each year over the past decade more Blacks than whites reported that they had never used marijuana. Thus, while both groups use marijuana at comparable rates, the arrest disparities suggest that law enforcement agencies have seemingly turned a blind eye to this conduct among white communities while aggressively enforcing marijuana laws in Black communities.

Further, marijuana arrests have not reduced usage rates. In 2002, 14.5 million people aged 12 or older (6.2% of the total population) had used marijuana in the previous month. By 2011, that number had increased to 18.1 million (7.0% of the total population).³⁴ According to 2008 findings from World Health Organization surveys of 17 countries, 42.2% of Americans have tried marijuana in their lifetime.³⁵ The researchers noted the failure of the United States' punitive marijuana policy: "The Netherlands, with a less criminally punitive approach to cannabis use than the US, has experienced lower levels of use, particularly among

younger adults. Clearly, by itself, a punitive policy towards possession and use accounts for limited variation in nation level rates of illegal drug use.”³⁶ The 2010 NSDUH survey reported similar numbers: 39.26% of Americans surveyed reported having used marijuana in their lifetimes and over 17.4 million Americans had used marijuana in the past month.³⁷

5. States spent over \$3.6 billion on marijuana possession enforcement in 2010.

The Report estimates the total national expenditure of enforcing marijuana possession laws in 2010 at approximately \$3.6 billion.³⁸ Broken down, states spent an estimated \$1,747,157,206 policing marijuana possession arrests, \$1,371,200,815 adjudicating marijuana possession cases, and \$495,611,826 incarcerating individuals for marijuana possession.³⁹ During a time of devastating budget shortfalls, it is simply irresponsible to continue wasting such vast sums of money arresting people for nonviolent, low-level marijuana offenses—particularly when this approach has not even met its purported goal of reducing marijuana usage.

iii. Marijuana Legalization Would Eliminate Racial Disparities in Arrests And Allow Marijuana Use to Be Treated as a Public Health Issue

The human and financial costs of marijuana arrests, prosecutions, and convictions – borne disproportionately by Blacks – cannot be overstated. The collateral consequences of an arrest or conviction can affect eligibility for public housing and student financial aid, employment opportunities, child custody determinations, and immigration status. Marijuana convictions can also lead to more severe charges and sentences if a given individual is ever arrested for or convicted of another crime.⁴⁰ In addition, the targeted enforcement of marijuana laws against Blacks deteriorates critical relationships between police and communities, creating mistrust and ultimately reducing public safety. The most effective way to eliminate marijuana arrests and the attendant racial disparities is to legalize marijuana.

Washington and Colorado have taken this step and stand to reduce the disparate impact that marijuana enforcement has on Black communities. In doing so, they are leading the way toward a safe and sensible drug policy that will begin to decrease the number of nonviolent drug offenders in the criminal justice system. Furthermore, by regulating and taxing marijuana like alcohol, and treating its use

as a public health issue rather than a criminal justice issue, these states and others that follow their lead will generate revenues that can be invested in public education, drug treatment, improving infrastructure, and an array of law enforcement priorities and community initiatives.

To the extent that this Committee shares the ACLU's concern about the criminalization of marijuana, and in particular the racial disparities in marijuana possession arrests, it should consider calling upon Congress to end federal marijuana prohibition, which would undoubtedly encourage repeal of prohibition at the state level as well.⁴¹

iv. Byrne JAG Grant Funding May Be Promoting Racial Disparities and Skewing Law Enforcement Priorities Toward Low-Level Arrests

Congress is currently authorized to spend \$1.095 billion per year on the Byrne JAG (“JAG”) grant program.⁴² Funding for the JAG program has hovered around \$500 million per year since 2006, with the exception of a one-time funding boost of \$2 billion through the American Recovery and Reinvestment Act of 2009.⁴³ The ACLU is extremely concerned that the JAG program may be unintentionally incentivizing local law enforcement agencies to make an unnecessarily high number of drug arrests, which could be one reason for the increase of racially biased marijuana possession arrests over the past decade.

One reason for this concern is that some State Administering Agencies (“SAAs”) that distribute JAG funds to law enforcement agencies use language in their grant administration materials that explicitly encourages using increased arrest numbers to project performance (and for subsequent measurement of performance). This, in turn, may incentivize low-level marijuana arrests, since low-level drug arrests are less resource intensive and time consuming than investigations and arrests for serious or violent crime. If the incentives to focus on low-level drug arrests were eliminated, police departments across the country could divert the time and money currently spent on making such arrests toward fostering collaborative police-community relations and fighting more serious, violent crime – much of which goes unsolved. The ACLU has documented examples of SAAs using grant materials that explicitly encourage law enforcement agencies to increase their drug arrest numbers.⁴⁴

The Bureau of Justice Assistance (“BJA”) has improved its capacity to collect and analyze data documenting local law enforcement use of JAG funding.

Today, BJA requires local law enforcement agencies that receive JAG funding (agencies that receive funding directly from BJA as well as agencies that receive funding through an SAA) to report on arrest numbers, including low-level drug arrests for marijuana possession, on quarterly and annual bases. But BJA could continue to improve its data-collection and analysis capacity.

Congress should investigate the potential for the JAG program to skew police priorities, in particular toward increasing low-level drug arrests. In addition, Congress should encourage DOJ, and specifically BJA, to issue clear guidance to SAAs and local law enforcement agencies affirming that JAG priorities include eliminating unnecessary incarceration while promoting public safety and reducing unwarranted racial disparities in arrest rates. Congress should also encourage BJA to require that grantees and sub-grantees (agencies that receive funding directly from BJA and agencies that receive funding through an SAA, respectively) include the following data in their quarterly and annual reports:

- a. Demographic data, specifically, race, age, gender, and ethnicity for all arrests reported. Race data should include the following categories: white, Black or African American, American Indian and Alaska Native, Asian, and Native Hawaiian and other Pacific Islander. Ethnicity data should indicate whether or not the arrestee was Hispanic/Latino.
- b. The address/location of all arrests reported.
- c. The total number of individuals who reside in the area over which the sub-grantee exercises jurisdiction, as well as the racial demographics of this population.
- d. Offense category for drug arrests, specifically, to differentiate drug sale or trafficking arrests from drug possession arrests. Type of drug should also be reported (e.g., X cocaine sale arrests or X marijuana possession arrests).

B. Marijuana's Classification as a Schedule I Drug Is Without Empirical Basis and Detrimental to Public Health Because it Obstructs Medical Research and Patients' Access to an Effective Treatment.

According to federal law, marijuana is classified as a Schedule I drug and “has no currently accepted medical use in treatment in the United States” and “a high potential for abuse.”⁴⁵ As such, the federal government places marijuana in the same Schedule as heroin and LSD, and treats it as more serious than cocaine, methamphetamine, and methadone. And yet to date, 20 states and the District of Columbia have recognized marijuana’s medicinal benefits and allow their residents to use marijuana to treat or alleviate symptoms caused by serious ailments such as chemotherapy treatment for cancer, AIDS/HIV wasting syndrome, glaucoma, epilepsy, Alzheimer’s disease, and Crohn’s disease. Many patients with such debilitating conditions report that marijuana is both more effective than any other medicine they have tried and burdens them with far fewer side effects than traditional treatments. Doctors also understand the benefits of medical marijuana: 76% of doctors recently surveyed by the New England Journal of Medicine said they would approve the use of marijuana to help ease a woman’s pain from breast cancer.⁴⁶

Just last month, Dr. Sanjay Gupta—whom President Obama considered for the position of U.S. Surgeon General in 2009—wrote in reference to medical marijuana that “[w]e have been terribly and systematically misled for nearly 70 years in the United States, and I apologize for my own role in that.”⁴⁷ Dr. Gupta has explained that in the past, “I had steadily reviewed the scientific literature on medical marijuana from the United States and thought it was fairly unimpressive.”⁴⁸ But now, after a year of intensive research, Dr. Gupta confesses:

I apologize because I didn’t look hard enough, until now. I didn’t look far enough. I didn’t review papers from smaller labs in other countries doing some remarkable research, and I was too dismissive of the loud chorus of legitimate patients whose symptoms improved on cannabis. Instead, I lumped them with the high-visibility malingerers, just looking to get high. I mistakenly believed the Drug Enforcement Agency listed marijuana as a schedule 1 substance because of sound scientific proof. Surely, they must have quality reasoning as to why marijuana is in the category of the most dangerous drugs that have “no accepted medicinal use and a high potential for abuse.” They didn’t have the science to support that claim, and I now

know that when it comes to marijuana neither of those things are true. It doesn't have a high potential for abuse, and there are very legitimate medical applications.⁴⁹

Indeed, Dr. Gupta concluded that “sometimes marijuana is the only thing that works.”⁵⁰ That was Joseph Casias’ experience when he started using medical marijuana.⁵¹ Joseph is 33 years old. Since he was 14 years old, Joseph has lived in Battle Creek, Michigan, where he met his wife, Angela. Joseph and Angela have been married for over ten years and have two young children. At age 17, Joseph was diagnosed with sinus cancer and a brain tumor. His brain tumor is located at the back of his head near his spinal column. When diagnosed, it was the size of a softball. Joseph’s cancer is inoperable. He underwent extensive radiation and chemotherapy immediately after he was diagnosed, and his treatments kept him in the hospital for a year and in a nursing home for six months. As a result of his treatment, he lost all his teeth and now wears false teeth. He suffered, and continues to suffer, severe pain in his face, head, and neck. Joseph used to play football and weigh 210 pounds, but over the course of his treatment he lost over 50 pounds and became too weak to walk. Nonetheless, Joseph persevered in rehabilitation and was eventually able to leave the nursing home. After he left the nursing home, and despite being in constant pain, Joseph went out and found a job. His first job was at Burger King.

Joseph experiences pain in his head and neck twenty-four hours per day. He describes his pain, when it is untreated, as a 10 on the scale of 10. Joseph’s oncologist prescribed Lorcet, a narcotic-based pain reliever, for Joseph, but this medication only lowers his pain to an 8 or 9 out of 10 and it has a side effect of nausea. After the people of Michigan enacted the Michigan Medical Marijuana Act by voter initiative in 2008, Joseph’s oncologist recommended that he try marijuana as permitted by state law. Joseph obtained the appropriate registry card from the state. The results were immediate and profound: Joseph’s pain decreased dramatically, the new medicine did not induce nausea, and Joseph was able to gain back some of the weight he had lost during his treatment. Of his experience with medical marijuana, Joseph has said:

I think medical marijuana has helped me become a better person overall. A better individual. It’s changed my life. When I first thought I was sick I was – I lost all my energy. I would cough up blood, and I would bleed out of my sinus, my nose, constantly. It wouldn’t stop. And they just—they couldn’t figure out what was wrong with me. One day I went into the emergency room, and a doctor told me that I had a form of sinus cancer with a brain

tumor. I weighed 210 pounds in high school, and I went down to nothing. I went down to nothing but skin and bones. My pain is in the back of my neck, because the tumor has eaten through my bone marrow. I don't wish it on anybody. It's something that you just pray that it'll just go away. I've tried liquid morphine, vicodins to lortabs. I had to take pills round the clock, every four hours, and they didn't always help. Me and my oncologist talked about it, and he felt that medical marijuana would help me, which it has. I felt less pain, for sure. The pain went immediately, just disintegrated. [My kids] love to play with their dad, play board games and things like that, and they love it. Where I didn't have that relationship with them before.⁵²

Yet the legal fiction in federal law that marijuana has no medicinal value persists, and its Schedule I classification erects nearly insurmountable hurdles preventing scientists in the United States from legally conducting standardized research.⁵³ The 91st Congress, which enacted the Controlled Substances Act (CSA) in 1970 and assigned marijuana to Schedule I, did not intend for marijuana to stay in Schedule I for over 40 years. When that Congress initially assigned drugs to the various CSA schedules, it noted a lack of scientific study on marijuana and claimed that further research was necessary to determine its health effects—marijuana's placement in Schedule I was meant to be temporary. In the CSA, Congress also established the National Commission on Marijuana and Drug Abuse to assess the medical and addictive effects of marijuana. The Commission's First Report to Congress, published in 1972, "Marihuana: A Signal of Misunderstanding," recommended that marijuana no longer be classified as a narcotic, since that definition associated marijuana with more addictive drugs such as heroin and misled the public by exaggerating marijuana's harms.⁵⁴ The report further recommended decriminalization of marijuana in small amounts for personal use.⁵⁵ A second report the following year, "Drug Use in America: Problem in Perspective," reaffirmed the findings of the first report and again recommended decriminalization.⁵⁶ While the reports and their recommendation to decriminalize marijuana had gained widespread support, the Nixon administration ignored the Commission's findings.⁵⁷

In 1975, the Ford administration's White Paper on Drug Abuse identified marijuana as a low-priority drug, and recommended that treatment and law enforcement efforts instead prioritize drugs that pose the greatest health risks, such as heroin and amphetamines.⁵⁸ In 1976, Jimmy Carter, whose own drug czar did not view marijuana as a serious public health threat, was elected President while campaigning on a platform supporting the decriminalization of marijuana. Since

then, no President, and no Congress, has taken on the long overdue task of removing marijuana from Schedule I.

Notably, we have not always treated marijuana with such reckless disregard for the truth. Indeed, until 1943, marijuana was part of the United States drug pharmacopeia.⁵⁹ As Dr. Gupta has explained:

One of the conditions for which [marijuana] was prescribed was neuropathic pain. It is a miserable pain that's tough to treat. My own patients have described it as "lancinating, burning and a barrage of pins and needles." While marijuana has long been documented to be effective for this awful pain, the most common medications prescribed today come from the poppy plant, including morphine, oxycodone and dilaudid. Here is the problem. Most of these medications don't work very well for this kind of pain, and tolerance is a real problem. Most frightening to me is that someone dies in the United States every 19 minutes from a prescription drug overdose, mostly accidental. Every 19 minutes. It is a horrifying statistic. As much as I searched, I could not find a documented case of death from marijuana overdose.⁶⁰

For too long, medical marijuana patients—and patients who might benefit from medical marijuana but are deterred by federal prohibition—have been waiting for "[t]he continuing conflict between scientific evidence and political ideology ... [to] be reconciled in a judicious manner."⁶¹ Marijuana simply does not belong in Schedule I and its continued misplacement, in the face of robust evidence that it can provide great relief to the suffering among us, harms sick people, obstructs scientific progress, and sows disrespect for federal law. In Joseph Casias' words, "it's not right to take sick people's medicine away from them. I want to ask the government to please, have some compassion and respect for the sick individuals who are using this as a medication."⁶²

In 1972, two years after Congress temporarily put marijuana in Schedule I and established the National Commission on Marijuana and Drug Abuse, the Commission told Congress and the President that marijuana should no longer be classified as a narcotic.⁶³ Over 40 years later, when we have significantly more research of its medicinal value, it is long past time for Congress to follow this evidence-based guidance.

III. What Congress Can Do to Advance Sensible Marijuana Reform.

A. Statutory Changes to Ensure that Washington and Colorado's Marijuana Legalization Laws Can be Fully and Successfully Implemented.

There are a number of pending bills in the House that would improve current federal marijuana policy and contribute to successful implementation of state level reform. For example, **H.R. 1523, Respect State Marijuana Laws Act of 2013** – introduced by Representative Rohrabacher (R-CA) has the highest level of bipartisan support of any marijuana bills introduced this Congress. It provides a clean fix for potential state/federal marijuana conflicts by exempting people in compliance with their states' marijuana laws from prosecution under the Controlled Substances Act. Indeed, H.R. 1523 strikes the right balance between states that have adopted new approaches to marijuana and those that have not. Similarly to the repeal of alcohol Prohibition, H.R. 1523 allows each state to chart its own course regarding marijuana but maintains the federal government's authority to enforce federal laws against individuals violating any individual state's laws. This type of pragmatic legislation provides clarity to the law enforcement, businesses, states, and the nation.

We urge the Committee's members to introduce a companion Senate bill to H.R. 1523 and to consider the other pending marijuana bills in the House. We also encourage Committee members to work with your colleagues in the House to end the War on Drugs and institute sensible, humane, and evidence-based policies.

B. Remove Marijuana From Schedule I.

Marijuana's classification under federal law should reflect the fact that evidence shows that marijuana can have tremendous and often unique medical benefits. Federal law should allow and enable qualified patients access to this medicine and should incentivize rather than hinder scientific research.

Conclusion

States are taking the lead in recognizing the harms associated with the War on Drugs and, in particular, the harms caused by the criminalization of marijuana. We urge the Committee and Congress to join in the trend toward decriminalization and, at least, to craft laws allowing states to lead us out of this country's failed marijuana policies.

ENDNOTES

¹ James M. Cole August 29, 2013 Memorandum (hereinafter Cole Memorandum), *available at*: <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting).

³ *New York v. United States*, 505 U.S. 144, 168 (1992).

⁴ *New York v. United States*, 505 U.S. 144, 162 (1992).

⁵ *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding that Congress cannot circumvent the prohibition established in *New York* by conscripting a State's officers directly).

⁶ *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring).

⁷ For example, the number of sentenced prisoners under state jurisdiction for drug offenses increased 52% between 1990 and 2010. See ALLEN J. BECK & PAIGE M. HARRISON, U.S., DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 2000 1 & 12 (Aug. 2001), *available at* <http://bjs.gov/content/pub/pdf/p00.pdf> (reporting the state prison population at 708,370 in 1990 and that 22% of that population, or 155,843 people, were incarcerated for drug offenses); E. ANN CARSON & WILLIAM J. SABOL, U.S., DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 2011 9 (Dec. 2012), *available at* <http://www.bjs.gov/content/pub/pdf/p11.pdf>. (Dec. 2011), *available at* <http://bjs.gov/content/pub/pdf/p10.pdf> (reporting the state prison population sentenced for drug offenses at 237,000 in 2010). Despite the increase of people incarcerated for drug offenses, drug use not only failed to decline, but instead increased. In 2011, an estimated 22.5 million Americans aged 12 or older—8.7% of the population—reported using drugs in the past month. *Drug Facts: Nationwide Trends*, NAT'L INST. ON DRUG ABUSE (Dec. 2012), <http://www.drugabuse.gov/publications/drugfacts/nationwide-trends>. This is an 8.3% increase from 2002. *Id.*

On the 40th anniversary on the drug war, President Jimmy Carter called for an end to the global drug war, noting that global drug consumption and the prison population explosion have increased since it started. Jimmy Carter, Op-Ed., *Call Off the Global Drug War*, N.Y. TIMES, June 16, 2011, *available at* <http://www.nytimes.com/2011/06/17/opinion/17carter.html>. President Carter called for the United States to adopt the reforms laid out by the Global Commission on Drug Policy, which recommends substituting treatment for imprisonment for nonviolent drug offenders, and a shift toward combating violent criminal organizations rather than going after nonviolent, low-level drug offenders. *Id.*

⁸ The ACLU estimates that states spent \$3.6 billion enforcing marijuana possession laws in 2010 alone. See ACLU, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* 75 fig.24 (2013) (hereinafter ACLU, *The War on Marijuana*), *available at* <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

Meanwhile, there are dire collateral consequences that accompany a marijuana arrest and conviction, both for society and the individual. For example, public safety is affected: studies have shown that “marijuana arrests in particular, do not lower criminal activity, and may actually increase crime.” See KATHERINE BECKETT & STEVE HERBERT, ACLU OF WASH., THE CONSEQUENCES AND COSTS OF MARIJUANA PROHIBITION, 31 (2008), *available at* http://www.aclu-wa.org/library_files/BeckettandHerbert.pdf. at 31 (citing Bernard E. Harcourt &

Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989-2000* 173 (U. OF CHI. L. & ECON., Working Paper No. 317, 2007), available at http://www.econ.brown.edu/fac/glenn_loury/louryhomepage/teaching/Ec%20222/marijuana-arrests-Ludwig.pdf). In addition, the financial costs to the individual can include lawyer's fees, missed or lost work, and bail, fines or court costs. *Id.* at 33-34. Perhaps, most serious are the costs that are impossible to quantify such as emotional stress, familial tensions and disruptions, and loss of faith in the legal system. *See id.* at 32.

⁹ Blacks, on average, are 3.7 times more likely than whites to be arrested for marijuana possession despite using marijuana at comparable rates. *See* ACLU, *The War on Marijuana*, *supra* note 8, at 47 fig.9.

¹⁰ Cole Memorandum, *supra* note 1, at 3.

¹¹ *Id.*

¹² *Id.* at 3-4.

¹³ *See* ACLU, *The War on Marijuana*, *supra* note 8.

¹⁴ *Id.* at 47.

¹⁵ *Id.* at 75 fig.24.

¹⁶ *About the Uniform Crime Reporting (UCR) Program*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/aboutucrmain>

Illinois, Florida, the District of Columbia, and the five counties of New York City do not report arrest data to the FBI/UCR Program. The ACLU obtained data for these jurisdictions by filing public records requests with the Illinois Department of State Police (ISP), the Florida Department of Law Enforcement (FDLE), D.C. Metropolitan Police Department (MPD), and the New York State Division of Criminal Justice Services (DCJS).

¹⁷ The report looked at counties with a population of at least 30,000 people and a Black population of at least 2%. The 945 counties that met these criteria represent 78% of the United States population.

¹⁸ *Nat'l Survey on Drug Use and Health (NSDUH)*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., <http://www.samhsa.gov/data/NSDUH.aspx>.

¹⁹ ACLU, *The War on Marijuana*, *supra* note 8, at 36 fig.1 & 37 fig.2.

²⁰ *Id.* at 9.

²¹ *Id.* at 8 & 9.

²² *Id.*

²³ *Id.* at 36 fig.1 & 37 fig.2.

²⁴ *Id.* at 8 & 9.

²⁵ *Id.* at 48.

²⁶ *Id.* at 50 fig.11.

²⁷ *Id.* at 49 tbl.6.

²⁸ *Id.*

²⁹ *Id.* at 48 fig.10.

³⁰ *See id.*, at 47 fig.9 & 48.

³¹ *Id.* at 21.

³² *Id.*

³³ *Id.*

³⁴ See *Drug Facts: Nationwide Trends*, NAT'L INST. ON DRUG ABUSE, (Dec. 2012), <http://www.drugabuse.gov/publications/drugfacts/nationwide-trends>.

³⁵ See Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MEDICINE 1053, 1061 & 1065 (2008), available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050141> (follow “download” hyperlink).

³⁶ See *id.* at 1062.

³⁷ U.S. DEP'T OF HEALTH & HUMAN SERV., SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2011), available at <http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.htm>.

³⁸ See ACLU, *The War on Marijuana*, *supra* note 8, at 75-77.

³⁹ *Id.* at 22.

⁴⁰ Habitual offender laws, which result in increased sentences based on prior convictions, are especially troubling when they are applied to people whose prior convictions are low-level nonviolent marijuana offenses. See Appendix for examples of state life without parole sentences for low-level marijuana convictions under habitual offender laws.

⁴¹ Under federal marijuana prohibition as it currently exists, nonviolent marijuana offenders can receive life without parole sentences. See Appendix for examples of federal life without parole sentences for marijuana convictions.

⁴² *History of Byrne JAG Funding*, NAT'L CRIMINAL JUSTICE ASS'N, <http://www.ncja.org/history-of-byrne-jag-funding>.

⁴³ NAT'L CRIM. JUST. ASS'N BUREAU OF JUST. ASSISTANCE, CORNERSTONE FOR JUSTICE: BYRNE JAG AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM 2 (2011), available at https://www.bja.gov/Publications/NCJA_JAGReport.pdf. In FY11 and FY 12, funding for JAG has been somewhat lower, as Congress has sought to reduce the federal deficit through cuts in non-defense discretionary spending. See *History of Byrne JAG Funding*, *supra* note 43. Byrne JAG was funded at \$424 million in FY11 and \$352 million in FY12. *Id.* The final FY13 appropriations bill increased funding for the program by 5%, from \$352 million to \$371 million, which was subsequently reduced by the sequester to \$352 million. *Id.* Final FY13 funding for Byrne JAG was, therefor funded at the prior FY12 level. *Id.*

⁴⁴ For example, one state Attorney General explained to prospective grantees, “objectives must be clearly expressed and in measurable terms. ... Example: Increase the number of drug-related arrests by 10 percent. ... [An example of] Performance Measures [are]: Number of drug-related arrests [for a given year].” Office of Att’y General of North Dakota, Edward Byrne Memorial State and Local Law Enforcement Assistance Program for Drug and Violent Crime Control Initiatives: Program Guidelines and Application Kit 14 (2004), available at www.ag.state.nd.us/bci/grants/byrne/Application.pdf. (emphasis omitted). Similarly, the application instructions for Byrne grant funding from the State of Louisiana Commission on Law Enforcement and the Administration of Criminal Justice states that “[m]easurable objectives use the words ‘to increase,’ ‘to decrease,’ or ‘to maintain.’ ... These are activity statements. Once the objectives are written, ask, ‘Does the statement allow you to measure something?’ The number that will be increased, decreased or maintained directly relates to the baseline statistics.” The Commission

gives the following example: “To increase the number of drug arrests from 300 to 350 within the twelve month period. Regarding “Prior Results” for continuing projects, the Commission notes: “Applications for continuation funding must describe the program’s activities and accomplishments to date. This should include a summary of the previous funding project’s activities such as, the number of arrests, drugs seized, the recidivism rate, policies and/or products developed, and data concerning the project’s progress up to the time of application in meeting its goals.” LOUISIANA COMM’N ON LAW ENFORCEMENT & THE ADMIN. OF CRIMINAL JUST. EDWARD BYRNE MEMORIAL/JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, APPLICATION INSTRUCTIONS 13-14 (July 2010), *available at* http://www.lcle.la.gov/programs%5Cuploads%5CByrne%5CByrne_JAG_App_Instruct_rev_072010.pdf.

⁴⁵ 21 U.S.C. § 812(b)(1).

⁴⁶ Jonathan N. Adler, M.D., and James A. Colbert, M.D., *Medicinal Use of Marijuana — Polling Results*, N. ENGL. J. MED. 2013; 368:e30, May 30, 2013, *available at* <http://www.nejm.org/doi/full/10.1056/NEJMcld1305159>.

⁴⁷ Dr. Sanjay Gupta, *Why I changed my mind on weed*, CNN.COM, Aug. 8, 2013, <http://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Complaint from Casias v. Walmart*, *available at* <https://www.aclu.org/files/assets/2010-6-29-CasiasvWalMart-Complaint.pdf>.

⁵² ACLU Interview with Joseph Casias: <https://www.aclu.org/drug-law-reform/casias-v-walmart>, *video available at* http://www.youtube.com/watch?v=_eAXRLty5e4.

⁵³ Researchers must obtain a special license from the DEA to conduct research and gain access to supply, which is controlled by the National Institutes of Drug Abuse (NIDA). Rep. Earl Blumenauer & Rep. Jared Polis, *The Path Forward: Rethinking Federal Marijuana Policy* 12 (2013), *available at* http://polis.house.gov/uploadedfiles/the_path_forward.pdf

There have been, however, numerous studies that have shown marijuana does in fact have significant medical uses, including stopping the spread of aggressive forms of cancer. See, e.g., Sean D. McAllister et al., *Cannabidiol as a Novel Inhibitor of Id-1 Gene Expression in Aggressive Breast Cancer Cells*, MOLECULAR CANCER THERAPEUTICS 2921 (2007), *available at* <http://mct.aacrjournals.org/content/6/11/2921.full.pdf+html> (follow “Show PDF in full window” hyperlink) (researchers found cannabidiol, a non-toxic, non-psychoactive chemical compound found in cannabis stopped the spread of breast cancer cells); Manuel Guzman et al., *A Pilot Clinical Study of Delta-9-tetrahydrocannabinol in Patients with Recurrent Glioblastoma Multiforme*, 95 BRITISH J. OF CANCER 197 (2006), *available at* <http://www.nature.com/bjc/journal/v95/n2/pdf/6603236a.pdf> (researchers found that delta 9-tetrahydrocannabinol (“THC”) significantly reduced tumor proliferation in human subjects); Paola Massi et al., *Antitumor Effects of Cannabidiol, a Nonpsychoactive Cannabinoid, on Human Glioma Cell Lines*, 308 J. OF PHARMACOLOGY & EXPERIMENTAL THERAPEUTICS 838 (2003), *available at* <http://jpet.aspetjournals.org/content/308/3/838.full.pdf> (researchers at the University of Milan found that cannabidiol produced significant antitumor activity, both in vitro and in vivo, thus suggesting its use as an antineoplastic agent); C. Sánchez et al., *Delta-9-tetrahydrocannabinol Induces Apoptosis in C6 Glioma Cells*, FEBS LETTERS 436 (1998), *available at* <http://scholar.qsensei.com/content/y05d9> (researchers found delta9-

Tetrahydrocannabinol (THC), the major active component of marijuana, induced the apoptosis (i.e., stopped the spread) in C6.9 glioma cells, an aggressive form of brain cancer).

⁵⁴ NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 223 (1972).

⁵⁵ *Id.* at 191.

⁵⁶ See NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, Second Report at 224 n.5 (1973). The first report recommended that federal and state governments decriminalize marijuana possession for personal use. *Id.* at 458-59.

⁵⁷ ERNESTO ZEDILLO & HAYNIE WHEELER, EDS., YALE CTR. FOR THE STUDY OF GLOBALIZATION, RETHINKING THE "WAR ON DRUGS" THROUGH THE US-MEXICO PRISM 10 (2012) (citing David F. Musto, *Drugs in America: A Documentary History* 460 (N.Y.U. Press 2002)), available at <http://www.ycsg.yale.edu/center/forms/rethinking-war-on-drugs.pdf>; Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43, 55-56 (2009) (citing Rudolph J. Gerber, *Legalizing Marijuana, Drug Policy Reform and Prohibition Politics* 25 (2004)) ("the 'Shafer Commission' . . . unequivocally recommended marijuana decriminalization . . . [and] urged more attention to scientific findings. . . . [However,] the President disowned the report out of hand, stating that although marijuana was no more dangerous than the drink then in his hand, following his commission's view would send the wrong message.").

⁵⁸ See *DEA History* 25, DRUG ENFORCEMENT ADMIN., available at <http://www.justice.gov/dea/about/history.shtml> (follow "1975-1980" hyperlink); Office of The White House Press Sec'y, Fact Sheet: White Paper on Drug Abuse (1975), available at <http://www.fordlibrarymuseum.gov/library/document/0248/whpr19751014-009.pdf>

⁵⁹ Gupta, *Why I changed my mind on weed*, *supra* note 47.

⁶⁰ *Id.*

⁶¹ Igor Grant et al., *Medical Marijuana: Clearing Away the Smoke*, 6 THE OPEN NEUROLOGY J. 18, 24 (2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3358713/pdf/TONEUJ-6-18.pdf>.

⁶² ACLU Interview with Joseph Casias: <https://www.aclu.org/drug-law-reform/casias-v-walmart>, video available at http://www.youtube.com/watch?v=_eAXRLty5e4.

⁶³ NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 223 (1972).

APPENDIX

Stories below from forthcoming ACLU Report
A Living Death: Life Without Parole for Nonviolent Offenses (Fall 2013).

*Examples of State Life Without Parole Sentences for Low-Level Marijuana
Convictions Under Habitual Offender Laws.*

- Dale Wayne Green is serving LWOP for his role as middleman in a sale of \$20 worth of marijuana to an undercover deputy. In September 1999, an undercover agent for the narcotics division of the Caddo Parish Sheriff's Office was driving around near Keithville, Louisiana, when he saw Green on the side of the road and stopped. *State v. Green*, 839 So.2d 970 (La. App. 2d Cir. 2003). Green reportedly asked the undercover agent if he was looking for anything, and when the agent responded that he was looking for weed, Green agreed to take him where he could buy some. *Id.* Green eventually found a young man to sell the agent a bag of marijuana worth \$20. The agent paid Green \$10 for his assistance. The agent's vehicle was equipped with surveillance equipment, but the sound was not functioning and the surveillance video tape was of poor quality, and the video does not capture the purchase of the marijuana. *Id.* The agent identified Green a day later, and Green was arrested in November 1999, after the undercover operation was completed.

Green was convicted of distribution of marijuana and sentenced to a mandatory life-without-parole sentence because he was a third-time offender and his case was adjudicated under Louisiana's multiple offender law. He had two prior convictions: he had pled guilty to attempted possession of cocaine in 1990 and to simple robbery in 1991. *Id.* According to Green, when he pled guilty to these prior charges he was never informed of the nature or elements of the crimes, or that these convictions could be used to enhance his sentence under the multiple offender law if he committed subsequent offenses. *Id.* Green had no lawyer to represent him on appeal, and he unsuccessfully tried to raise the claims that he had been entrapped and that there was insufficient evidence to convict him. Green, who is Black, is 54 years old and has served 13 years in prison.

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- Fate Vincent Winslow was homeless when he acted as a go-between in the sale of two small bags of marijuana to an undercover police officer, worth \$10 in total. *State v. Winslow*, No. 29888-Ka (La. App. 2d Cir., Oct. 17, 1997). During an undercover investigation in Shreveport in September 2008, an undercover officer approached a white man named Mr. Perdue and Winslow, who is Black. The officer asked Winslow for two dime bags of marijuana worth \$10 each and promised a \$5 commission for Winslow, who accepted the offer in order to earn some money to get something to eat. Letter to the ACLU from Fate Vincent Winslow, Louisiana State Penitentiary, Angola, Louisiana, May 16, 2013. Winslow says he bought two \$5 bags of marijuana from Perdue and sold them to the undercover officer as dime bags worth \$10 each. *Id.* The undercover officer testified he witnessed a hand-to-hand transaction between Winslow and Perdue, and he paid Winslow with a \$20 bill and a \$5 bill. Transcript, *State v. Winslow*, page 181. When officers arrested Winslow, he only had the \$5 bill on him. Officers found the marked \$20 bill on the white supplier (Perdue), but did not arrest him. *State v. Winslow*, No. 45,414 (La. App. 2d Cir. Dec. 15, 2010), 55 So.3d 910, *writ denied* 11-0192 (La. June 17, 2011), 63 So. 3d 1033.

According to Winslow, at trial, the 10 white jurors found him guilty of marijuana distribution, while the two Black jurors found him not guilty (the state of Louisiana does not require a unanimous jury to convict, and instead allows convictions by 10 out of 12 jurors). He was sentenced to mandatory life without parole as a fourth-time offender. His prior convictions were for a simple burglary committed in 1984, when he was 17 years old; simple burglary in 1994, when he was 27 years old (he was accused and convicted of opening an unlocked car door and rummaged inside, without taking anything), *State v. Winslow*, No. 29888-Ka (La. App. 2d Cir., Oct. 17, 1997); and possession of cocaine in 2000, when he was 37 years old (an undercover officer tried to sell Winslow cocaine, which he says he did not purchase).

Winslow is now 46 years old. He cannot afford an attorney and has filed his unsuccessful post-conviction appeals himself, written in pencil. His mother died six months ago and he has no friends or family outside prison with who he is in contact. He spends time in the law library daily, “try[ing] to learn how to get out” and prays “every day all day...just living day by day waiting

to die in prison.” Letter to the ACLU from Fate Vincent Winslow, Louisiana State Penitentiary, Angola, Louisiana, May 16, 2013.

Examples of Federal Life Without Parole Sentences for Marijuana Convictions.

- Larry Ronald Duke, 66, has served 24 years of his two life-without-parole sentences for a marijuana-only conspiracy. Duke was convicted of conspiring to possess with the intent to distribute in excess of 1,000 kilograms of marijuana and attempted possession with the intent to distribute in excess of 1,000 kilograms of marijuana. In late 1989, Duke attempted to purchase, with coconspirators, a large quantity of marijuana from a government informant who had a prior marijuana arrest. *United States v. Duke*, 954 F.2d 668 (11th Cir. 1992). Undercover officers set up the sale, and arrested Duke and his coconspirators immediately after delivering 4,800 pounds of marijuana to them. *Id.*

Duke is a decorated Vietnam combat veteran who served two tours of duty in Vietnam with Delta Company 1st Battalion, 7th Marine Regiment. He has been diagnosed with post-traumatic stress disorder due to his military service in Vietnam. Duke told the ACLU, “[W]hile I was there, I often thought I would probably die in a firefight in Viet Nam, and then later, I thought maybe I’d catch a streamer while sky-diving and crash and burn. Or perhaps, lose control of a car at a very high rate of speed, but never in my wildest dreams have I ever imagined I’d die in prison.” E-mail communication from Larry Ronald Duke, Jesup Federal Correctional Institution, Jesup, Georgia, April 27, 2013.

Duke has been a model prisoner since his incarceration in 1989. A carpenter and inventor who continues to work on engineering problems in prison, Duke obtained a federal patent for a clean water-delivery system while serving his life sentence. He has a wife, two children, two grandsons, and a large extended family who want him home. Duke says that he fervently wishes that Congress will “opt to give some degree of hope of our having one more shot of Tequila, and one more slow dance with Sheila before we go.” E-mail communication from Larry Ronald Duke, Jesup Federal Correctional Institution, Jesup, Georgia, April 27, 2013.

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- Charles Frederick “Fred” Cundiff, 66, is serving LWOP for importing marijuana. Prior to his incarceration, Cundiff worked at a plant nursery, in construction, as a mortgage solicitor, and as a stereo store manager. He was sentenced to life without parole for conspiracy to import and distribute over 1,000 kilos of marijuana and has been incarcerated since 1991. *United States v. Cundiff et al.*, No. 91-03069-06/RV (N.D. Fl.), *affirmed* 16 F.3d 1231 (11th Cir. 1994). At sentencing, the trial judge stated that he would sentence Cundiff to 15 to 20 years, but such a sentence would be reversed on appeal. Cundiff has served 22 years in prison and worked steadily for 12 years of his imprisonment, but had to stop working due to his declining health. He now is seriously ill and requires a walker. He suffers from skin cancer, a dropped foot and shrunken leg due to severe arthritis and spinal surgery, disintegration of orbital bone due to chronic infection, and vision problems.

Cundiff has three children, nine grandchildren and six great-grandchildren. He is regularly visited by two friends from his youth. Of prison, Cundiff says, “If I should die and go to hell, it could be no worse.” Letter to the ACLU from Charles Cundiff, Coleman Medium Federal Correctional Institution, Coleman, Florida, March 26, 2013.

- Craig Cesal is a first-time felony offender serving LWOP for conspiracy to possess with intent to distribute marijuana. His only prior conviction was a misdemeanor when he was a college student in 1981, for carrying a bottle of beer into a Bennigan’s bar, for which he paid a \$150 fine.

For over 23 years Cesal owned and operated a towing and truck repair business that provided services to police departments and sheriffs, car and truck rental companies, and trucking companies. His company retrieved trucks throughout the Midwest. Cesal’s clients also included a trucking company whose drivers trafficked marijuana.

Cesal’s Chicago, Illinois, company retrieved and repaired trucks operated by the Florida-based Sun Hill Trucking Company, whose drivers transported and distributed marijuana in addition to carrying the usual freight. Over the span of many years, drivers employed by Sun Hill would drop off semi-trailers at his shop for needed repairs after they were torn apart from smuggling contraband, then his company would return the truck to the rental company; sometimes the drivers would pay his company to retrieve the truck or trailer before repairing and returning it. For instance, on one occasion, his

company retrieved a semi leased by Sun Hill that had been impounded at the U.S.-Mexico border, secured the truck's release from DEA custody, made repairs to panels DEA agents ripped from the trailer in order to extract marijuana encased in the trailer's roof and walls, and returned the trailer to the leasing company. At no time did Cesal think he was breaking the law. Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

Cesal was arrested in 2002 when he traveled to Georgia to retrieve a rented semi discarded at a recycling center by Sun Hill workers who had transported, offloaded, and departed with 2,667 pounds of marijuana from Mexico. Cesal was accused of conspiring with over 20 coconspirators, including the Sun Hill employees. Those who provided, received, bought, and sold the marijuana were arrested and prosecuted in Texas, Florida, North Carolina, and elsewhere. "I was never accused of buying, selling, possessing, or using marijuana—and I didn't," he says. E-mail communication from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 27, 2013. "I never had a stake in the success of any marijuana venture—my repairs were required whether or not the driver was busted." Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

On the advice of his attorney, who advised him he would get a sentence of seven years, Cesal pled guilty. Cesal subsequently learned that under the terms of the plea agreement, he would have to testify in any grand jury, deposition, or trial requested by prosecutors, including by testifying against a number of people he did not know, including two people he was certain were innocent of the charges against them. Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013. According to Cesal, he was told that he would receive a life sentence if he refused to provide the expected testimony, and that he could only reduce the life sentence through a series of incremental reductions by providing substantial assistance in the prosecution of others. *Id.*

Having discovered the terms were not what he expected, Cesal announced he wanted to withdraw the plea agreement. The judge denied withdrawal. *See United States v. Cesal*, 391 F.3d 1173 (11th Cir. 2004). Because Cesal breached the plea agreement by refusing to testify falsely against others, he was sentenced to a mandatory LWOP sentence under the federal sentencing

guidelines for his first felony conviction. He says, “I voted my conscience and breached the plea agreement. I do not believe my sentence should have been inextricably intertwined with my ability or inability to provide substantial assistance in the prosecution of others.” Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

Because Cesal’s plea agreement included a waiver of any appeal of his sentence, Cesal has been unable to challenge his sentence. *United States v. Cesal*, 391 F.3d 1173 (11th Cir. 2004). All of Cesal’s eight codefendants pleaded guilty in exchange for sentences ranging from 50 to 130 months. He says, “In my case, those who did traffic marijuana received little or no prison sentences and resumed their activities. They patronize a different repair station now.” Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.

Cesal was 42 years old when he was arrested. He was married with two children, had held the same job for over 20 years, and had owned his home since 1983. Now 54 years old, Cesal has been incarcerated for 11 years. While in prison, Cesal has earned his paralegal certificate through a correspondence course and tirelessly works as a jailhouse lawyer assisting other prisoners with their cases. ACLU telephone interview with Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, May 9, 2013. He speaks weekly with his daughter, Lauren, and son, Curtis, who were 14 and 10 years old when he was incarcerated. Cesal is devastated that he has to “forever endure [his] life in prison,” and says, “I hope to die, sooner rather than later.” Letter to the ACLU from Craig Cesal, Greenville Federal Correctional Institution, Greenville, Illinois, April 3, 2013.