

LAW OFFICES

FEINBERG & KAMHOLTZ

125 SUMMER STREET
BOSTON, MASSACHUSETTS 02110

MATTHEW H. FEINBERG*
MATTHEW A. KAMHOLTZ

OF COUNSEL
HON. DANIEL KLUBOCK (RET.)

*ALSO ADMITTED IN NEW YORK

617.526.0700

TELECOPIER 617.526.0701

www.feinberg-kamholtz.com

March 13, 2008

VIA MESSENGER

Office of the Clerk, Criminal
Boston Municipal Court
Edward W. Brooke Courthouse
24 New Chardon Street
Boston, MA 02114

**RE: Commonwealth v. Richard Cusick and Russell K. Stroup
Nos. 0701 CR 7229 and 0701 CR 7230**

Dear Sir/Madam:

Enclosed for filing and the attention of the Court please find Defendants' Motion to Dismiss, and Request for an Evidentiary Hearing, together with a Memorandum and Affidavit in support thereof.

Thank you for your attention to this matter.

Very truly yours,



Robin B. Gifford
Legal Assistant

/rg
Enclosures
cc: Angela McConney, ADA

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET # 0701CR7229

COMMONWEALTH OF MASSACHUSETTS,)
)
v.)
)
RICHARD CUSICK,)
)
Defendant)

and

DOCKET # 0701CR7230

COMMONWEALTH OF MASSACHUSETTS,)
)
v.)
)
RUSSELL K. STROUP,)
)
Defendant)

**DEFENDANTS' MOTION TO DISMISS, AND REQUEST FOR AN
EVIDENTIARY HEARING**

Now come the Defendants and move this Court to
dismiss the charges against them on the grounds that
G.L. c. 94C's prohibition on the possession of
marijuana is beyond the constitutional power of the
Legislature by violating their rights and liberties
secured by:

The Constitution of the Commonwealth of
Massachusetts, including, but not limited to
the Preamble, Articles 1¹, 2, 4, 5, 7, 10², 11,
12, 18, and 30 of the Declaration of Rights;

¹ As replaced by Article of Amendment 106.

Part 2, C. 1, §1, Art 4; Part 2, C. 3, Art. 2³;
and, Part 2, C. 6, Art. 6.

In further support of this motion, Defendants request an evidentiary hearing whereby they will present expert testimony establishing that marijuana is harmless and its prohibition is not rationally related to a legitimate legislative purpose. In the absence of a rational basis for enactment, G.L. c. 94C, § 34's prohibition is unconstitutional and overbroad as applied to the Defendants, whose conduct in this case could not have disturbed the public peace.

WHEREFORE, Defendants request this Honorable Court:

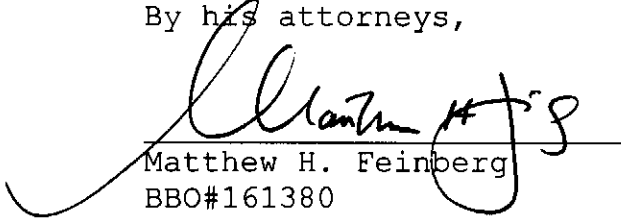
- 1) hold an evidentiary hearing to permit Defendants to establish that no credible scientific evidence supports the Legislature's determination to criminalize possession of marijuana; and thereafter,
- 2) hold G.L. c. 94C, § 34's provisions concerning the possession of marijuana unconstitutional.

² The second paragraph was added by Article of Amendment 39.

³ As replaced by Article of Amendment 85.

Respectfully submitted,

RICHARD CUSICK,
By his attorneys,




Matthew H. Feinberg
BBO#161380
Feinberg & Kamholtz
125 Summer Street
Boston, Ma 02110
(617) 526-0700

R. KEITH STROUP,
By his attorney,



Charles R. Nesson
BBO#369320
Harvard Law School
HFB 404
Cambridge MA 02138
617-495-4609



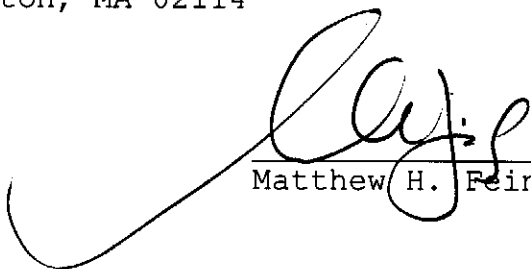
Steven S. Epstein
BBO# 546863
64 Central Street
Georgetown, MA 01833
(978) 352-3300

CERTIFICATE OF SERVICE

I, Matthew H. Feinberg, Esquire, hereby certify that I served the within Defendants' Motion to Dismiss, and Request for an Evidentiary Hearing by delivering a copy in-hand to counsel of record:

Angela McConney, ADA
Suffolk County District Attorney's Office
One Bulfinch Place
Boston, MA 02114

3/3/08
Date


Matthew H. Feinberg

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET # 0701CR7229

COMMONWEALTH OF MASSACHUSETTS,)
)
v.)
)
RICHARD CUSICK,)
 Defendant)

and

DOCKET # 0701CR7230

COMMONWEALTH OF MASSACHUSETTS,)
)
v.)
)
RUSSELL K. STROUP,)
 Defendant)

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO
DISMISS, AND REQUEST FOR AN EVIDENTIARY HEARING**

STATEMENT OF FACTS

On September 15, 2007, at about fifteen minutes after noon at a Freedom Rally on Boston Common, Boston Police Officer Robert Walsh observed the defendants Keith Stroup and Richard Cusick standing by themselves sharing a cigarette. Officer Walsh, correctly believing that the cigarette was marijuana, seized the Defendants and applied for a Criminal Complaint in accordance with G.L. c. 218, § 35A. After hearing, Clerk Magistrate Daniel Hogan, Esq., issued the

complaints.¹ It is Defendants' position that this police action and its authority under c. 94C, §34's criminalization of the possession and use of marijuana is unconstitutional and beyond the Legislature's powers.

STATEMENT OF LAW

I) Criminalization of marijuana possession unreasonably intrudes upon the autonomy of individual citizens.

The first constitutional challenge to marijuana prohibition occurred in 1968 in the case of Commonwealth v. Leis, 355 Mass. 189 (1969). The defendants in Leis moved to dismiss in the trial court. The Trial Judge granted an evidentiary hearing on this motion and subsequently upheld the statute, affirmed on appeal by the Supreme Judicial Court. Leis, supra.

The prohibition was challenged again in 1978 in Marcoux v. Attorney General, 375 Mass. 63, by a class action suit on behalf of citizens seeking a declaratory judgment that they were free to use marijuana within the privacy of their homes. Noting

¹ Defendants' recognize the benignity of the course of action of the Boston Police Department in not exercising the arbitrary power granted them by G.L. c. 94C, s. 41 to have arrested and held them for bail.

that the constitutionality of any particular law must be judged as to its reasonableness by the competing values involved, the Court delineated "a continuum of constitutional vulnerability determined at every point by the competing values involved." Id. at 65, Fn 4.

The Court concluded that the citizen plaintiffs were entitled to due process protection of their privacy, but termed their use of marijuana "merely recreational" and held that the protectable liberty interest in recreational use of marijuana was too weak to overcome the police power. Id. at 71. "The total situation finds a place on the continuum of constitutional vulnerability where judicial nullification of the proscriptive legislation appears unwarranted." Ibid.

Thirty years later, we once again challenge the constitutionality of General Law c. 94C, s. 34, under the Massachusetts Declaration of Rights. Five elements have changed since *Marcoux* was decided:

- (1) Since 1978, new scholarship has articulated the place of liberty in the conception of our government and the roles its agents are to play.
-

Randy E. Barnett, *Restoring the Lost Constitution*, Princeton University Press (2004);

- (2) Since 1978, all reasonable doubts about the harmfulness of marijuana have been resolved in its favor beyond reasonable scientific dispute (See affidavit of Dr. Lester Grinspoon and attached Appendix of Commission Statements of Rationality);
- (3) Since 1978, there is substantial new evidence that marijuana offers medicinal and other positive benefits (See affidavit of Dr. Lester Grinspoon and attached Appendix of Commission Statements of Rationality);
- (4) Since 1978, there has been overwhelming evidence of the enforcement problems and abuses engendered by the current law. Marcoux, at 71; and,
- (5) Since 1978, the test for judging the minimal level of reliability necessary for the admissibility of expert scientific testimony has become more stringent, Commonwealth v. Lanigan, 419 Mass. 15 (1994). What passed for science in support of outright criminalization in 1978 would not now be admissible in court.

Point 1 asserts appreciation for citizen liberty as a starting point for constitutional analysis and judgment. Points 2-4 shift the balance point on the continuum of constitutional protection from where it was seen to be in Marcoux in the direction of citizen liberty. Point 5 refines the evidentiary lens through which the location of the balance point is to be judicially determined, and offers a procedure for arriving at a conclusion supported by reason.

The Massachusetts Constitution's purpose is "to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life. . . ." (Preamble) Defendants' assert that possession and use of marijuana provides spiritual, medicinal, recreational, creative, and calming blessings, and that such possession and use is within the scope of the natural rights of citizens of the Commonwealth. The Defendants are representative of persons in the Commonwealth who use marijuana at least monthly.² They speak for all citizens who assembled at the Freedom Rally on Boston

² The National Survey on Drug Use and Health estimates, based on 1999, 2000 and 2001 data, that in Massachusetts 26.41 percent over the age of 18 and under 26 and 5.99 percent over the age of 25 used marijuana in the past month. Source: SAMHSA, Office of

Common on September 15, 2007, and at previous assemblies going back many years. They invoke a presumption of liberty in favor of this blessing sufficient to overcome the presumption of rationality accorded a legislative act criminalizing it. They invoke our Constitution's recognition of our right to take measures necessary for our safety and happiness whenever the objects of government are not obtained.

A Presumption of Liberty "gets the courts out of the business of picking and choosing among the liberties of the people to decide which is fundamental." Barnett, Restoring the Lost Constitution, Princeton Univ. Press (2004) at 260.

This is precisely what the Supreme Judicial Court did when it labeled the right to use marijuana as "in essence merely recreational," although acknowledging appellants' "interests surely have their place in the assortment of liberties protected by due process guaranties." Marcoux v. Atty. General, 375 Mass. 63, 71 (1978).

The Presumption of Liberty does not prevent the Legislature from enacting "laws that are necessary to prohibit wrongful or regulate rightful activity."

Restoring the Lost Constitution, supra at 262. What it does do is put the burden upon the Commonwealth to justify its total prohibition.

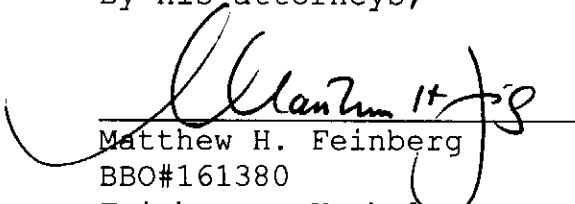
CONCLUSION


Defendants' ask the Court to hold an evidentiary hearing so that they can establish that no credible scientific evidence supports the Legislature's criminalization of marijuana sufficient to outweigh the tremendous loss and harm that criminalization causes.


Respectfully submitted,

RICHARD CUSICK,
By his attorneys,

R. KEITH STROUP,
By his attorney,


Matthew H. Feinberg
BBO#161380
Feinberg & Kamholtz
125 Summer Street
Boston, Ma 02110
(617) 526-0700


Charles R. Nesson
BBO#369320
Harvard Law School
HFB 404
Cambridge MA 02138
617-495-4609


Steven S. Epstein
BBO# 546863
64 Central Street
Georgetown, MA 01833
(978) 352-3300

CERTIFICATE OF SERVICE

I, Matthew H. Feinberg, Esquire, hereby certify that I served the within Defendants' Memorandum in Support of Motion to Dismiss, and Request for an Evidentiary Hearing by delivering a copy in-hand to counsel of record:

Angela McConney, ADA
Suffolk County District Attorney's Office
One Bulfinch Place
Boston, MA 02114

3/13/08
Date


Matthew H. Feinberg

APPENDIX OF COMMISSION STATEMENTS OF RATIONALITY

The growing use of marijuana as a recreational drug in the 1930s and the accompanying concerns about the consequences of this use led to the establishment of the first of a number of government sponsored investigative commissions; the first in this country began its work in 1938 and its results were published as *The Marijuana Problem in the City of New York* (the LaGuardia Report) in 1944. Since that time, governments in the United States (including a number of individual states), England, Canada, Switzerland, Australia Jamaica and the World Health Organization have, over the years since LaGuardia, established commissions or investigatory committees to assess the harmfulness of this drug. Brief summary statements of the conclusions of those investigatory bodies established since 1978 are presented as follows:

**House of Commons, Special Committee on the Non-Medical Use of Drugs
(Canada, 37th Parliament, 1st Session)
December 2002**

***Policy for the New Millennium: Working Together to Redefine Canada's Drug Strategy*
House of Commons: Ottawa**

"[T]he consequences of a criminal conviction for simple possession of a cannabis product are disproportionate to the potential harms associated with personal use. ... The Committee recommends that [Parliament] establish a comprehensive strategy for decriminalizing the possession and cultivation ... of cannabis for personal use."

**Special Senate Committee on Illegal Drugs (Canada, 37th Parliament, 1st Session) September 16, 2002
FINAL REPORT: *Cannabis: Our Position for a Canadian Public Policy*
Senate of Canada: Ottawa**

"Cannabis itself is not a cause of other drug use. ... Cannabis itself is not a cause of delinquency and crime; and cannabis is not a cause of violence. ... Cannabis alone, particularly in low doses, has little effect on the skills involved in automobile driving. ... Heavy use of cannabis can result in dependence requiring treatment; however, dependence caused by cannabis is less severe and less frequent than dependence on other psychotropic substances, including alcohol and tobacco. ... We believe ... that the continued prohibition of cannabis jeopardizes the health and well being of Canadians much more than does the substance itself or the regulated marketing of the substance. In addition, we believe that the continued criminalization of cannabis undermines the fundamental values set out in the Canadian Charter of Rights and Freedoms. ... In our opinion, Canadian society is ready for a responsible policy of cannabis regulation. ... [We therefore] recommend that the Government of Canada amend the Controlled Drugs and Substances Act to create a criminal exemption scheme, under which the production and sale of cannabis would be licensed ... to permit persons over the age of 16 to procure cannabis and its derivatives at duly licensed distribution centers."

**House of Commons, Home Affairs Committee (United Kingdom)
May 9, 2002
Third Report**

The Home Office: London

"The risks of cannabis need to be put into the context of the 'acceptable' risks posed by alcohol and tobacco. ... [W]e do not believe there is anything to be gained by exaggerating its harmfulness. On the contrary, exaggeration undermines the credibility of messages that we wish to send regarding more harmful drugs. We support, therefore, the Home Secretary's proposal to reclassify cannabis from Class B [an 'intermediate' category] to Class C [the 'least harmful' category]."

Advisory Council on the Misuse of Drugs (United Kingdom)

March 31, 2002

The Classification of Cannabis under the Misuse of Drugs Act of 1971

The Home Office: London.

“This Report considers the most appropriate Class into which cannabis preparations should be categorized based on its harmfulness. ... The occasional use of cannabis is only rarely associated with significant problems in otherwise healthy individuals. ... [T]he current classification of cannabis [as a Class B substance] is disproportionate in relation to both its inherent toxicity and to that of other substances (such as amphetamines) that are currently within Class B. ... The continuing juxtaposition of cannabis with these more harmful Class B drugs erroneously (and dangerously) suggests that their harmful effects are equivalent. This may lead to the belief, amongst cannabis users, that if they have had no harmful effects from cannabis then other Class B substances will be equally safe. ... The Council therefore recommends the reclassification of all cannabis preparations to Class C (the least harmful category) under the Misuse of Drugs Act 1971.”

National Commission on Ganja (Jamaica)

August 7, 2001

A Report of the National Commission on Ganja

Office of the Prime Minister: Kingston

“The Commission, after reviewing the most up-to-date body of medical and scientific research, is of the view that whatever health hazards the substance poses to the individual, ... these do not warrant the criminalization of thousands of Jamaicans for using it in ways and with beliefs that are deeply rooted in the culture of the people. ... The Commission is persuaded that the criminalization of thousands of people for simple possession for consumption does more harm to the society than could be done by the use of ganja itself. ... Accordingly, the National Commission is recommending that the relevant laws be amended so that ganja be decriminalized for the private, personal use of small quantities by adults.”

New Mexico Governor's Drug Policy Advisory Group

January 2001

Report and Recommendations to the Governor's Office

State Capitol: Santa Fe

“The criminal sanction for possession of one ounce or less of marijuana for personal use by a person aged eighteen or over should be eliminated. ... Having reviewed carefully the information available on marijuana and its effects, and having heard from various representatives of law enforcement, corrections and the courts, we believe that taking this step will result in greater availability of resources to respond to more serious crimes without any increased risks to public safety.”

Swiss Federal Commission for Drug Issues (Switzerland)

May 1999

Cannabis Report of the Swiss Federal Commission for Drug Issues

Federal Office of Public Health: Bern

“Using the criminal law to prohibit a (possibly) self-endangering form of behavior is repugnant to the fundamental values of a legal system founded on personal liberties and is thus not part of the legitimate function of a criminal justice system supposed to uphold a system of that kind. That applies to the consumption of all drugs but particularly so in the case of cannabis which, while it is not harmless, is nonetheless far less dangerous than the others. ... Following detailed consideration of the different options, the Federal Commission unanimously recommends the elaboration of a model which not only removes the prohibition of [cannabis] consumption and possession, but also makes it possible for cannabis to be purchased lawfully.”

National Academy of Sciences, Institute of Medicine (United States)

March 1999

Marijuana and Medicine: Assessing the Science Base
National Academy Press: Washington, DC

[T]here is little evidence that decriminalization of marijuana necessarily leads to a substantial increase in marijuana use. ... There is no conclusive evidence that the drug effects of marijuana are causally linked to the subsequent abuse of other illicit drugs. ... [E]xcept for the harms associated with smoking, the adverse effects of marijuana use are within the range of effects tolerated for other [legal] medications."

Connecticut Law Review Commission

January 21, 1997

Drug Policy in Connecticut and Strategy Options: Report to the Judiciary Committee of the Connecticut General Assembly

State Capitol: Hartford

"The Law Revision Commission has examined laws from other states that have reduced penalties for small amounts of marijuana and the impact of those laws in those states. ... Studies of [those] states found (1) expenses for arrest and prosecution of marijuana possession offenses were significantly reduced, (2) any increase in the use of marijuana in those states was less than increased use in those states that did not decrease their penalties and the largest proportionate increase occurred in those states with the most severe penalties, and (3) reducing the penalties for marijuana has virtually no effect on either choice or frequency of the use of alcohol or illegal 'harder' drugs such as cocaine. ... Based on [our] review, the [Connecticut] legislature should review and further consider as a strategy option establishing the offense of infraction for adults twenty-one years of age or older who possess one ounce or less of marijuana."

Report of the Premier's Drug Advisory Council (Australia)

Drugs in Our Community

March 1996

Premier's Drug Advisory Council: Melbourne

"The Council ... should look afresh at strategies that might curb demand and reduce the harm caused in society by the use of illicit drugs. These entail ...[the] elimination, as an offense, of personal possession and use of marijuana. ... Growing up to five plants per household for personal use would also no longer be an offense. This would apply to a normal residence, but should not apply to schools, colleges or public institutions."

World Health Organization (WHO)

August 1995

A Comparative Appraisal of the Health and Psychological Consequences of Alcohol, Cannabis, Nicotine and Opiate Use

Geneva

"On existing patterns of use, cannabis poses a much less serious public health problem than is currently posed by alcohol and tobacco in Western societies."

California Advisory Research Panel

1989

Twentieth Annual Report of the Research Advisory Panel

State Capitol: Sacramento

"An objective consideration of marijuana shows that it is responsible for less damage to the individual and society than are alcohol and cigarettes. ... A further consideration in forming a reaction to the wide use of marijuana is that it is a source of conflict between generations and of disrespect for the law. ... The Panel therefore suggests that the law be changed to permit cultivation [of marijuana] for personal use."

**National Research Council, National Academy of Sciences (United States)
1982**

***An Analysis of Marijuana Policy*
National Academy Press: Washington, DC**

“The existing evidence on policies of partial prohibition (marijuana decriminalization) indicates that partial prohibition has been as effective in controlling [marijuana] consumption as complete prohibition and has entailed considerably smaller social, legal, and economic costs. On balance, therefore, we believe that a policy of partial prohibition is clearly preferable to a policy of complete prohibition of supply and use.”

**Department of National Health and Welfare, Health Protection Branch (Canada)
January 1979**

***Cannabis Control Policy: A Discussion Paper*
Ottawa**

“Given our empirical understanding of both the effects of cannabis and the adverse consequences that flow from applying a counterproductive possessory sanction, it appears, on balance, that essentially the same measure of public health protection can be attained through a less comprehensive and injurious use of the criminal law. ... A legislative reform which best achieves this balancing of interests would probably bear a close resemblance to ... semi-prohibition.”

All of these advisory bodies concluded that cannabis was not sufficiently harmful to justify its continued criminalization.