

## Letter to the Editor

Sir:

During the Regular Session of the 64th Texas Legislature, Senate Bill 126 was introduced by Senator Meier, to be entitled "An Act" defining the term "marihuana"; amending Sections 1.02(17) of Chapter 429, Acts of the 63rd Legislature, Regular Session, 1973 (Article 4476-15, Vernon's Texas Civil Statutes); and declaring an emergency. The text of the Bill follows.

### BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Section 1.02(17) of Chapter 429, Acts of the 63rd Legislature, Regular Session, 1973 (Article 4476-15, Vernon's Texas Civil Statutes) is hereby amended to read as follows:

(17) "Marihuana" means the plant *Cannabis*, whether growing or not; the seeds thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, or its seeds. However, it does not include the resin extracted from any part of such plant or any compound, manufacture, salt, derivative, mixture, or preparation of the resin, nor does it include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

Section 2. The importance of this legislation and the crowded conditions of the calendars of both Houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House is suspended, and this Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

This Bill failed to pass the House, however, when it was buried in the Criminal Jurisprudence Committee.

On 25 June 1975, the Appellate Court issued an opinion on the definition of the Marihuana Law of Texas when reviewing the cases WILLIAMS, Appellant, No. 50,090, and WILLIAMS, Appellant, No. 50,091 v. The State of Texas, Appellee; Appeals from Dallas County; Attorney, Paul Leech.

Appeals were taken from convictions for possession of marihuana. The record reflected that the offenses in question occurred on 30 May 1973. Appellants, man and wife, were tried jointly before the court on 19 April 1974. Appellants elected to be punished under the Controlled Substances Act and each was assessed punishment of 10 days in jail and a fine of \$250.

During the appeal, the appellants contended that the State's proof failed to show "that the evidence was *Cannabis sativa* L."

A stipulation was entered into between the prosecutor, attorney for appellants, and the two appellants that the chemist who performed the analysis on the substances in question would testify that he "does not know or have knowledge of the methods for determining the difference between the different types of marihuana (either species, subspecies, or subgenus) and that he is familiar with the terms *Cannabis sativa* and *Cannabis indica*." However, in his opinion "marihuana is all one class chemically and that the evidence seized and turned over to him" (the evidence in instant case) "was, in fact, marihuana." He would not say definitely that "this evidence was specifically *Cannabis sativa* L."

While the conduct prosecuted herein occurred before the effective date of the Controlled Substances Act on 27 Aug. 1973, trial was not until April 1974. Under old code, Art. 725b(14), *Cannabis* was listed as a narcotic drug.

Under the Controlled Substances Act, Sec. 1.02(17), marihuana "means the plant *Cannabis sativa* L." While appellants had not developed any argument under this ground

of error, it appeared to be their position that Sec. 6.01(b) of the Controlled Substances Act, V.A.C.S., Art. 4476-15, is applicable, which reads as follows.

Conduct constituting an offense under existing law that is no longer an offense under this Act may not be prosecuted after the effective date of this Act. If, on the effective date of this Act, criminal action is pending for conduct that does not constitute an offense under this Act, the action is dismissed of the effective date of this Act.

Thus, it appeared to be appellants' position that in any prosecution after the effective date of the Controlled Substances Act for possession of marihuana, it was incumbent upon the State to show not only that the substance was marihuana but, further, that it was *Cannabis sativa* L. Assuming, *arguendo*, the appellants' premise that the State's evidence must meet the burden of proof set forth in the new Act, the question presented was examined.

21 U.S.C. Sec. 802(15) provides in part, "The term 'marihuana' means all parts of the plant *Cannabis sativa* L." A review of the definition of marihuana under the Federal code and under the new Controlled Substances Act reflects that they are virtually identical.

Sec. 1.02(17) of the Controlled Substances Act provides

"Marihuana" means the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, or its seeds. However, it does not include the resin extracted from any part of such plant or any compound, manufacture, salt, derivative, mixture, or preparation of the resin; nor does it include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

21 U.S.C. Sec. 802(15) provides

The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

In *U.S. v. Gaines*, 489 F.2d 690 (5th Cir. 1974), it was stated

Gaines further argues that it was error for the trial court to refuse to instruct the jury as to the statutory definition of marihuana. We disagree and affirm.

Noting that the Federal statutory definition of marihuana refers only to *Cannabis sativa* L., Gaines calls our attention to the fact that while the Government's expert chemist agreed that there are three species of marihuana; i.e., *Cannabis sativa* L., *Cannabis indica*, and *Cannabis ruderalis*, the chemist was unable to differentiate between the three. Building upon the premise that *Cannabis sativa* L. is the only species of marihuana expressly prohibited by statute, Gaines argues that the court's refusal to give the jury an instruction containing the statutory definition of marihuana deprived the jury of considering whether the Government's expert was sufficiently trained and whether he sufficiently tested the substance to prove beyond a reasonable doubt that, in fact, the substance examined was *Cannabis sativa* L. and not *Cannabis indica*.

The Third Circuit recently considered the issue raised by Gaines and concluded that *Cannabis indica* is included within the statutory definition of marihuana. *U.S. v. Moore*, 3 Cir. 1971, 446 F.2d 448. Similarly, the Second Circuit, while recognizing the possibility that there may be some botanical opinion that *Cannabis* is polytypic, found that "there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana . . . Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellants' actions." (*U.S. v. Rothberg*, 2 Cir. 1973, 480 F.2d 534, 536.)

We are in full agreement with what has been said by our sister Circuits, and thus find no error in the District Court's refusal to instruct the jury with respect to the statutory definition of marihuana.

In *U.S. v. Walton*, 16 Cr.L. 2415 (1/23/75), the U.S. Court of Appeals for the D.C. Circuit rejected an argument stating the Government had failed to meet its burden of proof under 21 U.S.C. Sec. 802(15) in that the marihuana was not shown to be *Cannabis sativa* L. The court rejected this contention, stating: "We think the fact that 21 U.S.C. Sec. 802(15) defines marihuana as *Cannabis sativa* L. is not sufficient to support the contention that Congress meant to outlaw the distribution of only one species." In *Walton*, it was stated

Thus, Walton's argument is that Congress meant to outlaw the euphoric effects of the *sativa* L. species but not the euphoric effect of other species. This result seems manifestly unreasonable and furthermore could raise the most serious equal protection problems if it were adopted, i.e., an individual convicted for distribution of *sativa* L. could state with more than a little justification that no legitimate legislative purpose permits the government to jail persons who obtain a THC 'high' from *sativa* L. but to not prosecute persons who obtain the exact same 'high' from another species. Moreover, Walton's expert concedes that at present there is no reliable biochemical or spectrographic method for distinguishing between the various species of marihuana. Thus, unless the Government has access to the growing plant, an unlikely situation, it cannot at present prove that a given defendant possesses one kind of marihuana or another. It may be that the Government has the capacity to develop a method but since Congress did not have the benefit of any such method when it enacted the statute in issue here, one must certainly pause to consider why Congress would enact a law the violations of which could not [be] proven on the basis of present knowledge. Even if Congress did have such a method it is apparently conceded that only citizens with expert botanical knowledge could distinguish between the various species of marihuana. This suggests a serious due process question: could the Government prosecute an individual for possession of *sativa* L. when there are no means whereby the average citizen can distinguish between *sativa* L. and other species to thus conform his conduct to the requirements of the law? It presses us to extremes to hold that Congress would enact a law the violations of which are not detectable to the group of citizens to whom the law is addressed.

In *Walton*, it was further noted that every Federal Appeals Court which had considered this question had reached a similar conclusion, and the following cases were cited.

*U.S. v. Honneus*, 16 Cr.L. 2338 (1st Cir. 12/24/74)

*U.S. v. Kinsey*, #74-2014 (2d Cir. 10/31/74)

*U.S. v. Gaines*, 489 F.2d 690 (5th Cir. 1974)

*U.S. v. Rothberg*, 480 F.2d 534, 13 Cr.L. 2314 (2d Cir.), cert. den. 414 U.S. 856 (1973),  
aff'g, 351 F.Supp. 1115 (E.D.N.Y. 19 1972)

*U.S. v. Moore*, 446 F.2d 448 (3d Cir. 1971), aff'g, 330 F.Supp. 684 (E.D. Pa. 1970).

See also *St. v. Romero*, 74 N.M. 642, 397 P.2d 26

*People v. Savage*, 64 Cal.App.2d 314, 148 P.2d 654

*Martinez v. People*, 160 Colo. 333, 417 P.2d 485

*St. v. Alley*, 263 A.2d 66 (Me. 1970)

*St. v. Allison*, 466 S.W. 2d 712 (Mo. 1971)

*St. v. Economy*, 61 Nev. 394, 130 P.2d 264

In *Walton*, it was recognized that the definition of marihuana set forth in 21 U.S.C. Sec. 802(15) was carried forward from the Marihuana Tax Act of 1937 without comment. It was further noted in *Walton* that there was no suggestion until the late 1960s that there was a possibility that marihuana had a polytypic status. *Walton* recognized that such issue was still very much in doubt. The Appellate Court was unable to find that the Legislature of Texas had the benefit of any method to distinguish between species of marihuana as defined in the Controlled Substances Act when it passed the statute in question. Thus they could not conclude that the Legislature of Texas intended to limit offenses relating to marihuana to those cases in which it was shown that the species involved was *sativa* L. and exempt other species, if indeed there are various species of marihuana. They were persuaded by the soundness of the numerous Appeals Court opinions in rejecting identical arguments advanced under a similar statute.

In the instant case, the record contained evidence in the form of a stipulation of the testimony of the chemist that the substance in question was marihuana and the opinion testimony of an officer with a number of years' experience in observing marihuana that the seeds and plants recovered in a search of appellants' house were marihuana. They found this to be sufficient proof to show the substance possessed by appellants was marihuana as that which is defined in the Controlled Substances Act. The appellants' contention that the evidence was insufficient to sustain the conviction in that the marihuana was not shown to be of the specific genus and species *Cannabis sativa* L. was rejected.

The judgments were affirmed and delivered 25 June 1975. Opinion approved by the Court.

W. T. Lowry, Ph.D.  
Associate Toxicologist  
Southwestern Institute of Forensic Sciences, and  
Instructor of Pathology and Forensic Science  
University of Texas Southwestern Medical School  
Dallas, Texas