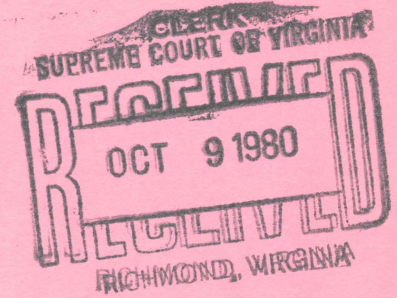


221 Va972

SUPREME COURT OF VIRGINIA



DAVID RUPLINAS  
APPELLANT

VS.

COMMONWEALTH OF VIRGINIA  
APPELLEE

---

RECORD NO. 800594

---

APPENDIX

---

JOHN M. DiJOSEPH  
Counsel For Appellant  
727 S. 23rd Street  
Arlington, Virginia 22202  
(703) 979 - 8745

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P R O C E E D I N G S

(The Court Reporter, J. Michelle Morgan, was  
duly sworn by the Clerk of the Court.)

THE COURT: Commonwealth of Virginia versus  
David P. Ruplenas, Criminal No. 30174.

Are there any amendments to the Indictment?

MR. WILLIAMS: No, Your Honor.

THE CLERK: Please rise. You are David P.  
Ruplenas?

THE DEFENDANT: Yes.

THE CLERK: In Criminal Case Number 30174, you  
have been indicted with the words and figures, to-wit:

"In Count I, the Grand Jurors of the Commonwealth  
of Virginia in and for the body of the County of Fairfax  
now attending in said Court at its September Term, 1979,  
charges that on or about the 13th day of June, 1979, in the  
County of Fairfax, David Ruplenas did unlawfully and  
feloniously, knowingly or intentionally possess a controlled  
drug with the intent to distribute, to-wit: Marijuana."

How do you plead, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE CLERK: In Count II, you have been indicted  
with these words and figures, to-wit:

1 "The Grand Jurors of the Commonwealth of  
2 Virginia in and for the body of the County of Fairfax now  
3 attending said Court at its September Term, 1979, charges  
4 that on or about the 13th day of June, 1979, in the County  
5 of Fairfax, David Ruplenas did unlawfully and feloniously,  
6 knowingly or intentionally, distribute a controlled drug,  
7 to-wit: Marijuana."

8 How do you plead, guilty or not guilty?

9 THE DEFENDANT: Not guilty.

10 THE BAILIFF: Ladies and Gentlemen, when I call  
11 your name, please file in the Jury Box.

12 Nancy Hastings.

13 Douglas Gordon.

14 Arthur Thue.

15 Frank Maffett.

16 Ronnie Fishman.

17 Eugene Lundgren.

18 Betty Drake.

19 Susan Lerner.

20 Ira Cox.

21 William Kiehl.

22 Shirley Komish.

23 Helen Huggins.



V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

October 22, 1979

COMMONWEALTH OF VIRGINIA )

vs. )

DAVID RUPLINAS )

Criminal Nos. 30174, 30175

MOTION TO QUASH INDICTMENT

COMES NOW the defendant, by counsel and moves this honorable Court to quash the indictments in the above-styled criminal cases on the following grounds:

1. Defendant was charged with and indicted for the distribution of a controlled drug to wit: marihuana; both offenses allegedly to have occurred in June, 1979.

The preliminary hearing was held September 5, 1979 and the Grand Jury returned a true bill of indictment on September 17, 1979.

2. The certificates of analysis introduced at the preliminary hearing states that the amount of marihuana sold was less than one-half ounce in each instance.

3. On July 1, 1979, Section 54-524.84(d)(10) of the 1950 Code of Virginia as admended, was repealed in which marihuana was removed from the controlled substance list; references to marihuana were deleted from Virginia Code Section 18.2-248 and this offense is no longer a felony.

4. Pursuant to Virginia Code Section 1-16, "...the proceedings thereafter had shall conform, so far as practicable, to the laws in force. at the time of such proceedings. "

WHEREFORE, the preliminary hearing and the indictment returned by the Grand Jury failed to conform to the laws in force at the time of such proceedings as mandated by Virginia code and are therefore void.

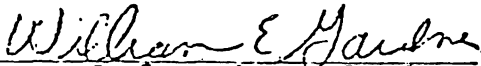
WILLIAM E. GARDNER  
ATTORNEY AT LAW  
SUITE 410, THE MOSBY  
10560 MAIN STREET  
FAIRFAX, VIRGINIA 22030  
(703) 591-2300

In consideration of the foregoing statements, the defendant respectfully prays that this honorable Court quash the indictments in the above-styled cases.

NOTICE:

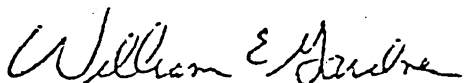
COMES NOW the defendant by counsel and files this motion to quash the indictment to be heard October 26, 1979 at 10 a.m. or as soon thereafter as possible.

  
\_\_\_\_\_  
DAVID RUPLÉNAS  
By Counsel

  
\_\_\_\_\_  
Counsel for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above notice and motion has been furnished to Robert F. Horan, Commonwealth Attorney by hand on this 22nd day of October, 1979.

  
\_\_\_\_\_  
William E. Gardner  
Attorney for the Defendant

FILED

MAR 17 1980

JAMES E. HOOFFER  
Clerk of the Circuit Court  
of Fairfax County, Va.

1 VIRGINIA

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - x

4 COMMONWEALTH OF VIRGINIA, :

5 -vs-

: Criminal No's. 30174, 30175

6 DAVID RUPLINAS, :

7 Defendant. :

8 - - - - - x

9 Circuit Courtroom No. 4  
10 Fairfax County Courthouse  
Fairfax, Virginia

11 Friday, October 26, 1979

12 The above-entitled cause came on for hearing,  
13 before the HONORABLE F. BRUCE BACH, Judge, in and  
14 for the Circuit Court of Fairfax County,  
15 Virginia, at 12:45 o'clock p.m.

## 16 APPEARANCES:

17 On behalf of the Commonwealth:

18 THOMAS GALLAHUE, ESQUIRE

19 On behalf of the Defendant:

20 WILLIAM GARDNER, ESQUIRE

21 - - -  
22  
23



P R O C E E D I N G S

(The Court Reporter, J. Michelle Morgan,  
was sworn by the Clerk of the Court.)

THE COURT: The Commonwealth of Virginia  
versus David Ruplenas, Criminal Numbers 30174,  
and 30175.

This comes on a motion to quash the  
indictment. Mr. Ruplenas is here in person  
with his attorney, William E. Gardner. The  
Commonwealth is represented by her attorney,  
Thomas Gallahue.

I've read the motion. It seems to me that  
ought to be pretty clear on this point. I don't  
know what it is --

MR. GALLAHUE: Your Honor, it would be  
the Commonwealth's position it's clearly covered  
in 1-16 in the Code, and that is, that the crime  
would remain in and of itself a felony.

There is some question as to whether the  
defense can elect a new penalty or not, but under  
1-16 I think a reading of that would be -- it still  
remains a felony as long as it was committed prior  
to the effective date of the new law.

1 I have a copy of it if you want to see it.

2 THE COURT: Mr. Gardner?

3 MR. GARDNER: Your Honor, as I stated in  
4 paragraph four of my motion, I'm relying on  
5 1-16, and it says the use of the word, shall, in  
6 the Code Section, save only -- I'm reading save  
7 only that the proceedings thereafter had shall  
8 conform, so far as practiceable, to the laws en-  
9 forced at the time of such proceedings.

10 When he was at preliminary hearing this was  
11 a misdemeanor or so he was bound over on a mis-  
12 demeanor, and then they returned a true bill of  
13 indictment from the Grand Jury.

14 He was indicted for a misdemeanor, but he  
15 was charged with a felony, and our position is,  
16 Your Honor, that the jury cannot return an  
17 indictment on a felony charge when all he's  
18 really -- in the laws enforced at the time of the  
19 proceeding, which the Code says was a misdemeanor.

20 He's charged with a felony. He's bound  
21 over for a felony, a true bill for a felony, and  
22 the laws and the Code says right here, you can't  
23 interpret these word any, on the save only at the

1 proceedings thereafter shall as must conform so  
2 far as practiceable, and believe me if they new  
3 what they were doing at the time they could have  
4 done a lot of things at the time.

5 They didn't conform to the laws enforced  
6 at the time, therefore, this indictment is no  
7 good, Your Honor.

8 THE COURT: I'll take it under advisement.  
9 I frankly didn't read the statute. It seems to  
10 me to be going both ways. I hadn't seen this  
11 case until just a few minutes ago.

12 Let me study it, and I'll send you all a  
13 letter of opinion within the next couple of  
14 days.

15 MR. GARDNER: I only ask his Honor that he  
16 takes the opener section of the motion, of course,  
17 here because I have stated that this crime was  
18 omitted from 248 and they put a new 248 one in.  
19 He's charged with 248. I know that doesn't alleviate  
20 the crime because they changed the Code Section.

21 I ask that Your Honor to read it. It's  
22 no longer a felony and all that has been changed.  
23 They had a chance to conform and did not. So, he's

1 indicted for some mythical felony in essence.

2 THE COURT: I'll read it all over.

3 MR. GARDNER: Thank you.

4 (Thereupon, at 12:50 o'clock p.m. the hearing  
5 in the above-entitled matter was concluded.)

6 - - -

7 CERTIFICATE OF REPORTER

8 I, J. MICHELLE MORGAN, the stenographic  
9 reporter who was duly sworn to well and truly  
10 report the foregoing proceedings, do hereby  
11 certify that they are true and correct to the  
12 best of my knowledge and ability; and that I have  
13 no interest in said proceedings financial or other-  
14 wise, nor through relationship with any of the  
15 parties in interest or their counsel.

16 IN WITNESS WHEREOF, I have hereunto set  
17 my hand this 16th day of March, 1980.

18   
19 J. MICHELLE MORGAN, Reporter

1 would give him some. If he could find him some, so, where-  
2 upon they drove, Mr. Ruplenas, they drove to a house of  
3 someone Mr. Ruplenas knew and when I say they drove, the  
4 investigator gave them a ride in his car, gave them the  
5 money and he went inside and came back out. That's the  
6 transaction, that's the evidence.

7 The defense will show at the end of the evidence  
8 and the Judge will instruct you as to the law. You will  
9 have to apply the facts to the law and come up with a  
10 decision, and if you believe the evidence that's put on by  
11 the defense from the overall evidence that you see, then I  
12 think that you will find the defendant not guilty in this  
13 case.

14 And thank you again for your time in coming in  
15 today.

16 THE COURT: Thank you, Ladies and Gentlemen of  
17 the Jury. I am going to ask the Sheriff to take you up-  
18 stairs for a brief period of time. I have two other short  
19 cases that I have to dispose of, which shouldn't take more  
20 than fifteen minutes.

21 (A short recess was taken.)

22 MR. GARDNER: Your Honor, I filed a preliminary  
23 motion in this case that was held Friday and taken under

1 advisement. I had a phone call telling me that my motion  
2 would be denied and at this time I would like to renew that  
3 motion and if it's going to be denied again, I would like  
4 to know a reason.

5 Your Honor, of course the defendant would also,  
6 I'm unable to ascertain from the words, from the motion I  
7 filed I could see no reason how it could be denied.

8 THE COURT: Well, you know it was not  
9 summarily denied. As a matter of fact, the reason it was  
10 denied by phone call was because of the time problem crunch  
11 on this case so I wanted you all to be aware that you  
12 received that answer as soon as possible.

13 The exact issue raised by you, as far as I could  
14 tell, was you needed an issue, there was no case exactly in  
15 Virginia. However, there were some five cases that were  
16 near your medial point.

17 The most recent of which, as I am going by my  
18 memory now, is the Smith case which I believe is 219 Va. is  
19 one of the latest cases. The O'Dell case which I believe  
20 is in 218 Va. and a number of earlier cases, one -- a couple  
21 of civil cases, Clinchfield, Cole, a couple of cases, one  
22 I remember I viewed and all of these cases led me to believe  
23 that the proper way to do it and try Mr. Ruplenas' was that

1 the crime existed at the time it was committed. They all  
2 indicated that particular result although I'm the first to  
3 admit none was precise on all four of these issues.

4 MR. GARDNER: I mean, is this not the proper  
5 time to discuss or this is fine because I want to ask you  
6 a question on my motion, if that's possible. I would like  
7 to ask a question on the Code section and it's just a reply  
8 so at least, that's my identification and of course put  
9 those on the record, but I think it's an excellent ground  
10 for an appeal, but I was curious about the Code 1-16.

11 In the Code section it says all proceedings  
12 shall conform as far as practical to the law and to be  
13 enforced at the time.

14 THE COURT: I think you have read the whole  
15 Code section.

16 MR. GARDNER: I do. There's a semicolon --

17 THE COURT: And I agree that the Code section  
18 is almost contradictory in and of itself, but the conclusion  
19 I came to in reading the Code section and reading the cases  
20 and interpreting that Code section was that the particular  
21 sentence you're referring to applies primarily to procedural  
22 matters rather than substantive matters.

23 MR. GARDNER: Okay.



1 THE COURT: And again, I base that on a number  
2 of cases that I read and as far as I know, the Supreme  
3 Court has not ruled on one precisely, on all four of what  
4 we have here today based on Smith and based on earlier  
5 cases.

6 I believe that the proper way to proceed is,  
7 so far as the crime and his punishment as it was when the  
8 crime was committed.

9 MR. GARDNER: Thank you.

10 THE COURT: But, I didn't summarily deny it.

11 MR. GARDNER: It was summarily too. I'm not  
12 saying to you that is what was transmitted to you, I'm  
13 not saying that you looked at these summarily --

14 THE COURT: I couldn't get a letter out to you  
15 and give you the reasons.

16 MR. GARDNER: That's the only reason I'm asking  
17 now.

18 THE COURT: Well, I don't mind giving you one.

19 MR. GARDNER: Okay, fine.

20 THE COURT: Call your first witness.

21 MR. WILLIAMS: Officer Pruitt.

22 (The Jury returned to the Courtroom.)  
23

1 stating parole or probation moves would be a fact, but it  
2 has no bearing.

3 MR. GARDNER: But, it may tell the Jury that  
4 maybe the Legislature was mistaken by passing the law,  
5 but they reconciled themselves. I understand, okay.

6 (The Jury returned to the Courtroom.)

7 THE CLERK: Members of the Jury, have you  
8 reached a verdict?

9 THE FOREMAN: Yes, we have.

10 THE CLERK: Is your verdict unanimous?

11 THE FOREMAN: Yes, it was.

12 THE CLERK: We, the Jury, on the issue joined  
13 in the case of the Commonwealth of Virginia versus David P.  
14 Ruplenas find the defendant guilty of distribution of a  
15 controlled drug as charged in Count II of the Indictment  
16 and fix his punishment at five years imprisonment.

17 THE COURT: Any objection to the form of the  
18 verdict?

19 MR. GARDNER: No, Your Honor.

20 THE COURT: Do you want the Jury polled?

21 MR. GARDNER: Yes, Your Honor.

22 THE CLERK: Nancy Hastings?

23 MS. HASTINGS: Yes.

P R O C E E D I N G S

(The Court Reporter, J. Michelle Morgan, was duly sworn by the Clerk of the Court.)

THE COURT: Commonwealth of Virginia versus David Ruplenas, Criminal No. 30174.

The Commonwealth is present by her attorney, as is the defendant present in person and by his attorney, John M. DiJoseph. The probation officer, Robert Conrad, is present.

Have you had an opportunity to review the probation report with your client?

MR. DiJOSEPH: Yes, Your Honor.

THE COURT: Do you have any questions of the probation officer?

MR. DiJOSEPH: Your Honor, that depends. I have submitted a motion and a memoranda.

THE COURT: I've read that motion. Let me ask what the Commonwealth's position is?

MISS KIMBLE: We would object to him being sentenced to twelve months and the reason is plain in reading 1-16, Section 1-16. It says in here that such provision may, with the consent of the parties, effected and applied and I think from that language that it is

1 discretionary with Your Honor at this point in time. Before  
2 you can impose something under a new penalty for an act  
3 that occurred before the new penalty was enacted, you must  
4 have the consent of the defendant to do it. You've got  
5 the consent of the defendant to do it in this particular  
6 case, but I think still those words may leave the dis-  
7 cretionary with the Judge and the Trial Court and I don't  
8 think that in this case with Mr. Ruplenas' background that  
9 it is appropriate to exercise discretion in that manner.

10 MR. DiJOSEPH: Your Honor, as I read the case  
11 of Abdul versus the Commonwealth and also Conaway versus  
12 the Commonwealth, I read it as saying or stating that the  
13 defendant has a right to be sentenced under the law which  
14 is in effect at the time of his sentencing, and the new  
15 marijuana law went into effect on July 1. As I read the  
16 case, the Virginia Supreme Court reversed the conviction  
17 of Mr. Conaway because he was not sentenced in accordance  
18 with a new law that was in effect at the time of his  
19 sentencing. So I think that Mr. Ruplenas, by his consent,  
20 is to be sentenced under the new law, has that right to be  
21 sentenced under the new law today.

22 I also point out to Your Honor --

23 THE COURT: Doesn't it say with the consent of

1 the parties affected?

2 MR. DiJOSEPH: Yes.

3 THE COURT: And the Commonwealth is a party,  
4 just like Mr. Ruplenas is. I read that statute to mean  
5 that if both parties agree to be sentenced under the new  
6 statute.

7 MR. DiJOSEPH: Your Honor, I think that the  
8 case law indicates that even considering the way the  
9 statute was worded, that the defendant has the right to be  
10 sentenced under a new law if both parties have the right,  
11 then there really is no reason for a savings clause because  
12 the Commonwealth can always object and it probably would  
13 be presumed that in most cases they would object to a  
14 defendant being sentenced under a new law.

15 THE COURT: I am going to deny your motion  
16 subject to hearing the Commonwealth's argument, although  
17 I am probably simply because in my opinion, he can demand  
18 it and I'm going to sentence him not under the new law, but  
19 under the old law, but adjust the Jury sentence so that it  
20 would conform with the new law, that's what I'm going to do.

21 MR. DiJOSEPH: Okay, by that then I would say  
22 that this will affect whether I want to call witnesses or  
23 question Mr. Conrad.

1 THE COURT: You're going to have to do whatever  
2 you think is the best thing to do and I'm not going to tell  
3 you what I am going to give him any more than what I said,  
4 but I believe it would, it would work an injustice to  
5 sentence him under the old law when if he had committed  
6 this old crime two weeks later, it would have been a  
7 misdemeanor.

8 Do you have any questions of the probation  
9 officer?

10 MR. DiJOSEPH: Could I have a minute to confer  
11 with my client?

12 THE COURT: Yes.

13 MR. DiJOSEPH: No questions of the probation  
14 officer.

15 THE COURT: Do you have any evidence that you  
16 would like to present?

17 MR. DiJOSEPH: No.

18 THE COURT: Does the Commonwealth have any  
19 evidence?

20 MISS KIMBLE: No, Your Honor.

21 THE COURT: Then I'll order that the pre-  
22 sentence report filed by the probation officer be made a  
23 part of the record in this case.

1 Do you want to argue, Mr. DiJoseph?

2 MR. DiJOSEPH: Since you already indicated  
3 some of the factors you're going to consider in sentencing,  
4 I am not going to argue that point. I will mention that I  
5 also feel that the Virginia General Assembly indicated a  
6 strong public policy of this State when they passed the new  
7 law. We mitigated the punishment for the offense for which  
8 Mr. Ruplenas is charged.

9 Your Honor, I have, well, I think that Mr.  
10 Ruplenas has passed a crossroad in his life. I think that  
11 he's starting to get some direction in his life. He's  
12 been taking some college courses over at the jail. He's  
13 been participating in the administering over there. I  
14 think he's at a stage where he's beginning to turn things  
15 around and I think that because of this, he's at a point  
16 where a large period of incarceration is really not going  
17 to help him. It's not going to help the Commonwealth, the  
18 people of this State. I think that Mr. Ruplenas is at a  
19 stage where it would be silly for the people of this State  
20 to have to pay \$26,000 per year for him. He's at a stage,  
21 I feel, where he can function in society, where he's  
22 starting to turn things around, and I think that he's on  
23 the way back to being able to live in this society, dealing



1 with it and functioning in what would be a Quote, normal,  
2 Unquote, manner. That's all.

3 THE COURT: Miss Kimble?

4 MISS KIMBLE: Your Honor, in looking at Mr.  
5 Ruplenas' prior record, his involvement in crime and his  
6 severe, what seems to be from this report, mental problems,  
7 we would have to object to what you already stated that  
8 you are going to do, but just for the record, the reason  
9 we object is that he does have a very bad prior record.

10 I wonder how many times during all this period  
11 that he has said he has been at the crossroads of his life,  
12 wanting to change his life around and attempted to do  
13 something like that. Yet, to go back to the same kind of  
14 behavior, this period of involvement in crime is not just  
15 over the last few months, it goes over several years, and  
16 I think Your Honor should uphold the Jury verdict.

17 You do have the right to sentence him under  
18 the old law and should sentence him under the old law and  
19 uphold the Jury verdict as given by the Jury in this case.

20 THE COURT: Stand up, Mr. Ruplenas. Is there  
21 anything you would like to say or any reason why I should  
22 not pronounce judgment against you?

23 THE DEFENDANT: No, sir.

1 THE COURT: Well, Mr. Ruplenas, I agree really  
2 with everything your attorney says, and with everything,  
3 particularly with everything the Commonwealth said. You  
4 have a terrible prior record. I don't agree with Mr.  
5 DiJoseph in the sense that the Commonwealth would be better  
6 off letting you out. I think the Commonwealth would  
7 probably be better off keeping you locked up, but I think  
8 I've got to consider the fact that the law under which you  
9 were convicted was changed two weeks after you committed  
10 the offense from a felony to a misdemeanor.

11 I'll sentence you to five years in the peni-  
12 tentiary. I'll suspend four of those five years conditioned  
13 upon your general good behavior for a period of four years.  
14 I want to make it clear to you that if you do go out and  
15 violate the law again, in spite of the change in the law,  
16 I will give you those other four years. Do you understand  
17 that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: You're committed to the custody of  
20 the Sheriff. You also, Mr. Ruplenas, have a right to appeal  
21 this. If you can't afford your own attorney, the Court will  
22 appoint an attorney for you to perfect that appeal.

23 MR. DiJOSEPH: Your Honor, of course he'll get

1 credit for time served.

2 THE COURT: I'm sure he's eligible to get  
3 released right now.

4 (Whereupon, at 10:15 o'clock a.m., the hearing  
5 in the above matter was concluded.)  
6  
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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth

vs.

David Ruplenas

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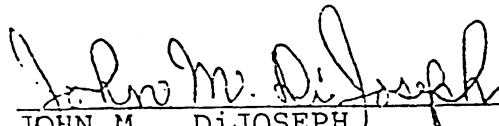
CRIMINAL NO. 30174

MOTION FOR SENTENCING UNDER  
NEW MARIJUANA LAW

COMES NOW the defendant, by and through counsel, and moves the Court to sentence him under the new marijuana law which took effect July 1, 1979. See attached Memoranda.

Respectfully Submitted,

DAVID RUPLINAS  
By Counsel

  
JOHN M. DIJOSEPH  
Attorney For Defendant  
374 Maple Avenue East  
Vienna, Virginia 22180  
(703) 281 - 4321.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH

vs.

DAVID RUPLINAS

)

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Criminal No. 30174

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION THAT HE  
BE SENTENCED UNDER THE NEW MARIJUANA  
LAW

The defendant was convicted on November 19, 1979 of distribution of less than 1/2 ounce of marijuana. The incident upon which his conviction was premised occurred on June 13, 1979. Defendant was arrested on July 3, 1979. The Virginia General Assembly at the 1979 session enacted a new marijuana law to take effect July 1, 1979. The new law reduced the punishment for the offense of distribution of marijuana to up to 12 months imprisonment and/or a \$1,000.00 fine if the amount of marijuana involved is less than 1/2 ounce. Defendant contends that he should be sentenced under the new law.

Generally the punishment provided by the statute in effect at the time the offense was committed is imposed unless, there is a "savings" clause which gives the defendant the right of election between the old and the new law.

Virginia has such a statute, namely section 1-16 of the Code of Virginia, 1950, as amended, which states,

§ 1-16. Repeal not to affect liabilities; mitigation of punishment.--No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim

arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. (Code 1919, §6.)  
Emphasis by defense counsel.

The Virginia Supreme Court applied the statute and reversed the defendant's conviction for murder in Conaway v. Commonwealth, 118 VA.792, 88 S.E.75(1916). The Court held that the accused in effect had elected to be tried under a new law which went into effect subsequent to the offense.

In People v. Guaghata, 362 Ill.427, 200 N.E.169 (1939) the defendants trial for the sale of a controlled substance started on the day that a recently enacted statute reducing the offense from a felony to a misdemeanor went into effect. The Illinois Supreme Court ruled that the defendant had the right to elect to be punished under either the old or new law.

As recently as 1977, the Virginia Supreme Court ruled on this point. In Abdo v. Commonwealth, 218 VA.473 (1977) the Court expressed its approval of the Conaway case referred to supra and stated that the defendant has until final judgement is pronounced to make his election. The Court said

(2) There is authority that the word "proceedings" includes each and every step from the issue of a criminal complaint to the conclusion of the case, and that word is broad enough to cover any act, measure, step or all steps in a course taken in conducting litigation civil or criminal. Sigmon v. Commonwealth, 200 VA.258, 105 S.E.2d.171 (1958)...Further, the language of the statute is that the court may (court's emphasis) apply the provisions of the new law, and the provision to be applied must (defense counsel's emphasis) be applied "to a judgement pronounced after the new law takes effect".

In Abdo final judgement had already been rendered so the savings clause did not apply. Nevertheless, the trial judge, Judge Jennings of this Court, reduced Abdo's sentence under section 53-272 of the Virginia Code, in recognition of the General Assembly act reducing the punishment for Abdo's offense.

The defendant in the instant case calls the Court's attention



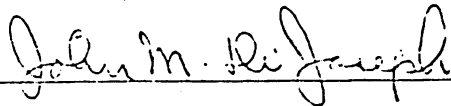
to the judicial discretion allowed under section 53-272 and proffer that his case offers an apt circumstance for utilizing this discretion. The General Assembly by revamping the criminal sanctions dealing with marijuana expressed a strong, public policy of this state regarding the punishment to be imposed for marijuana use and distribution. The Court should consider this public policy factor in sentencing.

In conclusion, defendant contends that he has a right to the

lesser sentences provided by the new marijuana law per section 1-16 of the Code of Virginia and that the General Assembly, in enacting the lesser penalties, expressed a strong public policy regarding punishment for marijuana offenses. The Court should exercise it's discretion under section 53-272 and sentence in accordance with the new law.

Respectfully submitted,

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Certificate of Service

I hereby certify that I delivers a true copy of the foregoing MOTION with attached MEMORANDA, to ROBERT HORAN, ESQUIRE, Commonwealth Attorney, at his office in the Fairfax County Courthouse, Fairfax, Virginia 22030, this 21st day of January, 1980.

  
JOHN M. DIJOSEPH