

BEFORE THE GOVERNOR OF THE STATE OF MISSOURI

In the Matter of: Jeff Mizanskey

Jeff Mizanskey DOC No. 521900
Jefferson City Correctional Center
8500 No More Victims Road
Jefferson City, Missouri
65101

SUPPLEMENT TO PETITION FOR CLEMENCY AND COMMUTATION OF SENTENCE OF LIFE-WITHOUT-PAROLE

COMES Now Jeff Mizanskey, by and through undersigned counsel, and in support of his Petition pursuant to Article IV, Section 7 of the Missouri Constitution, states as follows:

INTRODUCTION

Petitioner is serving a life sentence without the possibility of parole for being convicted of aiding and abetting another person's possession of seven pounds of marijuana with intent to distribute. Jeff is being held without the possibility of parole because he had three prior felony marijuana convictions, all of which he successfully completed probation for. Jeff has no other relevant criminal convictions. Jeff's criminal history involves absolutely no allegations of violence, involvement of juveniles, or other aggravating factors. Jeff's current period of incarceration is his first time in prison.

Jeff and his attorneys have made unsuccessful attempts for judicial relief from his conviction and sentence in direct appeals, post-conviction relief motions, petitions to correct clerical errors, requests to recall judgments, and successive federal habeas corpus petitions. See the attached annotated chronological judicial history for a summary of the issues raised and rulings made or not made. All avenues for judicial relief have been exhausted and Jeff now appeals to the mercy of the Governor for executive clemency.

Petitioner is 60 years of age, approaching the age of normal retirement. Jeff will have been restrained from his liberty for 20 years as of December 19, 2013, exclusively for aiding and abetting possession of marijuana with intent to distribute. Without Gubernatorial Clemency, Jeff will die in prison for his non-violent cannabis-only convictions.

The ability to grant clemency, granted by the people, gives you the exclusive power of mercy over state prisoners. That power is the only hope and last prayer Jeff has of not dying in prison. Your grant of clemency can correct and cure the unfortunate, draconian, unnecessary, and barbaric sentence of life without parole.

ARGUMENT SUMMARY

In the last 18 years since Jeff's sentence of life without parole (LWOP) commenced, the fundamentals of law, society, and governance have changed extraordinarily. LWOP sentences for marijuana have become irreconcilable with our present sense of basic fairness and justice because of the sea change in attitudes toward life sentences without parole and the change in societal beliefs about the benefits of marijuana and its potential for harm.

Looked at through the present prism of the historic rise in prison populations; the unaffordable, burgeoning costs of LWOP sentences; the dis-proportionality of sentences for drugs; the growing public sense that the drug wars have been a public policy failure; and, among the majority of Americans, a sense of the relative harmlessness of marijuana; this LWOP sentence is legally and factually unjustifiable. Clemency is the only solution to what has become an abiding injustice.

ISSUES NOT IN DISPUTE CONCERNING THIS PETITION:

1. On November 19, 1984 Jeff pleaded guilty to selling one ounce of marijuana to an informant and possessing over 35 grams of marijuana (approximately ½ pound) in his home the next day.
2. On October 9, 1991 Jeff pleaded guilty to possession of over 35 grams of marijuana (approximately 2-3 ounces) found inside his home.
3. On December 19, 1993 Jeff was arrested and has been restrained from his liberty since.
4. On June 19, 1996 Jeff was sentenced for aiding and abetting another person's possession of seven pounds of marijuana with intent to distribute.
5. There was no violence, guns, or juveniles involved in any of Jeff's convictions.
6. Jeff has been a model prisoner and has participated in prison programs designed to improve himself and his fellow inmates, i.e. exhibited actual rehabilitation.
7. Jeff has met and surpassed any and all reasonable standards of rehabilitation.
8. Jeff poses no threat or danger to himself or anyone else, or to society at all, if released.
9. Jeff has a stable home environment with family awaiting him.
10. Jeff is 60 years of age and health issues will likely make it substantially ever more expensive to keep him imprisoned.
11. Jeff is imprisoned with a life sentence without the possibility of parole.
12. Jeff will die in prison without the exercise of Gubernatorial Clemency.

WHAT PRECISELY DOES THIS PETITION ASK THE GOVERNOR OF MISSOURI TO DO?

Lacking any other avenue of redress, Petitioner requests the Governor exercise the constitutionally vested power of clemency by commuting his sentence to time served, which will authorize his immediate release from prison.

THE FUNDAMENTAL QUESTION RAISED BY THIS PETITION:

IS THERE ANY INTEREST OF AMERICAN SOCIETY, LAW, OR GOVERNANCE THAT IS FURTHERED BY THE CONTINUED INCARCERATION OF THIS FELON SERVING A LIFE SENTENCE WITHOUT PAROLE FOR HIS NONVIOLENT, CANNABIS-ONLY OFFENSE?

The answer is NO.

THESE ARE THE CHANGED CIRCUMSTANCES IN AMERICAN LAW, SOCIETY AND GOVERNANCE IN THE LAST 20 YEARS THAT MAKE THIS LWOP SENTENCE FOR CANNABIS UNJUSTIFIABLE:

Two highly significant historical events reflect a sea-change in relevant circumstances and public attitudes regarding marijuana since Jeff was sentenced to life in prison.

1. The U.S. Government, through its Attorney General, as empowered by the Controlled Substances Act (21 USC §801, et. seq.), and 20 states and the District of Columbia have given de jure status to a de facto reclassification of the medical benefits and value of marijuana by decriminalizing medical marijuana, to wit:

By the U.S., through its Department of Justice (“Ogden”) Memorandum (“Investigations and Prosecutions in States Authorizing Medical Use of Marijuana”, October 19, 2009) www.justice.gov/opa/documents/medical-marijuana.pdf acknowledging the legitimacy of States’ medical marijuana laws and affirming the fact that the DOJ will not prosecute citizens and state actors dealing with marijuana who are in compliance with their state medical marijuana laws; and

By the States, 20 of which legalized medical marijuana by state statutes or by constitutional amendment, and the District of Columbia, legalizing medical marijuana for legitimate doctor-prescribed medicinal uses against public illnesses and diseases; <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

thereby factually discrediting the underlying, although never proven, rationale for marijuana’s illegality: that marijuana was supposed to be a harmful, addictive, dangerous drug that was entirely devoid of any medicinal value; i.e., marijuana is not addictive, harmful or dangerous; and it was a mistake to originally classify it as a dangerous drug.

2. On November 6, 2012, the states of Colorado and Washington legalized possession of marijuana, when by citizens' initiatives they passed “recreational” marijuana decriminalization law, which now treats marijuana like alcohol. On August 29, 2013 the U.S. Department of Justice announced it would not interfere with the States' effective regulation of these legalization initiatives. <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>

“Recreational” marijuana is exactly what Petitioner is convicted of aiding and abetting in the possession of with intent to distribute. There is no suggestion in this case that the distribution of marijuana was for medical use. The point is that the legalization of medical marijuana by 20 states and the District of Columbia, and the legalization of recreational marijuana by two states since Jeff was sentenced, and the Department of Justice tolerance of the States' legislative reforms, provide compelling evidence that time has changed public attitudes toward both medical and recreational use of marijuana.

Since Jeff's marijuana conviction was handed down in 1996, 58% of Americans have come to support legalization of marijuana, according to a Gallup Poll released October 22, 2013. <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx> Additionally, over three-quarters of the U.S. population favors allowing marijuana to be used as legitimate medicine. See Pew Research Center for People and Press, April 1, 2010 Report; <http://www.people-press.org/2010/04/01/public-support-for-legalizing-medical-marijuana/> In Missouri, a September 2012 poll of likely Missouri voters indicates 50%-54% favor legalizing, regulating, and taxing recreational marijuana. <http://show-mecannabis.com/polling/>

Because marijuana now enjoys broad public acceptance, the fear, ignorance and theoretical harmfulness underlying its illegality have been profoundly discredited. There is no scientific evidence and little public support for the old perceived wisdom that marijuana is harmful, addictive, dangerous or devoid of medicinal value. Obviously, that marijuana is a “public menace” no longer has any scientific resonance, and public belief that it is harmful and that those who sell it are causing harm to the users of marijuana for medicinal or recreational purposes has waned.

Inasmuch as societal and governmental views about marijuana have gone through such a profound change in the last 18 years, it is fair and reasonable, Mr. Governor, for us to look anew at the most draconian prison sentence that could ever be imposed, to wit: life/death sentence without a possibility of parole against Jeff Mizanskey for having been convicted of doing nothing worse than aiding and abetting another person in possessing seven pounds of marijuana with the intent to distribute, in violation of our fundamentally misguided anti-marijuana laws.

Additional compelling reasons for commuting Jeff's sentence:

1. The LWOP sentence is grossly disproportionate to the minimal potential threat to the public good that marijuana sales present and grossly disproportionate to other sentences for controlled substance law convictions.

Human Rights Watch (H.R.W.) in its 2012 report “Old Behind Bars . . .” has among its conclusions:

“We are also concerned that some elderly inmates are being unnecessarily held in prison despite the fact that their continued incarceration does little to serve the principal purposes of punishment: retribution, incapacitation, deterrence, and rehabilitation. For

prisoners who no longer pose a public safety risk because of age and infirmity, and who have already served some portion of their prison sentence, continued incarceration may constitute a violation of their right to a just and proportionate punishment.”

http://www.hrw.org/sites/default/files/reports/usprisons0112_brochure_web.pdf, p.10; *See also* “Disproportionate Sentences as Human Rights Violations,” *The Modern Law Review*, vol. 67, no. 4, July 2004.

The fundamental principle of all sentences is that “persons who commit similar crimes and have similar culpability, should to the extent possible, be treated similarly.” See Holder Memorandum to All Federal Prosecutors: “Department Policy on Charging and Sentencing” May 19, 2010. <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf>, p. 1. Neither disparity in sentencing for similar offenses nor dis-proportionality between sentence and crime are tolerated in federal sentencing, and they likewise should not be tolerated in state sentencing.

Jeff's sentence is grossly disproportionate to sentences imposed on persons convicted of larger scale similar crimes during the past 20 years. For example, a “Leader of an international organization importing and distributing multiton shipments” described as “by far the largest smuggler the FBI was aware of” received an 8 year sentence; what the Coast Guard called the “biggest maritime marijuana arrest on the West Coast” resulted in release after 4 years of a 10 year sentence; the “mastermind of a multimillion-dollar marijuana ring” was released after serving 8 years; a “major supplier of marijuana in the United States” and the “primary source of marijuana in the western United States” was released in 2009 after serving 19 years of a 25 year sentence; one of the “biggest marijuana smugglers on the planet” was released in 2004 after serving 8 years; the “largest smuggler of marijuana in the world” was released in 2005 after serving 7 years of a 25 year sentence. <http://lifeforpot.com>, pages 13-14 of PDF link to “Group Petition for Clemency”; *also see* link therein to “Other Kingpin Sentences” for additional examples of lighter sentences for greater marijuana distribution convictions.

All of these convicts were involved in marijuana distribution conspiracies dwarfing the conspiracy for which Jeff is convicted. Each of these distribution criminals was allowed to return to society, theoretically rehabilitated. A sentence of life without parole would rarely if ever be handed down for a marijuana-only distribution conspiracy today. This Petitioner, though not branded as the biggest or the worst, was given a sentence that could only be terminated by his death. To the best of undersigned counsel's knowledge, Jeff Mizanskey is the only prisoner in Missouri serving a LWOP sentence for a non-violent cannabis-only conviction.

The LWOP sentence Jeff is serving is grossly disproportionate to not only the present lack of seriousness ascribed to marijuana offenses generally and the sentences historically imposed on other marijuana distribution convicts, but also to the sentences meted out to the other suspects in this case. The three transporters of 86 pounds of marijuana from New Mexico (Jorge Ibuado, Hosea Reyes, and Martin Maruffo), who were arrested the day before Jeff's arrest and who agreed to assist police in arresting the intended recipient, were never charged. The intended recipient and actual possessor of the seven pounds of marijuana (Atilano Quintana), pled guilty and received a 10 year sentence. The jury convicted Jeff of possession of marijuana

with intent to distribute based on evidence he provided a ride to the intended recipient and jury instructions for aiding and abetting Atilano in possessing and intending to distribute. Jeff's LWOP sentence was the most severe possible, while the main actors received leniency.

Jeff was sentenced to life in prison by the now-deceased Judge Theodore Scott. Jeff has been denied an opportunity for parole because he is considered a prior and persistent drug offender in that he had three prior cannabis-only felony convictions. Those convictions consisted of two guilty pleas entered on November 19, 1984 for sale of one ounce of marijuana and possession of over 35 grams of marijuana found in his home the day after the sale; and a guilty plea entered on October 9, 1991 for possession of over 35 grams of marijuana. Jeff had no prior felony convictions besides these three cannabis-only guilty pleas on two prior occasions. Jeff successfully completed probation for all three prior cannabis felonies and was never in prison before arrest for his current conviction. None of his convictions involved allegations of violence, weapons, juveniles, or other aggravating factors.

The merits of several of Jeff's legal arguments were never addressed by the Court of Appeals or Federal Courts because they were not timely raised or properly preserved. Having exhausted all possibilities of judicial relief, Jeff now seeks the mercy of the Governor to commute his sentence to time served in hopes of returning to society for an opportunity to live a normal life as he approaches retirement and old age. In Jeff's pro se Petition for Clemency, he admits to having a drug problem at the time of his arrest (3 grams of marijuana were found in his pocket and methamphetamine residue was detected in the baggie, but he was never charged for that). However, Jeff demonstrates by his attachments thereto that he has completed intensive substance abuse and rehabilitation programs in the Department of Corrections and been a model prisoner by all Department of Corrections accounts. Jeff is not likely to relapse.

Jeff has been employed all of his adult life. Jeff worked in the Air Force as a heavy equipment operator and was honorably discharged. Jeff owned his own construction business and worked as a carpentry foreman at construction sites building duplexes and doing maintenance on apartments at the time of his arrest. Jeff has been employed throughout his time in the Department of Corrections, except for brief periods when he was involved in intensive rehabilitation programs in the therapeutic community and after he broke his leg from a fall on a handball court. Jeff is currently employed doing finishing work on wood cabinets and earns 71 cents per hour. Jeff's attachments to his pro se Petition demonstrate numerous extraordinary references from his job supervisors and rehabilitation mentors. Jeff is likely to be able to maintain employment and a law-abiding lifestyle upon his release. Jeff has an offer to live with his brother in Illinois to assist him in his transition upon release.

Section 557.036 RSMo. gives general guidance regarding considerations for sentencing to be the nature and circumstances of the offense and the history and character of the defendant (and for jury sentencing specifically includes the impact of the crime upon the victim, the victim's family and others; but these factors are irrelevant because there is no specific victim identified with Jeff's conviction and he was sentenced by the judge in this case). 18 U.S.C. 3553 and the May 19, 2010 Holder Memo (above), give six more specific factors as guidance for the appropriate substantive due process considerations of sentencing:

1. Seriousness of the offense: Conspiring to distribute marijuana, in light of the legal and social acceptance of marijuana described above, can no longer be considered among those serious offenses for which LWOP sentences are usually given, e.g., murder, kidnapping, or terrorism. Of the hundreds of thousands of inmates in our nation's prison systems for drug felonies, the vast majority of marijuana offenders with no history of violence currently receive sentences ranging from probation to a few years in prison. This Petitioner's conviction does not warrant the seriousness of permanently forfeiting his life and freedom merely for marijuana.

2. Promote respect for the law: Indeed, this disproportionate sentence and the Drug Wars that fostered them have caused and will do potentially long-lasting damage to our criminal justice system by promoting disrespect for our laws and institutions. As a matter of both fact and policy, our national “War on Drugs” has been an abject failure. Among the societal and collateral victims of our marijuana “Drug Wars,” obviously including this prisoner, are our court system, our penal system, and all of our public service organizations that have been defunded, neglected or abandoned in order to pay for these costly “wars”. Perhaps the most profound societal loss stemming from the Drug Wars is the criminalization of huge segments of our country, as well as the corruption and cynical disrespect for all law and authority that bad law and policy—e.g., marijuana prohibition—have generated in rending the fabric of our society. The corruption, moral decay, and alienation caused by this unholy war have reduced our country’s moral vibrancy more than all of our real wars put together.

3. Provide just punishment: Justice is a dynamic. What was “just” 18 years ago may not seem so today, in light of changing dynamics of public attitudes, generational differences in values and interests, scientific breakthroughs, advances in education and tolerance, erosion of Victorian mores and sensibilities, economic considerations, population growth and overcrowding, extended life spans, and conceptual changes in problem solving and dispute resolutions. It is hard to imagine that LWOP sentences would be found appropriate in this age of greater tolerance for marijuana, when the futility of drug prohibition has become more apparent with each passing year.

4. Afford deterrence: Although the verdict remains mixed on the reality of deterrence, it can hardly be gainsaid that a life term as punishment would likely have some deterrent effect. However, a cost-benefit analysis reveals that there seems little doubt that the exquisite costs of LWOP for non-violent cannabis-only offenses would outweigh any imagined benefit to society, especially when considered in the context of today's widespread societal acceptance of the very activity this Petitioner stands convicted of.

5. Protect the public: This is an absolute must in the calculus of any punishment, probably one of the most enduring principles of criminal jurisprudence. However, do we really believe that after 20 years of punishing confinement, approaching retirement age, and the absolute lack of any history of violence among this model prisoner, whose only convictions were for possessing and distributing a substance, the harmfulness, addictiveness or dangerousness of which has never been satisfactorily established, either anecdotally or scientifically—there exists any part of our society that needs protection from the Petitioner?

6. Offer defendant an opportunity for effective rehabilitation: This model prisoner has been afforded 20 years of rehabilitation that is demonstrably effective because he availed himself of every course, program or activity within the prison system that could help him help himself and help his fellow inmates and has conducted himself in exemplary fashion throughout his long prison ordeal.

In sum, none of the principles of punishment has been dishonored by this prisoner, and no principle of criminal jurisprudence would be served by continuing his now undeniably excessive sentence. Clemency is justice in these circumstances, because life without parole is, in fact, a death sentence. But rather than have our government execute the condemned man, he is scheduled to be warehoused until he dies of “natural causes,” doubtless accelerated by the deprivations of decades in prison.

With sentence imposed and direct appeals exhausted, and with the sentence actually commenced, the law offers no way to correct this disparity between the life sentence of Petitioner and similar marijuana cases, other than through gubernatorial clemency by commutation of the sentence.

2. No public good, policy or interest is furthered by the continued incarceration of this elderly, fully rehabilitated, long-suffering prisoner and his family.

Elderly prisoners are the fastest-growing (estimated elderly prison population will be 10% of total by 2013 per HRW Report) segment of the prison population, primarily because of tough sentencing laws, and are three times more expensive to incarcerate than younger inmates. According to Human Rights Watch, between 1995 and 2010, the number of state and federal prisoners age 55 and older nearly tripled to 124,400 inmates (an increase of 282%), while the overall prisoner population grew by less than half (increase of 42%).

http://www.hrw.org/sites/default/files/reports/usprisons0112_brochure_web.pdf, p. 6.

Time is running out for Jeff. As an aging inmate, Jeff will gradually become a prisoner of his jail bed as he approaches the end of his life, unless he is granted clemency. Jeff is now condemned to life without parole—effectively a death sentence—for his conviction of aiding and abetting possession of seven pounds of marijuana with intent to distribute. While Jeff is chronologically in his sixties, physiologically prisoners are much older due to poor diet, stressful prison life, and poor medical care. This reality is compounded by the perversity of the fact that while geriatric prisoners need special care and attention, which they most likely will not receive to an adequate degree, age is known to be the most reliable predictor of recidivism: older prisoners are less likely to re-offend than younger prisoners. Our society gets nothing of value from the millions of dollars spent on protracting the suffering of this man and his family. Both the actual and the opportunity costs of wastefully warehousing this man cannot possibly be worth the zero-sum of life in prison for marijuana.

The American Law Institute, the acknowledged leader in criminal justice reform, has encapsulated its conclusions and recommendations, particularly on sentencing reform, in the

second draft of its Model Penal Code: Sentencing, dated March 25, 2011. *See also* The Sentencing Project, “No Exit: The Expanding Use of Life Sentences in America,” by Ashley Nellis and Ryan S. King, July 2009, particularly pp. 36–40. Among the findings, conclusions and recommendations that are particularly relevant to Jeff’s plight, ALI recommends:

- a universal review of all sentences after the convicted has served 15 years in prison, noting that the actual percentage of convicts serving more than 15 years is in the low single digits; still a significant number of souls, in light of the burgeoning prison population of almost 2,380,000 inmates nationwide;
- all long or life prison terms be closely restricted to those who pose real dangers to society;
- recidivism risks be carefully assessed in all long prison terms, noting especially that “lifers,” when they do get out, have far and away the lowest recidivism rates of any other grouping; and the establishment of a comprehensive framework for good time and earned time reductions to sentences served.

ALI Model Penal Code 305.6: “resentencing . . . after 15 years served there is a presumption that much new information about the prisoner will have accumulated, new criminological knowledge may exist about the offenders’ rehabilitation, broader societal values (as with marijuana) may have shifted. . . . If the offender presents a continuing danger to the community, the sentence can remain undisturbed on incapacitation grounds (i.e., incapable of being law abiding). Where (as with Jeff) there are no reasonable grounds to believe the prisoner presents a danger to public safety, incapacitation does not apply, e.g., progress in correctional treatment programs and behavior while institutionalized can now support a low assessment of recidivism risk; in which case there is no sound rationale for continued incarceration.” (emphasis added)

Additional conclusions by ALI, pertinent to Jeff:

Page 86: “. . . sentence modification on proportionality grounds may be warranted if the opprobrium attached to certain criminalized conduct has diminished (à la marijuana) over a long period of time When a subject is controversial and the public’s attitudes are in flux, there is a possibility that ‘a new consensus’ as to offense gravity is emerging. . . .” Herein ALI singles out marijuana as an example. Drug offenses have no identifiable victim. (page 89).

Page 93 covers some studies of long-termers and the change in criminal propensity over the life course.

The ALI concludes that the most severe sanction in criminal law should be life in prison with a meaningful possibility of release before the prisoner’s natural death. This is the “Second Look” called for by the ALI. Service of more than 15 years should constitute “exceptional circumstances,” raising a presumption in favor of release, along with advanced age, physical or mental infirmity, or exigent family circumstances justifying a modification of the life penalty.

CONCLUSION

On March 9, 2012 Jeff submitted his pro se application for executive clemency to the Governor via the Parole Board. On June 6, 2013 undersigned counsel submitted a brief letter supplementing Jeff's application. This supplemental petition for clemency adds depth to the arguments supporting Jeff's pending application.

We respectfully say to you, Mr. Governor, without hesitation or equivocation, that no conceivable good for our State can come from causing this non-violent cannabis-only convict to die in prison and pray that you commute the sentence of this prisoner without undue delay.

Respectfully Submitted,

/s/Tony Nenninger¹

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¹ Counsel for Petitioner gratefully acknowledges the citations to authority and parallel arguments propounded by Michael Kennedy and David C. Holland from the Law Offices of Michael Kennedy, P.C., 419 Park Avenue South, 16th Floor; New York, N.Y. 10016 in their "Petition For Clemency to Relieve Five Elderly Petitioners from Life Without Parole for Marijuana" submitted to the President of the United States on or about November 19, 2012 with regard to five elderly federal prisoners serving life without parole for non-violent cannabis offenses who were sentenced pursuant to the now-amended federal mandatory sentencing laws.