



SACRED MUSHROOMS AND THE LAW

by Richard Glen Boire

Foreword by Terence McKenna



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PHARMACO PROHIBITA

by Richard Glen Boire

QUESTION: There is a lot of talk about mandatory minimums. Do any apply to entheogens? Some of the plants I use contain a controlled substance. For example, I routinely have a pound of *Mimosa tenuiflora*, or other similar entheogenic plants. If I am ever busted could I be subjected to a mandatory minimum because of the quantity of the plant material, even though it is far from 100% pure controlled substance?

RESPONSE: In the War on Some Drugs, mandatory minimums are like government-placed landmines. They are buried in complex sentencing statutes with tripwires leading into America's streets, businesses, and even into our homes. Once triggered, they explode indiscriminately. Fortunately, the specifications of these landmines—what triggers them and how forcefully they detonate—are revealed in the pages of the federal codes. I'll try to lay them bare here.

Most talk of "mandatory minimums" is related to federal law. It is probable that a person convicted of a federal drug crime other than simple possession, will get at least a five-year mandatory minimum sentence. A study by the U.S. SENTENCING COMMISSION showed that mandatory minimum sentences were applied to just under 80% of federal drug cases in 1997 (*U.S. Sentencing Commission Annual Report 1997*, p. 38). According to the 1997 *Sourcebook for Federal Sentencing Statistics* (pp. 67–68), in 1997 there were 18,922 drug offenders sentenced under the federal guidelines. 527 of these people were convicted based on a drug other than *Cannabis*, cocaine/crack, heroin, or methamphetamine.

At the moment, a conviction for simple possession (*i.e.* possession for one's own use—not for sale) for all entheogens is not subject to a mandatory minimum. In fact, assuming it's a first offense for simple possession of an outlawed entheogen, one can get anything from probation to a maximum of one year in federal prison. (NOTE: This is under *federal* law. Many states have much more draconian sentences for simple possession.) Federal mandatory minimums for a couple of entheogens arise when the offense is manufacturing (which includes cultivation), importing, exporting, distributing, or possession with intent to do any of these activities.

Participating in a conspiracy to commit any of these offenses will also trigger the mandatory minimum. Currently, courts are holding that practically anything will suffice to link a person to a conspiracy, including making a phone call to help arrange a deal, driving someone to a deal, or providing money, equipment, or chemicals.

Finally, a five-year mandatory minimum is also triggered by possessing or using a gun during a federal drug offense (18 U.S.C. 924(c)). I've seen this minimum applied in cases where the defendant merely had a gun in the same room as the





drugs. In fact, the gun doesn't even have to be loaded (see *U.S. v. Munoz-Fabela* (5th Cir. 1990) 896 F.2d 908; *U.S. v. Gonzalez* (9th Cir. 1986) 800 F.2d 895; *U.S. v. Martinez* (10th Cir. 1990) 912 F.2d 419).

The federal laws are explicit with regard to mandatory minimums for the following entheogens:

LSD: manufacturing, distributing (including giving away), or possessing with intent to manufacture or distribute 1 gram triggers a five-year mandatory minimum sentence (21 U.S.C. 841(b)(B)(v)). If 10 grams, a ten-year mandatory minimum sentence is triggered (21 U.S.C. 841(b)(1)(A)(v)). When calculating the weight of LSD for purposes of the mandatory minimum, the actual weight *including the carrier medium* is used. A standard weight of 0.4 milligram per dose is used only if no mandatory minimum is triggered (see *Neal v. U.S.* (1996) 116 S.Ct. 763, 766–769).

Cannabis: cultivating, distributing (including giving away), or possessing with intent to cultivate or distribute 100 live plants or 100 kilos of harvested *Cannabis* triggers a five-year mandatory minimum sentence (21 U.S.C. 841(b)(B)(vii)). If 1000 live plants or 1000 kilos of harvested *Cannabis*, a ten-year mandatory minimum is triggered (21 U.S.C. 841(b)(1)(A)(v)).

Remember that mandatory minimums don't tell you the worst case scenario—they tell you the guaranteed *minimum* sentence. Under the federal sentencing guidelines, one's criminal history, role in the offense, sophistication of the offense, whether weapons were involved, whether children were involved, the location of the offense, *etc.*, can all be factored in, and can produce a longer sentence. If a mandatory minimum sentence is triggered, there are only two ways out: (1) the safety valve; or (2) the snitch valve.

In 1994, Congress enacted a "safety valve" provision that gives federal judges the power to exempt certain nonviolent first-time offenders from mandatory minimums. In 1997, 23% of federal drug offenders benefited from the safety valve (*U.S. Sentencing Commission Annual Report 1997*, p. 38). To be eligible for the safety valve a person must meet all five of the following criteria: (1) have no prior drug conviction; (2) must not have possessed a weapon, or threatened violence in conjunction with the current offense; (3) must not have had a "managerial" or "supervisory" role in the offense; (4) must confess the full scope of your involvement in the offense; and

(5) must not have caused any physical injury as a result of the offense (18 U.S.C. 3552(f); USSG Sec. 5C1.2).

If a person does not qualify for the safety valve, his or her only way out of a mandatory minimum is through the "snitch valve." This disturbing provision actually codifies government extortion by rewarding snitches with more lenient punishment. Under the provision, a defendant who provides "substantial assistance" in the prosecution of someone else can escape a mandatory minimum, if the prosecutor (not a judge) deems the assistance valuable enough. A study by the U.S. SENTENCING COMMISSION showed that just shy of $\frac{1}{3}$ of federal drug offenders who faced mandatory minimum sentences escaped them by snitching (*U.S. Sentencing Commission Annual Report 1997*, p. 38).

Under the federal sentencing guidelines, a person convicted of manufacturing, importing, exporting, or possessing with intent to sell 50 mg or more of LSD or the equivalent amount of another Schedule I or II "hallucinogen" is assigned an offense level of 14, meaning that the minimum sentence is 15 months. Below that amount (*i.e.* 50 mg LSD or equivalent), the person is eligible for probation.

The federal sentencing guidelines operate on a weird equivalency scheme under which most drugs are equated to a specific amount of *Cannabis*. 1 gram (1000 mg) of LSD, for example, is equated to 100 kilos (100,000 grams) of *Cannabis*. 50 milligrams of LSD (the amount that correlates to offense level 14) equates to 5 kilos (5,000 grams) of *Cannabis*. Using this equivalency, and plugging in other entheogens, we get the following quantities that will mandate no less than a 15-month sentence:

- 70 grams bufotenine
- 62 grams DET
- 50 grams DMT
- 2 grams DOB
- 3 grams DOM
- 100 grams MDA
- 166 grams MDEA
- 142 grams MDMA
- 500 grams mescaline
- 5000 grams dry weight or 50,000 grams wet weight of mushrooms containing psilocybin or psilocin
- 10,000 grams of dry weight or 100,000 grams of wet weight of peyote
- 10 grams psilocybin





In my professional opinion, *Mimosa tenuiflora* (= *M. hostilis*) roots and root-bark are not controlled substances. But, assuming arguendo that a person were to suffer a federal conviction for manufacturing DMT based on cultivating *M. tenuiflora* and let's further say that the person was found with a pound of harvested plant material, what would be the punishment?

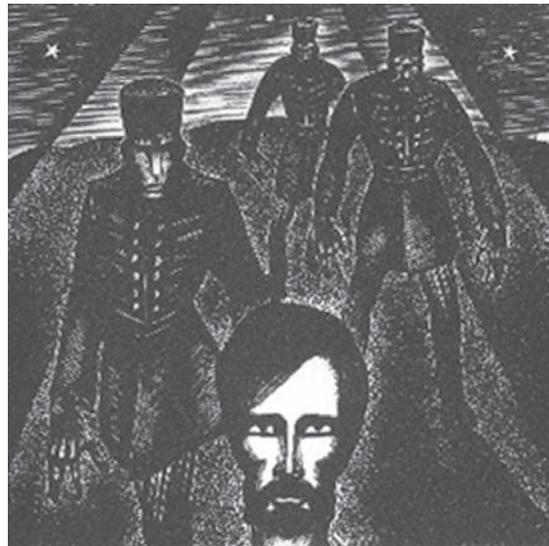
Based on the earlier list, we know that if the person were convicted of manufacturing 50 grams of DMT they would be subject to a low-term sentence of 15-months in prison. One analysis of *M. tenuiflora* roots showed them to contain nearly 0.6% DMT (PACHTER *et al.* 1959, in OTT 1994, presented under the earlier taxonomic name *M. hostilis*). Based on the scenario of 1 pound of harvested material, a defense attorney should argue that their client possessed only 2.74 grams DMT, at the very most. Under such a theory it would take just over 18 pounds of *M. tenuiflora* roots to reach offense level 14 and trigger a 15-month low term. (Again, I stress that in my opinion, it is almost unthinkable that a conviction could be sustained on the basis of growing *M. tenuiflora*, or possessing or selling unextracted harvested roots or root-bark.) The federal prosecutor, however, would likely argue that the sentence must be based on the gross weight (1 pound in the example) of the plant material.

Generally speaking, under the federal sentencing guidelines the weight of any drug includes the weight of the "mixture" containing the illegal drug. In most cases this "mixture" theory has been used with regard to "pharmaceutical drugs" to include the weight of binders and other additives needed to press a drug into a pill (see, for example, *U.S. v. Lazarchick* (11th Cir. 1991) 924 F.2d 211, 214 [pharmaceutical drugs]; *U.S. v. Crowell* (9th Cir. 1993) 9 F.3d 1452, 1454 [dilaudid]) as well as "street drugs" to include cutters and dilutants, inactive substances commonly mixed with controlled substances to stretch profits (see *Chapman v. U.S.* (1991) 500 U.S. 453).

If the sentencing court accepted the prosecutor's argument that raw plant material was indeed a "mixture" containing DMT, the court would determine the defendant's sentence as if he or she manufactured 1 pound, or 454 grams, of DMT. Given that the guidelines equate 1 gram of DMT to 100 grams of *Cannabis*, the defendant's sentence would be the same as a person convicted of growing 45,400 grams of *Cannabis*, which is offense level 20. The punishment for this offense level is 33 to 41 months.

There is a very good argument, however, that any "mixture" that cannot be consumed should not be included in the weight. The official commentary to Section 2D1.1 of the U.S. Sentencing Guidelines (USSG) states that "mixture" does not include any "materials that must be separated from the controlled substance before the controlled substance can be used." Now, no one would sit down and eat raw *M. tenuiflora* roots or root-bark; they would extract the active principle and discard the left-over marc. Accordingly, it seems to me that in the case of a natural entheogen that is not ingested whole (*i.e.* unextracted), the correct procedure for determining a sentence under the USSG would be to calculate it based only on the controlled substance constituent. ✧

TERRA INCOGNITION



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