

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- v -

09 Cr. 1136 (WHP)

SEAN MCCARTHY,

Defendant.

- - - - - x

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**DEFENDANT SEAN MCCARTHY'S SECOND SUPPLEMENTAL SENTENCING  
MEMORANDUM ADDRESSING THE APPROPRIATE GUIDELINE**

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This Second Supplemental Sentencing Memorandum is respectfully submitted in reply to the government's arguments in Part III of its July 7, 2010, Sentencing Memorandum in the case of Defendant Sean McCarthy. This Memorandum is not exhaustive in that it does not address Mr. McCarthy's personal characteristics as they relate to 18 U.S.C. § 3553(a).

The government's brief scientific argument attempts to create a scientific dispute where none exists and does nothing to diminish Mr. McCarthy's central claim: that the scientific foundation for the MDMA Guideline currently in effect has been undermined. See Def.'s Supp. Sent. Memo

(June 30, 2010) at 5-14. First, the government does not even attempt to refute Mr. McCarthy's central point that MDMA is not, as the Commission erroneously believed in 2001, more harmful than cocaine. See *id.* at 11-14. As to the question of neurotoxicity, the government does not attempt to defend the discredited work of key Commission source Dr. George Ricaurte, only to minimize his significance in the Guideline formulation. See Gov't Sent. Memo (July 7, 2010), at 7.

In attempting to refute Mr. McCarthy's other evidence that the Commission overestimated MDMA's neurotoxicity, the government merely repeats the overdosing error of the studies on which the Commission relied - an error debunked in detail by the studies Mr. McCarthy cites. See Def.'s Supp. Sent. Memo at 10 & n. 16. The government's claim that "MDMA, at certain levels of abuse, is neurotoxic," Gov't Sent. Memo at 7 (emphasis added), glosses over the crucial question of *what* level is meaningful for study. The government points to evidence of neurotoxicity at levels exceeding 25 milligrams of MDMA per kilogram of body weight (mg/kg); the Adori paper, which uses dosing levels of 7.5 mg/kg and up;<sup>1</sup> and the seven-year-old Green paper,

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<sup>1</sup> See Adori et al., *Damage of Serotonergic Axons*, 497 J. Comp. Neurol. 251, 252 (2006) (noting the use of dosing levels of 7.5 mg/kg, 15 mg/kg and 30 mg/kg).

which merely compiles early high-dose research.<sup>2</sup> See *id.* But as more recent studies cited by Mr. McCarthy demonstrate, the assumptions about rat metabolism underlying the dosing levels of earlier studies were incorrect, and therefore the earlier studies with dosing levels such as 25 mg/kg or even 7.5 mg/kg are useless in demonstrating the effect of normal MDMA use/abuse - in either rats or humans - which occurs at levels ranging from 0.25 to 3 mg/kg. See Def.'s Supp. Sent. Memo at 10 & n. 16, and sources cited.<sup>3</sup>

Put another way: at some point, practically any substance can be toxic; the important question is how toxic the substance is at the level at which it is normally used. The Commission's task is to evaluate the true harm of the substance in the form and amount in which it is commonly consumed. The existence of hypothetical worst case scenarios based on unrealistic dosages does not meaningfully contribute to that evaluation.

Having added nothing of significance on the scientific question, the government essentially argues that the extent

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<sup>2</sup> See Green et al., *The Pharmacology and Clinical Pharmacology of 3,4-methylenedioxymethamphetamine*, 55 *Pharmacol. Rev.* 463, 467-76 (2003) (summarizing studies dating back decades).

<sup>3</sup> See, e.g., Baumann et al., *3,4-Methylenedioxymethamphetamine (MDMA) Neurotoxicity in Rats: A Reappraisal of Past and Present Findings*, 189 *Psychopharmacology (Berl.)* 407, 411-13 (2007) (noting levels of self-administered use in rats and humans and explaining why earlier studies' assumption that a higher dosage in rats was needed to approximate the effects of human use was incorrect).

of the Commission's outreach and taking of testimony in advance of its 2001 amendment should be conclusive. The government stresses that the Commission "'received literally hundreds' of submissions from a wide variety of interested parties, including 'clinicians, physicians, psychologists, academic researchers, users, defense attorneys, and other interest groups, in addition to the organizations and agencies that usually comment on proposed guidelines, such as the Department of Justice and the Federal Public and Community Defenders.'" See Gov't Sent. Memo (July 7, 2010), at 8 (quoting the Commission's MDMA Report). But when years of defendants' lives are at stake, this Court should not allow a fair process to substitute for a fair outcome. If, as Mr. McCarthy asserts and the government has failed to rebut, MDMA is far less harmful than the Commission believed, its conclusions and resulting Guideline should not be controlling simply because the Commission spoke to a lot of people and determined that MDMA use and importation was rising a decade ago.

The Supreme Court's elaboration on the notion that Guidelines should be based on "empirical data and national experience," *Kimbrough v. United States*, 552 U.S. 85, 109 (2007), reveals that these ideas are not procedural formalisms based on the taking of *some* testimony and the

reliance on *some* data, no matter how accurate or reliable. Rather, "Congress established the Commission to formulate and *constantly refine* national sentencing standards." *Id.* at 108 (emphasis added). If a hearing and public comment is all that is required to establish an empirically-based Guideline, then no "refine[ment]" would be necessary; the Commission would need only go through the motions of taking testimony once for its Guideline to be deemed "empirical." That cannot be - and in fact is not - all the Commission is charged with doing. Instead, the Commission must "refine" the Guidelines in accordance with "empirical data and national experience." As our empirical understanding about the science of MDMA evolves, see Def.'s Supp. Sent. Memo at 8-14 (documenting the more recent scientific understanding of MDMA and dosing errors identified in earlier studies), and as our national experience changes, see *id.* at 12-13 (documenting the low proportion of emergency room visits resulting from MDMA), the Guidelines should change with them. To hold otherwise would be to replace Congress's vision of Guidelines based on "empirical data and national experience" with determinations based on *any* data and *some* experience as long as the Commission held a hearing and heard from witnesses. This Court should decline the government's invitation to substitute process for substance

in the determining whether a Guideline has an "empirical basis."

Instead, based on the scientific argument in Mr. McCarthy's Supplemental Sentencing Memorandum of June 30, this Court should find that it has the discretion to vary from the MDMA Guideline and in the interest of fairness should do so. Then, beginning from a lower baseline as suggested in Mr. McCarthy's previous memorandum (either 8-14 months or 46-57 months), see Def.'s Supp. Sent. Memo at 19-21, the Court should consider Mr. McCarthy's tragic life story and extremely limited role in the offense under 18 U.S.C. § 3553(a), as documented in the Sentencing Memorandum of co-counsel and exhibits thereto, and sentence Mr. McCarthy to time served.

Respectfully submitted,

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