

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 4:08CR00053 JLH

MICHAEL CURTIS KELLY,

March 19, 2009

Little Rock, Arkansas

Defendant.

9:37 a.m.

TRANSCRIPT OF SENTENCING PROCEEDINGS  
BEFORE THE HONORABLE J. LEON HOLMES,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

On Behalf of the Government:

MR. JOHN RAY WHITE, Assistant U. S. Attorney  
United States Attorney's Office  
425 West Capitol Avenue, Suite 500  
Post Office Box 1229  
Little Rock, Arkansas 72203-1229

On Behalf of the Defendant:

MR. KENT TESTER, Attorney at Law  
230 Highway 65 North, Suite 7  
Clinton, Arkansas 72031

Defendant Present.

Proceedings reported by machine stenography and displayed  
in realtime; transcript prepared utilizing computer-aided  
transcription.

## P R O C E E D I N G S

1  
2 THE COURT: We're here this morning for sentencing in  
3 the case of United States v. Michael Curtis Kelly, Case No.  
4 4:08CR53-01. The defendant, Michael Curtis Kelly, is in the  
5 courtroom and is with his lawyer, Mr. Kent Tester, and the  
6 prosecution is represented by Assistant United States Attorney  
7 John Ray White.

8 Are the parties ready?

9 MR. WHITE: Government's ready, Your Honor.

10 MR. TESTER: We are, Your Honor.

11 THE COURT: Michael Curtis Kelly was charged in a  
12 three-count indictment on February 6, 2008. Count 1 charged him  
13 with manufacturing more than 100 marijuana plants, a violation  
14 of 21 U.S.C. 841(a)(1). Count 2 charged him with possession of  
15 a firearm during a drug-trafficking crime, a violation of 18  
16 U.S.C. 924(c)(1). Count 3 charged him with a felon in  
17 possession of a firearm, a violation of 18 U.S.C. 922(g)(1).  
18 The offenses occurred on or before March 26, 2007. The  
19 indictment also included a forfeiture allegation.

20 On October 2, 2008, Mr. Kelly appeared before the Court  
21 with Mr. Tester and, pursuant to a written plea agreement, pled  
22 guilty to Count 1 of the indictment. The remaining counts were  
23 dismissed upon motion of the government. The indictment in Case  
24 No. 4:08CR220 JMM was also dismissed upon motion of the  
25 government. A final order of forfeiture was entered on

1 January 26, 2009.

2 Mr. Kelly, if you'll come forward, please.

3 MICHAEL CURTIS KELLY, DEFENDANT, DULY SWORN

4 THE COURT: Mr. Kelly, are you satisfied with the work  
5 that Mr. Tester has done for you in this case?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: In all respects?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: If you had any issues with anything he's  
10 done or not done, this would be the time to tell me. Do you  
11 understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you know of any reason you should be  
14 allowed to withdraw your guilty plea?

15 THE DEFENDANT: I'm considering it, Your Honor. But I  
16 guess not.

17 THE COURT: Well, let's just pause a minute and just  
18 take some time. And I remember that at your plea hearing, your  
19 change of plea hearing, we talked a good bit, and there was some  
20 issue in your mind about what you wanted to do, and there was an  
21 issue in my mind about whether there was a hundred plants.

22 THE DEFENDANT: Yeah.

23 THE COURT: But eventually I was satisfied that the  
24 cuttings constituted a hundred plants, and you agreed that there  
25 were a hundred of them, and you decided to go forward and change

1 your plea, and I accepted it. Now, do you know of any reason  
2 why you should be allowed to withdraw your guilty plea?

3 THE DEFENDANT: Well, Your Honor, I don't really want  
4 to withdraw it because I admit that I was growing some pot. I'm  
5 troubled by the quantity because, botanically speaking, a  
6 cutting is a cutting. It's not a plant. But Mr. White  
7 threatened me with the end of the world if I didn't -- it just  
8 seems logical to take the plea rather than go to trial and get  
9 13 years. So, yes, I'll plead guilty to it.

10 THE COURT: So you want to continue to plead guilty,  
11 which will require treating those plants -- those cuttings as  
12 plants?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Okay. Mr. Tester, do you have any reason  
15 you think the Court should set aside his guilty plea or do you  
16 think it should stand?

17 MR. TESTER: Your Honor, I think it should stand based  
18 upon the definition of a plant and what we were able to find in  
19 research.

20 THE COURT: Mr. White, do you agree that those  
21 cuttings constitute plants?

22 MR. WHITE: Yes, Your Honor.

23 THE COURT: Then we'll go forward.

24 Mr. Kelly, what we do in sentencing is really four steps,  
25 although I don't necessarily always separate them out into four

1 steps. We do all of these things. We'll determine the  
2 guideline range for your case. I'll consider whether to depart  
3 from that range for reasons provided for in the guidelines.  
4 I'll consider whether to impose a sentence outside the  
5 guidelines. And I'll impose a sentence considering all the  
6 factors under 18 U.S.C. 3553(a).

7 And did you get to go over the presentence report with  
8 Mr. Tester?

9 THE DEFENDANT: I did.

10 THE COURT: Mr. Tester, are there any objections to  
11 the presentence report?

12 MR. TESTER: No, not in this final draft, Your Honor.

13 THE COURT: I'll adopt the presentence report, and if  
14 either side appeals my sentence, it will be released to the  
15 lawyers for the parties without further orders of the Court.

16 The base offense level is 16. As referenced in paragraph  
17 11, the defendant was in possession of a Ruger 22-caliber  
18 revolver and a Ruger 44-mag carbine rifle during a  
19 drug-trafficking crime. The defendant will receive a two-level  
20 enhancement. There's a three-level enhancement because the  
21 defendant is responsible for conduct in Docket No. 4:08CR220  
22 JMM. And that comes in under Guideline Section 3C1.3, which  
23 makes the offense level 21. A two-level reduction for  
24 acceptance of responsibility, which makes the final offense  
25 level 19.

1 Does the government move for the third point?

2 MR. WHITE: No, Your Honor.

3 THE COURT: There are no criminal history points, so  
4 there's a criminal history category of I. The statutory term of  
5 imprisonment is a minimum of five years and a maximum of 40  
6 years. Based on an offense level of 19 and a criminal history  
7 category of I, the guideline imprisonment range is 30 to 37  
8 months. However, the minimum of that range is less than the  
9 statutory minimum of 60 months. Of course, the maximum of that  
10 range is also less than the statutory minimum, 60 months. So  
11 the guideline range becomes 60 months because that's the  
12 statutory minimum. Supervised release is not less than four  
13 years. Probation is not authorized under the statute or under  
14 the guidelines. The statutory maximum fine is \$2 million.  
15 Under the guidelines, the fine range for the offense is from  
16 6,000 to \$2 million. A special assessment of \$100 is mandatory  
17 and has not been paid. The financial report indicates that  
18 Mr. Kelly would not be able to make a lump sum payment or  
19 installment payments on a fine. There are no restitution needs.

20 Are there any objections to this interpretation of the  
21 sentencing options?

22 MR. TESTER: No objection, Your Honor.

23 MR. WHITE: No, Your Honor.

24 THE COURT: Mr. Tester, I'll recognize you at this  
25 time.

1 MR. TESTER: I'm sorry?

2 THE COURT: I'll recognize you at this time to argue  
3 or do whatever you want to do for Mr. Kelly.

4 MR. TESTER: Your Honor, Mr. Kelly has prepared a  
5 statement for the Court, and I would ask that it be an unsworn  
6 allocution.

7 THE COURT: I'll permit him to make an unsworn  
8 allocution.

9 Mr. Kelly, whatever you want to tell me at this point, you  
10 can tell me.

11 THE DEFENDANT: I've written it down because I'm not  
12 too good an extemporaneous speaker. This is largely in  
13 reference to that enhancement of the three points about  
14 intimidation of a witness. It's not long.

15 THE COURT: Take your time.

16 THE DEFENDANT: Your Honor, my sentencing and your  
17 decision regarding the three-point enhancement the prosecutor  
18 wants to give me is a momentous one. It will answer the  
19 questions: Can a police informant sell drugs and be immune from  
20 prosecution? And what does a citizen do when police refuse to  
21 do their duty? I asked the police for nine months and then  
22 attempted to do what was right. Your decision is very weighty  
23 in the constitutional sense.

24 I have spent ten and a half months in jail for demanding  
25 the law be upheld. Paid police informer Daniel Watts came to my

1 house on March the 25th of 2007, and coerced me into buying  
2 marijuana from him. I did, and I paid him by check. Besides  
3 wanting money, informant Watts succeeded in planting evidence in  
4 my house. The next day, I was arrested. This was done to me  
5 over his anger and damaged pride. A young woman, Shalom Weiss,  
6 sitting in this courtroom, had broken off a relationship with  
7 him and he vowed revenge. Proof of this is all on tape. Also  
8 on tape is the informer's clear admission of his drug sales. In  
9 that tape, made two years ago, he vows to lie about it to you,  
10 Your Honor, if he is ever hauled into this court. The police  
11 and the prosecutors have always hidden this man and protected  
12 him from that fate. I then presented the confession and  
13 cancelled check to Sheriff Scott Bradley with my criminal  
14 complaint. He brushed me off. I went to prosecutor Marcus  
15 Vaden, then to drug task force agent Johnny Sowell. None of  
16 them would do their duty. They obstructed justice.

17 At this time, Van Buren County filed an amended complaint,  
18 accusing me of selling Watts the very marijuana. An incredible  
19 act of corruption. Their own recordings, which they made,  
20 proves this is a lie. Citizens picketed the courthouse over  
21 this issue. Finally, disgusted, I attempted a citizen's arrest  
22 of this drug dealer, and shortly thereafter, I myself was  
23 arrested, accused by these men of intimidation.

24 The evidence is clear, the truth obvious, sale of marijuana  
25 is illegal under federal statutes. Marijuana is a Class I

1 substance. I hereby request, sir, that you order a warrant for  
2 the arrest of the drug dealer Daniel Watts.

3 I also wish to formally complain that Mr. White has  
4 rejected very serious evidence of police corruption we have  
5 presented to him. He has, in fact, energetically defended  
6 organized crime in Van Buren County. These men up there are  
7 simply racketeers hiding behind badges. They are a disgrace to  
8 good police and a danger to our community. I call again for a  
9 federal investigation.

10 I take full responsibility for cultivating the pot plants,  
11 but considering the police misconduct, the small size of the  
12 offense, the year I have served, and assistance rendered to the  
13 government, I ask you to be lenient and wise as you sentence me.

14 Thank you.

15 THE COURT: Mr. Tester, anything else?

16 MR. TESTER: Your Honor, I believe the defendant's  
17 friend had sent down a package of information to the Court.

18 THE COURT: There's a three-ring binder and, in  
19 addition, there's a manila folder, both of which were full of  
20 information and which I have substantially read. I've looked at  
21 it all. But I got it this morning, just a few minutes before my  
22 first hearing. I had a hearing before this one. So I've looked  
23 at it all. And it corresponds to what Mr. Kelly just said now,  
24 and it elaborates on it. There's more information. But the  
25 gist of it is substantially what he just said, I think. That's

1 the way I took it.

2 Is that right, Mr. Kelly?

3 THE DEFENDANT: Yes, it is, sir. As well as the  
4 recordings that should have been in there.

5 THE COURT: There were CDs in there, that's right.

6 Mr. White, you've seen those, haven't you, sir?

7 MR. WHITE: I have seen the binder, Your Honor. I  
8 haven't read the entire thing, but I've seen it, and I don't  
9 have any objection to the Court taking notice of it and dealing  
10 with it as it considers appropriate.

11 THE COURT: Mr. Tester, anything else?

12 MR. TESTER: Your Honor, Mr. Kelly has two witnesses  
13 that he requested that I call on his behalf, which, essentially,  
14 they're consistent and congruent with the package of information  
15 that was mailed to the Court. And because I didn't know if the  
16 Court would allow me to call those witnesses in light of the  
17 statutory mandatory minimum and the quandary that we're in with  
18 the --

19 THE COURT: And here's the difficulty, and here's  
20 where we are. We're in a situation where there's a statutory  
21 minimum of five years, and I have no authority to go below that.  
22 And that is the guideline range. I have authority to go up, but  
23 I have no inclination to do that. But if there were some  
24 finding of fact -- like, for instance, in this instance, if  
25 there was an enhancement to the guideline range that was going

1 to make a difference in Mr. Kelly's sentence, then I'd have to  
2 make findings of fact, and we'd have to hear evidence, and I  
3 would hear that evidence, or if we were in a situation where you  
4 could argue for a downward departure under the guidelines. If  
5 we were dealing with the guidelines and not with a statutory  
6 minimum, then I could consider going under the guidelines, and I  
7 might need to hear testimony to determine whether that would be  
8 an appropriate thing to do. But in this instance, there's not  
9 anything I can do. I mean, it's a five-year sentence, and I  
10 don't have any discretion to go below that. And so I don't see  
11 how the evidence that you could offer would be relevant to any  
12 decision that I have to make. I'm willing to consider the  
13 information for whatever it's worth, but it's already been  
14 provided to me, and it doesn't change the sentence, which is  
15 what we're here for today. And I know that Mr. Kelly and his  
16 friends -- I've read them, and they have very earnest and  
17 strongly felt complaints about law enforcement authorities up in  
18 the county where they live. And I respect that. But there's  
19 nothing I can do about it today because it doesn't affect the  
20 sentence, unless we were to set aside the plea agreement, and  
21 Mr. Kelly's already told me he doesn't want to do that. He  
22 wants to go on with the five years. And so my hands are pretty  
23 much tied. And so I'm not going to hear any testimony because  
24 it doesn't relate to any decision that I can make today.

25 MR. TESTER: Your Honor, that's all the information

1 that we have to present here, given the state of calling the two  
2 witnesses.

3 THE COURT: Mr. White, do you have anything to say?

4 MR. WHITE: No. Thank you, Your Honor.

5 THE COURT: Well, of course, the guidelines are  
6 advisory, and I know that, and if we were dealing with the  
7 guidelines and not a statutory minimum, then I'd want to look  
8 very closely at whether or not it would be an appropriate case  
9 to depart downward. But I don't have any authority in this  
10 instance because the statute of conviction requires a minimum of  
11 60 months. And considering all the factors under the  
12 guidelines, I see no reason to go up from that. Although I  
13 would have the authority to impose a sentence up to 40 years, I  
14 don't see any reason to give him more than the minimum.

15 And so Mr. Kelly will be committed to the custody of the  
16 Bureau of Prisons for a term of 60 months. The Court recommends  
17 that he participate in nonresidential substance abuse treatment  
18 and educational and vocational programs during incarceration. A  
19 term of supervised release of four years is imposed to follow  
20 imprisonment with the following special conditions: The  
21 defendant's presentence report indicates a history of substance  
22 abuse, and the offense involved controlled substances. Pursuant  
23 to the Violent Crimes Control Act, he'll be subject to a special  
24 condition of drug testing while on supervised release, under the  
25 guidance and supervision of the Probation Office. The defendant

1 must participate, under the guidance and supervision of the  
2 probation officer, in a substance abuse treatment program, which  
3 may include testing, outpatient counseling, and residential  
4 treatment. The defendant must abstain from the use of alcohol  
5 throughout the course of treatment. The defendant must  
6 cooperate in the collection of DNA, as directed by the probation  
7 officer. No fine is imposed, as the defendant is not able and  
8 is not likely to become able to pay all or even part of a fine,  
9 even with the use of a reasonable installment schedule. A  
10 one-hundred-dollar special assessment is mandatory in this case.

11 Let me say one thing. I'm going to take Mr. Kelly's  
12 statement as an objection to the portion of the presentence  
13 report that provided for a three-level enhancement under the  
14 guidelines. But because the statutory minimum, even if I  
15 sustained his objection on that point, we'd still be at 60  
16 months, and so it wouldn't accomplish anything for me to rule on  
17 that. But that's what it would constitute if we were dealing  
18 with the guidelines and not the statutory minimum. It would  
19 substantially -- in effect, it would be an objection to that  
20 portion of the presentence report.

21 Are there any objections to the form of the sentence?

22 MR. TESTER: No, Your Honor.

23 MR. WHITE: No, Your Honor.

24 THE COURT: Mr. Kelly, is there anything about this  
25 sentence that you believe violates your plea agreement?

1           THE DEFENDANT: No, Your Honor. One just last thing  
2 while I'm here and able to speak.

3           THE COURT: Yes.

4           THE DEFENDANT: I accept your decision. I only want  
5 to know, sir, if Daniel Watts clearly broke the law, when you  
6 listen to that tape, gave him the check, will he be arrested?

7           THE COURT: Well, you know --

8           THE DEFENDANT: And how do we go through the procedure  
9 to get that accomplished?

10          THE COURT: Let me say, you're a very, very  
11 intelligent man, and you thought a lot about all of these  
12 things, and you understand that we have three branches of  
13 government. And we have a division of authority between the  
14 state authority and the federal. But in each of those three  
15 branches of government, I'm in the Judicial Branch of  
16 government, Mr. White is in the Executive Branch of government,  
17 the FBI and the Alcohol, Tobacco & Firearms, they're in the  
18 Executive Branch. The Drug Enforcement Agency, they're all in  
19 the Executive Branch. And the state level, the sheriff is in  
20 the Executive Branch. The judges are in the Judicial Branch. I  
21 don't have any authority to go tell the Executive Branch to go  
22 arrest somebody unless they come to me and ask for a warrant. I  
23 don't tell them to go out and investigate and do those things.  
24 It's not within the purview of my branch of government. We  
25 respond to the cases that are brought here when someone files a

1 lawsuit, when there's a prosecution, when there's a request for  
2 a warrant. But I don't have any authority to tell them to go do  
3 something like that. The U.S. Attorney has that authority, the  
4 Attorney General has that authority, and the local law  
5 enforcement officials have that authority. If there's some  
6 corruption, the State Police have authority to investigate it.  
7 But I don't have any authority to investigate or to initiate an  
8 investigation or to get involved on one side or another. It's  
9 our job, the Judicial Branch, to resolve the disputes brought  
10 before us.

11 THE DEFENDANT: I understand. So then -- well, we've  
12 been to the FBI several times. Others have too. Would then  
13 Christine, my fiancée back there, would she go to Mr. White, the  
14 U.S. Attorney? Something has to be done about this.

15 THE COURT: The United States Attorney's Office has  
16 the authority to investigate and prosecute crimes. I don't have  
17 the authority to investigate and prosecute crimes.

18 THE DEFENDANT: I understand.

19 THE COURT: And there's nothing I can do about that.  
20 But, yes, the U.S. Attorney has the authority to investigate and  
21 prosecute crimes, and so that would be a person, that would be  
22 within the realm of their authority, to investigate that or to  
23 ask for an investigation or to pursue it in some way.

24 THE DEFENDANT: I understand. That's what we'll do.

25 THE COURT: Is there anything else?

1 MR. TESTER: That's all we have, Your Honor.

2 THE COURT: The defendant's in custody and will remain  
3 in custody.

4 Mr. Kelly, you have the right to appeal your conviction if  
5 you believe that your guilty plea was involuntary or if there's  
6 some other fundamental defect in the proceeding that was not  
7 waived by your guilty plea. You also have a statutory right to  
8 appeal your sentence under certain circumstances, particularly  
9 if you think the sentence is contrary to law. With very few  
10 exceptions, a notice of appeal must be filed within ten days of  
11 judgment being entered in your case. If you're unable to pay  
12 the costs of appeal, you may apply for leave to appeal in forma  
13 pauperis. If you ask, the Clerk of the Court will prepare and  
14 file a notice of appeal on your behalf.

15 We're adjourned.

16 (Whereupon, the hearing concluded at 10:00 a.m.)

17 C E R T I F I C A T E

18 I, Eugenie M. Power, Official Court Reporter, do hereby  
19 certify that the foregoing is a true and correct transcript of  
20 proceedings in the above-entitled case.

21

22 /s/ Eugenie M. Power, RMR, CRR, CCR Date: April 3, 2009  
23 United States Court Reporter

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