

# Hemp in Your Suitcase Can Get You Convicted of Trafficking in Marijuana

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A hard lesson was learned after cannabis was discovered in a suitcase at the airport: the government does not have to prove cannabis is marijuana to convict you of trafficking in marijuana. A new case recently clarified that the legal burden shifts and requires the accused to produce evidence that the cannabis is *not* marijuana.

Traveling by airplane with marijuana has been all over the news since Gigi Hadid, a supermodel and television personality, was arrested and released for marijuana possession in the Cayman Islands after Customs and Border Protection searched her luggage and discovered alleged marijuana and paraphernalia earlier this month. But not all instances of cannabis in international travel result in a simple slap on the wrist – as Ms. Raquel Rivera, the Defendant in *U.S. v. Rivera*, recently learned the hard way.

Ms. Rivera’s story also provides a valuable lesson to the accused and their legal representatives. One does not need to be a lawyer to know that the prosecution must prove beyond a reasonable doubt that the defendant committed the crime. We hear it constantly on television shows, true-crime podcasts, and on the news – but it isn’t necessarily so. Ms. Rivera and her lawyer also found this out the hard way.

## Cannabis Discovered by Customs and Border Protection

The saga began when Ms. Rivera flew from Miami to Saint Thomas. Customs and Border Protection officers searched her two suitcases at the Saint Thomas airport. Ms. Rivera was evasive about who owned the suitcases and who packed them but did not persuade the government officers that they were not hers. Ultimately, a grand jury charged Ms. Rivera with

1. conspiracy to possess, with intent to distribute, less than 50 kilograms of marijuana; and
2. possession, with intent to distribute, less than 50 kilograms of marijuana.

## Distinguishing Between Hemp and Marijuana

At trial, the government’s expert testified that the cannabis discovered in Ms. Rivera’s luggage was marijuana. On cross-examination by the lawyer for the Defendant, the government’s expert stated that he did not determine the precise amount of delta-9 tetrahydrocannabinol (THC) in the cannabis. The amount of THC is critical because the 2018 Agricultural Improvement Act (aka the Farm Bill) amended the Controlled Substances

Act (CSA) to exclude hemp from the definition of marijuana. Both hemp and marijuana are the plant *Cannabis sativa* L, but hemp has a THC concentration of 0.3% or less. Following this change in law, hemp is no longer considered a controlled substance.

Unfortunately for Ms. Rivera, she and her lawyer did not introduce at trial evidence of the THC content of the cannabis in her suitcases. In fact, after the government presented its evidence, Ms. Rivera rested without presenting any evidence and instead moved for judgment of acquittal under Federal Rule of Criminal Procedure 29. Under Federal Rule of Criminal Procedure 29, a defendant is entitled to judgment of acquittal if, viewing the record in the light most favorable to the government, no rational jury could have found the defendant guilty beyond a reasonable doubt.

Ms. Rivera argued that the government failed to prove its case beyond a reasonable doubt because it did not present evidence that there was more than 0.3% THC in the seized substance. The District Court deferred ruling on the motion until after the jury returned a verdict. The jury acquitted Ms. Rivera of the conspiracy offense and convicted her of the possession offense. After the jury returned its verdict, the District Court denied Ms. Rivera's motion for judgment of acquittal.

## Shifting Burdens When Whether Cannabis is Hemp v. Marijuana Becomes a Legal Issue

Ms. Rivera appealed her conviction, and the United States Court of Appeals for the Third Circuit upheld her conviction. Why was Ms. Rivera's conviction upheld when the government did not prove that the cannabis contained more than 0.3% THC?

The answer is that the law places the burden on Ms. Rivera to introduce evidence showing that the cannabis was 0.3% or less THC.

Certain defenses to an alleged criminal act are *affirmative* defenses. For example, in murder trials in which the facts clearly show that the defendant killed the victim, the defendant often will contend that he killed the victim in self-defense. While state laws vary, generally, self-defense is an affirmative defense, which means the defendant has the burden of producing evidence of that defense. In other words, he must put on some evidence from which a jury can find self-defense. Once the defendant does so, the burden of proof returns – or shifts back – to the prosecution, which must disprove self-defense beyond a reasonable doubt.

The Appeals Court in *U.S. v. Rivera* examined the Farm Bill's amendments to the CSA and Congressional intent when enacting it. It focused on 21 U.S.C. § 885(a)(1), which provides that the government does not need to “negative any exemption or exception set forth” in the subchapter of the Controlled Substances Act that defines marijuana. Moreover, the Appeals Court found that, through § 885(a)(1), Congress placed “the burden of going forward with evidence” of “such exemption or exception” squarely on “the person claiming the benefit.”

The Appeals Court opinion does not state what the THC content of the cannabis was in the cannabis in Ms. Rivera's suitcase. It would appear that Ms. Rivera's mistake was that her lawyer introduced no evidence at trial that the cannabis was not marijuana. That is, she failed to affirmatively raise the defense that the cannabis in her suitcases was not marijuana and present evidence from which a judge or jury could conclude the cannabis was not marijuana. Of course, this may not have been an oversight by Ms. Rivera's lawyer. Indeed, if the

cannabis were marijuana, it would have been a mistake for the defense to introduce evidence of the THC content of the cannabis, proving it is marijuana. Her best option, given those facts, may have been to raise the arguments she did and rely on a rule-29 motion.

## Lessons Learned and Best Practices

For a number of reasons, it is important for all persons involved in any way with cannabis to know the THC content of cannabis you possess, sell, grow, process, or are in contact with in any way.

The key takeaway from Ms. Rivera's case – for both supermodels and regular people everywhere – is that if you are accused of trafficking in marijuana and the cannabis is not marijuana, you – the defendant, or accused – have the burden of producing evidence that the cannabis is excepted from the definition of marijuana under the Farm Bill because its THC content is 0.3% or less. Your failure to raise this distinction and provide evidence at trial can result in your waiving the issue altogether.

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