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# PROBLEMS IN COURT PRACTICE WITH DETERMINING CERTAIN ELEMENTS OF THE OFFENSES UNDER THE ARTICLE 246 AND 246a OF THE CRIMINAL CODE OF SERBIA<sup>1</sup>

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**Abstract:** Unauthorized production and trafficking of narcotic drugs is a criminal offense the Police and the Public Prosecution Office separate significant material and human resources for its prevention. This work is primarily about crime analysis, i.e. problems in collecting the evidence and difficulty in determining the elements of the offense. In this particular prosecutorial and police work in practice, a large number of problems are diagnosed. The offenses related to abuse of narcotic drugs due to imprecise law formulations often provide inadequate qualification and application of the provision of the Criminal Code favourable for the perpetrator. As we shall see, very often it is proved that they committed the criminal offense under Article 246 or its qualification into 246a as a lump term of these provisions provide relatively simple qualification of use of narcotic drugs for personal use, without any drug dealing. In practice we have a large number of cases where “drug dealers” are convicted in a short time for possession of various narcotic drugs (cocaine, heroin, amphetamines, marijuana, etc.) for “personal use”. A number of questions can be asked. Did the police and other criminal authorities use all possible ways to prove the unauthorized sale of narcotics? Is it necessary to make changes and amendments of the specified Criminal Code provisions to make them more precise? Does the number of different kinds of addicts (drug addicts) who consume more types of narcotic drugs increase? We will try to answers these questions and through examples from Court practice show the work of the police, public prosecutors and judges in detecting and proving the illicit traffic of narcotic drugs.

**Keywords:** narcotic drugs, illicit trafficking, illegal possession, criminal offense, the police, public prosecutors, court.

## INTRODUCTION

The abuse of narcotic drugs and psychotropic substances is one of the most serious global threats and all the countries of the world are interested in finding a way to stop it. The period we live in, as well as following years and decades are characterized by the process of globalization and internationalization, which carry the risk of criminal expansionism. We can see a

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<sup>1</sup>This work is the result of the research on the project: „Kriminalitet u Srbiji i instrumenti državne reakcije“, financed and realized by the Police Academy in Belgrade, cycle of scientific research in the period 2015-2019.

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large number of measures and activities taken in suppressing illegal trafficking of drugs at a regional and international level that necessarily affect the internal national legislation. Also, globalization has enabled simple and easy crossing the borders, which contributes a lot to the increase of abuse. The removal of barriers along the entire North American free trade zone and the EU made the flow of both good and bad easy. At the very beginning we can notice that globalization and internationalization on the one hand, and Criminal Code expansionism, on the other hand, are in cause-and-consequential relation.<sup>3</sup>

But we should not forget that the beginning of the use of narcotic is connected with positive effects of these substances, primarily in medicine. They were used for medical treatment, reducing pain, eliminating fatigue and similar. Their use was limited and strictly controlled. However, the development of mankind led to uncontrolled use of narcotic drugs, without medical supervision, which pointed out its harmful effects and led to a continuous increase in the abuse of narcotic drugs. "According to some data of drug use, the year 1950 was taken as the year of drug use explosion in the United States, and 1960 is the year of the enormous increase of drug abuse in the most developed countries of Europe, while 1970 marks the expansion of drug use in the former Yugoslavia."<sup>4</sup>

As a way of trying to prevent abuses in using narcotic drugs, in the second half of the 20th century a series of legal acts were adopted by the United Nations. In the period between 1961 to 1972 the following sources were adopted: the Unique Convention about narcotic drugs<sup>5</sup> from 1961, the Convention on psychotropic substances from 1971<sup>6</sup> the Protocol from 1972 of amended Unique Convention on narcotic drugs from 1961.<sup>7</sup> It was necessary to change measures specified by those international acts in order to intensify fighting against the growth of illegal traffic of narcotics and its serious consequences and to strengthen the legal basis for international cooperation. In order to make a comprehensive, efficient and operative international convention aimed directly against illicit traffic considering different aspects of this problem (especially those who haven't been treated with existing conventions for narcotic drugs and psychotropic substances), the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances<sup>8</sup> was adopted in Vienna, on the 19<sup>th</sup> of December 1988.

The negative effects of the abuse of narcotic drugs are primarily reflected in more cases of criminal offenses. Crime associated with drug abuse can be divided into primary, secondary and tertiary. Primary criminality refers to commission of criminal offenses relating to the illicit production and trafficking of drugs. Secondary criminality refers to criminal offenses committed in order to obtain narcotic drugs or money and other resources for the purchase of drugs, and offenses committed under the influence of narcotics. When it comes to offenses committed under the influence of narcotics it primarily refers to crimes which occurred as a result of consumption of narcotic drugs. However, the abuse of narcotic drugs consumption can be aimed to intentionally bring user into a condition that occurs after the use of narcotic drugs,

3 Marković, S.; „Kriminalistička i krivično-pravna analiza krivičnog dela nedozvoljene proizvodnje i stavljanja u promet opojnih droga“, Zbornik radova: „Suprotstavljanje savremenim oblicima kriminaliteta – analiza stanja, evropski standardi i mere za unapređenje“, Tom 1, Criminal-police Academy, Belgrade, 2015, page 437

4 Konstantinović, Vilić, S; Nikolić, Ristanović, V; Kostić, M; „Kriminologija“, Niš, 2009, page 397.

5 The United Nations Conference for the Adoption of a *Single Convention on narcotic drugs* met at United Nations Headquarters from 24 January to 25 March 1961.

6 The United Nations Conference for the Adoption of a Protocol on psychotropic substances met in Vienna from 11 January to 21 February 1971.

7 The Protocol was adopted on 24 March 1972 by the United Nations Conference to consider amendments to the *Single Convention on narcotic drugs*, 1961, held at Geneva from 6 to 25 March 1972.

8 Our country ratified this Convention and adopted the Law on Ratification of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (*“Sl.list SFRJ – Međunarodni ugovori”*, no.14/90)

so that the user can make a specific criminal offense in the changed state of mind. And finally, tertiary criminality is the one directly linked to international criminal organizations involved in the illegal production of narcotic drugs and their wholesale at the international level.<sup>9</sup>

Drug abuse is a problem that needs a multidisciplinary approach. It is, among other things, social-pathological phenomenon that follows historical development of mankind, and it reached alarming figures in modern society. In contemporary science (considering ways of preventing drug abuse) it is accepted that positive results can be achieved only by a complex interaction of coordinated operation of a number of social factors. In fighting against abuse of narcotic drugs, priority should be given to its prevention. Yet in modern society repression remains the primary way of trying to stop unauthorized production and sale of narcotics and in that way preventing their misuse.<sup>10</sup>

## PREVENTION AND SUPPRESSION OF ABUSES RELATED TO NARCOTICS IN OUR LEGAL SYSTEM

In 2009 the Criminal Code was changed<sup>11</sup> and the criminal act of unauthorized production, possession and trafficking of narcotics was divided into two offenses: illicit production and trafficking of narcotic drugs and illegal possession of narcotics.<sup>12</sup>

Basic form of the offense under Article 246 is done by anyone who is not authorized to produce, process, sell or offer for sale, or who purchases for resale, holds or transfers, or who mediates in sale or purchase or in any other way without authorization distributes substances or preparations that are classified as narcotic drugs. Penalty for the execution of basic form of the offense is imprisonment from three to twelve years. The perpetrator can be acquitted from sentence if he reveals whom he purchased narcotics from. That can be used as a reason for being free from the sentence.

The one who, for their personal use, illegally possess a small quantity of substances or preparations declared as narcotic drugs commits criminal offense under Article 246a. For this criminal offense sentence can be imprisonment for up to three years and defendant can be acquitted from the penalty.

The biggest problem in Court practice is the application of Article 246a in order to determine the exact meaning of “small quantities” of narcotics and “personal use” of narcotics. The legislator has not specified what „small amount“ means. Court practice still did not give a unified definition of what is considered as a small amount. In fact, in each case the Court makes a decision according to the circumstances of that case, whether the amount of found narcotic drugs, temporarily confiscated from the defendant, is considered as small amount or not. This moot issue makes the work of police and authority proceedings (Public Prosecution Office and Court) more difficult. While the analysis of judgements of High Court in Valjevo was being done, different attitudes of the Court were found. In one case 31 grams of heroin was found at the defendant and it was considered as a smaller amount intended for personal use (because it wasn't packaged in several plastic sachets, just in one, and the defendant, according to his statement, consumed up to 2 grams of heroin a day, so from his aspect it

9 Delibašić, V.; „Suzbijanje zloupotreba opojnih droga sa stanovišta krivičnog prava“, Official Gazette, Belgrade, 2014, page 34.

10 Štojanović, Z., Delić, N; „Krivično pravo-posebni deo“, Faculty of law, Belgrade, 2013, page 196.

11 “Sl.glasnik RS”, no. 72/2009.

12 See the Articles 246 and 246a of Criminal Code, “Sl.glasnik RS”, no. 85/2005, 88/2005 - revision 107/2005 - revision 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

could be considered as a small amount)<sup>13</sup>. In other case 611 grams of marijuana, found at the defendant, was also considered as a smaller amount, because the defendant cooked tea from it for his personal use and consumed 20-30 grams of marijuana (he was active sportsman for 20 years exposed to great physical effort so the tea helped him to relax)<sup>14</sup>. So in both cases judgements were given according to Article 246a by the same Court because it wasn't proven there was an intention of selling narcotics (if the intention was proved then judgement could be according to Article 246(1) of the Criminal Code).

Objects in both offenses were substances and preparations declared as narcotic. Narcotic drugs are classified into four groups: 1. central nervous system depressants with opium as the main representative, 2. stimulants, with cocaine as the most important representative, 3. hallucinogens with LSD as the most famous and 4. cannabis. In Article 112(15) of the Criminal Code an authentic interpretation is given which points out that narcotics are substances and preparations which are declared as narcotics and other psychoactive controlled substances by law or other regulations based on the law.

The list of narcotic drugs and other psychoactive controlled substances is an integral part of the Law on psychoactive controlled substances.<sup>15</sup> The minister of health defines the List, suggested by the Commission. The List contains psychoactive controlled substances according to the ratified conventions of the United Nations which regulate that specific area, as well as psychoactive controlled substances determined on a proposal given by the competent authority. The List is published in the "Official Gazette of the Republic of Serbia".<sup>16</sup> Psychoactive controlled substances from the List are classified in seven lists (from 1 to 7), according to the ratified conventions of the United Nations.<sup>17</sup> Narcotic drug is any substance of biological or synthetic origin, from the List, in accordance with the Unified Convention on narcotic drugs ("Official Gazette of SFRJ" no. 2/64), or a substance that primarily affects on the central nervous system by reducing pain, causing drowsiness or alertness, hallucinations, irregular motor functions, as well as other pathological or functional changes in central nervous system.<sup>18</sup> According to the Law on psychoactive controlled substances, Article 112(15), narcotic drugs also include other psychoactive controlled substance such as: a) psychotropic substances, involving any substance of biological or synthetic origin from the List, in accordance with the Convention on psychotropic substances, meaning substances that primarily affects the central nervous system and brain function, and changes the perception, mood, consciousness and behavior, b) the products of biological origin that have a psychoactive effect; and c) other psychoactive controlled substance.

However, before changing Criminal Code from 2012<sup>19</sup>, the authentic interpretation of narcotics, under Article 112 of the Code, made huge problems in Court practice. Criminal Code as narcotic drugs considers substances and preparations declared as narcotics by law and other regulations based on the law. Therefore, if someone was illegally producing and distributing psychotropic substances it sometimes happened that Court acquitted the accused because of the inadequate interpretation of Article 112 of Criminal Code. Defendant M.B., previously convicted twice for illegal possession of narcotic drugs (2008 and 2011) to suspended sentences, was acquitted of the charges by the Higher Court in Valjevo case no. 30/12, from 30/05/2012. High Public Prosecutor's Office in Valjevo issued an indictment against

13 Judgement of the High Court in Valjevo, *K.no.92/12, on 28/03/2013.*

14 Judgement of the High Court in Valjevo, *K.no. 39/12, on 27/05/ 2012., and of the Court of Appeal in Belgrade kž 1 4493/2013., on 14/11/ 2013.*

15 "Sl.glasnik RS", no. 99/2010

16 *Ibid.*, Article 8

17 *Ibid.*, Article 10

18 *Ibid.*, Article 3 (1) (1)

19 „*Zakon o izmenama i dopunama Krivičnog zakonika*“, "Službeni Glasnik RS", 121/2012, on 24/12/2012

M.B. for the crime of illegal drug trade in the period from the end of July 2011 till 05/08/2011. The police searched M.B.'s apartment and other premises and found 37.33 grams of psychotropic substances "amphetamine". M.B. was in custody (from 05/08/2011 to 30/05/2012) until he was acquitted by the Court. In Court proceedings, after the main hearing was over, the Court made a decision that the defendant purchased and sold "amphetamine" for obtaining necessary funds for further procurement of the psychotropic substances for personal use and further selling. The Court ordered the expert witness, specialist in clinical pharmacology, to give an opinion on this matter. In his report expert witness gave an opinion that "amphetamine" is psychotropic substances with psycho stimulating effect with almost no difference compared to "cocaine" as a narcotic drug. The report of expert witness was accepted as professional and given according to the rules of science and profession, and the same was included as evidence. However, based on the evidence in this case and according to the following acts:

- The Law on psychoactive controlled substances (which distinguishes narcotic drugs and psychotropic substances),
- The Decision on the determination of narcotic drugs and psychotropic substances<sup>20</sup> issued by the Ministry of Health (Decision classifies "amphetamine" as psychotropic substances not as narcotic drugs),
- The Convention on psychotropic substances<sup>21</sup> ("amphetamine" classified as psychotropic substances<sup>22</sup>)
- The Criminal Code<sup>23</sup> (object acts Article 246 is a substance or preparation proclaimed a narcotic drug)
- the Court acquitted the accused of charges, based on the Article 355(1) of the Criminal Code.

On 8/11/2012, considering the appeal of High Public Prosecutor's Office from Valjevo, the Court of Appeal in Belgrade rendered the judgement Kž1 4120/12, changing with it the first-instance the judgement of the Higher Court in Valjevo, and found the defendant M. B. guilty. According to the Court of Appeal M.B. "in the period from late July 2011 to 05/08/2011, in Valjevo, M.B. was capable to completely understand and control his actions and was aware that his actions were not allowed. For his personal use and further selling M.B., unauthorized, purchased and held "amphetamine" which is declared as narcotic drugs according to the Law on psychoactive controlled substances ("Official Gazette of the Republic of Serbia", no. 99/2010) and the Convention on psychotropic substances, "Official Gazette of SFRJ", no. 40/73). M.B., in Belgrade, bought 60 grams of narcotic drugs, for 150 euros, from his acquaintance for the propose of further selling of the narcotic in Valjevo and his personal use. On 05/08/2011 the authorized police officers found and confiscated 33,7 grams (quantity remained from 60grams) which M.B. held unauthorized in his apartment. Police officers made an official report." The Court of Appeal sentenced him to imprisonment of three (3) years.

20 "Sl.glasnik RS", no. 24/2005, on 15/03/2005., Remark: ceased to be valid when new regulations were adopted „Pravilnik o utvrđivanju Spiska psihoaktivnih kontrolisanih supstanci“, "Sl.glasnik RS", no. 28/2013 on 26/03/2013., replaced with new one "Sl.glasnik RS", no. 126/2014, on 19/11/ 2014., replaced with new one "Sl.glasnik RS", no. 27/2015, on 18/03/2015., replaced with new and still valid „Pravilnik o utvrđivanju Spiska psihoaktivnih kontrolisanih supstanci“, „Sl.glasnik RS“ no.111/2015,on 29/12/2015. 21 "Konvencija o psihotropnim supstancama", "Službeni list SFRJ", no.40/73, SFRJ ratified this Convention on 15/10/1973.

22 See: *Ibid.*, Article 1. table II. Article 1. of this Convention „psychotropic substance“ refers to any substance, natural or synthetics, or any natural product from the table I, II, III, IV, and AMPHETAMINE is classified in table II.

23 „Krivični zakonik Srbije“, „Sl.glasnik RS“, no. 85/2005, 88/2005 - revision, 107/2005 - revision., 72/2009, 111/2009.

The Court of Appeal explained in judgement that its decision was based on the Article 1(1)(j) of The Unique Convention on narcotic drugs from 1961 (which our country ratified in 1978), the Convention on psychotropic substances from 1971 (our country ratified in 1973), the United Nations Convention against illicit trafficking of narcotic drugs and psychotropic substances (our country ratified in 1990) and the provisions of the Law on psychoactive controlled substances, which clearly point that production of both narcotic drugs and psychotropic substances is prohibited and punishable and both are treated by the same regulations for that kind of offenses. As stated in the explanation “the fact that provision of Article 246 of Criminal Code doesn’t explicitly indicate that anyone who produces psychotropic substances without authorization is making the same offense as the one who produces and distributes narcotic drugs, cannot have influence on the fact the criminal act exists and cannot support the attitude that the person involved in unauthorized production of psychotropic substances is not committing criminal offense according to Article 246 of Criminal Code.” The decision Court passed was also based on the fact that provision of Article 16 and 194 of Constitution of Republic of Serbia strictly indicates that all the laws and acts in the Republic of Serbia must be in compliance with the Constitution and also that all ratified international treaties and generally accepted rules of the international law represent constitutional part of the legal order of Republic of Serbia. Court also concluded that Criminal Code, as act that regulates offenses, in this case, is not inconsistent with ratified Conventions.

It should be pointed out that this attitude was taken by one council of the Court of Appeal, and that it was legally possible to confirm first instance acquittal judgement (in our opinion with proper interpretation of Criminal Code). Although the ratified international treaties are part of the legal order of the Republic of Serbia, they are not easily applicable for many reasons. Therefore it was necessary to change provision on Article 112 of the Criminal Code.

The Law on Amendments to the Criminal Code in 2009 presented new provisions (Article 57(2)) that punishment for certain offenses, including illegal production and trafficking of narcotic drugs, cannot be reduced (Article 246 (1) and (3)). That way, the reduction of punishment ceased to be a general institute in our Criminal Code and started to apply in some (still very small number) offenses.<sup>24</sup> That way, the legislator primarily intended to limit possibilities the Court had in reducing punishments for some serious offenses. However, the professional public is very critical of this legal solution. The question is how to defend a solution which excludes the application of reducing the sentence in listed crimes on legal bases (which equates sentence for attempted and committed offense and does not consider significantly reduced mental responsibility etc.)<sup>25</sup>.

Also the defendants with issued indictment they committed the above offenses are often young people with no previous convictions, whose personal and other circumstances suggest that in the absence of prohibition in Article 57(2) of Criminal Code, prison sentences would be less than legal minimum (which are often inappropriately high) and in such cases penalties imposed with absence of the prohibition of migration would be more adequate than sentences of prison imposed in accordance with the prohibition. From the perspective of special prevention, in order to prevent the return, especially for young, first time convicted, the length of stay in prison could affect their future behavior. For example practical application of Article 246 of Criminal Code made a lot of problems when it comes to small quantities of narcotic drugs or soft drugs because it is rated that the sentence of three years imprisonment for possession of single joint with intention of selling it is too high.<sup>26</sup>

24 Delić, N.; „Zabrana (isključenje) ublažavanja kazne u određenim slučajevima“, Crimen, no. 2, Faculty of law in Belgrade and Institute of comparative law in Belgrade, 2010, page 238.

25 Stojanović, Z.; „Krivično pravo-opšti deo“, Belgrade, 2013, page 325.

26 Kolarić, D.; „Krivičnopravni instrumenti državne reakcije na kriminalitet i predstojeće izmene u oblasti krivičnih sankcija“, „Optuženje i drugi krivično pravni instrumenti državne reakcije na kriminalitete“, LIV

Is that really so? To answer this question we have to “take a look” in Court practice. First we have to know what evidence need to be collected so that Public Prosecutor’s Office could prove intention for unauthorized sale of narcotic drugs, because the illegal possession represents quite another – offense of minor significance. The existence (or not) of intention of selling makes a significant difference between the basic offense 246(1) and the offense 246a of the Criminal Code of the Republic of Serbia. The possession of one joint is not a criminal offense under Article 246(1), unless the joint is held with intention of selling. We could agree that in such case (although with minimal possibility of happening in the Court practice) penalty of three years imprisonment would be too high. Even if qualification under Article 246(1) existed, if that person (without previous criminal history) revealed from whom the joint was bought, that person could be (in Court practice would be) acquitted from punishment under Article 246(5), of the Criminal Code of Republic of Serbia.<sup>27</sup>

Considering the opinions in criminal legal doctrine, we advocate that the institute of mitigating penalties in some form should exist in the Criminal Code. Why? We will point out one observation interesting for the police. The number of cases where, after first selling, unauthorized seller of narcotic drugs, even the „soft“ ones, was arrested and criminal proceeding against him was initiated, can be measured in permillage (maybe even that can be given as a hypothetical example). Number of “drug dealers” who sold huge amounts of drugs and were convicted with condition sentence or a minimum sentence is large. Therefore, as a compromise solution „*de lege ferenda*“ it should be considered to ban the Court to mitigate penalties for certain serious crimes that won’t be randomly selected. After well-conducted analysis, primarily of Court practice (for all serious crimes) in our opinion new changings of the Criminal Code should be done in a way to give such solutions which would cause less controversy than present. The prohibition of Court’s mitigating of sentences is a better way of directing Court practice towards more moderate use of mitigation of sentences.<sup>28</sup>

## PENALTIES POLICY OF THE HIGHER COURT IN VALJEVO FOR THE CRIME OF “ILLICIT PRODUCTION AND TRAFFICKING OF NARCOTIC DRUGS”

In the table below we can see penalties policy of the Higher Court in Valjevo in the period between 2010 and 2014 for the crime of illicit production and trafficking of narcotic drugs according to the Article 246 (1) and (3) of Criminal Code.<sup>29</sup>

	Indictment	Suspects	Final judgements	Convicted	Penalties up to 3 years and suspended ones	Penalties longer than 3 years	Acquitted	Acquitted + dismissed charges	Corrective measures
246(1)	64	92	39	56	10 + 1	36	3	2+1	3
246(3)	5	11	2	2	-----	-----	2	-----	---
246(5)	----	----	3	3	-----	-----	3	-----	---
246a	----	----	13	13	10 + 3	-----	-----	-----	---
In total:	69	103	57	74	21 + 4	36	5	3	3

Conference of the Serbian Association for criminal law theory and practice, Zlatibor, 2014, page 502.

27 Marković, S.; „*Zloupotreba opojnih droga i institut (zabrane) ublažavanja kazne u praksi Višeg suda u Valjevu*“, Zbornik: „*Suđenje u razumnom roku i drugi krivičnopravni instrumenti adekvatnosti državne reakcije na kriminalitet*“, Zlatibor-Beograd, 2015, page 215

28 *Ibid.*, page 229.

29 Note: The table refers to the issued indictment and final judgements in the period 2010-2014.

By analyzing data from the table we can conclude that the most of convicted for the crime according to Article 246 got the sentence of imprisonment between the special legal minimum and maximum (58 finally convicted to 36). Five people were found guilty and acquitted from the penalty, of which three in accordance with Article 246(5), and two in accordance with Article 31 of the Criminal Code. Charges were dismissed against one person and two persons were finally acquitted of charges. Three persons committed offenses as younger adults so they were sentenced to corrective measures. It is interesting to analyze judgements of eleven persons who were sentenced under the special legal minimum. How was that possible when, for this kind of offense, there is a prohibition of mitigation sentence below the legal minimum?

We can see from the table that in the period between 2010 and 2014 sixty four indictments were issued because of reasonable doubt that ninety two persons committed an offense under Article 246(1), and the Higher Court in Valjevo found only thirteen (13) of defendants guilty for having committed an offense under the Article 246a. If we consider there is a large number of convictions for this crime which indictment, given by the Public Prosecutor, were overqualified, even 20% or 1/5, question can be asked whether Public Prosecutor makes wrong decisions when issuing indictment or Court avoids the application of Article 57(2), of the Criminal Code, avoiding that way legal provision on prohibiting the mitigation especially minimum punishments?

As it was expected, most of the defendants had been convicted for criminal offense between legal minimum and maximum, according to Article 246(1). Thirty six of fifty six finally convicted, were sentenced to imprisonment for more than three (3) years. That was certainly helped by the provision of the Criminal Code that prohibits mitigation of sentence.

In the following part of this work we will analyze and compare judgements of persons convicted for offenses related to abuse of narcotic drugs in various criminal sanctions and prison sentences of different length, and we will try to explain the reasons for this, keeping in mind that we analyze similar charges and different judgments which questions the legal security of citizens.

## DETERMINATION OF THE ELEMENTS OF THE OFFENSES UNDER THE ARTICLE 246 AND 246A -JUDICIAL PRACTICE OF THE HIGHER COURT IN VALJEVO-

First, we'll analyze eight judgments in the offenses related to narcotic drugs to point out the attitude of the Court in questioning what amount of narcotics is considered to be a small amount and why there are no elements of criminal offenses under the Article 246 of the Criminal Code. We will then analyze the following seven judgments in which Court takes the opposite standpoint, and for a certain amount of narcotic drug the offense is related to, indicates that it's not a small amount and there is an intention of selling.

**Example 1:** By the indictment of High Public Prosecution's Office in Valjevo Kt. no. 137/12, on 04/06/2013, AA was charged for possession of 12gr of narcotic drug "marijuana". AA bought the drug on 28/11/2012 from an unknown person. The part of that quantity he used for his own purposes and the part of it he sold to BB for 500 RSD on 29/11/2012. He measured the remaining amount (6,36gr) and packed it in eleven different packages weighing between 0.38 to 0,76gr for further sale. All of it was found in his pocket and confiscated from the police officers (also on 29/11/2012) when they found and searched him in one cafe in Valjevo. AA was convicted for committing an offense under the Article 246(1) of the Criminal Code. On 03/03/2014 judgement K. no.5/14 was rendered and the defendant AA was convict-

ed to a single sentence of imprisonment of ten months for criminal offense under Article 246 altogether with offense according to Article 247(2). The sentence will be executed in a way AA may not leave the premises he lives in, except in cases defined by the law regulating the execution of criminal sanctions (hereinafter: "house arrest"). The Court accepted the defense of the accused that he hadn't sold narcotic drugs to BB, but had given him about 1 gram so that he could enjoy in it. The explanation of this judgment had just one sentence: "After the judgment was published the parties waived their right to appeal and did not request a written copy of the judgment, so this judgment in accordance with Article 428(1) of the Criminal procedure code does not contain an explanation."

**Example 2:** By the indictment of High Public Prosecution's Office in Valjevo Kt. no. 31/12, on 09/05/2012, PP was charged for committing an offense under Article 246(1) and (2) of Criminal Code. The police found 357.55 grams of narcotic drug marijuana at the same person, produced from the seventeen plants of Indian cannabis trees, PP was breeding in his household in village Miličinca, Municipality of Valjevo. The police also found five plastic sachets of total net weight 253.72 grams of narcotic drug marijuana which according to his statement he had bought from an unknown person in Novi Sad. At the main hearing the defendant claimed that he had used found marijuana for himself (611 grams ???) and had consumed 20-30 grams of the same for cooking the tea, which he consumed during the day. According to the judgement of the High Court in Valjevo K.no.39/121 on 27/05/2013 PP was convicted for criminal offense under Article 246(2) of the Criminal Code altogether with the criminal offense of unauthorized possession of narcotic drugs, Article 246a of the Criminal Code, to a sentence of imprisonment of one year and three months.

It was stated in the judgement that High Public Prosecution's Office didn't submit to the Court or provide any evidence that the defendant had intended to sell narcotic drug that was taken away from him. In any criminal offense the intention, including the intention of selling narcotic drugs is a legal concept that cannot be assumed, it must be unambiguously proven in Court proceeding. The Court gave an opinion if the intention was assumed the presumption of innocence of the suspect would be breached and that would violate one of the fundamental principles on which modern criminal proceedings are based. In its opinion the Court also added data obtained from the proceedings that defendant used a 20-30 grams of marijuana for making tea, and considering the long-standing dependence of PP the amount of marijuana that was found in his possession could have been used for his own needs.

Both parties appealed on the first instance judgement. The appeal of the High Public Prosecution's Office was rejected, and the appeal of the defense attorney was partially adopted. On 14/11/2013, case no. Kž 1 4493/2013, the Court of Appeal in Belgrade changed the first instance judgement and PP was convicted for criminal offenses 246(2) altogether with 246a and sentenced to prison for eight months.

**Example 3:** By the indictment of High Public Prosecutor's Office in Valjevo Kt.no. 122/11, on 02/02/2012, LL was charged for committing an offense under Article 246(1) of the Criminal Code. On 28/11/2011, police searched the LL's apartment and found thirty three plastic small packages of marijuana and electronic scales for precise measurement. The total weight of all packages was 27.98 grams. The defendant was charged for the criminal offense (so it was written in the indictment) because during the investigation it was indisputably established that the defendant had bought 30 grams of the narcotic drug "marijuana" in Belgrade three days before his apartment was searched. He brought it to Valjevo by train. Then he divided it using electrical scales for precise measurement to thirty three small packages and hid it under the mattress in his bed. Altogether this indicates the intention of resale. At the main hearing the defendant stated that he had bought 30 grams of marijuana in Belgrade for his own use and when he arrived in Valjevo, he used electronic scales to divide the quantity he

had bought into thirty three small packages, which he placed under the mattress of his bed to hide them from his family. The Court gave an explanation in the judgement K. no. 10/12 from 02/11/2012 in which it stated that the amount found at LL was small and there were no elements of crime according to Article 246(1) of the Criminal Code (intention of selling was not proven), but there were some according to Article 246a. All the parties from the proceeding made an appeal against the judgement but Court of Appeal in Belgrade rejected them and confirmed the first instance judgement (Kž1 6989/12 from 28/01/2013)

**Example 4:** By the indictment of High Public Prosecution's Office in Valjevo Kt.no.199/09, on 18/02/2010, ĐĐ was charged for committing a criminal offense under the Article 246(1) of Criminal Code. In mid-May in 2009 the defendant bought 20 grams of marijuana in Belgrade for the amount of 5,000.00 RSD and 10 grams of narcotic drug *speed* for the amount of 6,000.00 RSD and brought drugs to Valjevo. After that, according to his statement, he gave 5 grams of marijuana to XX for the amount of 1750,00 RSD. XX gave him 1500,00 RSD and owed him 250,00 RSD more. ĐĐ claimed that he had not sold the drug but had bought it in advance for XX. The police first found narcotic drugs at XX and he told the police that he had bought it from ĐĐ. Afterwards the police searched ĐĐ's house and found certain amount of narcotic drug. On 11/08/2010, judgement K. no.114/10, Court convicted ĐĐ with suspended sentence for committing crime under the Article 247(1) of the Criminal Code, altogether with criminal offense of illegal possession of narcotics from Article 246a.

In judgement's explanation, the Court indicated (considering already established facts) that defendant had not sold narcotic drug marijuana, but had purchased it and had used for its own needs and the part of narcotic drugs, according to previous agreement, he had purchased for the witness XX and gave it him. The Court stated that allegations of the prosecution that ĐĐ was selling narcotic drugs marijuana and amphetamine have not been proved. *It is interesting that although the explanation given in the judgement had a lot of deficiencies in explaining of why the elements of the offense under the Article 246(1) of the Criminal Code were not fulfilled, High Public Prosecutor's Office as well as the other party in proceeding waived the right to appeal, so the judgement has become final the moment when pronounced.*

**Example 5:** By the indictment of High Public Prosecution's Office in Valjevo Kt. no. 56/13, on 05/08/2013, VV was charged for committing criminal offense according to the Article 246(1) of the Criminal Code. VV was convicted three times for criminal offenses related to narcotic drugs, including conviction under Article 246(1) (three years of imprisonment) and he had just served his last sentence when he got arrested in this case. On 09/06/2013 police officers found and confiscated from VV 8.45 grams of narcotic drugs amphetamine packed in two bags which contained thirteen small sachets of that drug. The search was conducted at the time when VV took the narcotic drugs from the place where he had hidden it, under a bench in a public place, near the basketball Court in Valjevo, and when he tried to sit on the motorcycle which was assumed to be used for distribution and selling of narcotic. When he saw the police he threw away the drugs and at first denied it was his but when the police found narcotics he admitted it was his (narcotic drug was secured and exempted during the investigation due to taking of DNA sample).

By judgement K.no. 46/13 from 26/09/2013 VV was convicted for a criminal offense according to the Article 246a and sentenced to one year of imprisonment. The Court found that the defendant was consuming narcotic drugs, and when rendering the judgement Court indicated that 8.45gr of amphetamines could be considered as a small amount from defendant's point of view. Even the fact that VV measured and packed narcotic drugs in thirteen small plastic sachets as well as the fact of his previous convictions for unauthorized sale of narcotic drugs, was not enough for Court to convict the defendant for committing the criminal offense under Article 246(1) of the Criminal Code. High Public Prosecutor appealed to the

judgement, but the The Court of Appeal in Belgrade confirmed the same. (KZ1 no.6660/13 from 25/12/2013).

**Example 6:** By the Indictment of the High Public Prosecution's Office in Valjevo Kt. no.116/12, on 29/11/2012, MM was charged for committing the criminal offense under Article 246(1) of the Criminal Code. On 19/10/2012 the defendant bought 31gr of narcotic drug heroin in Belgrade, and put it in his underwear to transfer it. On his way back to Valjevo, the police searched his vehicle and found and confiscated 30.93 grams of narcotic drug heroin. With the judgement K.no. 92/12 from 28/03/2013 the Court convicted MM for the criminal offense under Article 246a and pronounced him a suspended sentence (it means sentence of ten months shall not be executed if within three years after the final judgement MM does not commit another offense). When rendering the judgement the Court indicated that 30.93 gram of narcotic drug heroin found in MM's vehicle represented a smaller amount intended for personal use (because it was not packed in more plastic sachets but just one and the defendant stated that he had consumed up to 2 grams of heroin daily so according to his subjective aspects that could be considered as a smaller amount). The High Public Prosecutor's Office appealed on the first instance judgement but the Court of Appeal confirmed it (KZ1 2821/13 on 27/05/2013).

**Example 7:** By the Indictment of High Public Prosecution's Office in Valjevo Kt. no. 71/11, on 13/12/2011, CC was convicted for committing the criminal offense under Article 246(1) of the Criminal Code. During the search of CC's house net weight of 15.82 grams of narcotic drug amphetamines was found packed into three large and seven small plastic packages. By the indictment the defendant was charged for this criminal offense considering the found quantity, way of packing and the fact that defendant does not have permanent employment and source of income. By the judgement of the Higher Court in Valjevo K.no.76/12, on 09/11/2012, CC was sentenced to "house arrest" of 10 months for committing a criminal offense under Article 246a. In his defense CC stated that two weeks before his arrest he bought 25 grams of narcotics in Belgrade and used it for his own purposes.

Explaining the judgement, the Court pointed out that it was a case of smaller quantity of narcotic drugs in accordance with Article 246a of the Criminal Code, keeping in mind the fact that defendant has been a longtime consumer of psychotropic substance amphetamine and that he was on the treatment of drug addiction since 2009 and didn't stop consuming amphetamine during the treatment period and he purchased the same in Belgrade for two to three month's needs. Due to the previously stated, the amount that was found was in proportion to his needs for the period of how often he purchased the substance. Both parties appealed and the Court of Appeal in Belgrade, by judgement KŽ1-6988/2012, on 27/06/2013, confirmed the first instance judgement.

**Example 8:** By the Indictment of High Public Prosecution's Office in Valjevo Kt.no. 16/12, on 9/04/2012, SS, twice finally convicted for criminal offenses associated with unauthorized possession of narcotics (245(3) of Criminal Code), was charged for committing the criminal offense under Article 246(1) of the Criminal Code. On 22/02/2012 police officers searched the defendant when he was leaving his vehicle in front of his home in Valjevo. SS had just returned from Belgrade where he bought 10 grams of heroin from an unknown person. Heroin was packed in two plastic bags which he had hid in his sock during the transport. SS stated that he was going to Belgrade once a week to purchase the narcotic drugs for personal use. Narcotic drug that was found was temporarily revoked.

By the judgement of the Higher Court in Valjevo K.no. 25/12, on 13/06/2012, SS was convicted for committing the criminal offense according to 246a to imprisonment of six months. It was stated in the explanation of the judgement that intention of selling was not proven and that quantity of ten grams of heroin could be considered a small amount because the defen-

dant, according to his statement, used between 1 gram and 1.5 grams per day. According to the Court, it didn't make sense to go every day from Valjevo to Belgrade to buy daily necessities of heroin, when there were financial possibilities for purchasing necessities for the period of seven to ten days.

All participants of the proceeding appealed against the judgement. The public prosecutor asked for conviction according to Article 246(1), stating that the defense was focused on the avoidance of responsibility for committing a criminal offense and that frequent purchases of heroin (weekly) in an amount of 10 grams and the way how transport from Beograd to Valjevo was done indicated that purchase was in the purpose of further sale. By judgement, KŽ1-4119/2012, the Court of Appeal in Belgrade denied public prosecutor's appeal and partially accepted the one from defense counsel and reduced the sentence to five months of imprisonment.

**Example 9:** By the judgement of the Higher Court in Valjevo K.no.186/10, on 23/02/2011, the defendant A.V. (previously convicted for possession of narcotic drugs to suspended sentence) was found guilty because he was illegally producing plant Indian cannabis in the period from April to 17/09/2010 in the village M., Municipality M. In April A.V. planted approximately ten seeds of the plant in the backyard of his family house. From the seeds A.V. grew more stalks of Indian cannabis which he cut in September, picked flowers, leaves and twigs, dried all and produced 1683.12 grams of narcotic drug marijuana. He kept the drug in the bedroom on the upper floor, in the bath and at the attic of the house. On 17/10/2010 the authorized police officers, while searching the house, found and confiscated the drug (with official report made) as well as the three more stalks of the plant which still were in the phase of growth. A.V. was convicted for criminal offence under Article 246(1) of the Criminal Code, to imprisonment of three (3) years and six (6) months. In this case question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use, as A.V. defended himself during the trial. According to the Court, amount of narcotics that was found was not only sufficient for several months of use but for several years, so the defense of A.V. could not have been accepted. According to the Court **“small amount of drug is a quantity of one to two doses that can be used. Everything more than that cannot represent smaller amount, because drug addicts always think of obtaining just dose they need at that moment (maybe one more) and while under the influence of drug they do not think about new one.”** After defense counsel appealed to the judgement, Court of Appeal in Belgrade has confirmed the same.

**Example 10:** By the the judgement of the Higher Court in Valjevo K.no. 46/11, on 26/01/2011, the accused O.J. was found guilty because in V., on 18/03/2011, authorized police officers searched his parents apartment and found dried parts of plant Indian cannabis. O.J. kept marijuana unauthorised for his personal use and further selling and he had 499.82 grams in one bag, 1.88 grams packed in a metal box and 0.57 grams in a plastic bag. Police confiscated all of it. O.J. was convicted for criminal offense under the Article 246(1) of the Criminal Code, to imprisonment of three (3) years. In this case the question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. The Court stated in the explanation of the judgement that “considering larger quantity of narcotic drugs was found, that defendant certainly didn't need for personal use because he wasn't using narcotics constantly, it can be concluded there was an intension of selling. The defendant didn't have permanent income, worked from time to time, and how his father-witness M. stated he was supporting all the family with his pension of 15,000 RSD. It was obvious that the defendant bought narcotic drug without authorization on an unknown day and kept it hidden in his room and his backpack, for the purpose of sale.” The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement.

**Example 11:** By the judgement of the Higher Court in Valjevo, K.no.197/10, on 10/03/2011, defendant L.N. (previously finally charged for robbery, aggravated theft and violent behavior) was found guilty because on 10/11/2010, completely in control of his actions, aware of the fact what he intended to do was prohibited, but still wanted to perform it, he bought 50 grams of “marijuana”, in the city B. for 200 euros, for the propose of his personal use and further unauthorized selling on the territory of municipality LJ. After he had purchased the narcotic he measured it and packed it in small plastic bags with the intention of illegal selling to narcotic addicts and for his own use. He kept it in his apartment until 07/11/2010 when the authorized police officers searched the apartment and found four sachets of marijuana in his clothes and one bag with forty small packages of the same drug in the courtyard (which L.N. had thrown out of the window). All the narcotics, total weight of 34.85 grams, were confiscated and official report was made. He was convicted according to Article 246(1) of Criminal Code, to imprisonment of 3 (three) years. In this case question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. Explaining the judgement, the Court stated: “It doesn’t make sense that defendant who is unemployed and supported by his parents purchased for his own use large amount of marijuana for period of two months, that he paid 200 euros, and in his own testimony he declared he used two to three (sometimes even less) small packages of marijuana daily, which he mixed with tobacco and then smoked.”

**Example 12:** By the judgement of the Higher Court in Valjevo, K.no.14/10, on 13/07/2010, the defendant V.Đ. was found guilty because of the unauthorized possession of dried parts of the plant cannabis, known as marijuana, packed in six small plastic bags and one plastic bag, total amount of 57.43 grams, he kept in his parents’ apartment. On 31/10/2009, in V., authorized police officers searched the apartment where V.Đ. was in a state of significantly reduced mental capacity, as effect of drug use, and during the search he voluntarily surrendered the narcotics to police officers who confiscated the drug and made an official report about it. V.Đ. purchased narcotic drugs on the territory O., from the person he knew, for the purpose of unauthorized selling and then sold the same on the territory V. He was convicted according to Article 246(1) of Criminal Code, to the imprisonment of three (3) years. In this case the question can be asked whether the amount of narcotic drug could have been considered as small one and for the personal use, as A.V. defended himself during the trial. Explaining the judgement, the Court concluded that the amount of found narcotics was large, even though the light narcotics were involved. Also, from the way it was packed (in several small sachets and one large) it can be concluded the defendant had the intention of selling narcotic drugs, so although the defense of the accused stated that he packed the narcotics that way in order to control himself in drug consumption, the Court found that illogical considering the fact that total amount of the drug was available to V.Đ. all the time, and the Court didn’t find how packing of narcotics into smaller bags could help the defendant to control himself in using the drug. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement.

**Example 13:** By the judgement of the Higher Court in Valjevo G.no.63/12, on 25/10/2012, the defendant S.M. (previously finally convicted for criminal offenses related to narcotic drugs) was found guilty because on 10/06/2012 he bought 5.55 grams of “heroin” for 8000 RSD, from the person he knew, for his personal use and further unauthorized selling. Due to prolonged use of narcotic drugs his consciousness was significantly reduced, but he was aware of the fact what he intended to do was prohibited and he still performed it. He measured the drug he purchased and packed it in twenty two plastic sachets in order to do unauthorized selling to drug users and for his personal use. He kept the drugs in his apartment, one sachet in the pocket of his shorts and twenty one sachets in bottle of glass in the fridge in the kitchen, until the 11/06/2012 when the drug was found and confiscated from authorized police

officers. He was convicted according to Article 246 (1) of Criminal Code, to imprisonment of 3 (three) years. In this case the question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. In its judgement the Court explained that “one or two doses of narcotic drugs can be considered as a small amount, a person can enjoy, and everything more than that can’t be treated as smaller amount of drugs. That’s because drug users always think of buying a new dose in time they need it and want to use it, sometimes maybe of buying one dose more, and while drugged they don’t think of getting a new one“. The Court also pointed out that twenty-two welded plastic sachets were found at defendant, which contained a total of 5.55 grams of heroin, or less than a quarter of a gram of narcotic drugs per sachet.” The Court did not accept the defense of the accused that he measured and packed the drugs for easier use as illogical, because the long-term narcotic drug addict must have the experience to take his consumption dose without previous measurement. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement.

**Example 14:** By the judgement of the Higher Court in Valjevo K.no.17/12, on 28/09/2012, the accused V.M. was found guilty because he had kept, for use and sale in the city V., 197.52 grams of dried parts of the plant cannabis - marijuana without authorization in several sachets and foil and 14.79 grams of “amphetamine”, in a rented apartment in V. On 01/04/2010 authorized police officers, during the search of the apartment confiscated the narcotic drugs. He was convicted according to Article 246(1) of Criminal Code, to imprisonment of 3 (three) years. In this case question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. In its judgement the Court explained that “The accused in his own defense, pointed out that he had purchased narcotic drug marijuana and amphetamine, which in the criminal sense is treated as narcotic drugs, for personal use with no intention of selling it. Solving this problem, which is the question only of a legal nature, is of importance especially for the legal qualification of the acts of the defendant. If taken as indisputable that the accused at the time of the relevant event consumed marijuana and amphetamine in quantities stated in his defense (for six days he allegedly consumed 4.2 grams of amphetamine and 42 grams of marijuana) and that at the critical time in his rented apartment specified quantity of narcotic drugs was found, enough for several days, even weeks for the accused, the Court had no doubt that this case couldn’t be treated as the case of smaller quantity of narcotic drugs kept just for personal use of the defendant. One or two doses of narcotic drugs a person enjoys can be considered as a small amount and everything more than that can’t be treated as smaller amount of drugs. That’s because drug users always think of buying a new dose in time they need it and want to use it, sometimes maybe one dose more, and while drugged they don’t think of getting a new one“. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement on 26/03/2013.

**Example 15:** By the judgement of the Higher Court in Valjevo K.no.158/10, on 02/11/2010, the defendant V.M. (previously finally convicted for criminal offenses related to narcotic drugs) was found guilty because on 03/09/2009 he had 0.35 grams of “heroin”, which he held for further unauthorized selling. Due to prolonged use of narcotic drugs his consciousness was significantly reduced, but he was aware of the fact what he intended to do was prohibited and he still wanted to perform it. He packed the narcotic in three plastic sachets and carried it with him while going towards building of Employment Service in V., in order to do unauthorized selling to witness S.A. He was convicted according to Article 246(1) of Criminal Code, to imprisonment of 3 (three) years. The authorized police officer noticed the defendant standing on the street, and because he was suspicious (suspected to be involved in selling narcotics) they continued to watch him. He noticed when V.M. entered the passenger vehicle parked next to him, and since there was someone sitting on the front passenger seat he sat at the back seat. The officer continued to follow the vehicle and when it stopped at the traffic light,

he approached the vehicle, identified himself as a police officer, and called the intervention police patrol which arrived soon. When the vehicle was examined three bags of heroin, of the specified weight, were found at the back seat and the same were confiscated from the defendant with official report made. Witnesses (driver and the man seating next to him) confirmed at the trial they intended to buy narcotic drugs from the defendant. The defendant denied that the drug was his, but experts isolated his DNA profile when expertise of the sachet with drugs was done. For the Court that was, along with other testimonies (of the customers and the police) enough to convict the defendant according to the Article 246(1) of the Criminal Code. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement on 21/01/2011.

From the example listed, the Court practises vary. Apart from the listed examples, we analysed all the judgements rendered by the Higher Court in Valjevo in the period between 2010 and 2014 for this type of criminal offence. In one of the judgements, it is stated that it is necessary to prove the sale, irrelevant of the quantity of the narcotics which has been found, because in case *in dubio pro reo* the Court is obliged to decide in favor of the accused; in another judgement, if there is a buyer, then it must be proven that the accused sold them the narcotics, because the accused bought the narcotics from the 'drug dealer' for the buyer and was only being a carrier of the drugs between the dealer and buyer for a certain fee; in the third judgement, the accused did not sell 'the quarter' (0.25g of heroin) but only let him use and enjoy it; in the fourth judgement, possession of 600g of marihuana and admittance to buying the 250g found in 5 separate bags in Exit music festival in Novi Sad, was not sufficient material evidence to prove the intent to sell, for the reason of considering this a smaller amount attended for personal use (the accused uses 30g of marihuana for one tea dose, and he makes tea with it for drinking and relaxation); in the fifth judgement, 31g of narcotic drug 'heroin' was confiscated in one bag, which indicates personal use, because it is a widely known fact that heroin is sold in packets made of plastic bags of precise weight, so 31g can be considered a smaller amount, because the accused uses 2g a day, lives in Valjevo, but buys his drugs in Belgrade and is financially capable of buying this quantity at once, and also no precision scales nor packaging was found; in the sixth judgement, the fact that the 8.45g of narcotic drug 'amphetamine' was separately packed in 13 bags does not mean that it was prepared for sale, but it could only indicate that, also the accused lives in Valjevo and is buying in Lajkovac, where the drugs are cheaper, but is also financially capable of buying this quantity at once for longer period (of one month), all indicates that this is a smaller amount; in the seventh judgement, the accused admitted to buying drugs in one packet which he later measured and divided into smaller packets, and the electronic scales for precision measurement were found during the search, this activity does not indicate, in the opinion of the Court, that there was an intention to sell; in the eighth judgement, 10g of heroin was found which, as stated by the Court, cannot be objectively considered as 'small quantity', but taking into account that 1-2g are consumed a day, means it only covers the accused needs for 7-10 days, and it does not make sense for the accused to have to go to Belgrade every other day to buy a quantity of 1-2g, so the reasonable defence of the accused is that: buying 10g at once is cheaper than buying multiple smaller amounts; in the ninth judgement, previous conviction for selling narcotics (the accused has only just come out of prison, after serving 3 years) and also finding 13 packets of amphetamines in overall quantity of 15g during the search does not indicate carrying out of a criminal offence under the Article 246(1).

To the contrary of the above judgements, in the judgements in which the accused were convicted for criminal offence 246 from the Criminal Code, smaller quantity of drugs was seen as quantity equating from one to two doses which the particular person can consume, and anything above this cannot be considered a smaller amount, for the reason that narcotic

users always think about obtaining a quantity which they immediately require, and possibly one more, and while they are under the influence they don't think about a future dose; that the narcotics were meant to be sold is obvious from the fact that it is a larger amount of narcotic drugs (500g of marihuana) which the accused certainly did not need for personal use considering that they were not a regular user, they are without regular income, with occasional jobs, and live on the father's pension; it is therefore illogical that the accused who is unemployed, and is supported by the parents, buys a large amount for drugs (50g of marihuana) for personal use; for this he pays 200 euros and it would cover 2 months, although he states that he only uses 2-3 packets a day and occasionally even less, as they mix it with tobacco to smoke. In one of the judgement, it is explained in a similar way why even 5.5g of heroin divided into multiple bags can be considered a larger amount of drugs intended to sell.

## CONCLUSION

Based on all of the above, the conclusion is that unless the police and the public prosecutor provide sufficient evidence to prove that selling of narcotic drugs took place, primarily meaning providing evidence that particular persons bought drugs from the accused, it is pure lottery if the conviction or release would be the judgement to criminal offence from the Criminal Code, Article 246. From the convictions listed, it is not possible to draw a unanimous stand and legal opinion, which would be acceptable for convicting a person who has been found with a certain amount of narcotic drugs (from 10g of heron or amphetamine, to 600g of marihuana) under the Criminal Code, Article 246. Law practices have been so inconsistent that you would not dare, at the end of this document, claim that a certain person who is found by the police with, for example, 30g of amphetamines, divided into 60 bags and a high precision scales, would be convicted for unauthorised selling of narcotics, unless there is additional proof from people who have bought the drugs. But, we couldn't claim with certainty that this person would be found not guilty for this criminal offence and instead convicted for offence of minor significance - possession of narcotic drugs.

For the reasons mentioned, the High Public Prosecutor's Office will more often avoid trying to prove the bigger criminal offence to do with narcotic drugs abuse (Article 246) and will pass the criminal report to Basic Public Prosecutor's Office to prosecute the suspects for criminal offence of minor significance (Article 246a). For example, Valjevo Transport Police found, during a routine check in the traffic, a bag with 20g of marihuana, a bag with 7g of amphetamines and electronic scales. On another occasion, we have an accused (who already previously served a multiple year prison sentence for unauthorised selling of narcotic drugs) who was found, by the Criminal Police on the 19/04/2014 during the search of his vehicle in traffic, with 10g of 'cocaine'. The same case was passed from the High to Basic Public Prosecutor's Office, as they considered that there was not sufficient evidence to prove the criminal offence from Criminal Code, Article 246. The accused was convicted with house arrest, and since then, on the 13/06/2015, the police searched his premises and found 5g of heroine, divided into 18 plastic bags. This case is also passed down from High to Basic Public Prosecutor's Office. The following example considers an accused person, who was stopped by the police in traffic checks on 16/10/2015 and, in his passenger vehicle, found 6g of marihuana, 13 bags of 11.3g of amphetamine each and 2 ecstasy pills. High Public Prosecutor's Office pleaded that there were no basis to suspect that criminal offence from Article 246 was executed. The last example that we will give happened on the 19/05/2015 in Lajkovac. When the police stopped a car, the driver threw away 2 plastic bags, containing smaller 34 plastic bags, overall weighing 8.8g of a substance which was suspected to be a narcotic drug 'heroine'. The accused was arrested, based on the Article 291(1) of Criminal Procedure Code. The deputy of the High

Criminal Prosecutor's Office was informed and he stated that there are sufficient suspicions that criminal offence from Article 246(1) of the Criminal Code was carried out and decided that based on the Article 294 of Criminal Procedure Code, the suspect should be kept. The police decided to keep the suspect (as entrusted by the public prosecutor) and engaged an attorney on official duty (for the mandatory defence). The following day, High Public Prosecutor's Office re-qualified the criminal offence to 246a Article of Criminal Code and ordered for the suspect to be taken to the Basic Public Prosecutor's office in Ub.

The above mentioned law practices create enormous difficulties for the police. The police will adjust its work, based on the previous Court practice, and will look for evidence which they think is required and sufficient for the Court to charge for a particular offence. Based on the Court's attitude in the examples presented here, it is difficult for the police to adequately direct its work towards collecting evidence in order to prosecute persons involved in unauthorised selling of narcotic drugs.

In certain occasions, although the Court's practises lead the police in the direction of collecting evidence of selling the narcotic drugs by collecting evidence about the buyers, there still could be difficulties. The most clear situation would be to find the narcotic drugs (for example, 0.20-0.25g of heroin) with the buyer (the end user) during the handover<sup>30</sup> or immediately after by searching the buyer. But, what happens frequently is that the end user will place the small amount of narcotics in their mouth, and transport it that way to the place where they would use it. That way, if they are stopped by the police, they destroy all of the DNA traces of the seller, swallow the drugs immediately and by doing so, destroy the object of the criminal deed and make it impossible to prove anything.

*De lege ferenda*, in case the legislator decides that Article 246a will remain as part of Criminal Code, some thought should be given to possible definition of the 'smaller amount for personal use' of narcotic drugs which would be sufficient to prove criminal offence from Article 246a of the Criminal Code. In our opinion, which has been based on the analysis of the convicting judgements for Article 246 of the Criminal Code, smaller amount should be considered as 1-2 doses of narcotic drugs that a person can use based on their current health condition. Besides, the Court expert (of medical profession) would have to determine, in each case, the dose that the particular user (the suspect) is using. By regulating the matter in this way, you would avoid cases where the suspect in possession of 10, 20, 30 or more grams of heroin or 600g of dry-pressed marihuana could be convicted only for the possession of narcotic drugs for personal use.

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