SB 423 Monitoring: Montana Marijuana Act
Developments Through March 2012

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March 2012

Background

Senate Bill 423 repealed Montana's Medical Marijuana Act on July 1, 2011, and replaced it with new requirements for the cultivation, manufacture, and possession of marijuana for use by people with debilitating medical conditions.

SB 423 specifically requires the Children, Families, Health, and Human Services Interim Committee to:

- monitor how the Department of Public Health and Human Services (DPHHS) puts the new law into effect; and

- draft legislation for 2013 if members decide changes to the law are needed.

This briefing paper summarizes developments related to SB 423's implementation since January 2012, as well as other items that have had or may have an effect on the cultivation and possession of marijuana for debilitating medical conditions.

Legal Challenge: Montana Cannabis Industry Association v. State of Montana

The Montana Supreme Court has scheduled oral arguments in the ongoing legal challenge to SB 423. The court will hear the case on April 30, in Bozeman.

The Montana Cannabis Industry Association filed suit against the law on May 13, 2011, contending it should be prevented from going into effect because numerous provisions are unconstitutional. On June 30, 2011, District Judge Jim Reynolds stopped five provisions of the law from going into effect as scheduled while a trial on the merits of the suit proceeded.

However, the state appealed two aspects of the lower court ruling to the Supreme Court. In addition, the Cannabis Industry Association filed a cross-appeal. The District Court case has been on hold while the appeals are proceeding.

Final briefs in the appeals were scheduled to be filed by early March. However, the Attorney General's Office has twice sought an extension of time in filing its response. The court has given the state until March 23 to file its response. The association's reply is due 14 days later.

The five provisions of the law currently on hold are:

- the limit of three patients per provider (formerly known as a caregiver);

- the prohibition on providers being paid for marijuana or related products;

- the prohibition on advertising of marijuana and related products by registered
- cardholders or providers;
- the ability of DPHHS and local law enforcement to conduct unannounced inspections of the locations where providers indicate they will grow marijuana; and
- the requirement that DPHHS report to the Board of Medical Examiners the names of physicians who provide written certification for more than 25 patients in a 12-month period, so the board may review the practices of those physicians.

The state has appealed Judge Reynolds' decision to enjoin the limit of three patients per provider and the prohibition on payment for marijuana or related products. The state maintains that the lower court incorrectly applied the highest standard of judicial review to the case. The state is asking the Supreme Court to reverse Judge Reynolds and provide the District Court with guidance on the framework for its future review of the merits of the challenge.

The Cannabis Industry Association, meanwhile, argues in its cross-appeal that the entire law should be enjoined because of numerous constitutional issues. It asks the court to direct Judge Reynolds to issue a preliminary injunction against the entire act and reinstate the former Medical Marijuana Act while a trial proceeds on the merits of the association's request for a permanent injunction.

After the Supreme Court rules on the appeals, the case will go back to District Court for further action.

Other Legal Action

The Montana Cannabis Industry Association lawsuit is the main legal challenge to SB 423 at this point. However, other issues involving either SB 423 or the use of marijuana for medical conditions have also been taken to court. Some of the key cases are summarized below.

- **Christ v. State of Montana**: In December 2011, Jason Christ, doing business as the Montana Caregivers Network, filed a challenge to SB 423 in Missoula District Court. The suit raises many of the same issues contained in the Cannabis Industry Association suit.

  The court had set a March 28 scheduling conference for the suit. However, the state on Feb. 29 asked the Missoula court to put the case on hold until the Supreme Court has ruled on the appeal in the Montana Cannabis Industry Association suit. The state says that staying the proceedings would prevent different district courts from issuing different rulings that could be confusing to patients, providers, and doctors. The state's brief notes that the issues raised in the MCN suit are virtually identical to the issues raised in the Cannabis Industry Association suit, adding that the Supreme Court ruling will give guidance to all lower courts on how to proceed with challenges to the law.

- **Challenge to Federal Raids**: Several individual caregivers filed suit in May 2011 alleging the federal government violated their constitutional rights by carrying out raids against their medical marijuana businesses and seizing plants, marijuana, other property, and money. The plaintiffs contended that the raids violated: the Tenth Amendment to the U.S. Constitution, which gives to the states rights that are not delegated to the federal government; the Ninth Amendment, which holds that the enumeration of rights in the U.S. Constitution is not meant to deny other rights retained by the people; and their right to be free from unreasonable search and seizure and their right to due process. They maintained that the state's former Medical Marijuana Act protected them from federal prosecution.

  U.S. District Judge Donald Molloy dismissed the complaint in January 2012, saying the Supremacy Clause of the federal constitution "unambiguously provides that if there is any conflict between federal law and state law, federal law shall prevail." He noted federal courts have consistently held that the Commerce Clause of the U.S. Constitution gives the federal government authority to enforce the federal Controlled Substances Act. Under that federal law, cultivation and sale of marijuana are illegal.

- **Caregiver-to-Caregiver Sales**: District Court judges in Flathead and Missoula counties ruled in 2011 that the former Medical Marijuana Act (MMA) did not allow caregivers to transfer or sell marijuana to other caregivers. Both rulings were appealed to the Supreme Court.

  On Feb. 28, the high court dismissed the Missoula County appeal as moot, because SB 423 repealed the MMA. The court noted that a moot question is an issue that no longer presents an actual controversy because an event has occurred between the time the original controversy occurred and a decision on appeal was issued. It gave as an example a case in which "the grievance that gave rise to the case has been eliminated." The court concluded that the Legislature's repeal of the MMA made Kerr's appeal moot.

  Also on Feb. 28, the court ordered the parties in the Flathead County case to file briefs within 30 days on why that appeal should not be dismissed as moot.

  If Initiative Referendum 124 succeeds in November, SB 423 will be repealed and the provisions of the MMA will be in effect. A Supreme Court ruling on caregiver-to-caregiver sales would have clarified an area of that law that many people had interpreted in different ways and that had created confusion for law enforcement.

Registry Statistics

The number of people registered to use marijuana for a debilitating medical condition continued to decline in February. DPHHS statistics for the marijuana registry program show that 14,364 people held cards as patients as of Feb. 29. That represents a decrease of 54% from the 31,522 patients who were registered in May 2011, the last month before the provisions of SB 423 went into effect.

The February 2012 statistics also show:

- a continued decrease in the number of doctors providing written certification of debilitating medical conditions, from 362 physicians last May to 274 doctors in January and 263 doctors in February.

- a slight increase in the number of people registered to cultivate and provide marijuana, with 422 registered providers in February, compared with 417 in January; and

- fewer cardholders under the age of 21. These individuals represented 2.58% of the cardholders in February, compared with 4.1% in May 2011.

Regulation at the Local Level

The Whitefish City Council in February considered various ways to extend its moratorium on businesses that sell marijuana for debilitating medical conditions. The council enacted a moratorium in 2009, and the second extension of that moratorium will expire in June. The City Council last month directed its staff to look into options for another interim zoning ordinance. The council also will consider prohibiting licensure of businesses that violate federal law. Possessing, growing, and distributing marijuana is a crime under federal law.

The city attorney told the council that SB 423 gives local governments authority to regulate marijuana-related businesses and prohibit storefront businesses. But she also noted the uncertainty posed by the November referendum and ongoing legal challenges.

At least three other local governments took action last year to regulate the cultivation or sale of marijuana in their jurisdictions: the city of Billings, the town of Roundup, and Valley County.

Board of Medical Examiners Activity

In late January, the Board of Medical Examiners fined an Ohio physician who had provided written certification during a traveling clinic sponsored by the Montana Caregivers Network (MCN) in 2010. And in mid-March, it's scheduled to review a request by Montana State Hospital employees about clarifying the use of marijuana by patients at the facility.

Board documents show that the board fined Dr. Wayne Kawalek $4,500 after reviewing his work with MCN. Kawalek obtained a Montana physician's license on March 25, 2010, and saw MCN patients from April 1 through April 7, 2010. The board initiated a complaint against Kawalek and agreed at a July 2010 meeting to review a random sampling of the records of 10% of the 195 patients he saw during a one-day MCN clinic.

Kawalek was unable to produce the full records that he said he entered into an MCN computer system, saying that MCN denied him access to the records. Screening panel members were able to review one-page records, but noted that the records lacked such standard items as a medical history, a review of symptoms, a list of medications, indications that a physical examination was conducted, and any indication that patients were referred to other physicians

for treatment of their underlying conditions.

In late January, Kawalek entered into an agreement to pay a $250 fine for each of the 18 patients for whom records were unavailable, for a total fine of $4,500. Kawalek must pay $2,500 of the fine within three months; the remainder is due if he renews his Montana medical license.

At its March 16 meeting, the board is scheduled to review a letter from Montana State Hospital employees. The employees wrote to the board in November 2011, saying that MSH patients frequently possess a medical marijuana card at the time they are admitted to the facility. The employees say that marijuana use has been shown to exacerbate mental illness, and they expressed frustration that there appears to be no means of terminating the card of a person who has been admitted to MSH.

The employees asked the board to consider supporting the sharing of information about physicians who are providing written certifications for mentally ill patients, as well as investigating whether physicians are meeting the standard of care if they provide certifications for patients who have been diagnosed with a mental illness.

Law and Justice Interim Committee Activity

In February, the Law and Justice Interim Committee invited law enforcement representatives to discuss the effects of SB 423 on the criminal justice community. Speakers represented county attorneys, sheriff's and police departments, the Department of Corrections, and the Attorney General's Office. Most participants felt that fewer people are trying to obtain registry cards as patients or providers. The speakers felt the decrease was attributable at least in part to the federal raids that have been carried out over the past year.

Some law enforcement representatives said it was difficult to obtain information about whether people were registered cardholders or providers or to know who had the burden of obtaining proof that an individual who is in possession of marijuana is a registered cardholder or provider. SB 423 requires cardholders and providers to carry their cards and present the card and photo identification at the request of law enforcement. The testimony indicated that some officers are still uncertain whether the law allows them to seize marijuana from a person who does not have a card or to take any other legal action against the person.

Summary of Issues Raised to Date

Following is a summary of issues raised to date as the Children and Families Committee has monitored implementation of SB 423.

- SB 423 prohibits an individual under the supervision of the Department of Corrections (Department) or a youth court from obtaining a card as a patient or provider. The Department has been made aware of instances in which probationers or parolees have obtained cards. The application forms developed by DPHHS allow applicants to attest to the fact that they are not under the Department's supervision. Since becoming aware of the fact that some people on probation or parole have received cards, DPHHS has been

working with the Department to ensure that an applicant's status is verified through the Corrections Department database.

- A provision on shared premises prevents some people from being providers for persons who share their homes. The provision prohibits a provider from growing marijuana at a premise shared with a cardholder unless the two are related by the second degree of kinship by blood or marriage. A provider who cares for a developmentally disabled cardholder in her home has suggested that SB 423 should be amended to allow a waiver of this prohibition.

- The requirement for providers to submit fingerprints may be reducing the number of potential providers because of their concern that the submission may alert federal authorities that they are growing marijuana and may subject them to federal investigation.

- The decrease in the number of providers may be affecting the ability of patients to legally obtain marijuana and may be increasing illegal marijuana sales.

- If voters reject SB 423 in November, the law regarding use of marijuana for medical conditions will revert to the provisions in place before passage of SB 423. Many of the provisions of SB 423 that would no longer be in effect were included in other bills introduced in the 2011 Legislature and had the support of many legislators. Those included the ban on smoking in public, the requirement that patients and providers be Montana residents, the prohibition on the use of telemedicine or electronic means for physicians to diagnose debilitating conditions, the authority of local governments to regulate marijuana cultivation and sales, and the ability of law enforcement to obtain a search warrant for a blood test of a cardholder suspected of driving while impaired.

- Montana State Hospital employees are concerned about the use of marijuana by State Hospital patients. They have requested that steps be taken to allow the revocation of cards held by people admitted to MSH and to allow MSH to obtain the names of the physicians who have provided written certifications to MSH patients, so staff can share information about the patients' mental illnesses with the certifying physicians.

- Law enforcement officers expressed uncertainty about how to carry out 50-46-317, MCA, which requires cardholders and providers to keep their registry identification cards in their immediate possession and show their cards and photo identification to law enforcement officers upon request. The confusion indicated that some clarification of this section may be warranted.