

Law Offices

of

BONNIE L. WARNKEN
32 EAST PRESTON STREET
BALTIMORE, MARYLAND 21202-2727
(410) 727-5951
(410) 727-1049 (Fax)

March 9, 2000

Delegate Joseph F. Vallario, Jr.
Chair, House Judiciary Committee
121 Lowe House Office Building
84 College Avenue
Annapolis, Maryland 21401-1991

Re: House Bill 308 (Marijuana - Exception for Compassionate Use)

Dear Chairman Vallario:

I am writing to the House Judiciary Committee on behalf of the Marijuana Policy Project (MPP). MPP supports House Bill 308, which, if enacted, would modify Maryland's laws that prohibit possession of marijuana and related paraphernalia. Under House Bill 308, when a qualifying physician provides written documentation to a patient regarding the medical use of limited quantities of marijuana, Maryland law would render noncriminal the conduct of both the patient and the physician.

Preemption: It is my understanding that the Committee has concern as to whether existing federal laws regulating controlled dangerous substances preempt the field, thus prohibiting Maryland's enactment of the proposed legislation. The answer is **no**, meaning that federal law in no way limits the Maryland General Assembly's power to enact the proposed legislation.

If Maryland enacts the proposed legislation, both federal law and Maryland law would control the possession of marijuana, but in differing ways. State legislatures have broad police powers to enact legislation in the interest of the health and welfare of their citizens. Congress has the same broad police power when enacting legislation limited to federal enclaves. Congress may also enact legislation that controls conduct in the states, but only when there is either an express constitutional authorization or such legislation is **necessary and proper** to further an express power -- most typically, the Commerce Clause. Thus, both Congress and the Maryland General Assembly have the power to enact legislation regulating the use and possession of marijuana.

The preemption issue is whether, under the Supremacy Clause of the United States Constitution, Congress is the only legislative body that may regulate a particular area, i.e., whether Congress has the power to, and intended to, preempt the field. In Pennsylvania v. Nelson, 350 U.S. 497, rehearing denied, 351 U.S. 934 (1956), the Supreme Court set forth a three-pronged test to determine whether federal law preempts state law, examining (1) whether the federal regulatory scheme is pervasive, (2) whether federal occupation of the field is necessitated by the need for national uniformity, and (3) whether there is danger of conflict between state laws and the administration of federal programs. It is rare that the courts interpret federal legislation as preempting state law.

This is particularly true in the area of criminal law. Legislation to control criminal activity has always been considered to be particularly a state -- and not a federal -- function, as the courts have noted the importance of the **50 little laboratories** in the area of criminal law. Six states and the District of Columbia have enacted laws similar to the proposed Maryland law. I have been unable to find on Westlaw even one reported or unreported decision in any United States District Court or any United States Circuit Court squarely addressing preemption in the context of this type of legislative scheme, i.e., decriminalizing medical use of marijuana under state law when federal law still criminalizes such usage. In fact, the only case to have made reference to preemption supports the understanding that there is no federal preemption involved here. In Turner v. District of Columbia Board of Elections & Ethics, 77 F. Supp. 2d 25, 34 n.5 (D.D.C. 1999), the court stated: **[W]hatever else Initiative 59 purports to do, it proposes making local penalties for drug possession narrower than [sic] the comparable federal ones. Nothing in the Constitution prohibits such an action.** Thus, although Congress may regulate the possession and use of marijuana, so may the state legislatures, even when the two legislative bodies regulate the area differently.

The Interrelationship of the State and Federal Law as to the Patient's Conduct: Under present law, a patient who uses marijuana for medical purposes violates both federal criminal law and Maryland criminal law. The enactment of H.B. 308 would protect the patient under Maryland law by decriminalizing medical use. At the same time, the patient's criminal exposure under federal law would be no more or no less than it is without the enactment of H.B. 308.

Under the proposed Maryland statute, for a qualifying patient, with a debilitating medical condition, it would not be criminal to use marijuana for medical purposes, in quantities not to exceed an adequate supply for the particular medical need, provided such conduct is pursuant to a physician's written documentation that the potential benefits of the medical use would likely outweigh the health risks for that patient. H.B. 308 (Md. Ann. Code art. 27, ' 292(B)(1) & (C)(1)).

At the same time, possession of marijuana is a federal crime under 21 U.S.C. ' 841. Although the patient's conduct would still constitute a federal crime, prosecution is highly unlikely. Among the six jurisdictions with laws like the one proposed for Maryland, I have been unable to find on Westlaw even one reported or unreported decision in any United States District Court or any United States Circuit Court addressing a federal prosecution of a patient for marijuana possession in states that have enacted statutes like the proposed Maryland law.

The Interrelationship of the State and Federal Law as to the Physician's Conduct: Under the proposed Maryland statute, the physician would provide written and signed documentation to the patient, stating **that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient.** H.B. 308 (Md. Ann. Code art. 27, ' 292(a)(8)). Under the proposed legislation, the physician's conduct (1) would not constitute a crime in Maryland, and (2) would not be subject to regulatory discipline in Maryland. H.B. 308 (Md. Ann. Code art. 27, ' 292(B)(2) & (C)(2)-(3)).

At the same time, federal law authorizes the United States government to register physicians, as dispensers of controlled substances, and to revoke registrations under certain conditions. 21 U.S.C. " 801-04, 821-28. There is an argument that the physician's conduct, in providing the written and signed documentation, would make the physician subject to federal licensing disciplinary action, under the theory that such conduct **may threaten the public health and safety.** 21 U.S.C. ' 823(f)(5). Nonetheless, as with the conduct of the patient, I have been unable to find on Westlaw even one reported or unreported decision in any United States District Court or any United States Circuit Court addressing an administrative disciplinary case of a physician who provided the written documentation under a statute similar to the proposed Maryland legislation. In fact, analysis in the United States District Court for the Northern District of

California stands for the proposition that federal disciplinary action would not be permissible. In Conant v. McCaffrey, 172 F.R.D. 681, 701 (N.D. Cal. 1997), a federal class action on behalf of physicians who recommend, and patients who use, marijuana for medical purposes, the court enjoined the United States government from **revoking [physician] licenses ... based upon conduct relating to medical marijuana that does not rise to the level of criminal offense.**

There is also an argument that the physician's conduct, in providing the written and signed documentation, would constitute aiding and abetting the patient's subsequent possession of marijuana. Federal law criminalizes the conduct of anyone who **aids, abets, counsels, commands, induces or procures [the] commission** of a federal crime. 18 U.S.C. ' 2. Section 2 has been interpreted to include the **causing** of an act that is criminal. In interpreting **counsels**, the United States Court of Appeals for the Ninth Circuit stated: **It is only necessary that the [defendant] counseled and advised the commission of the crime, and that the counsel and advice influenced the perpetration of the crime.** United States v. Barnett, 667 F.2d 835, 841 (9th Cir. 1982) (quoting Workman v. State, 216 Ind. 68, 21 N.E.2d 712, 714 (1939)).

Nonetheless, as with the conduct of the patient and the regulation of the physician, I have been unable to find on Westlaw even one reported or unreported decision in any United States District Court or any United States Circuit Court addressing a federal criminal prosecution of a physician who provided the written documentation under a statute similar to the proposed Maryland legislation. In fact, as referenced above, Conant v. McCaffrey, 172 F.R.D. 681, 701 (N.D. Cal. 1997), enjoined the United States government **from threatening or prosecuting physicians ... based upon conduct relating to medical marijuana that does not rise to the level of criminal offense.** The court also noted that **the First Amendment protects physician-patient communication up until the point that it becomes criminal ... Id.** In addition, our federal circuit, the United States Court of Appeals for the Fourth Circuit, has implied that even prescribing for medical purposes is not criminal. Two Fourth Circuit criminal appeals from convictions for prescribing controlled substances distinguish between prescribing for the treatment of a patient and prescribing for non-legitimate purposes. In United States v. Tran Trong Cuong, 18 F.3d 1132, 1137 (4th Cir. 1994), the court stated that 21 U.S.C. ' 841(a)(1) was violated when the physician's **authority to prescribe controlled substances was being used not for treatment of a patient, but for ... dispensing controlled substances for other than a legitimate medical purpose.** Accord United States v. Singh, 54 F.3d 1182, 1188-89 (4th Cir. 1995).

Conclusion: There are no legal or practical reasons that H.B. 308 should not be enacted, at least based on the issues that I have been asked to address to the members of the committee. If desired by the Committee, I would be available to provide further written or oral input to the Committee. I have enclosed a copy of my curriculum vitae. Thank you for your consideration.

Cordially yours,

Byron L. Warnken

Enclosure

cc: Committee members