"THE FEDERAL CORNER"

Medical Marijuana and Supervised Release

Buck Files

[Note: *Mea Culpa.* If you thought that my last column – "Fingerprints, Thumbprints and Compelled Biometric Scans To Unlock Encrypted Devices" -- was confusing, you were correct. We unintentionally sent in what was supposed to run in the *VOICE* along with an earlier draft of the introduction to the column. So, what you had was, at best, redundant. The fault lies with me and not with our editor or TDCLA's staff who are absolutely wonderful to work with.]

More than twenty years ago, I was aware of a conspiracy to obtain and distribute marijuana here in Tyler, Texas. This is what happened. Susie had terminal cancer and all the pain that went with it. Only marijuana could give her any relief. I had a client who had been an informant for the FBI for more than a dozen years. With their knowledge, he would purchase marijuana and give it to one of the agents who supervised him. The marijuana would then go to a former assistant United States attorney who would pass it on to Susie's husband. Then Susie could have her "medical marijuana." It was not long before Susie died, but, for those last months, she did not have the pain that had been so terrible for her.

In 2015, the Texas legislature authorized prescriptions of low-THC cannabis for patients who were diagnosed with epilepsy; a seizure disorder; multiple sclerosis; spasticity; amyotrophic lateral sclerosis; autism; terminal cancer or an incurable neurodegenerative disease.[1]

In June, 2019, Governor Abbott signed a bill into law that expanded who can have access to medical marijuana products in Texas. Effective immediately, specialty doctors can now prescribe medical marijuana to treat multiple sclerosis; Parkinson's disease; ALS; terminal cancer; autism; and many kinds of seizure disorders.[2]

So, you ask, why are we talking about medical marijuana? Because, eventually, we are going to have a much broader medical marijuana statute or series of statutes. More Texans will be able to take advantage of medical marijuana – and some of them will wind up as defendants in federal criminal cases and be on supervised release. And then they will be denied the benefits of the Texas medical marijuana statutes.

In *Gonzales v. Raich*,[3] users and growers of marijuana for medical purposes under California's Compassionate Use Act sought to declare the Controlled Substances Act (CSA), as applied to them, was unconstitutional. Justice Stevens, writing for the Court, held that the application of CSA provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes did not violate the Commerce Clause.

[1] Occupations Code, Sec. 169.004 (2015)
[2] H.B. 3703, 86th Legislature (2019)
[3] 125 S.Ct. 2195 (2005)

United States v. Kelly[4] is the latest case to discuss this issue. The opinion of United States Magistrate Judge Jay McCarthy reads, as follows:

[Decision and Order]

> May an individual facing federal criminal charges use marijuana for medical purposes, provided that such use is legal under state law? For the following reasons, the answer is no.

[Discussion]

> Defendant is charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Indictment. On October 26, 2018, I ordered him to be released from custody subject to various conditions, including that he 'shall not commit any offense in violation of federal, state or local law while on release,' and that he 'submit to any method of testing required by the pretrial services office for determining whether he is using a prohibited substance.' Order Setting Conditions of Release [4], §§(1), (8)(s).
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> On October 10, 2019, defendant provided the pretrial services office with a notice of his acceptance into the medical marijuana program at Dent Neurological Institute. That office has asked me whether he may participate in this program, and defendant has asked that I rescind his drug testing condition with respect to the use of marijuana for medical purposes.
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> The Bail Reform Act provides that any defendant who is on pretrial release must 'not commit a Federal, State, or local crime during the period of release.' 18 U.S.C. §§ 3142(b), (c)(1)(A). 'Compliance with federal law is a mandatory condition' of release. *United States v. Arizaga*, 2016 WL 7974826, (S.D.N.Y. 2016). Although New York State has legalized, 'for state law purposes, approved forms of medical marijuana dispensed and administered under certain, highly regulated conditions' (*id.*), '[t]he possession of marijuana [remains] illegal under federal law. *See* 21 U.S.C. § 844(a). There is no federal exception for medical marijuana.' *Id.*
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> While acknowledging that it 'cannot eliminate the mandatory legal compliance condition,' the court in *Arizaga* nevertheless directed its pretrial services department 'not to charge a violation of Defendant's release conditions based solely on New York state-approved medical marijuana use or a drug-testing result consistent with New York state-approved medical marijuana usage.' In doing so, the court invited disobedience of its release order, thereby 'send[ing] the wrong message to recalcitrant parties ... that defiance goes unpunished.' *Rosemond v. United Airlines, Inc*., 2014 WL 4245974, (E.D. Va. 2014). A court order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded,' *Coene v. 3M Co.*, 303 F.R.D. 32, 49 (W.D.N.Y. 2014), and '[i]f the courts do not

[4] 2019 WL 6693528 (W.D.N.Y. December 9, 2019)

take seriously their own ... orders who will?.' *Arnold v. Krause, Inc.*, 232 F.R.D. 58, 66 (W.D.N.Y. 2004), adopted, 233 F.R.D. 126 (W.D.N.Y. 2005) (Arcara, J.).

Thus, in *United States v. Pearlman*, 2017 WL 7732811 (D. Conn. 2017), the court denied defendant's request to remove the drug testing condition of his pretrial release so that he could participate in a state-sanctioned medical marijuana program. The court reasoned that 'even if [that] Condition were removed, defendant would be barred by Condition 1, which is mandatory and not waivable, from using marijuana while on pre-trial release. Accordingly, the request made by defendant would not achieve the relief he seeks. The Court cannot, and will not, sanction the violation of federal law by a defendant on pre-trial release, even if state law and the weight of public opinion appear to contradict that federal law.'

Congress may one day decide to legalize the possession of marijuana for medical (or other) purposes. However, it has yet to do so, and 'where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.' United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). *See also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014) ('[t]he wisdom of Congress's judgment ... is not our concern. Our responsibility is to enforce [the statute] as written'). (emphasis added)

[Conclusion]

For these reasons, §§(1) and (8)(s) of my Order Setting Conditions of Release remain in effect.

SO ORDERED.

There are no Circuit Court opinions on this issue.

In the *Kelly* opinion, Magistrate Judge McCarthy mentions *Arizaga*[5] and *Pearlman*[6]. *Kelly* was from the United States District Court from the Western District of New York. *Arizaga* was from the Southern District of New York and acknowledged the conflict between federal law and New York state law. *Pearlman* was from the United States District Court for the District of Columbia and reached the same conclusion as Magistrate Judge McCarthy did in *Kelly*.

There are also other cases in which the defendant was prohibited from participating in a state medical marijuana program while on supervised release; e.g.,

- *United States v. Meshulam*[7]
- *United States v. Small*[8]

[5] [Not reported in F.Supp.] 2016 WL 7974826 (S.D.N.Y. December 22, 2016)
[6] [Not reported in F.Supp.] 2017 WL 7732811 (D.Conn. July 7, 2017)
[7] [Not reported in F.Supp.3d] 2015 WL 894499 (S.D. Fla. March 3, 2015)
[8] [Not reported in F.Supp.2d] 2010 WL 4922510 (D.Montana November 29, 2010)

- *United States v. Bey*[9]
- *United States v. Johnson*[10]

My Thoughts

- We live and breathe and have our being in the Fifth Circuit.
- *If* Texas ever has a broad medical marijuana program, there is no reasonable expectation that the United States Court of Appeals for the Fifth Circuit or any district courts within the Circuit will authorize a defendant to participate in a medical marijuana program while on supervised release.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 239th column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com.

[9] 341 F.Supp.3d 528 (E.D. Pa. 2018)
[10] 228 F.Supp.3d 57 (D.D.C. 2017)