

Sunday, December 3, 2006

Marks & Katz obtains Maryland medical marijuana sentence on multiple plants.

On December 1, our law firm obtained a medical marijuana sentence in Prince George's County, Maryland, Circuit Court. Soon after Maryland's medical marijuana law went into effect four years ago, the Washington Post contacted and quoted us about the law, and we wrote this detailed published article on the topic. The medical marijuana provision of Maryland's marijuana possession statute states: "(i) In a prosecution for the use or possession of marijuana, the defendant may introduce and the court shall consider as a mitigating factor any evidence of medical necessity. (ii) Notwithstanding paragraph (2) of this subsection, if the court finds that the person used or possessed marijuana because of medical necessity, on conviction of a violation of this section, the maximum penalty that the court may impose on the person is a fine not exceeding \$100." Md. Code, Crim. Law art. 5-601(c)(3). Maryland's medical marijuana law was a compromise between those who wanted to legalize medical marijuana use outright, and those opposed to going that far. Unfortunately, Maryland's medical marijuana law does not immunize defendants using marijuana for medical necessity from a conviction or from prosecution for personal use, but does at least prevent jail or probation after any conviction of such defendants. The law helps reduce -- but still continues -- the politicization of marijuana that has prevented it from being federally approved for medicinal prescription purposes. Maryland's medical marijuana law provides a defense not only against jail for marijuana possession, but also protection of the defendant's right to present evidence of medicinal use to a jury in a prosecution for possession of marijuana with intent to distribute, in order to show that the marijuana was possessed for personal use only. Mounting the best medical marijuana defense will ordinarily be costly, calling for the testimony or written opinion of the defendant's treating physician (or an evaluating physician if the defendant had no personal physician), and sometimes the testimony or written opinion of a medical marijuana expert if the treating physician lacks sufficient knowledge about marijuana's medicinal relevance to the defendant, or refuses to provide a medical marijuana opinion. When Maryland's medical marijuana provision took effect in 2002, the executive director of a Maryland physicians group erroneously advised against physician testimony to support a medical marijuana defense, based on concerns for the federal law's prohibition against physicians recommending marijuana. It sounds like this executive director obtained bad legal advice on the matter, or no legal advice at all. His statement also does not seem to comport with physicians' Hippocratic oath, including the duty to do no harm. When a physician testifies that marijuana use was medically necessary, that does not show that the physician recommended the marijuana nor that the physician will recommend its use to anybody; it just shows that the physician agrees, retrospectively, that the defendant's marijuana use was because of a medical necessity. Moreover, physicians cannot be penalized by federal authorities nor federal law for recommending medicinal marijuana use. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2003). With the foregoing backdrop, here is how we fought this Prince George's County case towards a medical marijuana sentencing victory. This case started with a search of our client's trash bags left outside his house but still on his property. The police obtained a search warrant based, among other things, on a claim of finding some marijuana in one of the trash bags, and obtaining a positive field test for marijuana. Unfortunately, the police intrusion onto my client's property to seize a full trash bag likely would not have won a motion to invalidate the search warrant and the subsequent search. We blogged about this trash search issue here. The suppression motion, instead, would have needed to focus more on arguing an insufficient connection between a small amount of marijuana allegedly found in the trash bag and the house from which the trash bag allegedly came. In executing the search warrant of our client's home, the police found and seized over thirty marijuana plants in a basement grow room. This led to a federal forfeiture action against my client's house -- under the draconian federal asset forfeiture laws -- followed soon thereafter with a state prosecution for felonious marijuana possession. We immediately went to work to prepare a medical marijuana defense to present to the jury at trial -- to show how the marijuana was for personal medical use -- and to present to the prosecution in seeking a plea agreement for misdemeanor marijuana possession, which carries a maximum of one year in jail versus five years for marijuana possession with intent to distribute. We started by obtaining two medical marijuana grow experts, and later added a physician to confirm our client's need to use marijuana as medicine for his severe sleep apnea, which had already been fully diagnosed through an in-depth hospital study of our client as he slept overnight, or at least tried to sleep despite the sleep apnea. Our formidable medical marijuana grow team consisted of (1) Chris Conrad of El Cerrito, California, and (2) Jon Gettman of Lovettsville, Virginia, who is a former national director of the National Association for the Reform of Marijuana Laws. (To date, I have found no marijuana grow experts available for the defense side who do not advocate for marijuana law reform; such experts apparently are all on government payrolls and testify exclusively for the prosecution). Before the date set to argue our motion to suppress evidence and other legal motions, the lawyer for our client's co-defendant and I joined Jon Gettman for a visit to the prosecutor's officer, to have one of the lead police officers show us the seized marijuana. Armed with Jon Gettman's and Chris Conrad's review of the seized plants, police reports showing no possible indicia of an intent to sell the marijuana other than its quantity, police photos from the execution of the search warrant, and our client's physician's report confirming

his severe sleep apnea, we provided the prosecutor with our expert report that our client grew so many marijuana plants in order to yield sufficient quantities of his medicinal marijuana. Our expert report confirmed that male and immature marijuana plants do not yield the marijuana buds needed to provide sufficient medicinal marijuana, and that it is quite possible that only a few grams of useable marijuana were seized from our client's home. In my cover letter to the prosecutor that attached our expert report and other information to support a simple marijuana possession plea, I told the prosecutor: "By growing the marijuana himself rather than buying it, [our client] helped assure that his medicinal marijuana was of sufficient quality to medicate himself (this is imperfectly similar to preferring to make a tuna sandwich at home, than to buy it at a greasy spoon with old mayonnaise and soggy bread from the chef's failure to drain out the water or oil from the can first); he avoided the impurities and sometimes dangerous adulteration that can be found in marijuana purchased illicitly on the street (e.g., oregano (which can be dangerous to smoke) or PCP/angel dust (which can be sprayed to offset poor quality marijuana, with the dangerous risks of ingesting PCP, a very dangerous drug); and avoided the dangers of street crime (e.g., robbery, and assisting others to commit the crime of distributing marijuana by his purchase of the marijuana)." I also informed the prosecutor as follows: "Sleep apnea is a medical disorder characterized by frequent interruptions in breathing of up to ten seconds or more during sleep. The condition is associated with numerous physiological disorders, including fatigue, headaches, high blood pressure, irregular heartbeat, heart attack and stroke.' 'Sleep apnea' http://www.norml.org/index.cfm?Group_ID=7016." A major medical study from the University of Illinois at Chicago supports that marijuana (through its active ingredient, which is THC) can provide substantial benefits for treating sleep apnea. David Carley, et al., 'Functional Role for Cannabinoids in Respiratory Stability During Sleep,' Sleep Journal, Vol. 25, Issue 4, at 391-398 (see abstract at <http://www.journalsleep.org/ViewAbstract.aspx?citationid=2104>, which includes a java link to the full article)." On the motions hearing date, the prosecutor offered for our client to plead guilty to simple, misdemeanor marijuana possession, and to dismiss the remaining charges. This was an excellent resolution, in that the chances looked low of suppressing the evidence, low of receiving a jury verdict of anything better than simple marijuana possession, and possible of receiving a jury verdict for possession with intent to distribute marijuana. We set the sentencing date far enough in advance to obtain a written opinion from our medical marijuana expert, David Bearman, MD, of Goleta, California. Dr. Bearman consulted with our client, and reviewed his medical report confirming his severe sleep apnea, our marijuana grow expert report, and the police allegations in the case. Dr. Bearman provided an excellent and detailed written explanation and conclusion that our client had a medical necessity for using marijuana both at present and at the time of the seizure of the marijuana plants. I submitted to the judge in the case a sentencing memorandum attaching our expert reports and other important case information. At sentencing, my main points included the following: - Whether or not we agree with Maryland's medical marijuana law, it mandates a sentence no worse than a \$100 fine for a marijuana possession conviction where the defendant had a medical necessity for using marijuana. - We presented Dr. Bearman's written report, and explained that it was cost-prohibitive for our client to pay Dr. Bearman's additional hourly fees and travel expenses to come to court to testify. We explained that Dr. Bearman's opinions are particularly beneficial to aiding a fair sentencing decision, in part because California physicians have more opportunities to evaluate medical marijuana users firsthand, seeing that California state law allows the use of medical marijuana, even though medicinal use does not prevent federal prosecution versus state prosecution in California. Moreover, as shown in this Washington Post article, local physicians -- unfortunately -- probably are more fearful and reluctant to provide such testimony. - If any case calls for a medical marijuana sentence, this one does. Our client's severe sleep apnea can be life-threatening, and marijuana is highly effective in treating this ailment. - In case a medical marijuana sentence was not given, I presented proof that our client had attended weekly drug education group sessions and had submitted to drug tests that confirmed no more marijuana use. Although I feel marijuana should be legalized and I oppose the years-long drug testing madness, so long as marijuana remains illegal, drug classes and negative drug testing can be a significant benefit at sentencing. The prosecutor in our case opposed a medical marijuana sentence, and underlined that many plants were seized. I responded to the judge that our grow experts found that it is quite possible that only a few grams of useable marijuana were seized from our client's home, and that, this being our client's medicine, it was important for him to err on the side of growing too much than too little medicine. The judge agreed that we had established sufficient grounds for a medical marijuana sentence, and imposed a sentence of a \$100 fine plus court costs of \$145. This was a great and just result for our client, but it remains an injustice that medical marijuana remains criminalized in most of the nation, and that marijuana itself continues to be criminalized. Unfortunately, the benefits of Maryland's medical marijuana law are reduced by the limited financial resources that many criminal defendants will have for presenting such a defense. Our client's medical marijuana sentence was issued upon a showing of insufficient alternatives to marijuana for sleep apnea. Although Marinol -- which is lawful to prescribe -- contains THC, which is also found in marijuana, support for the benefits of marijuana over Marinol is available at www.books.nap.edu/html/marimed/ch4.html. For a defendant arguing for a medical marijuana sentence where many lawful and effective drugs exist for the defendant's ailment, it becomes important to show the extent to which marijuana is superior medicine for such factors as dosage control, its proven reliability to treat the ailment after centuries of marijuana use for many medical problems, and its coming straight from a rather safe plant, as opposed to medicines -- whether synthesized or more natural -- that often bring significant adverse side effects or are not proven to be without the risk of significant adverse side effects. - Most marijuana defendants will not have the funds to hire a physician to testify at sentencing. For them, their alternatives are to introduce the physician's medical report at

sentencing, possibly accompanied by a learned treatise that the report is shown to rely upon. For defendants who cannot even afford a physician's written report, they have available some persuasive and scholarly reports on the medical benefits of marijuana. Starting points can include the Drug Policy Alliance (www.dpf.org and www.dpf.org/marijuana/medical/index.cfm), and the National Organization for the Reform of Marijuana Laws (www.norml.org and www.norml.org/index.cfm?Group_ID=3376). Lawyers can get a primer on the medicinal benefits of marijuana by reading *Marihuana: The Forbidden Medicine*, by Harvard Medical School Professor Lester Grinspoon, M.D., and James Bakalar, J.D. (excerpts available at www.rxmarihuana.com). Jon Katz. ADDENDUM: See a list of all our marijuana articles and blog entries here.

Posted by Jon Katz in Drugs at 00:10

Congrats on your win! Please keep on fighting the good fight.

May common sense, compassion and JUSTICE finally prevail once and for all wrt: MMJ patients.
Anonymous on Dec 17 2006, 13:12

Good post, but have you thought about Marks & Katz obtains Maryland medical marijuana sentence on multiple plants. before?
Anonymous on Feb 5 2009, 08:46

Please keep on fighting the good fight.
Anonymous on May 27 2009, 12:35