

OFFICE OF THE GOVERNOR
STATE OF MONTANA

BRIAN SCHWEITZER
GOVERNOR



Exhibit #4
4.28.11
SB 423
JOHN BOHLINGER
LT. GOVERNOR

April 28, 2011

The Honorable Jim Peterson
President of the Senate
State Capitol
Helena, MT 59620

Dear President Peterson:

In accordance with the powers vested in me as Governor by the Constitution and the laws of the State of Montana, I hereby return with amendments Senate Bill 423 (SB 423) "AN ACT ESTABLISHING THE MONTANA MARIJUANA ACT AND REVISING LAWS RELATING TO THE USE OF MARIJUANA; CREATING A REGISTRY PROGRAM FOR THE CULTIVATION, MANUFACTURE, TRANSPORTATION, AND TRANSFER OF MARIJUANA BY CERTAIN INDIVIDUALS; REQUIRING REPORTING; ALLOWING INSPECTIONS; REQUIRING LEGISLATIVE MONITORING; PROVIDING DEFINITIONS; PROVIDING RULEMAKING AUTHORITY; ESTABLISHING A TRANSITION PROCESS; AMENDING SECTIONS 37-1-316, 37-3-343, 37-3-347, 41-5-216, 45-9-203, 46-18-202, 50-46-201, 50-46-202, AND 61-11-101, MCA; REPEALING SECTIONS 50-46-101, 50-46-102, 50-46-103, 50-46-201, 50-46-202, 50-46-205, 50-46-206, 50-46-207, AND 50-46-210, MCA; AND PROVIDING EFFECTIVE DATES."

As presented to me, Senate Bill 423 is disappointing. In its original form, Senate Bill 423 introduced by Senator Essmann was a more substantive bill with a broader statutory scheme that included a licensing system. Numerous iterations of Senate Bill 423 surfaced during the session and over eleven amendments were proposed.

The Children, Families, Health and Human Services Interim Legislative Committee worked diligently for eighteen months, with the input of all stakeholders, devising a medical marijuana reform bill eventually introduced as House Bill 68. The interim committee heard from citizens, law enforcement officers, patients, hospice workers, growers, community leaders, etc. Like the original version of SB 423, House Bill 68 was more substantive but regrettably was set aside at the outset of the session, never to surface again.

Senate Bill 423 does have some positive provisions. It addresses the needs of law enforcement and local government. It also provides local jurisdictions the ability to ban operations within certain areas, including storefronts, which send the wrong message to children in our communities.

However, Senate Bill 423 has no licensing provisions for providers and laboratories and no genetic tracking of medical marijuana to assist in prosecuting individuals who illegally divert marijuana to non-cardholders. It abruptly shuts down the provider industry effective July 1, 2011, eliminates the jobs associated with the industry and makes access to medical marijuana very difficult for vulnerable patients. More importantly, the content of the current version of the bill ignores over forty hours of compelling testimony by the public describing patients who are suffering terribly and their reliance on "caregivers", now known as "providers" in Senate Bill 423.

As you know, I vetoed House Bill 161, the outright repeal of I-148, the 2004 citizen initiative that created our current medical marijuana law. That initiative passed with a vote of 276,042 to 170,579; almost 62% of those Montanans casting a ballot voted for the measure. It is not the role of my office or the legislative

SB 423

body to pass laws that ignore the will of the people expressed at the ballot box. I believe HB 423 essentially repeals I-148.

This is the fourth session since passage of the medical marijuana initiative. I hoped this legislature would pass a law that honored the intent of the voters while providing law enforcement the necessary tools to prevent abuse and protect public safety. I agree current law is unacceptable and have spent considerable time crafting amendments to the current bill to set up a reasonable regulatory framework, missing in the provisions of I-148. My amendments to the Senate Bill 423 are constrained by the title and I am unable to address the need for licensing or legally requiring genetic tracking of the strains of marijuana. Nonetheless, I *urge* the legislature to uphold my amendatory veto.

My amendments do the following:

- SB 423 requires one physician for minors. While there are only 51 minors on the registry as of April 1, 2011, I believe it is appropriate that two physicians certify in those rare cases a child may respond to treatment with medical marijuana in an edible form or topical cream.
- My amendments to SB 423 address the bill's constitutional problems. SB 423 ignores privacy concerns. Article II, Section § 10 of our Montana Constitution guarantees our citizens the right to privacy. Those who register for cards have a constitutional right to privacy protected by Article II, Section § 10. Under SB 423, cardholders, i.e. patients' names and addresses must be provided to local law enforcement by the Department of Public Health and Human Services. The right to privacy is a fundamental right. The blanket disclosure requirement in the bill would never survive the strict scrutiny standard for invading a patient's right to privacy. The requirement also directly violates the Montana Government Health Care Information Act. (*See*, 50-16-601-611, MCA.) Our Montana Government Health Care Information Act was enacted with the express purpose of expanding the Health Insurance Portability and Accountability Act of 1996 (HIPAA) coverage to non-HIPAA covered entities. (*See*, 50-16-502(6) & (7) & 505, MCA.) Releasing a list of the identities of patients is forbidden under HIPAA and our law. Currently, law enforcement can verify that particular people who hold themselves out as cardholders actually are cardholders with the Department of Public Health and Human Services. This process has worked well and need not be tampered with in the new law. Handing over a list of cardholders to law enforcement is unfair to vulnerable patients who legitimately qualify for a card. I fear it would drive those patients to the illegal market for marijuana.
- Compounding the privacy issues, SB 423 also permits law enforcement unlimited access, without permission or warrant, to the private homes of cardholders who grow their own marijuana. Article II, Section § 11 of our Montana constitution protects citizens from unreasonable searches and seizures. Patients who grow their own plants were not the genesis of any of the problems that arose under the current law and should not now be subject to warrantless searches. If law enforcement officers believe a patient is diverting their marijuana or growing beyond the allowed limits they should properly investigate the matter; gain access through consent or through a search warrant. Law enforcement, working with the Department of Public Health and Human Services can ensure suspected abuse is investigated and when confirmed, appropriate enforcement action taken. My amendments permit inspections of providers and manufacturers by the Department of Public Health and Human Services and law enforcement during normal business hours. My amendments provide for a reasonable time limit for unannounced inspections, which may often occur in a provider's personal residence. My amendments also provide reasonable procedures for securing marijuana products and paraphernalia where a cardholder is admitted to a health care facility.
- My amendments move the reviewing authority for approving a new medical condition for eligibility for medical marijuana treatment from the legislature to the Department of Public Health and Human Services. The Department of Public Health and Human Services is the only agency in

the bill with all the responsibility for administering the law. It is in a good position to review records and seek advice from medical experts if a physician is seeking to have a new medical condition approved for a potential cardholder. These patients need not be subject to the long delay between sessions awaiting approval of their physician's recommendations.

- My amendments also provide for a more rational transition time for providers to register and comply with the new law. The new effective date for some of the provisions in the bill is October 1, 2011 and for other provisions July 1, 2011. The local government and law enforcement provisions are effective upon passage and approval.
- Providers who grow and manufacture marijuana products must register their location with the Department of Public Health and Human Services and local law enforcement, ensuring more effective compliance enforcement. My amendments provide rule making authority for the Department to enable cardholders to receive a list of providers in a particular area. Given that SB 423 prohibits advertizing and storefronts may be prohibited by local jurisdictions, it is essential patients are able to find a provider.
- I believe SB 423 makes access to medical marijuana far too difficult for patients, many of whom are suffering chronic and severe illness and do not have the physical or financial ability to grow their own marijuana to treat their debilitating condition. Patients must be able to obtain medical marijuana from legitimate sources with a reliable product. Therefore, I have increased the number of cardholders a provider or manufacturer may have from three to twenty-five. I believe this limit will prevent the large grow operations that boomed under the current law. My amendments do allow a provider to charge for their plant products and lift the no profit restriction from the bill. Another amendment allows a provider to be both a grower and manufacturer of marijuana infused product. There has been no testimony that this now common practice has been a problem.
- SB 423 codifies the restrictions on physicians and provides for review of physicians who certify more than fifteen patients a year. My amendment increases that number to 50 patients. Fifty is less than 5% of your average Montana physician's patient load and this limit will still certainly curtail the number of cardholders.
- Finally, I have put rulemaking authority in the Department of Public Health and Human Services to write rules around the transportation, possession of samples, testing and labeling of marijuana by laboratories in Montana. Laboratories have been receiving, testing and labeling marijuana under the current law and doing so protects the patients in titrating proper doses and assists the medical community with scientific information about the value of particular strains on specific debilitating conditions. It may also help us in the future with tracking marijuana and prosecuting illegal activity. My amendments permit laboratories to register with the department and provide legal protections to the laboratories that do testing and labeling.

I respectfully request that the legislature agree to these proposed amendments. It would be irresponsible to adjourn without a reform bill that addresses the weakness of I-148 and the concerns raised at public hearings while honoring the intent of the initiative and the Montanans who voted for it.

Sincerely,



BRIAN SCHWEITZER
Governor

c Legislative Services Division

Amendments to Senate Bill No. 423
Reference Copy

Requested by the Governor

For the Senate Committee of the Whole

Prepared by Susan Byorth Fox
April 28, 2011 (2:41pm)

1. Title, page 1, line 13.
Strike: "50-46-201, 50-46-202,"
2. Page 2, line 4.
Following: "delivery,"
Insert: "including delivery for laboratory testing,"
3. Page 2, line 24 through line 25.
Following: "BY"
Strike: ":", on line 24 through "(I)" on line 25
4. Page 2, line 25.
Following: "INCLUDING"
Insert: "relevant and necessary"
5. Page 2, line 27 through line 29.
Strike: "OR" on line 27 through "EXAMINATION;" on line 29
6. Page 3, line 7.
Strike: "LEGISLATURE"
Insert: "department by rule"
7. Page 4, line 4.
Strike: "REGISTERED CARDHOLDER,"
Following: "PROVIDER"
Strike: "└"
8. Page 4, line 25.
Following: "RELEVANT"
Insert: "and necessary"
9. Page 4, line 27.
Following: "REVIEWING"
Insert: "any"
Following: "RELEVANT"
Insert: "and necessary"
10. Page 6, line 8.
Following: "department"
Strike: "shall" through "renewal"

Insert: "must have complete application materials and may verify any documentation that is"

11. Page 7, line 3.

Strike: "registered cardholders"

Following: "and"

Strike: "└"

Following: "providers"

Strike: "└"

12. Page 7, line 5.

Strike: "cardholders"

Following: "or"

Strike: "└"

Following: "providers"

Strike: "└"

13. Page 7, line 8.

Strike: "15"

Insert: "50"

14. Page 7, line 19 and line 20.

Strike: "└" on line 19 through "(A)" on line 20

15. Page 7, line 21 through line 25.

Strike: "; AND" on line 21 through "CERTIFICATIONS" on line 25

16. Page 7, line 28.

Strike: "and (3)"

Insert: "through (4)"

17. Page 8, line 15.

Following: "any"

Insert: ", or names, dates of birth, and street addresses of both providers if a patient has both types of providers"

18. Page 9.

Following: line 10

Insert: "(3) An application for a registry identification card for a minor must be accompanied by the written certification and accompanying statements required pursuant to [section 7] from a second physician in addition to the minor's treating physician or referral physician."

Renumber: subsequent subsections

19. Page 10, line 30.

Strike: "THREE"

Insert: "25"

20. Page 11, line 3.

Strike: "TWO"
Insert: "24"

21. Page 11, line 5 through line 7.
Strike: subsection (4) in its entirety
Renumber: subsequent subsections

22. Page 11, line 10 through line 15.
Strike: ":" on line 10 through "(C)" on line 15
Following: "CARDHOLDER" on line 15
Strike: "; or"
Insert: "."

23. Page 11, line 16.
Strike: line 16 in its entirety

24. Page 11, line 17.
Strike: "(a)"

25. Page 11, line 19.
Strike: "(i)"
Insert: "(a)"
Renumber: subsequent subsections

26. Page 11, line 24 through line 25.
Strike: subsection (b) in its entirety

27. Page 12, line 3 through line 4.
Following: "PROVIDER" on line 3
Strike: ":" through "(A)" on line 4
Following: "PRODUCTS" on line 4
Strike: "AND" on line 4
Insert: "unless the marijuana-infused products provider is also a registered provider."

28. Page 12, line 5.
Strike: line 5 in its entirety

29. Page 12, line 28 through page 13, line 20.
Strike: subsection (D) through subsection (M) in their entirety
Insert: "(d) confirm that the physician:
 (i) has assumed primary responsibility for providing management and routine care of the patient's debilitating medical condition after obtaining a comprehensive medical history and conducting a physical examination that included a personal review of any medical records maintained by other treating physicians and that may have included the patient's reaction and response to conventional medical therapies;
 (ii) has reviewed all prescription and nonprescription medications and supplements used by the patient and has

considered the potential drug interaction with marijuana;

(iii) has explained the potential risks and benefits of the use of marijuana to the patient; and

(iv) plans to continue to assess the patient and the patient's use of marijuana during the course of the physician-patient relationship;

(e) state that in the physician's professional opinion the potential benefits of the use of marijuana would likely outweigh the health risks for the patient; and

(f) attest that the information provided in the written certification and accompanying statements is true and correct.

(3) A physician who is the second physician recommending marijuana for use by a minor shall submit:

(a) a statement initialed by the physician that the physician conducted a comprehensive review of the minor's medical records as maintained by the treating physician or referral physician;

(b) a statement that in the physician's professional opinion, the potential benefits of the use of marijuana would likely outweigh the health risks for the minor; and

(c) an attestation that the information provided in the written certification and accompanying statements is true and correct."

Renumber: subsequent subsection

30. Page 13, line 30.

Following: "(1)"

Insert: "(a)"

31. Page 14, line 1.

Following: "hospices"

Insert: "and residential care facilities"

32. Page 14, line 2.

Strike: "in the order listed"

33. Page 14, line 4.

Strike: "(a)"

Insert: "(i)"

34. Page 14, line 5.

Following: " ; "

Insert: "or"

35. Page 14, line 6.

Strike: "(b)"

Insert: "(ii)"

Following: "PROVIDER"

Insert: ", court-appointed guardian, or person with a power of attorney"

36. Page 14, line 7.

Strike: "; or"

Insert: "."

37. Page 14, line 8.

Strike: "(c)"

Insert: "(b) If a patient is unable to remove the marijuana or the health care facility is unable to contact an individual as provided in subsection (1)(a), the facility shall"

38. Page 14, line 9.

Following: "provider"

Insert: ", "

Strike: "OR"

Following: "PROVIDER"

Insert: ", court-appointed guardian, or person with a power of attorney, if any,"

39. Page 14, line 11 and line 12.

Following: "respond by"

Strike: "removing and destroying"

Insert: "storing"

Following: "marijuana" on line 12

Insert: "and any paraphernalia for up to 45 days for the registered cardholder or by transferring the marijuana to the cardholder's provider or marijuana-infused products provider to be held for the cardholder. If the cardholder is released from the health care facility within 45 days, the marijuana and any paraphernalia must be returned to the cardholder. After 45 days, the marijuana and any paraphernalia must be destroyed"

40. Page 14, line 26.

Strike: "or"

41. Page 14, line 27.

Following: "marijuana"

Insert: "; or

(c) a testing laboratory or its owners, officers, or employees are transporting, receiving, or in possession of marijuana samples for testing and labeling under rules adopted by the department"

42. Page 19, line 4.

Strike: "FREQUENT,"

43. Page 19, line 7.

Strike: "AT ANY TIME"

Insert: "during normal business hours of 8 a.m. to 5 p.m."

44. Page 19, line 13.

Following: "INVESTIGATION"

Insert: "during normal business hours of 8 a.m. to 5 p.m."

45. Page 19, line 24.

Strike: "or"

46. Page 19, line 27.

Following: "PRODUCTS"

Insert: "; or

(c) fails to cooperate with the department concerning an investigation or inspection if the person is registered and cultivating or manufacturing the person's own marijuana"

47. Page 21.

Following: line 30

Insert: "(d) a process for maintaining a list of providers and marijuana-infused products providers who have fewer than 25 registered cardholders and who want their contact information provided to cardholders in their area;

(e) procedures for adding to the list of debilitating medical conditions for which use of marijuana is allowed;

(f) requirements for testing laboratories to register with the department;

(g) the manner in which testing laboratories may transport, receive, test, and label marijuana samples for providers and marijuana-infused product providers;

(h) inspections procedures for registered cardholders who have chosen to cultivate and manufacture marijuana for their own use; and"

Renumber: subsequent subsection

48. Page 28, line 17 through page 30, line 6.

Strike: section 30 through section 31 in their entirety

Renumber: subsequent sections

49. Page 32, line 28.

Strike: "July 1, 2011"

Insert: "October 1, 2011"

50. Page 32, line 30.

Strike: "Before July 1, 2011,"

Insert: "By October 1, 2011,"

51. Page 33, line 29.

Strike: "July 1, 2011"

Insert: "October 1, 2011"

52. Page 33, line 30 through Page 34, line 1.

Strike: "30" on page 33, line 30 through "38" on page 34, line 1
Insert: "31, 33, and 36"

- END -