

# **SB 423 Monitoring: Montana Marijuana Act Developments Through August 2012**

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## 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Senate Bill 423 repealed Montana's Medical Marijuana Act on July 1, 2011, and replaced it with new requirements for the cultivation, manufacture, and possession of marijuana for use by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 also required the Children, Families, Health, and Human Services Interim Committee to monitor the new law and to draft legislation if members decide changes to the law are needed.

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

## Ballot Measures

An initiative effort to legalize marijuana use by adults failed to gather the necessary voter signatures by the June 22 deadline. Backers of Constitutional Initiative 110 submitted 17,878 that represented 10% of the voters in five House districts. To qualify, the measure needed 48,674 signatures that represented 10% of the voters in at least 40 House districts.

The issue of medical use of marijuana, however, will be on the ballot in November. Voters will have a chance to reject or retain SB 423 when they go to the polls this fall. Opponents to SB 423 last year gathered enough signatures to place Initiative Referendum 124 on the ballot.

Voters will be asked whether they want to keep or repeal the law. If they vote against SB 423, the former Montana Medical Marijuana Act will again be in place to govern the use of marijuana for medical conditions.

## Legal Challenge to SB 423 and Other Court Cases

The fate of appeals over a Helena District Court decision in a challenge to SB 423 remained unresolved in early August. The Montana Supreme Court heard oral arguments on May 30 in appeals filed by both the state and the Montana Cannabis Industry Association, but had not ruled on the appeals by Aug. 6.

The appeals focused on a decision by District Judge Jim Reynolds last summer to let most — but not all — of the new law go into effect while trial proceeded on the merits of the association's suit. However, before the trial could proceed, the state appealed the lower court decision to temporarily halt the limit on the number of patients for whom providers may

grow or manufacture marijuana and the ban on compensation for marijuana. The association, meanwhile, appealed the decision to let the prohibition on registry cards for probationers and parolees stand, along with the standard of care that doctors must follow when certifying medical conditions. The association also contended the entire law should be enjoined while the suit goes to trial.

Although it had not ruled yet on the appeals related to SB 423, the Supreme Court did issue decisions recently in four other cases that involved the former Medical Marijuana Act. The rulings will be significant should voters reject SB 423 in November and laws relating to marijuana use revert to the provisions of the Medical Marijuana Act. The rulings, summarized below, involve several areas of the former law that had proven murky for law enforcement, prosecutors, patients, and caregivers.

- **Caregiver-to-Caregiver Sales:** In a Flathead County case, the court ruled that the former Medical Marijuana Act clearly prohibited what were known as "caregiver-to-caregiver" sales. The court noted that the law allowed caregivers to grow, manufacture, possess, and transfer marijuana only for patients who had named the person as their caregiver. The appeal, brought by three caregivers and the Montana Medical Growers Association, contended that the use of terms such as "acquire" and "deliver" in the Medical Marijuana Act showed that the law meant for caregivers to be able to obtain marijuana for their patients from other sources. Because caregivers were the only other lawful source for obtaining marijuana, the appellants said the law clearly intended to allow for caregiver-to-caregiver sales.

The Supreme Court rejected that argument in its July 6 decision, saying: "We decline the invitation to engage in the expansive interpretation of the 2009 MMA urged by the Plaintiffs, as it is simply unsupportable under the plain language of the statute." The court concluded that the Medical Marijuana Act did not allow caregivers to exchange marijuana among themselves or allow a caregiver to grow or manufacture marijuana for another caregiver.

The court had previously dismissed a similar appeal from Missoula County as moot because of SB 423's repeal of the former Medical Marijuana Act. However, it determined that the Flathead County case was not similarly moot because two caregivers had been charged with criminal possession of a dangerous drug with intent to distribute. The court determined that it should rule in this case because SB 423 did not specifically bar prosecutions under the old law and because felony criminal charges may be brought for up to five years after the date of the alleged offense. Thus the defendants in the Flathead County case could face prosecution until February 2016.

- **Patient Acquisition from a Non-Caregiver:** In May, the Supreme Court ruled that a patient who obtained marijuana from someone other than her designated caregiver was properly prosecuted for criminal possession of dangerous drugs. Tristiana Johnson was charged with several misdemeanors in Park County Justice Court after being stopped on suspicion of driving under the influence. She was in possession of marijuana and a medical marijuana card. During the stop, a Montana Highway Patrol officer learned that Johnson had obtained the marijuana from someone other than her designated caregiver. That information resulted in a misdemeanor possession charge. Johnson appealed her conviction on that charge to District Court and subsequently to the Montana Supreme Court. She argued that she was entitled to possess marijuana because she had a medical marijuana registry card.

The state, however, contended that the Medical Marijuana Act did not authorize patients to buy marijuana from anyone other than the caregiver they designate on their registry applications. The Supreme Court agreed, noting that the former law allowed DPHHS to revoke the card of someone who failed to notify the agency when they changed caregivers. In making its decision, the high court noted: "We agree with the State's position that it makes no sense that Johnson could buy marijuana from an unidentified drug dealer, rather than her caregiver, and somehow have more legal protections than a patient who changed caregivers without notice."

The ruling interprets the so-called "affirmative defense" portion of the former law. That section of law was the subject of much discussion during the work done in the 2009-2010 interim to revise the Medical Marijuana Act.

- **Definition of Usable Marijuana:** In a July 20 ruling, the Supreme Court said that hashish is not "usable marijuana" as defined and protected by the Medical Marijuana Act. The ruling came in an appeal by man with a Washington state medical marijuana certification. Buddy Pirello was charged with felony possession of dangerous drugs in 2010 after being found to have marijuana and hashish oil in his vehicle during a traffic check in Mineral County. Pirello challenged the felony drug charge for hashish on the grounds that the Montana Medical Marijuana Act allowed him to possess "usable marijuana," which was defined as "the dried leaves and flowers of marijuana and any mixture or preparation of marijuana." He made a two-pronged argument: that the definition included hashish and that if it didn't, the term was unconstitutionally vague.

The Supreme Court disagreed, saying that the Medical Marijuana Act adopted the definition of marijuana that is contained in the state's Controlled Substances Act (CSA). That definition limits marijuana to "all plant material." The CSA also defines hashish as a separate drug that is extracted from the marijuana plant and composed of resin from the plant. As a result, the court said, hashish does not meet the definition of "usable marijuana" nor does it fall "within the MMA's narrow exception to the CSA."

SB 423 retained the Medical Marijuana Act's definition of marijuana and altered the definition of marijuana only slightly.

- **Extent of Legal Protections:** In a July 31 decision, the court ruled that patients and caregivers are not protected by the law unless they have obtained a registry identification card. The ruling came in a case in which a Havre man charged with several drug offenses applied to be a medical marijuana caregiver and patient after he was charged and then sought dismissal of the charges. Shawn Stoner said the Medical Marijuana Act protected him from arrest and prosecution, even though the marijuana was discovered and charges were filed before he submitted an application to the medical marijuana registry.

The court, however, concluded that a "common-sense reading" of the law makes it clear that the immunity from arrest and prosecution applies only to a person who has obtained a registry card before being found in possession of marijuana.

### Registry Statistics

The number of people registered to use marijuana experienced a slight uptick in July 2012 for the first time since the new law went into effect. The registry listed 8,834 patients in July, compared with 8,681 in June. However, the July figures still represented a 72% decline in patient numbers since May 2011, when 31,522 patients were registered to use marijuana under the former law.

The July 2012 statistics also show that the number of cards issued to people under 30 years of age continued to decline, reaching the lowest point since passage of SB 423. The number of minors with cards dropped from 54 in May 2011 to two in July 2012, while the number of 18-year-olds to 20-year-olds with cards dropped from 1,238 to 125. And cardholders who are 21 to 30 years of age represented 15.96% of the cardholders in July, compared with 25% in May 2011.