F I S C A L I M P A C T R E P O R T

SPONSOR Robinson **DATE TYPED** 2-16-05 **HB**

SHORT TITLE Compassionate Use Medical Marijuana Act **SB** 492

ANALYST Collard

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			See Narrative		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 795

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General's Office (AG)
Aging and Long-Term Services Department (ALTSD)
Human Services Department (HSD)
Department of Health (DOH)
Health Policy Commission (HPC)
New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

Senate Bill 492 authorizes beneficial use of marijuana in treatment of an "eligible medical condition," defined as a chronic or debilitating disease that produces severe pain or sever muscle spasms, or a condition designated by the department of health to be an eligible medical condition. The bill gives responsibility for developing procedures in a marijuana program to DOH. A patient must be "certified" by the secretary of health for participation in such a program, the patient must have a certification by a physician that the patient has an eligible medical condition and the patient must be a New Mexico resident.

The AG's Office notes Section 7 adds requirements for additional certifications in writing for a

patient under the age of 18. Section 8 of the bill permits prosecution of a certified patient who is driving while intoxicated by marijuana as well as prosecution for using marijuana in a school bus, on school grounds, at a place of employment and in public parks and recreation areas. Section 5 exempts the patient and licensed physician from arrest or prosecution under state law for manufacturing, possessing, certifying the patient or administering marijuana within the program.

Finally, this legislation proposes a "topical use" drug delivery method that does not involve ingesting or inhaling marijuana but does include the application of marijuana by means of a topical patch, lotion, gel, alcohol or bath.

Significant Issues

DOH indicates marijuana and marijuana components, administered through smoking or through ingestion, have been demonstrated to have some efficacy in the treatment of certain medical conditions including nausea associated with cancer chemotherapy and HIV medications, chronic wasting syndrome associated with advanced HIV disease, glaucoma, and spasticity associated with neuromuscular conditions including multiple sclerosis and spinal cord injury. There are data that suggest that topical ophthalmic preparations of marijuana might be effective in the treatment of elevated intraocular pressure in glaucoma.

It is possible that further medical research related to the medicinal use of marijuana might be helpful in evaluating the safety and efficacy of medical marijuana. Such research is authorized under the "Controlled Substances Therapeutic Research Act". Repeal of the Therapeutic Research Act could limit the ability to research the medical benefits of medical marijuana.

This bill would require DOH to register individuals as distributors of topical marijuana preparations for medicinal use by enrolled patients. This implies that the department would be responsible for evaluating the safety and efficacy of preparations distributed through the program. DOH has no authority or capacity to evaluate or regulate medicinal preparations manufactured by individuals.

NMCD indicates this bill will increase the number of offenders who test positive for THC and will increase the number of hearings over whether the THC in their system was prescribed by a physician or ingested illicitly (or possibly both). Offenders who can get a prescription for a marijuana topical ointment will feel they have the liberty to smoke marijuana with impunity. Further, NMCD states, unless the medical benefits are significant and no other therapies are helpful, this bill could create more problems than it would helpful. There is no prohibition for possession in a correctional setting.

The AG's Office indicates the issues presented by this bill mirror those presented by past similar bills that have not been enacted. The vigor of federal prosecutions in the face of similar measures in other states, particularly California, has not abated. The question whether a state can tailor a medical marijuana program sufficiently to prevent federal prosecution is presently pending in the United States Supreme Court.

It is clear that any state statute that permits use of medical marijuana would authorize an act that is illegal under the federal Controlled Substances Act (CSA). The United States Supreme Court so ruled. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001). In that case the Court noted that it was not deciding whether the CSA could apply to strictly ***intrastate***

activity: "Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause." Oakland Cannabis Buyers' Cooperative, 532 U.S. at 1719 n.7.

Under the Commerce Clause, Congress can only regulate activity that has an impact on interstate commerce. The bill under consideration does not address the source of marijuana to be used as authorized in the proposed medical marijuana program, thus there does not appear to be any attempt to narrow the impact of the Act to solely intrastate impact. For this reason, the bill could not support an argument that the CSA does not apply since the bill permits an impact on interstate commerce, rendering activities permitted under this bill as a matter of state law illegal under federal law.

The view that a medical marijuana program carefully tailored to only have an impact intrastate within New Mexico, and no impact on interstate commerce, relies on such cases as United States v. Lopez, 514 U.S. 549 (1995), where the Supreme Court struck down the Gun-Free School Zone Act of 1990 because it exceeded the Commerce Clause authority of Congress since having a gun in a school zone does not have an impact on interstate commerce, and United States v. Morrison, 120 S.Ct. 1740 (2000), where the Court struck down the Violence Against Women Act of 1994 as exceeding the scope of the Commerce Clause, because the direct and "aggregate" impact on interstate commerce of violence against women was too remote—such regulation is left to the states.

A general claim that the CSA's ban on marijuana use was unconstitutional as beyond the Commerce Clause failed in Kuromiya v. United States, 37 F.Supp.2d 717, 723 (E.D.Pa. 2000). In Pearson v. McCaffrey, 139 F.Supp.2d 113, 121-23 (D.C.C. 2001), the court rejected the claim by physicians that the CSA violated the Commerce Clause by restricting their right to prescribe a useful medicine.

The argument that the CSA exceeds the scope of the Commerce Clause succeeded in the Ninth Circuit in a case the United States Supreme Court now has under consideration. In Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), the Ninth Circuit reversed denial of a preliminary injunction, ruling that the plaintiffs' conduct, lawful under state law pursuant to the California Compassionate Use Act, had no impact on interstate commerce and thus could not be prosecuted by federal authorities. This case was argued in the United States Supreme Court on November 29, 2004, and a decision from the Court is expected by June 2005. The ground upon which the Ninth Circuit enjoined federal prosecution of the California medical marijuana participants was that they "use only soil, water, nutrients, growing equipment, supplies and lumber originating from or manufactured within California" and thus participate in a narrow class of activities, "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." Raich, 325 F.3d at 1225, 1228.

If the United States Supreme Court upholds the Ninth Circuit in Raich, it would be safe to say that a bill that restricted medical marijuana to strictly intrastate New Mexico activities would protect physicians and patients from federal prosecution. However, the federal government to date, applying the CSA as interpreted by many courts prior to the Ninth Circuit's decision in Raich, has vigorously pursued prosecution of physicians, patients, growers and others involved in state-permitted use of marijuana for medical purposes in not only California, but the other states that have similar programs in Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon

and Washington. Unless the Supreme Court affirms in Raich, the same result is likely if the proposed medical marijuana program in SB 492 becomes law in New Mexico.

At this point, one would be guessing at the outcome to predict how the Supreme Court will rule in Raich. The Court overrules the Ninth circuit more frequently than any other federal circuit, so caution is advised before reliance is placed on the Ninth Circuit's ruling in Raich. The provisions of SB 492 are sufficiently similar to the California law (Cal. Health & Safety Code Section 11362.5), that the outcome in Raich is a fair indicator of how the proposed New Mexico program would be treated if the people involved strictly limited their activities to New Mexico only. If the Supreme Court affirms in Raich, a medical marijuana program that tracks California's program would also prevent federal prosecution of persons acting under such a program. Unless and until that occurs, it seems very likely that persons acting under a program adopted pursuant to SB 492 would be subject to federal prosecution in an area that the federal government has demonstrated ample vigor to prosecute.

An example of the federal government's vigor in this regard is found in United States v. Rosenthal, 266 F.Supp.2d 1068 (N.D. Cal. 2003), where the defendant grew marijuana strictly and openly for use in Oakland's medical marijuana program pursuant to state law. The federal government prosecuted, convicted and sentenced Mr. Rosenthal for violation of the CSA. Given the uncertain state of the law, the lawfulness of the statute proposed in SB 492 depends on the outcome of Raich. Until the United States Supreme Court renders a decision in that case, making medical marijuana lawful under state law gambles with the personal liberty of those, such as Mr. Rosenthal, who follow state law in a medical marijuana program that is authorized by state law but subjects them to criminal prosecution by the federal government.

FISCAL IMPLICATIONS

There is no appropriation attached to this bill and DOH indicates without funds for staff, space, materials and support services the program would be difficult to administer.

ADMINISTRATIVE IMPLICATIONS

AOC notes this bill can potentially reduce the caseload in the judiciary due to the legitimate use of marijuana for medicinal reasons. However, AOC indicates there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. AOC does not specify these needs.

NMCD states this places a substantial and onerous burden on the staff of correctional institutions to determine which visitors who may test positive with an ion scan are legally able to possess marijuana. Additionally, preventing the introduction of marijuana for inmates into the institution by visitors who may legally have it in their possession may strain the resources of prisons. Finally, the restriction on the release of medical information may make it difficult for non-medical personnel at the institution to identify those who may legally possess marijuana.

RELATIONSHIP

Senate Bill 492 relates to Senate Bill 795 which is also a compassionate use bill.

TECHNICAL ISSUES

AOC suggests defining the term "manufacture" as used within the act.

HPC indicates the issues are specific to this legislation:

- The act does not include an appropriation to DOH to staff, develop and implement the Medical Use of Marijuana Program that the bill establishes.
- In order to fully offer physicians or other providers prescribing marijuana for therapeutic use the protections offered under the act, it may be necessary to review and consider amendment of certain sections of and the New Mexico Board of Pharmacy regulations (16 NMAC Chapter 19) and other regulations.
- The definition of "practitioner" is limited to physicians. Other practitioners licensed to prescribe controlled substances who may be treating patients with the defined "debilitating medical conditions" may therefore be prohibited from prescribing marijuana as a legal and viable treatment for their patients under the act.

OTHER SUBSTANTIVE ISSUES

ALTSD notes the use of marijuana is reported to assist in the treatment of cancer patients, to alleviate the pain associated with certain ailments and medical conditions, and to stimulate the appetite in patients in need of enhanced nutritional intake.

HSD notes the major concern with this bill is reconciling with the federal government, which has not been accommodating in its position with respect to marijuana as a Schedule I drug. Additionally, since this would not be dispensed by pharmacies it is unlikely to become a Medicaid funded benefit.

DOH indicates the relief of physical pain and suffering must be a goal of compassionate medical care. Intractable pain and suffering can plague people with terminal cancer, AIDS and neuromuscular diseases, including muscular sclerosis and spinal cord injury. Often, prescription medications adequately relieve these symptoms. However, in many cases, there is no relief from suffering, relief is incomplete or the side effects of the prescription medications are intolerable. It has been the experience of many patients with these conditions that smoking small amounts of marijuana will provide relief from these symptoms when prescription medications do not. This is often the case even when smoking marijuana is compared to taking Marinol, a prescription oral preparation of one component of marijuana, tetrahydrocannabinol (THC).

Because smoked cannabis can provide welcome relief from pain and suffering among people with serious or terminal medical conditions, the therapeutic uses of the drug should be clearly distinguished from the illegal recreational uses of the drug. For example, we distinguish the appropriate medical uses of Morphine and Valium (for pain and anxiety relief) from their illegal recreational uses. In medical practice, it would not be considered acceptable to deny cancer patients access to opioid analgesics such as morphine simply because morphine has a potential for abuse as a recreational drug.

The therapeutic effects of cannabis in a medical context have been recognized. These effects include the control of intractable nausea and vomiting associated with cancer chemotherapy, stimulation of appetite in people suffering from the AIDS wasting syndrome, and the control of severe painful muscle spasms in people living with certain neuromuscular conditions, including spinal cord injury and multiple sclerosis.

In 1997, the White House Office of National Drug Control Policy (ONDCP) commissioned the Institute of Medicine of the National Academy of Sciences to review the scientific evidence regarding the medical use of marijuana. Their findings were published in 1999: "Marijuana and Medicine: Assessing the Science Base." The following are quotes from the executive summary of that report:

"The accumulated data indicate a potential therapeutic value for cannabinoid drugs, particularly for symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation.... people vary in their responses to medications, and there will likely always be a subpopulation of patients who do not respond well to other medication. The combination of cannabinoid drug effects (anxiety reduction, appetite stimulation, nausea reduction, and pain relief) suggests that cannabinoids would be moderately well suited for particular conditions, such as chemotherapy-induced nausea and vomiting and AIDS wasting."

DOH cautions there are adverse effects associated with the medical use of cannabis, as is true of most effective prescription medications. However, real and potential adverse effects of medical cannabis must be weighed against the therapeutic benefits that could be realized for patients with serious or terminal illnesses.

Smoking marijuana may impair the ability to drive motor vehicles or operate machinery. (It is unknown whether topical marijuana would have the same effect). This is true also for other medications used to treat pain and anxiety, including opioid analgesics (such as Morphine) and benzodiazepines (such as Valium). It will be important that the physician recommending the use of medical cannabis review these concerns thoroughly with patients. This bill explicitly states that the enrolled patient would not be protected from liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of cannabis.

The medical use of cannabis is analogous to the therapeutic use of other powerful medicines (including Morphine and Valium) in the relief of pain and suffering. As is the case with those powerful prescription medications, a clear distinction should be drawn between the proper medical therapeutic use of cannabis and its illegal recreational use. As is the case with any medication, the benefits of medical cannabis must be weighed against its potential adverse effects in thorough discussions between a patient and their physician.

HPC states among 1,706 adults polled in AARP's random telephone survey in November 2004, 72 percent of respondents agreed "adults should be allowed to legally use marijuana for medical purposes if a physician recommends it." Those in the northeast (79 percent) and west (82 percent) were more receptive to the idea than in the midwest (67 percent) and southwest (65 percent). In southern states, 70 percent agreed with the statement.

HPC indicates the National Institutes of Health issued a report reviewing the scientific data concerning the potential therapeutic uses for marijuana and the need for, and feasibility of, additional research. The findings included that marijuana has potential therapeutic value for analgesia

and neurological and movement disorders

It is difficult to compare marijuana with products that have received regulatory approval under more rigorous experimental conditions than those previously conducted on marijuana. More and better clinical trials and studies would be needed.

However, HPC cautions, when smoked, marijuana produces over 2,000 chemicals, including hydrogen cyanide, ammonia, carbon monoxide, acetaldehyde, acetone, phenol, cresol, naphtalene, and other well-known carcinogens, many in higher concentrations than found in tobacco smoke. Smoking marijuana causes cancer of the lungs, mouth, lip and tongue.

The National Institute of Allergy and Infectious Disease reported that the many carcinogens in marijuana smoke would be a health hazard for patients with compromised immune systems. The quality control of marijuana is difficult to standardize and regulate.

ALTERNATIVES

DOH research indicates, in the skin, delta (9)-tetrahydrocannabinol (THC), an active component of marijuana, excites sensory nerve endings that are also excited by capsaicins (the active component of chile peppers) and mustard oils (Mustard oils and cannabinoids excite sensory nerve fibres through the TRP channel). Topical capsaicin preparations, licensed for use as medicinals, are already commercially available and could be legal alternatives to topical marijuana preparations.

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