

IN THE COUNTY COURT FOR THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff

CASE NO.: 08-016288MM10A

vs.

JUDGE: GEHL

XXXXXXX,
Defendant

_____ \

MOTION TO DISMISS

AND TO DECLARE FLA. STAT. 893.03(c)(7), 893.13(6)(b) UNCONSTITUTIONAL
COMES NOW, the Defendant, XXXXXXX, by and through undersigned counsel, *MICHAEL*

MINARDI, P.A., pursuant to the Florida Rules of Criminal Procedure and the Florida Constitution, respectfully moves this Honorable Court to dismiss Count One (1) of the Information, charging the Defendant with Possession of Cannabis, a violation of *Fla. Stat.* 893.03(c)(7), 893.13(6)(b), and as grounds for said Motion the Defense would show unto this Court the following:

1. The Defendant was arrested for a violation of Fla. Stat. 893.13(6)(b), Possession of Marijuana.
2. That subsequent to the issuance of that citation, the Office of the State Attorney filed a one count Information charging the Defendant with an offense in violation of Fla. Stat. 893.13(6)(b).
3. That pursuant to U.S.C.A. V and XIV, Article I, Section 9 of the Florida Constitution, due process concerns are implicated where a criminal statute *fails to provide adequate notice* of the conduct it prohibits and under those circumstances is *void for being overbroad, vague, and is arbitrary, and oppressive*.
4. The Defendant, XXXXXXX, respectfully moves this Honorable Court pursuant to Fla. R. Crim. Proc. 3.190, U.S.C.A. V and XIV, and Florida Constitution Article I, Section 9, to dismiss the instant information asserting that the instant Statute, Fla. Stat. 893.13, is void for being overbroad, vague, and arbitrary and oppressive, because it fails to provide a reasonable restriction, and is not based on current law or fact.
5. Further, the Defendant avers that the Statute is constitutionally infirm as overbroad as it criminalizes conduct that is otherwise innocent in nature.
6. The Defendant also asserts that the Statute as written encourages arbitrary discriminatory and erratic enforcement, and is thus also constitutionally infirm in this basis.

7. As a result, the Defendant moves this Honorable Court for an order dismissing count one of the instant Information declaring Fla. Stat. 893.13(6)(b), unconstitutional for any and/or all of the reasons asserted herein, and further says not.
8. Other grounds to be argued ore tenus.

MEMORANDUM OF LAW

The Defendant avers that *Fla. Stat. 893.13(6)(b)*, is constitutionally infirm in that it is impermissibly vague and does not provide a person of normal intelligence what the Statute itself prohibits. Further, the Defendant represents that the Statute is unconditionally overbroad as it potentially criminalizes lawful conduct. Finally, the Defendant asserts that the Statute itself is unconstitutional as it encourages arbitrary, discriminatory and erratic enforcement by law enforcement.

I. FLA. STAT. 316.191 IS CONSTITUTIONALLY INFIRM AS THE STATUTE IS VAGUE AND AMBIGUOUS AND IS THUS SUBJECT TO A VOID FOR VAGUENESS CHALLENGE:

Under Florida law, when reasonably possible and consistent with constitutional rights, all doubts regarding a statute should be resolved in favor of its validity. *State v. Wershow*, 343 So.2d 605, 607 (Fla. 1977). The Florida Supreme Court has also held, however, that when there is doubt about a statute in the context of a vagueness challenge, the result should be resolved in “favor of the citizen and against the State.” *State v. Wershow*, at 608; *Brown v. State*, 629 So. 2d 841 (Fla. 1994), (Where sufficient doubt about a Statute exists, such doubt must be resolved in favor of the citizen and against the State).

Florida Statute 893.03, in pertinent part, indicates as follows:

893.03 Standards and schedules.--The substances enumerated in this section are controlled by this chapter. The controlled substances listed or to be listed in Schedules I, II, III, IV, and V are included by whatever official, common, usual, chemical, or trade name designated. The provisions of this section shall not be construed to include within any of the schedules contained in this section any excluded drugs listed within the purview of 21 C.F.R. s. 1308.22, styled "Excluded Substances"; 21 C.F.R. s. 1308.24, styled "Exempt Chemical Preparations"; 21 C.F.R. s. 1308.32, styled "Exempted Prescription Products"; or 21 C.F.R. s. 1308.34, styled "Exempt Anabolic Steroid Products."

(1) SCHEDULE I.--A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards. The following substances are controlled in Schedule I:

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances or which contains any

of their salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

7. Cannabis.

The Statute further defines “Potential for Abuse” as

- (19) "Potential for abuse" means that a substance has properties of a central nervous system stimulant or depressant or an hallucinogen that create a substantial likelihood of its being:
- (a) Used in amounts that create a hazard to the user's health or the safety of the community;
 - (b) Diverted from legal channels and distributed through illegal channels; or
 - (c) Taken on the user's own initiative rather than on the basis of professional medical advice.

Proof of potential for abuse can be based upon a showing that these activities are already taking place, or upon a showing that the nature and properties of the substance make it reasonable to assume that there is a substantial likelihood that such activities will take place, in other than isolated or occasional instances.

Fla. Stat. 893.02(19)

The Defendant avers that to survive the scrutiny of a void-for-vagueness challenge, the language of the pertinent Statute must provide adequate notice of the conduct it prohibits. Brown, *supra* at 843.

In Brown, *supra*, for instance, the Defendants raised challenges to Fla. Stat. 893.13 (1)(I)(1990), which imposed enhanced penalties on those who sold, purchased, manufactured, delivered or possessed a controlled substance within 200 feet of a public housing facility. Specifically, the Defendants challenged whether the phrase “public housing facility” was unconstitutionally vague for failing to provide adequate notice of what conduct is prohibited and whether, because of its imprecision, it invited arbitrary and discriminatory enforcement. Brown at 842.

The Brown Court further clarified that the testing for vagueness under Florida Law is whether the Statute itself gives a person of ordinary intelligence a fair notice of what constitutes forbidden conduct. Brown at 842.; Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Specifically, the Brown Court points out that the language of the Statute must provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice.

The Brown Court found that the phrase “public housing facility” simply does not give citizens a fair warning of what conduct is forbidden. Because the phrase “public housing facility” is so “imprecise that it is impossible to tell from the Statute’s plain language what the legislature intended to target”, the

Court found that an arbitrary discriminatory enforcement was likely and that the Statute was void-for-vagueness. Brown at 843.

The Brown Court further focused on the lack of notice problem created by the phrase “public housing facility”. The Court found that no matter what the goals of the legislature are, a law “must include sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions”. *Id.*

Mr. BROWN avers that the Statute in the instant case, like Brown, is constitutionally infirm because of its failure to place a person of ordinary intelligence on notice as to what the Statute intends to prohibit. The Statute itself does not define the most important words “no currently accepted medical use” or “medical supervision” or “accepted safety standards”. The currently accepted common definition of the above words in the Schedule I statute do not give a citizen of ordinary intelligence what is prohibited.

Such a definition suggests that the failure to provide a definition of these words would mean the ordinary and plain meaning would be used. The common definition of Webster’s dictionary to “no” is “to reject, refuse approval”. “No” is an extremely vague word and would mean that, taken literally the substances listed have absolutely no medicinal value. This assertion is vague, arbitrary, discriminatory, and oppressive, and is not in line with current studies and evidence regarding the medicinal use of cannabis.

The common definition of currently is “1. passing in time belonging to the time actually passing, 2. prevalent; customary: new; present; most recent: 3. popular; in vogue; 4. publicly reported or known”. The common definition of the word “currently” would require the substances in Schedule I be reexamined regularly to determine if the listed substance has medicinal use. The importance of this definition to determining the statute unconstitutional is of utmost importance. If the statute by plain common meaning requires new research to be considered and a time element to be considered, it could never give someone notice of what is illegal. The Court cannot simply ignore one aspect in reading the statute which clearly states that “no currently accepted medical”. This would again, require the statute to naturally flow or change over time, something a criminal statute cannot do without violating a persons substantive due process rights.

The common definition of medical is “1. of or pertaining to the science or practice of medicine: 2. curative; medicinal; therapeutic: 3. pertaining to or requiring treatment by other than surgical means.” Again, the word currently modifies the word medical, and would require the court to determine whenever there is any new uses for the substances in the practice of medicine.

The definition of use is “1. to make use of; 2. to avail oneself of; to expend or consume in use: 6. to drink, smoke, or ingest habitually.” The definition of the word supervision is “the act or function of supervision; superintendence.” Accepted is defined as “generally approved; usually regarded as normal; right, etc.” The definition of the word safety is “1. the state of being safe; freedom from the occurrence or risk of injury, danger, or loss. 2. the quality of averting or not causing injury, danger, or loss.” All of the above words are modified by the word currently and would have to be determined on a regular and consistent basis.

A person coming from another state with a prescription, or someone with a terminal illness who is using cannabis for medicinal purposes would not know their conduct was illegal. The terms of the statute indicate that the definition of a schedule I substance must be reconsidered regularly. The current medical laws in the United States are required to be considered in determining whether a substance listed as a Schedule I substance currently has medicinal value in the United States. Further, the common definition of medicine also must be considered based on the currently available and updated medicinal values of the substance. For example, patients from Alaska, California, Colorado, Hawaii, Maryland (recognizes medicinal marijuana affirmative defense), Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, Washington, would be able to have prescriptions for a variety of illnesses. Therefore, there are some legislators and voter initiatives that have concluded that cannabis has medicinal uses. This Court should take Judicial Notice of the Legislative Findings of the above states. The terms no currently accepted medical use, under medical supervision, or accepted safety standards are impermissibly vague and do not express clearly to a person of common or ordinary intelligence what is criminal. The statute also requires substances listed in Schedule I to be reevaluated and reconsidered on a regular basis, thus no one could ever know what should be criminalized. In *Simmons v. State*, 944 So. 2d 317 (Fla. 2006), the court stated “the need for definiteness is even greater when the ordinance imposes criminal penalties on individual behavior or when it implicates constitutionally protected rights.”

The failure to have proper or updated information regarding whether cannabis is properly included as a schedule I substance violates the statute. The fact that there needs to be a constant recurring assessment of the use of Schedule I substances, specifically the use of cannabis, for medicinal purposes does not permit a person of ordinary intelligence knowing interpreting the statute and knowing what should and should not be illegal on a daily basis. If the Court does not reevaluate the requirements of the statute it is not reading the plain language of the statute. Schedule I also requires consideration of the climate in the United States of use of cannabis, in addition to the list of states above which currently allow

for the medicinal use, twelve additional states, listed below, have pending legislation permitting medicinal marijuana access.

II. FLA STAT. 893.13(6)(b), IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND THERE IS NO RATIONAL BASIS FOR CANNABIS TO CONTINUE TO BE A SCHEDULE I SUBSTANCE

The scheduling of Cannabis as a Schedule I Substance is still Unconstitutional arbitrary, discriminatory, and oppressive, in that the current changes in law, and medicinal research clearly support it has medicinal value. If Cannabis is proven to have accepted medicinal uses, the current categorization as a Schedule I Substance is Unconstitutionally arbitrary, oppressive, and irrational. The research listed below, is by no means all available supportive studies, but includes clear proof that cannabis has medicinal (as defined above) properties. New Mexico, passed medicinal marijuana bills through their house and senate, and was signed into law in the spring of 2007; which currently permits medicinal marijuana for the following illnesses:

- 1 Cancer
- 2 HIV/AIDS
- 3 Epilepsy
- 4 Glaucoma
- 5 Multiple Sclerosis
- 6 Glaucoma
- 7 Spinal Cord Injury With Intractable Spasticity
- 8 Admittance into Hospice Care
- 9 Painful Peripheral Neuropathy
- 10 Severe Anorexia/Cachexia
- 11 Hepatit C (currently receiving antiviral treatment)
- 12 Crohn's Disease
- 13 Post-traumatic Stress Disorder
- 14 Amyotrophic Lateral Sclerosis (Lou Gehrig's Disease)
- 15 Severe Chronic Pain.

See LYNN AND ERIN COMPASSIONATE USE ACT, New Mexico (2007).

New Mexico currently has 284 people whom legally proscribe cannabis for the above illnesses. The New Mexico act also has a Medical Advisory Board which determines whether illnesses should be added or removed from the above list. The Medical Advisory Board after receiving petitions and

conducting hearings determined additional illnesses benefit from cannabis and recommended eight more illnesses to the list:

1. Chronic muscle inflammation accompanied by muscle weakness
2. severe osteoarthritis
3. rheumatoid arthritis
4. reactive arthritis
5. post-polio syndrome
6. Parkinson's disease
7. Alzheimer's
8. Severe Chronic Pain

More Diseases May be Treated With Medicinal Marijuana, *Associated Press*, April 14, 2009;
<http://www.drugpolicy.org/about/stateoffices/newmexico/medmj/>.

There following 13 states have pending medicinal marijuana legislation, including;

1. Alabama (HB 434) which cites the Institute of Medicine Report as support for the medicinal use of cannabis.
2. Connecticut (HB 6156)
3. Delaware (SB 94)
4. Illinois (HB2514) (SB1381 which has passed Senate and moved to the House)
5. Minnesota (HF 292) (SF 0097)
6. Missouri (HB 277)
7. New Hampshire (HB 648)
8. New Jersey (S119)
9. New York (AO 7542) (SO 4041A)
10. North Carolina (H1379)
11. Pennsylvania (HB 1393)
12. Tennessee (HB 368)

The amount of states with pending legislation clearly indicate that there is currently accepted medicinal uses of cannabis.

Further, the Institute of Medicine in *Marijuana and Medicine, Assessing the Science Base*, Janet e. Joy, Stanley J. Watson, Jr., and John A. Benson., *Editors*, (1999), (I.O.M.) stated that cannabis had medicinal benefits in alleviating “nausea, appetite loss, pain, and anxiety are all afflictions of wasting and all can be mitigated by marijuana.” This report has been further supported by the nationwide change in

medicinal marijuana laws, and the new and current research associated therewith. In a study by the Clinical Nursing Research entitled *Marijuana Effectiveness as an HIV Self-Care Strategy*, Vol. 18, Number 2, May 2009, 172-193, (2009 SAGE Publications) <http://cnr.sagepub.com/cgi/reprint/18/2/172>, which results indicated “that marijuana ... is perceived by users as at least as effective as prescribed medications in symptom management”. This study clearly indicates cannabis would have medicinal use, unlike the Schedule I. definition it is categorized as.

The following websites/sources also provide studies which prove the medicinal benefits of cannabis:

1. <http://medmjscience.org/>
2. Zimmer, Lynn and Morgan, John. *Marijuana Myths, Marijuana Facts: A Review Of The Scientific Evidence*. New York: The Drug Policy Alliance. 1997, 241 pages.
3. <http://www.safeaccessnow.org/section.php?id=256>
4. <http://medicalmarijuana.procon.org/viewresource.asp?resourceID=000884>
5. <http://medicalmarijuana.procon.org/viewresource.asp?resourceID=000145>
6. http://norml.org/pdf_files/ReviewofHumanStudies.pdf
7. http://norml.org/pdf_files/ReviewofHumanStudies.pdf (which provides a list of organizations supporting medicinal marijuana).

Because of the vagueness challenges in this case and the doubt as to the precision of the Statute, the Defendant asserts that under Florida Law such doubt must be resolved in favor of the Defendant and against the State. Brown at 843., Warshow, supra. The Defendant therefore respectfully requests that, on this basis alone, the Court GRANT this, the Defendant’s Motion to Dismiss count one of the instant Information and declare Fla. Stat. 893.03(c)(7), 893.13(6)(b), unconstitutional and void for vagueness. The statute is also arbitrary in that it is not based on current facts and medicinal studies. The current modern research suggests that the categorization of cannabis as a Schedule I substance is outdated, discriminatory, and oppressive. The very definition in the statute requires a constant evaluation of currently accepted medicinal uses of cannabis. Thus, without an evaluation of the currently accepted medicinal research, a review of the legislatures, whom have passed medicinal marijuana laws through the

legislature, ballot initiatives, and clinical information, the scheduling of cannabis in Schedule I, is arbitrary.

The laws as they are currently written are not based on current, research, fact, or the climate of the American people in this state. Wherefore, this Court should find Fla. Stat. 893.13(6)(b), Unconstitutional, as violating Defendant's Due Process rights.

III. FLA. STAT. 893.03(c)(7), 893.13(6)(b) IS OVERBROAD THAT CRIMINALIZES BEHAVIOR THAT IS CONSTITUTIONALLY PROTECTED:

Mrs. BROWN avers that, in conjuncture with arguments in Section I and III, that the Statute itself is overbroad as it criminalizes what is clearly constitutionally protected behavior. Fla. Stat. 893.02(21), the term "(21) 'Prescription' . . . The term also includes an order for drugs or medicinal supplies so transmitted or written by a physician, dentist, veterinarian, or other practitioner licensed to practice in a state other than Florida." This clearly permits doctors from other states, namely the ones mentioned above to permit a patient to come to Florida and get prescribed, or legally possess cannabis for medicinal reasons, if prescribed by a physician.

Reading these portions of the Statute and the definitions contained in Chapter 893, in para materia, then, this Statute contemplates a violation of law, for example, where someone can get a legal prescription from another state, yet have it be illegal for that person to possess, and to have it categorized as having no medicinal value and it being unsafe under medical supervision. The litany of outrageous examples of innocent behavior criminalized by such an overbroad law is limitless. Further, because the research regarding cannabis is forever changing and is currently accepted in many states, a common person would not know what was and was not illegal. Where a statute is so overly broad that it encompasses innocent behavior, it is constitutionally infirm and must be struck down and found to be unconstitutional.

Furthermore, the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof." U.S. Const. Art. IV § 1. In *Embry v. Ryan*, Case No. 2D08-1323 (Fla. 2nd DCA, May 13, 2009), the court held that "regardless of whether the trial court believed that the Washington adoption violated clearly established public policy in Florida, it was improper for the trial court to refuse to give Washington judgment full faith and credit." This Court should take Judicial Notice of the Statutes of the above states, afford them Full Faith and Credit as required by the United States Constitution and find Fla. Stat. 893.13(b)(6), Unconstitutional.

In conjuncture with the arguments raised in I and II, Mrs. BROWN points out that, 893.03, and 893.13(b)(6), not only potentially criminalizes innocent and constitutionally protected conduct, and is inherently unclear as to what conduct it does prevent, but that its statutory construction would lead to arbitrary and capricious results in its enforcement. As raised in Section I, if the Statute is found to be constitutional, it is an arrestable offense for someone to have a legal prescription and be arrested. If such a reading of the Statute is correct, and the Statute is allowed to stand, the ability to enforce the Statute on a capricious basis is evident. The Defendant asserts that the Statute's construction encourages arbitrary, discriminatory and erratic enforcement and thus cannot stand.

The Defendant further proffers that, since no severability clause exists, the Statute may not be salvaged by striking a portion of the Statute that may be unconstitutional. Hence, if any portion of the Statute is unconstitutional, it must fall as a whole.

WHEREFORE, the Defendant, XXXXXXXX by and through undersigned counsel, and pursuant to Fla. R. Crim. Pro. 3.190, U.S.C.A. V and XIV, and the Florida Constitution, Article 1, Section 9 moves this Honorable Court for an Order Dismissing the instant information and declaring Fla. Stat. 893.03(c)(7), 893.13(6)(b), unconstitutional, and further says not.

Respectfully Submitted,

MICHAEL C. MINARDI, ESQUIRE
Florida Bar No.: 0568619
MICHAEL MINARDI, P.A.
PMB #343
5955 SE Federal Highway
Stuart, FL 34997
Broward #: (954) 729-9680
Martin #: (772) 475-7086
Facsimile: (954) 827-0553

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8TH day of June, 2009, a true and correct copy of the foregoing *Motion for Continuance* was mailed/hand delivered, postage prepaid, to the Clerk of the Court and to the Office of the State Attorney both located at 201 Southeast Sixth Street, Fort Lauderdale, FL 33301.

Respectfully Submitted,

MICHAEL C. MINARDI, ESQ
Florida Bar No.: 0568619