

**In the Iowa District Court
in and for
Polk County Iowa**

George McMahon, and Barbara
Douglass, Petitioners

vs.

The Iowa Board of Pharmacy,
Respondent

Docket No. CV7415

Motion to Expand Ruling

COME NOW George McMahon and Barbara Douglass and respectfully request the Court to expand its ruling to resolve issues left unaddressed by its decision, *to wit*:

1. Petitioners filed a petition with the Iowa Board of Pharmacy on June 24, 2008 asking the Board of Pharmacy to comply with its duty to recommend to the Iowa legislature removal of marijuana from Schedule I of the Iowa Controlled Substances Act because marijuana no longer meets the second criteria required under Iowa Code Section 124.203.

2. The Board did not schedule a hearing, or provide notice of a record making process in response to the aforementioned petition.

3. Instead the Board orally denied the petition at its next scheduled meeting, stating that the the federal government should make the decision first.

4. Later the Board issued a formal ruling in which it held instead that:

While neither accepting or rejecting...the assertion that the medicinal value of marijuana is established by legislation adopted in other states, the Board notes that before recommending to the Iowa legislature that marijuana be moved from schedule I to schedule II, the Board would also need to make a finding that marijuana lacks a high potential for abuse

5. Petitioners appealed to this Court on grounds that the Board had misperceived the law and this Court ruled that:

Section 124.203 of the Iowa code requires that any controlled substance have (1) a high potential for abuse, **and** (2) no accepted medical use in treatment in the United States before it may be classified under Schedule I. Because the Code imposes both criteria as a prerequisite to Schedule I classification, the failure to meet either would require recommendation to the legislature for removal or rescheduling...As such, the Board's statement that it "would also need to make a finding that marijuana lacks a high potential for abuse before it could recommend to the legislature that marijuana be moved from schedule I to Schedule II is based upon an erroneous interpretation of the law. [Footnote 1: ...**A finding of accepted medical use for treatment in the United States alone would be sufficient to warrant recommendation for reclassification or removal pursuant to the language of Iowa Code section 124.203.**]

6. The foregoing holding became the law of this case.

7. On remand, the Board again held that it must complete its analysis of the relative potential for abuse under Iowa Code Section 124.201 before it can complete its recommendation for rescheduling.¹

¹ The Board's counsel refused to seek a ruling from the Board on Petitioner's original petition but has insisted that the ruling on Mr. Olson's petition covered Petitioner's claims as well.

8. Petitioners have never disagreed with that proposition, but have continued, with the support of this Court's initial ruling, to contend that the process of recommending a rescheduling must proceed once it is established that marijuana no longer meets the criteria of "having accepted medical use for treatment in the United States."

9. On remand, contrary to the law of this case, the Board continued to rely on arguments related to "high potential for abuse" in denying the requested relief. [Supplemental Order of the Board, 7/21/2009, p. 12.]

10. On remand the Board rejected the argument that "as a matter of law, the fact that marijuana has been legally accepted for medical use in at least 13 states establishes that it has accepted medical use in treatment **in** the United States.

11. In rejecting the fact that other states had accepted marijuana for medical use in treatment, the Board continued to act arbitrarily in that it did not use any alternative discernible legal or evidentiary standard in determining how the criteria of having acceptance for medical use in the United States would or could be met.

12. As such the actions of the Board were:

- a. arbitrary, capricious, and an abuse of discretion
- b. continued to be based on an erroneous interpretation of law,
- c. the product of a decision making process in which the agency did not consider a relevant and important matter (fact that other states had accepted marijuana for use in medical treatment) that a rational decision maker in similar circumstances would have considered, and
- d. taken without any prescribed decision making process,

13. Petitioner's raised the deficiencies of the Board's supplemental order by way of seeking further review from this Court.

14. This Court's decision upon further review acknowledges the Board has complied with the Court's prior directive to review Mr. Olson's evidence and issue a finding relevant thereto

15. However, the Court has not ruled on the very issues that the Petitioner's have placed before this Court. Specifically, the Court has not ruled on:

- a. Whether, as a matter of law, the fact that at least 13 other states have legally authorized marijuana for medical use, conclusively establishes that it has medical use in treatment in the United States.
- b. Whether the Board of Pharmacy acted irrationally and contrary to law in the manner and grounds upon which it decided the issue of whether marijuana continued to meet the essential criteria for listing in Schedule I (*i.e.*, having no medical use in treatment in the United States).

WHEREFORE, Petitioners respectfully request the Court to rule as follows:

A. This Court should find that to the extent the Board has continued to condition its refusal to recommend removal of marijuana from Schedule I based on factors related to its potential for abuse it has proceeded contrary to statute and the prior determination of this Court;

B. This Court should find that the Board has failed to establish any rational or even discernible standard for establishing when a substance has accepted medical use in treatment in the United States, and that it has proceeded irrationally in resolving this issue by failing to state what alternative showings would be relevant, hold hearings on the same and further by discounting without rational explanation the legal significance of the fact that marijuana does have legally accepted medical use in treatment within the United States or by failing to, at least

articulate the degree of jurisdictional acceptance that would be required in order to satisfy the letter of Iowa's law.

C. This Court should rule on Petitioner's requests to determine as a matter of law that marijuana does have "accepted medical use in treatment in the United States," based on the undisputed accepted medical use of marijuana in 13 states, and does, therefore fail to satisfy the criteria for listing in Schedule I of Iowa's Controlled Substance Act.²

Respectfully Submitted:



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² Iowa Code Section 124,203, which lists the criteria for inclusion in Schedule I actually lists the second criteria as having "no accepted medical use in treatment in the United States; **or lacks accepted safety for use in treatment under medical supervision**" These two clauses, however, encompass just one criterion. Subsequent to the adoption of Iowa's Controlled Substances Act, the federal DEA analytically merged the issue of a substance having "lack of accepted safety" with the issue of whether it has "accepted medical use," upon the consideration that a substance cannot have the one quality without the other. 57 FR 10499, 10504 ("Marijuana Scheduling Petition; Denial of Petition; Remand" March, 26, 1992). In other words, substances that have achieved approval for medical use only include those that are considered at the same time to have accepted safety under medical supervision. In the proceedings below, no hairs were split on this point. Iowa Code Section 203, itself, lists the two concepts, "accepted safety" and "accepted use" as alternative formulations within the same numbered criterion. In essence, there are but two distinct requisites under schedule I for inclusion of substances: lack of medical acceptance within the United States combined with a "high potential for abuse."

Proof of Service

I certify on or before November 10th, 2009 I effected service of this filing upon the other parties to this action by placing a true copy of the same in the U.S. Mail addressed to each the parties or their attorney of record as follows:

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