

STATE OF MICHIGAN

THIRD CIRCUIT COURT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN, Judge Thomas Jackson
Plaintiff,

v. Case No. 05-10248-FY
MATTHEW BURNELL,
Defendant. Cultivation of Marijuana
Felony Firearm

Kym L. Worthy (P57976)
Wayne County Prosecutor
1441 St. Antoine Street
Detroit, MI 48226
313.961.5777

Matthew R. Abel (P38876)
Attorney for Defendant
450 W. Fort Street, Suite 200
Detroit, Michigan 48226
248.866.0864

MOTIONS TO DISMISS,
OR FOR EVIDENTIARY HEARING, FOR EXAMINATION AND TESTING OF
EVIDENCE, FOR PUBLIC FUNDS TO HIRE EXPERTS, AND FOR BILL OF
PARTICULARS

Matthew R. Abel, attorney for Defendant, moves this court to dismiss this case, or for an evidentiary hearing and requests that this Court invalidate the statute under which Defendant is charged, due to unconstitutionality.

1. Defendant was arrested for possession of marijuana.
2. The search was invalid, illegal, and the fruits of the search must be suppressed.
3. Defendant moves to invalidate his arrest as a violation of Defendant's rights under the Constitution of the United States and the Constitution of the State of Michigan, and dismiss the case with prejudice.
4. Defendant requests that this court find that the federal classification scheme placing marijuana in Schedule 1 (having no medicinal value) is invalid, and that the prohibition is unconstitutional as a denial of substantive due process.
5. Defendant requests that this court find that the state statute under which Defendant is being prosecuted is unconstitutional because it fails to pass strict scrutiny of even having a rational basis toward achieving a legitimate state objective sufficient to curtail Defendant's fundamental right to life, liberty, and the pursuit of happiness.

IMPROPER SCHEDULE 1 CLASSIFICATION DENIES DUE PROCESS AND EQUAL PROTECTION

Michigan statutory controlled substances law relies on and refers to the Federal Schedule Classification Scheme for Controlled Substances. Marijuana is erroneously classified as a Schedule 1 substance, one with no medicinal value. That clearly is in error. Several states in this country, as well as the cities of Detroit, Ann Arbor, Ferndale and Traverse City in Michigan have authorized the use of marijuana as recommended by a physician. It has been prescribed for such diverse ailments as glaucoma, asthma, chronic wasting disease, cancer, multiple sclerosis, and AIDS. The illegal classification scheme is unconstitutional as a denial of procedural and substantive due process and of equal protection.

CONTROLLED SUBSTANCES ACT LACKS COMPELLING STATE INTEREST TO IMPACT DEFENDANT'S FUNDAMENTAL RIGHTS

Regulation which restricts the exercise of certain fundamental rights may be justified only by a compelling state interest. *Birth Control Centers, Inc. v. Reize*, 508 F. Supp. 1366 (1981).

The U.S. Constitution guarantees people the right to the pursuit of happiness. That includes the right to protect one's health, *Right to Choose v. Byrne*, 398 A.2d 587. While the state may impose reasonable limitations on the pursuit, the state has a heavy burden to justify its interference in a person's right to the pursuit of happiness. *Jacobs v. Benedict*, 301 N.E. 2d 723.

While a California court has found that there is not a deprivation of the right to the pursuit of happiness by the prohibition of marijuana, *NORML v. Gain*, 161 Cal Rptr. 181, Defendant asserts that holding to be in error, and in any event, of no precedential value here in Michigan.

The U.S. Constitution also protects Defendants First Amendment right to freedom of expression. The governmental interest in the controlled substances laws, which presumably is to foster the health of the people, is not only not being met by the regulatory scheme, but is actually being harmed by application of the laws.

The worst thing about marijuana is that it is against the law. No evidence of physical harm has ever been shown. Even if some harm were shown, there are less restrictive means of accomplishing the governmental objective (assuming that it is a legitimate objective under the Constitution).

SANCTIONS FOR VIOLATION OF THE ACT ARE IRRATIONAL, CAUSING CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

Prison, jail, or probation for possession of a natural growing herb which has homeopathic healing properties for both physical and mental health is cruel and unusual, and the statutes should be held unconstitutional for this reason.

ONLY CANNABIS SATIVA IS PROHIBITED, AND THE PEOPLE ARE UNABLE TO DISTINGUISH BETWEEN CANNABIS SATIVA AND CANNABIS INDICA AND CANNABIS RUDERALIS

The Michigan Legislature enacted a statute prohibiting marijuana, which then defines marijuana as cannabis sativa: 333.7106 Definitions; I to M.

Sec. 7106 (3) "Marihuana" means all parts of the plant *Cannabis sativa* L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

History: 1978, Act 368, Eff. Sept. 30, 1978

There are other varieties of cannabis which are not sativa, and therefore not prohibited. The people cannot produce any evidence that the substance confiscated was sativa as opposed to any other variety.

Botanists have been at odds since the 16th century over whether cannabis consists of only one species (*Cannabis sativa*) or more than one species. That there are different strains of cannabis has not been in question; whether these strains possess qualities of a true species or lesser taxonomic designations, such as races, ecotypes, cultivates, chemovars, and so on, has been at issue (Schultes and Hofmann 1980).

Current research indicates the classification consists of more than one species. Botanists such as Richard E. Schultes at Harvard University and Loran C. Anderson at Florida State University conclude sufficient scientific evidence exists to support three species of cannabis: *Cannabis sativa*, *Cannabis indica*, and *Cannabis ruderalis*. *C. sativa* grows to a height of 18 feet (6 metres), is loosely branched, and thrives in cool, damp climates. *C. indica* grows from 3.5 to 4 feet (1.3 metres), is conical in shape, and thrives in hot, dry climates. *C. ruderalis* grows from 1 to 2.5 feet (0.4 to 0.7 m), is dense and never branches, and is found primarily in Russia. There are other distinguishing features as well, related to cell and leaf structures.

There are gelatinous fibers in the wood and vessels that exist singly or in small groups in *C. sativa*. *C. indica* has liberiform fibers in its wood and its vessels occur in large groups. *C. ruderalis* is mostly intermediate in these characteristics. Although the number of leaflets may vary within a species, *C. sativa* normally has seven leaflets, *C. indica* has nine, and *C. ruderalis* has three. The leaflet of *C. sativa* is narrow, or lanceolate. The *C. indica* leaflet is broad, or oblanceolate. And the *C. ruderalis* leaflet is oval, or elliptic, being broadest at the mid-length of the leaf (Anderson 1974, 1980). All three species contain THC; *C. indica* produces the most and *C. ruderalis* the least. Cannabis has been cultivated for thousands of years for its intoxicating flowering tops and leaves, its fibrous stems and branches, and its nutritious seeds. A strain that is high in one of these three qualities tends to be low in the other two. *C. indica*, for example, is very low in fiber content but generates the most potent marijuana. *C. sativa* produces the hemp fibers that

have been used for centuries for making rope and coarse woven produces, but races of C. sativa high in this quality contain very little THC (less than 0.5 percent). The seeds of C. sativa can also be harvested for use as animal feed and for producing oil that is used in cooking and in making paint.

www.bambooweb.com/articles/m/a/Marijuana.html

While courts have held that by prohibiting cannabis sativa, the legislature intended to prohibit all varieties of the genus cannabis, *People v. Riddle*, 65 Mich App 433, 237 NW2d 491 (1975) that holding cannot stand, for it flies in the face of the settled rule of legislative construction that words enacted by the legislature are intended to have meaning. With the current interpretation of the statute, the word sativa has been rendered superfluous, and we know that cannot be what the legislature intended.

If the legislature acted in a less than delicate way, it is not for the court to clean up their mess, but to send a clear message to the legislature that it is a mess, which will not be tolerated.

If the legislature wants to prohibit all varieties of the genus cannabis, they easily can do so. This court should not be in the position of agreeing that statutory words have no meaning. The statutory definition was enacted AFTER the Michigan Court of Appeals decided *Riddle*, and the legislature is presumed to have known of the *Riddle* holding when the statute was enacted. Accordingly, the later statutory construction must prevail over the earlier court decision.

Accordingly, unless the People can prove through admissible evidence that the Defendant was in possession of cannabis SATIVA, the case must be dismissed.

MOTION FOR EXAMINATION AND TESTING OF EVIDENCE

Defendant has been advised that the totality of the physical evidence against him consists of “a green stalk”, and “roach material”. Under M.C.L § 333.7106 (3) the definition of marijuana specifically states that “it does not include the mature stalks of the plant”... Defendant should be allowed to have the evidence examined and tested by a qualified independent expert.

MOTION FOR PUBLIC FUNDS TO HIRE EXPERTS

Defendant has barely been able to afford to retain counsel in this matter, and is without the necessary funds to hire experts to assist in his defense.

Accordingly, Defendant requests that this court grant him sufficient funds to hire independent experts at government expense.

MOTION FOR BILL OF PARTICULARS

Even if the “green stalk” is determined to be cannabis sativa L., it is excepted from the statute prohibiting marijuana, as discussed above.

Defendant is then left to suppose that he is being charged with possession of “roach material” of unstated quantity or other description.
Defendant moves that the People be required to file a bill of particulars describing exactly what the charge is against Defendant, and for what material.

DEMAND FOR SPEEDY TRIAL

Defendant reasserts the demand for a speedy trial by jury.

Respectfully Submitted,

Matthew R. Abel P 38876
Attorney for Defendant

February 13, 2006