Legal Brief Bank

WASHINGTON V. SEELEY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 63534-0

STATE OF WASHINGTON,

Appellants,

v.

RALPH SEELEY, Pro Se,

Respondent.

AMICUS CURIAE BRIEF OF THE
NATIONAL ORGANIZATION
FOR THE REFORM OF MARIJUANA LAWS
(NORML)

Michael D. Cutler
LAWSON & WEITZEN
425 Summer Street, 5th Floor
Boston, MA 02210-1736
Tel. (617) 439-4990

Jeffrey Steinborn
30th Floor, Smith Tower
506 Second Avenue
Seattle, WA 98104
Tel. (206) 622-5117

Attorneys for NORML

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SPECIFIC ISSUE ADDRESSED BY THE AMICUS

Whether the state law (RCW 69.50.201, et seq., including 204[c][14]) forbidding medical prescription of marijuana to the terminally-ill; while allowing the lawful prescription of far more dangerous drugs (including cocaine, PCP [angel dust], methamphetamine, morphine and chemically-duplicated THC [the psycho-active chemical in marijuana]): Is arbitrary and irrational, and thus unconstitutional, requiring the affirmance of the trial court ruling for the plaintiff-appellee?

Even under the lowest possible standard of constitutional analysis ("mere rationality"): The challenged scheduling provisions of the state controlled substances act make no sense, lacking any conceivable justification.

STATEMENT OF THE CASE

NORML adopts the statements of the case appearing in the briefs of amici, the American Civil Liberties Union and the Drug Policy Foundation. State law classifies marijuana as a schedule I drug, thereby preventing its use as a palliative remedy by the terminally-ill pro se plaintiff-appellee, Attorney Ralph Seeley. This case presents the State's appeal from a trial court determination, that the statute's schedule I classification of marijuana violates Ralph Seeley's rights under the state constitution.

ARGUMENT

THE STATE DRUG SCHEDULING LAW'S CLASSIFICATION OF MARIJUANA IN SCHEDULE I, FOR THE TERMINALLY-ILL, LACKS ANY RATIONAL BASIS FURTHERING A LEGITIMATE STATE INTEREST;

THUS, IT MUST BE MOVED TO A LOWER APPROPRIATE SCHEDULE (ALLOWING ITS PRESCRIPTION TO THE TERMINALLY-ILL), BECAUSE AS FOUND BY THE TRIAL COURT:

THE SCHEDULE I PROHIBITION AGAINST MEDICAL USE VIOLATES THE STATE CONSTITUTIONAL RIGHTS (ART. I: SEC. 12, EQUAL PROTECTION; AND, SEC. 32, FUNDAMENTAL RIGHTS-SUBSTANTIVE DUE PROCESS) OF DYING PATIENTS

The State argues that the trial court erred in failing to apply a "mere rationality" standard, when evaluating the constitutionality of marijuana's schedule I classification (appellant's brief at 26-28; reply brief at 18 and 21). Seeley and the Amicus ACLU argue that, as the trial court found: A higher standard (requiring a relatively more compelling state interest) applies, which the statute's schedule I classification failed to satisfy.

NORML asserts that the basis and effect of the invalidated law's schedule I classification (preventing the prescription of marijuana to the terminally-ill), however, are rationally bankrupt. Any connection between the law's ban on marijuana for the terminally-ill, and a legitimate state interest, cannot survive even the low "mere rationality" test.

The Challenged Classification: Marijuana's Placement in Schedule I, Thereby Preventing its Use by Terminally Ill Patients.

The legislature's decision to place marijuana in schedule I prevents its use as a medication, even for terminally ill patients under a doctor's supervision. The trial court found the patient's right to alleviate his pain, outweighed the State's interest in "protecting" the public from marijuana, by preventing its medical use. NORML argues that this denial of medication to dying patients is totally senseless and irrational.

Dying, and healthier patients, have access to medication far more dangerous than marijuana. For many diseases, the treatment (such as cancer chemo-therapy) can be more toxic and life-threatening than the illness being treated. It is undisputed that, in the 5,000 year recorded history of marijuana's medical and recreational use, there has never been a single overdose fatality. Andrew Weil, M.D. testified at a 1987 federal administrative hearing on whether to reschedule marijuana, that a potentially fatal dose would require the consumption of 1,500 pounds of marijuana in 15 minutes; by comparison, aspirin fatalities average about 1,000 people annually.

The abuse potential of Schedule II drugs like PCP and morphine is (beyond reasonable dispute) dramatically greater than marijuana; which is less addictive than alcohol, nicotine and caffeine, based on research reports from the federal government's National Institute of Drug Abuse (NIDA)(Ph.D. Jack E. Henningfield, 1995). The federal government Department of Health and Human Service's 1993 National Household Survey on Drug Abuse (National Survey) found that 34% of respondents had used marijuana sometime in their life, but less than 3% used it within the last week. An estimated seventy million Americans have tried marijuana (including the President and Vice-President of the United States and the Speaker of the House of Representatives) without a significant change in the use of more dangerous drugs. Thus, there is no support for a rational fear that any marijuana use is addictive.

If a state decides to deny all access to a medicine that, the unrefuted trial court evidence found to have a substantial benefit to the quality of Ralph Seeley's life (including his capacity to successfully litigate this case): It must have at least a rational basis for doing so (unless a higher standard of state interest evaluation applies). City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

The State's Proposed Legitimate Interests, Alleged to be Rationally Furthered, by Marijuana's Schedule I Classification.

The State's brief identifies several rationales for marijuana's schedule I placement:
(1) Protecting patients from vegetative THC (the therapeutic agent in marijuana, synthesized as the schedule II drug Marinol), having "a highly variable chemical composition;" and, to enhance the "purity and predictability of all medicinal drugs [appellant-State's brief at 28-31];"
(2) controlling "drug availability [id. at 32];"
(3) marijuana's "significant potential for abuse outside of [sic] any medical setting . . . linked to cancer and short term memory loss . . . clearly a stepping stone to more serious problems [cocaine; id. at 34];"
(4) and, a perceived value in the "nationwide uniformity" of drug scheduling [id. at 38-39].

None of these objectives are rationally served by marijuana's schedule I classification, rather than its scheduling at a level that would enable the terminally ill to obtain marijuana's remedial effects.

Drug purity and predictability are not enhanced, by schedule I's ban on medical access by terminally-ill patients.

The State supports criminalizing access by the terminally-ill, to what often is their only remedy to intractable pain (after the exhaustion of all legal alternatives), based on fears that: Marijuana from an uncertain, or known but illegal source, may contain impurities; or, has a significantly and unpredictable variable potency.

Ralph Seeley is dying from cancer, and nothing can save him; marijuana makes the end of his life not only dramatically more bearable, but (if this litigation is evidence) productive. What is an articulable suspicion of harm, worse than his terminal disease, from which the state's ban on medicinal marijuana will protect Ralph? What possible side-effect of impure marijuana use is worse than being left "curled in a fetal position on the floor, covered in my own vomit and excrement [Seeley's Declaration, Ex. B; Clerk's Papers, 83-84]," caused by his life-extending chemo-therapy?

The former White House "Drug Czars," and other federal government officials (who would know better if they read the government's own records) have spread the "blood libel," that the potency of marijuana is dramatically higher now than it was "in the Sixties." NIDA contracts with the University of Mississippi's School of Pharmacy (Prof. Mahmoud El-Sohly's Research Institute of Pharmaceutical Sciences) to operate the Potency Monitoring Project (PMP), using federally-seized marijuana from around the country. In PMP's reports for (and between) 1982 and 1993, annual marijuana potency was measured at 3.05% THC (the psycho-active ingredient in marijuana) and 3.32% (with a high during the period of 3.36%, and a low of 2.39%).

Passing the statistics, the potency myth is an obvious lie. How could the mysteries of potency, for a plant cultivated over 5,000 years, be solved in 15 years by amateur farmers furtively experimenting with small plantings? Thus, the issue of variable potency has no basis in fact.

If the State is genuinely concerned about the purity of Ralph Seeley's undisputedly effective medicine, it has a rational alternative to banning all access to marijuana. Pure, medicinal-quality marijuana is grown for the federal government at the University of Mississippi, and the University of Indiana. The Mississippi farm continues to supply federally-grown marijuana to the eight surviving participants of the Compassionate Investigative New Drug program, which began in 1978 and closed in 1991. The State's purity "concern" is bogus.

Illicit availability and use by juveniles have not been noticeably affected by schedule I classification.

The idea that a terminally ill patient should endure unrelenting and immobilizing pain, as a means to somehow deny someone else recreational drug use, is non-sensical in theory and totally ineffective in reality. The government's Mississippi farm has operated for 22 years (and its Indiana farm for nearly 6 years), with sufficient safeguards against illicit use or theft to encourage the continued operation of those facilities.

There is no rational basis for connecting access by terminally ill patients to medicinal marijuana, with any effect on marijuana's illicit availability generally, and juvenile access in particular. Crime statistics prove this point beyond reasonable dispute.

The FBI's 1994 Uniform Crime Report reveals 482,000 marijuana arrests nation-wide, up 26% from 1993. Over ten million Americans have been arrested for marijuana-related offenses, according to the same sources, since 1965. The federal Department of Justice reports that the national prison population more than doubled from 1985 to 1995, and that the percentage of drug offense prisoners has risen during that time from under 10% to over 25% of the prison population. The 1996 National Survey recently reported an increase in juvenile marijuana use of 33%, between 1994 and 1995.

If arrest and imprisonment are useless "Drug War" weapons: By what reasoning does denying medicinal marijuana to the terminally ill advance the State interest in reducing marijuana's illicit availability?

Specious allegations of marijuana's harm (cancer, memory, hard drug gateway) provide no rational basis for denying proven relief to a terminally-ill patient.

As argued by the ACLU at page 19 of its brief: "Terminally ill patients . . . hardly pose a threat of developing future drug abuse problems." As argued above in section B1 above, temporary memory loss and lung cancer are not rational risks to a patient dying of bone cancer. Temporary memory loss may be the patient's objective in using marijuana. As this case demonstrates, marijuana does not necessarily impede adult productivity.

Can the State persuade this Court, that marijuana use by the terminally ill reasonably risks a "gateway" effect to more abusive drugs (than chemo-therapy?)? A few undisputed facts demonstrate the irrationality of marijuana's "gateway" effect, even for the non-terminally ill. The Center for Addiction and Substance Abuse (a Prohibitionist group) reports since 1991 show a steady increase in marijuana use, while cocaine use has remained steady (and much lower); similarly, it reports (but fails to publicize) that 83% of marijuana users never go on to use cocaine.

National Survey reports show that during the 1980's, while marijuana use declined, heroin use remained stable; LSD use has remained constant for 20 years, while marijuana use has fluctuated significantly.

The ACLU observes at 16-17 in its brief, that a terminally ill patient can order the removal of life-support, or engage in physician-assisted suicide: Curzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990); Compassion in Dying v. Washington, 79 F.3d 790 (9 Cir. 1996, en banc); Quill v. Vacco, 80 F.3d 716 (2 Cir. 1996). Thus, what rational basis does the State have for denying that same dying patient the ability to improve his quality of life (instead of ending it), by banning his access to the undisputed pain-relieving effects of marijuana?

There is no nation-wide uniformity in drug scheduling, to rationally support the withholding of effective medicine from a terminally-ill patient.

If every other jurisdiction in the country decided, in the name of demagoguery or other similar policy, that some rationale existed for denying a form of effective medical relief to the terminally-ill: Why should the State of Washington blindly follow the leader?

In any event, every jurisdiction has not done so. Since 1981, the District of Columbia has classified marijuana as a schedule V drug (the lowest level of drug control, for substances having

the least dependence liability of all controlled drugs, and having an accepted medical use): D.C. Code, sec. 522(2). Many states, including Washington (RCW 69.51.080), classify marijuana as a schedule II drug when used medicinally pursuant to a state's therapeutic research program: Iowa Code, sec. 124.204(4)(m) and 124.206(7)(a); Montana Code, sec. 50-32-222(3); New Mexico Stat., sec. 30-31-3; and, Tenn. Code, sec. 39-17-408(b)(6)(B).

Also, several states allow medicinal possession and use of marijuana, as an affirmative defense of medical necessity to a criminal possession prosecution, including Washington State: State v. Cole, 74 Wn.App. 571, 578, rev. den. 125 Wn.2d 1012, 874 P.2d 878 (1994); Jenks v. Florida, 582 So.2d 676 (1991); and, Idaho v. Hastings, 801 P.2d 563 (1990).

Ohio's legislative judgment since 1978, on marijuana possession and cultivation, has been to provide an affirmative defense to criminal prosecution where: "possessed or cultivated under any other circumstances that indicate the marihuana was solely for personal use;" R.C. sec. 2925.04(F); and, where possessed "solely for medicinal purposes . . . pursuant to the prior written recommendation of a licensed physician," R.C. sec. 2925.05(I).

The Emperor Wears No Clothes: There is No Rational Basis for Denying Palliative Marijuana to the Terminally-ill.

The State's reply brief concludes (at 23): "We don't live in a perfect world, and as a result, we must rely on the judgement of our elected representatives to weigh marijuana's risks or potential benefits." Would the Court mimic such glib platitudes, if you or your own spouse, partner or child found him, her or yourself in Ralph Seeley's place?

Our world is not perfect, but it is a constitutional democracy where judges are empowered and obligated to protect citizens from unreasonable legislative interference, with the universal human right to relieve pain and suffering. The State's 'imperfect world' view is colored by its irrational fear, that medicating the dying can somehow (rationally) harm the living.

The Court is better advised to reject such emotional assessments, and to be guided instead by a dispassionate, reasoned view of the interests at stake in this case.

We are faced today with a high-pitched public debate [on criminal justice policy], where emotions play a more significant role than ideas. Where bumper-sticker themes are more important, than policy papers. Where reason and evidence have taken a back seat, to anecdotes and innuendo. Washington State Attorney General Christine O. Gregoire, "Crime and Politics in the 1990s: Creating a Demand for New Policies," Feb. 16, 1996.

CONCLUSION

The trial court decision was correct and deserves to be affirmed.

NATIONAL
ORGANIZATION FOR THE
REFORM OF MARIJUANA
LAWS

By its attorneys

Michael D. Cutler (BBO# 110940)
LAWSON & WEITZEN, LLP
425 Summer Street, 5th Floor
Boston, MA 02210-1736
Telephone: (617) 439-4990

Jeffrey Steinborn
Smith Tower-Floor 30
506 Second Avenue
Seattle, WA 98104
Tel. (206) 622-5117

Certificate of Service: I hereby certify that on this date, true copies of this document were served by over-night mail on Ralph Seeley, Esq., Law Offices of Neil J. Hoff, 252 Broadway, Tacoma WA 98402; Assistant AG Melissa A. Burke-Cain, P.O. Box 40109, 905 Plum Street: Building 3, Olympia WA 98504-0109; Kevin J. Hamilton, Esq., PERKINS-COIE, 1201 Third Avenue, 40th Floor, Seattle WA 98101-3099; and, Gregory J. Kopta, Esq., DAVIS-WRIGHT, 2600 Century Square, 1501 Fourth Avenue, Seattle WA 98101-1688.
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