

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0469

Appeal of Andrew Panaggio

Rule 10 Appeal from the New Hampshire Compensation Appeals Board

REPLY BRIEF OF APPELLANT ANDREW PANAGGIO

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES 2

ARGUMENT

 I. The politics may be in flux at the Federal level, but the trend
 lines favoring leniency toward cannabis use are clear 3

 II. Setting politics and these atmospheric aside, Federal law as it
 stands today is no bar to the relief requested here 5

CONCLUSION. 7

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

	<u>PAGE</u>
FEDERAL STATUTES	
18 U.S.C. § 2(a)	6
21 U.S.C. § 846	6
FEDERAL CASES	
<u>United States v. Cuni</u> , 689 F.2d 1353 (7th Cir. 1982)	6
<u>United States v. Dolt</u> , 27 F.3d 235 (6th Cir. 1994)	6
<u>United States v. Peoni</u> , 100 F.2d 401, 402 (2d Cir. 1938)	7
<u>United States v. Pino-Perez</u> , 870 F.2d 1230 (7th Cir. 1989)(en banc)	7
<u>United States v. Watson</u> , 669 F.2d 1374 (11th Cir. 1982)	6
NEW HAMPSHIRE STATUTES	
RSA 281-A-23	7
SECONDARY AUTHORITIES	
JAMA INTERNAL MED. “ <i>The Role of Cannabis Legalization in the Opioid Crisis.</i> ” (pub. online 4/2/18)	4n.4
MEDICARE RESOURCES, “ <i>What Was the Medicare ‘Doc Fix’ Legislation?</i> ” (2/24/18)	3n.1
NEW HAMPSHIRE RULE OF PROFESSIONAL CONDUCT 1.2(E)	4
NEW YORK TIMES, “ <i>John Boehner’s Marijuana Reversal: ‘My Thinking On Cannabis Has Evolved’</i> ” (4/11/18)	4n.3
WASHINGTON POST, “ <i>Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff Over Justice Nominees</i> ” (4/13/18)	4n.2
WASHINGTON POST, “ <i>Schumer Introduces Measure to Decriminalize Marijuana</i> ”, (4/20/18)	5n.5

ARGUMENT

I. The politics may be in flux at the Federal level, but the trend lines favoring leniency toward cannabis use are clear.

The Appellee relies heavily on the Attorney General's formal withdrawal of the Cole Memorandum in January 2018 to suggest that the pendulum may be shifting back toward "renewed vigor" of enforcement of the Controlled Substances Act against marginal actors like workers' compensation insurers. APPELLEE'S BRIEF at 14.

But a review of the events in just the months since the Cole Memorandum was withdrawn shows that the Attorney General is the outlier, even within the Executive branch, on this issue. The Appellee has already conceded that the Attorney General's open plea to Congress not to extend the safe harbor of the Rohrabacher-Farr Amendment was roundly rejected on March 23, 2018. *Id.* The unbroken streak of withholding of Department of Justice funding for medical marijuana prosecutions continues as it has since 2015, now with unified Republican control of both houses of Congress and the Executive branch, in exactly the same way as the Medicare "doc fix" to the Federal budget required reauthorization 17 times without fail between 2003 through 2014 to prevent provider reimbursement cuts.¹

In reaction to Attorney General Sessions' withdrawal of the Cole Memorandum three months ago, the junior Republican Senator from Colorado, Cory Gardner, began publicly blocking all the President's Justice Department nominees in an effort to force the President to stand by his campaign promise to allow state-level experimentation with cannabis decriminalization and legalization to proceed without

¹ The dance finally ended in 2015 with a permanent fix thanks to the enactment of the Medicare Access and CHIP Reauthorization Act. Louise Norris, "What Was the Medicare 'Doc Fix' Legislation?", MEDICARE RESOURCES (2/24/18), available at <https://www.medicareresources.org/faqs/what-is-the-medicare-doc-fix-legislation/>.

Federal interference. It worked; on April 13, 2018, *contra* Attorney General Sessions, the President “told Gardner that despite the DOJ memo, the marijuana industry in Colorado will not be targeted[.]”²

Also since January 2018, cannabis has become available at retail in California. With a GDP larger than that of Canada, California is now one of nine states to have legalized the sale and distribution of cannabis outright. Perhaps not coincidentally, on April 11, 2018, former Speaker of the House of Representatives John Boehner publically announced his support for legalization and has joined the board of advisors of Acreage Holdings, a major investment firm in cannabis.³ Also in April, The Journal of the American Medical Association (JAMA) published two massive, multi-year studies of Medicare Part D and Medicaid prescription data which found that after states authorized the medicinal or recreational use of cannabis, both the number of opioid prescriptions and the daily dose of opioids saw a statistically significant decline.⁴

It is further interesting to note that this very Court, on April 19, 2018, prompted by the shifting reality of this precise development in the law, has issued an order clarifying New Hampshire Rule of Professional Conduct 1.2(e) to expressly permit attorneys to counsel clients “regarding conduct expressly permitted by state or local that conflict with federal law, provided that the lawyer counsels the client

² Seung Min Kim, “*Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff Over Justice Nominees*”, WASHINGTON POST (4/13/18) available at https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html.

³ Daniel Victor, “*John Boehner’s Marijuana Reversal: ‘My Thinking On Cannabis Has Evolved’*”, NEW YORK TIMES (4/11/18), available at <https://www.nytimes.com/2018/04/11/us/politics/boehner-cannabis-marijuana.html>.

⁴ Kevin P. Hill, MD, MHS, Andrew J. Saxon, MD, “*The Role of Cannabis Legalization in the Opioid Crisis.*” JAMA INTERNAL MED. (pub. online 4/2/18), available at <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2676997>.

about the potential legal consequence of the client’s proposed course of conduct under applicable federal law.”

Finally, on the day this brief is being submitted, Senate Minority Leader Charles Schumer has formally introduced a Marijuana Decriminalization bill that is intended to de-Schedule cannabis, permit state-by-state evolution on the issue to continue, and eliminate entirely the threat imagined by the insurer in this matter. He is not the first Senator to introduce such a bill, but is arguably the highest-profile Senator to have done so.⁵

II. Setting politics and these atmospherics aside, Federal law as it stands today is no bar to the relief requested here.

As important as it is to note how quickly the political and legal ground on multiple fronts is tending towards leniency, thereby undermining the insurer’s claimed fear of prosecution, this Court is ultimately not being asked to read tea leaves or guess about the outcome of future Federal legislation. The status of Federal law as it currently exists provides no genuine basis for prosecution.

One way we know this is true is because Mr. Panaggio pointed out in his opening brief that “neither the carrier nor the Board in this case has pointed to *any evidence of any actual criminal conviction* in any court nationwide suffered by any insurance carrier who has complied with an administrative order to reimburse an injured worker for the purchase of medically necessary, causally related treatment

⁵David Weigel and John Wagner, “Schumer Introduces Measure to Decriminalize Marijuana”, WASHINGTON POST (4/20/18), *available at* <https://www.washingtonpost.com/news/powerpost/wp/2018/04/19/schumer-backs-effort-to-decriminalize-marijuana> (“His bill would not legalize marijuana outright, but instead allow states to decide whether to make the drug available commercially. It would end the limbo that marijuana sellers find themselves in, months after Attorney General Jeff Sessions rescinded Obama-era guidance that prevented federal law enforcement officials from interfering with the marijuana business in states where it had legal status.”).

with state-approved therapeutic cannabis.” APPELLANT’S BRIEF at 24 (emphasis added). Such orders have existed, at minimum, for five years in New Mexico, and for two years or more in other jurisdictions like Maine and Connecticut. The Appellee has not cited to this Court any real world example of a corresponding criminal charge suffered by any workers’ compensation insurer.

Instead, the insurer conjures the apparition of a charge of “conspiracy” it might invite by paying the injured worker for his medication: but again, it asserts this proposition without establishing it. The insurer’s mere speculation that complying with an order to reimburse an injured worker for state-sanctioned therapeutic cannabis from the Department of Labor will subject it to criminal liability, is entirely unfounded.

This is because the necessary predicate for any such charge is the intent to engage in a crime, which the insurer – as evidenced in this case by its original denial of payment and vigorous litigation since – does not manifest under either statute. “In order to prove a conspiracy under 21 U.S.C. § 846, the government must prove, by direct or circumstantial evidence, that there was an agreement among the defendants to achieve an illegal purpose.” United States v. Cuni, 689 F.2d 1353, 1356 (7th Cir. 1982)(citing United States v. Watson, 669 F.2d 1374, 1379 (11th Cir. 1982))(emphasis added). Similarly, an aider and abettor is conventionally defined under 18 U.S.C. § 2(a) as one who knowingly assists an illegal activity and wants it to succeed. United States v. Dolt, 27 F.3d 235, 238 (6th Cir. 1994) (“In order to establish aiding and abetting...[e]vidence must demonstrate that the defendant committed overt acts or affirmative conduct to further the offense, and intended to facilitate the commission of the crime.”)

Judge Learned Hand observed that inchoate crimes such as these “all demand that [the defendant] in some sort associate himself with the venture, that he participate in it as in something that he *wishes* to bring about, that he *seek by his action* to make it succeed. All the words used— even the most colorless, ‘abet’— carry an implication of purposive attitude towards it.” United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)(emphasis added); see also United States v. Pino-Perez, 870 F.2d 1230, 1235 (7th Cir. 1989)(en banc).

The point is that a straightforward application of state law in this case removes from the insurer the supposed threat of Federal prosecution. In the face of an administrative order that the insurer comply with RSA 281-A:23 by reimbursing the claimant the medical expenses for his workers’ compensation injury, no such showing of “purposive attitude” to violate the Controlled Substances Act can be made.

CONCLUSION

Ultimately, there is no specific law, no text, state or federal, prohibiting reimbursement. The insurer must pile inference upon prosecutorial discretionary inference in the face of judicially-enforced budget prohibitions. Although the Federal government’s positions are in flux, New Hampshire’s own public policy and enacted legislation are clear, and point in one direction.

This is not an area like foreign policy or immigration where the Federal Government completely occupies the field. This is medicine validly prescribed pursuant to New Hampshire law for an injured New Hampshire worker, where the New Hampshire legislature has a controlling say.

The simple fact is that New Hampshire authorizes therapeutic cannabis for use by New Hampshire citizens, some of whom also have valid claims under New Hampshire workers' compensation law.

It is the obligation of the New Hampshire Department of Labor and Compensation Appeals Board to apply the New Hampshire Workers' Compensation Act as written. The insurer's statutory obligation to provide the injured worker all "reasonable medical, surgical, and hospital services, remedial care, [and] medicines" under RSA 281-A:23, an obligation left unamended by the enactment of New Hampshire's Therapeutic Cannabis law, requires insurers to pay for all medical treatment related to a work injury. When the Board found unanimously as a factual matter that the pain caused by Mr. Panaggio's spine injury was relieved by his prescribed therapeutic cannabis, its responsibility was to order the insurer to comply with state law and reimburse him.

This Court should hold that the Board erred as a matter of law in not doing so, and remand with instructions to reimburse.

Respectfully submitted by:
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Dated: April 20, 2018

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CERTIFICATE OF SERVICE

In recognition of the fact that this brief was hand-delivered to the Court on this date, an electronic (PDF) copy has been emailed this date to James O’Sullivan, Esq., and Robert S. Martin. Esq., counsel for the insurer. Hard copies will follow by U.S. Mail.

Dated: April 20, 2018

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