

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Americans for Safe Access, et al.,)
)
 Petitioners,) No. 11-1265
)
 v.)
)
Drug Enforcement Administration,)
)
 Respondent.)

MOTION TO INTERVENE IN PETITION FOR JUDICIAL REVIEW

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Carl Eric Olsen (“Olsen” hereafter), pursuant to Federal Rules of Appellate Procedure Rule 15(d) and District of Columbia Circuit Rule 15(b), moves for leave to intervene in the petition for judicial review of the final order of the Drug Enforcement Administration (“DEA” hereafter), reported at 76 FR 40552 on July 8, 2011, filed by Americans for Safe Access (“ASA” hereafter) and others on July 22, 2011. Olsen has been granted leave to intervene in a companion case related to this petition, In re Coalition to Reschedule Cannabis, No. 11-5121, but is unsure if District of Columbia Circuit Rule 15(b) has already granted him leave to intervene in this case. The local rule says all cases involving the same “agency action or order”. Olsen was granted leave to intervene in Case No. 11-5121 on July 12, 2011, but this court was not notified of the final agency action or order until July 19, 2011, so Olsen is not sure exactly how local rule 15(b) is interpreted.

Olsen is an original member of the Coalition to Reschedule Cannabis as reflected in the Letter from Michael Kennedy to DEA, dated October 9, 2002 [found at http://www.safeaccessnow.org/downloads/CRC_Letter.pdf], cited in ASA’s Petition for Writ of Mandamus, Case No. 22-5121, at pages 11 and 13.

Olsen was also a petitioner in the Marijuana Rescheduling Petition, DEA Docket No. 86-22 (Sept. 6, 1988) [found at <http://www.ukcia.org/pollaw/lawlibrary/young.php>], cited in ASA’s Petition for Writ of Mandamus at page 10.

Olsen is not represented by the attorney representing ASA.

On August 14, 2010, Olsen sent a letter to the Coalition for Rescheduling Cannabis (“Coalition” hereafter) asking to be removed from the coalition and notifying them that in addition to petitioning the DEA for reclassification of cannabis, legal action must also be taken against the states for their failure to file for federal rescheduling [found at http://www.iowamedicalmarijuana.org/States/pdfs/CannabisReschedulingCoalition_20100814.pdf].

In 2008, Olsen filed a petition to remove marijuana from schedule I of the Iowa Uniform Controlled Substances Act, Iowa Code 124.204(4)(m). On February 17, 2010, in a unanimous ruling, the Iowa Board of Pharmacy found that marijuana no longer meets the statutory requirement of having “no accepted medical use in treatment in the United States” and recommended the Iowa Legislature remove marijuana from state schedule I:

http://www.iowa.gov/ibpe/pdf/2010_02_17minutes.pdf

Since 1996 a total of 16 states and the District of Columbia (with Congressional approval) have enacted medical marijuana legislation, and yet not one of those states has reviewed the classification of marijuana under their own versions of the Uniform Controlled Substances Act (with the exception of

Oregon¹) or applied for federal reclassification of marijuana. Oregon reclassified marijuana into schedule II on July 1, 2010, but it was forced legislatively and not by administrative action. 2009, SB 728. The Oregon Legislature ordered the Oregon Board of Pharmacy to pick one of the other four schedules and forbid them from picking schedule I. 2009 Oregon Acts, c.898 § 2.

OLSEN DISAGREES WITH ASA AND DEA

All of the Coalition members have either failed to seek state reclassification of marijuana under their own state's Uniform Controlled Substances Act and/or file civil actions in state courts complaining of the failure of their own states to apply for federal rescheduling. Because of this failure on the part of the Coalition there is a difference of opinion between Olsen and the Coalition which forced Olsen to withdraw and separate from the Coalition.

On page 9 of the Petition for Writ of Mandamus, Case No. 11-5121, ASA cites the reliance of the DEA on a letter written in 1975 from the Acting Secretary of the U.S. Department of Health and Human Services to the Acting Deputy

¹ Because Or. Rev. Stat. § 475.035 antedates the Federal Controlled Substances Act, 21 USC §§ 811 to 812, Or. Rev. Stat. § 475.005(6) and Or. Rev. Stat. § 475.035 show a legislative policy to apply different criteria from those of the federal act when classifying controlled substances; Oregon has not chosen to include medical use as a factor. *State v. Eells*, 72 Or. App. 492, 696 P.2d 564 (1985), review denied by 299 Ore. 313, 702 P.2d 1110 (1985).

Although Or. Rev. Stat. § 475.005(6) states that a controlled substance is defined by reference to the schedules under the Federal Controlled Substances Act, 21 USC §§ 811 to 812, the statute does not adopt the federal criteria, as Oregon has its own standards for amendment of the schedule, as set out in Or. Rev. Stat. § 475.035. *State v. Eells*, 72 Or. App. 492, 696 P.2d 564 (1985), review denied by 299 Ore. 313, 702 P.2d 1110 (1985).

Administrator of the U.S. Drug Enforcement Administration, 40 FR 44167, which concluded there was no accepted medical use of marihuana in the United States. There were no State laws recognizing the medical use of marijuana in 1975. Since 1996, a total of 16 states and the District of Columbia (with Congressional approval) have enacted laws defining marijuana as medicine.

The Marijuana Rescheduling Petition referred to in ASA's Petition for Writ of Mandamus at page 10, received a final ruling from this court in 1994 in *Alliance for Cannabis Therapeutics*, 15 F.3d 1131 (D.C. Cir. 1994). Again, at that time, in 1994, no State had accepted the medical use of marijuana. States did not begin defining marijuana as medicine until 1996.

The Gettman petition referred to in ASA's Petition for Writ of Mandamus at page 10, was filed in 1995, which, again, was a year before any State had enacted a State law defining marijuana as medicine.

The current Rescheduling Petition by the Coalition, filed in 2002, mentions that 8 States that had enacted laws defining marijuana as medicine at the time that petition was filed.

STANDING TO SEEK JUDICIAL REVIEW

Olsen questions the standing of the petitioners to make an argument based on state sovereignty in this petition for judicial review now that the DEA has

responded to the petition to reschedule cannabis. Olsen cannot risk the lives of patients on a defect in the petition which may deprive the petitioners of an essential argument that should have been included in this petition for judicial review.

In *Gettman v. DEA*, 290 F.3d 430 (D.C. Cir. 2002), the court found that the petitioner did not have standing to seek judicial review from the final order of the Drug Enforcement Administration (“DEA” hereafter). The petitioners in the current rescheduling petition think they have cured that defect by including patients and caregivers in the Coalition. Olsen thinks a State government would have standing to seek judicial review from a final order of the Drug Enforcement Administration on the question of whether marijuana has accepted medical use in treatment in the United States because that question is a matter of law (state statutes) not a question of fact (medical opinion). Olsen bases his opinion on the decision of the U.S. Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006):

The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.

Federal scheduling of controlled substances is an administrative rule making process. For the same reason the Attorney General (the DEA) cannot make a rule which would declare an accepted State medical standard for care and treatment

specifically authorized by State law illegal under federal law, the Attorney General (the DEA) cannot maintain an existing rule if it declares an accepted State medical standard for care and treatment specifically authorized by State law illegal under federal law. In other words, the DEA cannot legally deny a petition for rescheduling of marijuana if the petition is authorized by a State government and supported by a State law defining marijuana as medicine.

Olsen agrees the petitions have standing to seek judicial review on the question of fact (medical opinion), but Olsen has serious doubts about the ability of the Coalition to seek judicial review of any adverse decision by the DEA which would make an accepted State medical practice illegal because of a federal regulation (scheduling is an administrative rule making process). There is no excuse for 16 State governments and the District of Columbia, which have accepted the medical use of marijuana, failing to join the Coalition or file separately for federal reclassification of marijuana.

Olsen also disagrees with the DEA for its failure to tell the States they must file for federal reclassification of marijuana when they enact a State law defining marijuana as medicine. Filing for federal reclassification is not optional. The States have a duty to file for federal reclassification because they can't honestly say they are protecting their citizens if they don't file. DEA should have the integrity to remind them of this duty if they fail to recognize it.

OLSEN HAS SUCCESSFULLY CHALLENGED THE CLASSIFICATION OF MARIJUANA IN IOWA

Unlike Oregon, Iowa does use the same statutory criteria for scheduling as found in the federal act. The eight factor test found in Iowa Code 124. 201 is the same 8 factor test found in 21 U.S.C. 811. The schedule I criteria found in 124.203 are the same criteria found in 21 U.S.C. 812. This is no coincidence. The scheduling criteria in Iowa are derived from the Uniform Controlled Substances Act [found at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ucsa94.pdf>]. See Iowa Code 124.601. The Uniform Controlled Substances Act, in turn, references the federal Controlled Substances Act, Prefatory Note for Uniform Controlled Substances Act (1990):

The Uniform Controlled Substances Act (1990) is designed to supplant the Uniform Controlled Substances Act adopted by the National Conference of Commissioners on Uniform State Laws in 1970. The 1970 Uniform Act was designed to complement the federal Controlled Substances Act, which was enacted in 1970.

...

This Uniform Act was drafted to maintain uniformity between the laws of the several States and those of the federal government.

...

A main objective of this Uniform Act is to continue a coordinated and codified system of drug control initiated with the federal act and the 1970 Uniform Act.

Thus, the similarity in scheduling criteria is no coincidence. It is also no coincidence that each of the States that have adopted the uniform act has

maintained its state sovereignty to make scheduling decisions independently of the federal government. In other words, federal rescheduling begins with a state determination of accepted medical use.

CONCLUSION

For the foregoing reasons, Olsen moves for leave to intervene in the petition for judicial review filed by ASA.

Dated: August 8, 2011

Respectfully submitted,

/s/ Carl Olsen

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class mail
upon the following parties:

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