Washington State Department of Health
Meeting on Marijuana Scheduling
November 20, 2015, 2:00 to 4:00 p.m.
Educational Services District 113
6005 Tyee Drive SW, Tumwater, WA 98512

Prepared Statement of Carl Olsen

My name is Carl Olsen and I live in Des Moines, Iowa. Thank you for the opportunity to participate in this meeting.

Background:

I exchanged emails and phone calls with Jason McGill in 2011 before your former governor, Christine Gregoire, petitioned the U.S. Drug Enforcement Administration to reclassify marijuana under the federal Controlled Substances Act. It was my advice that the state of Washington remove marijuana from Washington's state schedule 1 to demonstrate good faith in asking the federal government to remove marijuana from federal schedule 1. Governor Gregoire did not accept my advice. I am attaching a copy of the email exchange between myself and Mr. McGill (see Attachment #1).

I was a participant in the last federal marijuana scheduling petition which was denied by the U.S. Drug Enforcement Administration in 2011. Denial of Petition to Initiate Proceedings to Reschedule Marijuana ("Denial"), 76 Fed. Reg. 40,552, 40,552 (July 8, 2011). I was an intervenor in the appeal from that denial. Americans for Safe Access v. Drug Enforcement Administration, 706 F.3d 438 (D.C. Cir. 2013), *certiorari denied*, Carl Olsen v. Drug Enforcement Administration, 134 S. Ct. 673, 187 L. Ed. 2d 422 (2013).[1]

In 2008, I filed a petition with the Iowa Board of Pharmacy to remove marijuana from Iowa schedule 1. In 2010, the Iowa Board of Pharmacy voted unanimously to recommend that the Iowa legislature remove

[1] http://medicalmarijuana.procon.org/sourcefiles/carl-olsen-writ-of-certiorari-09112013.pdf

marijuana from schedule 1 in the state of Iowa. I am attaching copies of those announcements from the National Association of Boards of Pharmacy (see Attachment #2 and Attachment #3).

On April 15, 2015, the Iowa Senate voted 44-0-6 in favor of an amendment (S-3123) to SF 484 which would remove marijuana from schedule 1 in Iowa. SF 484 is currently pending in the Iowa House of Representatives. I am attaching a copy of S-3123 (see Attachment #4). Another bill, HF 567, which would also remove marijuana from schedule 1 in Iowa is currently pending in the Iowa House of Representatives. I am attaching a copy of that announcement from the National Association of Boards of Pharmacy (see Attachment #5).

Preliminary Remarks:

I would like to thank Governor Jay Inslee for the rationale he gave on April 24, 2015, in vetoing sections 42 and 43 of 2SSB 5052. Governor Inslee praised the legislature for wanting to remove cannabis products from schedule 1, while at the same time pointing out the difficulty of leaving the source for those products in schedule 1. Governor Inslee is right. The entire plant and all of its components need to be removed from schedule 1.

Legal Argument:

The petition I filed with the Iowa Board of Pharmacy in 2008 did not include any scientific evidence. The only evidence I presented were 12 state laws defining marijuana as medicine. I made a legal challenge to the scheduling based on federalism, not a traditional challenge as to whether the scheduling is reasonable. The administrative agency responsible for scheduling is always going to be timid about changing the status quo. No one has ever won a challenge to an administrative decision to maintain marijuana in schedule 1. I am the only person who has ever presented a legal reason why marijuana cannot be maintained in schedule 1, and I am the only person who has ever won an administrative ruling saying that marijuana should be removed from schedule 1. I am attaching a copy of the ruling from the Iowa Supreme Court dismissing my appeal because the pharmacy board ruled in my favor (see Attachment #6).

Like the controlled substances act in the state of Washington, the Iowa Controlled Substances Act requires that substances in schedule 1 must have no “accepted medical use in treatment in the United States” or be removed. See Iowa Code Chapter 124, Section 203(1)(b); Washington Code Chapter 69.50, Section 203(a)(2).

Because 12 states had accepted the medical use of marijuana in 2008, I said the condition had been met and the board was legally obligated to recommend that our legislature remove marijuana from schedule 1.

The board responded by saying that I had not addressed the issue of abuse potential and denied my petition. We appealed, and in 2009 the Iowa District Court ruled that the abuse potential of schedule 1 was identical to the abuse potential of schedule 2 and abuse potential was not relevant to my petition. Abuse potential is only relevant to moving a substance lower than schedule 2. I did not ask the board to place marijuana in any particular schedule. Therefore, the board could have recommended schedule 2 without considering marijuana’s potential for abuse. All I asked the board to do was eliminate schedule 1. I am attaching a copy of the court’s ruling (see Attachment #7).

In response to the Iowa District Court ruling, the board held a series of public meetings in four Iowa cities, Des Moines, Mason City, Iowa City, and Council Bluffs. Each meeting lasted between 8 to 9 hours. The board accepted written testimony from August of 2009 through November of 2009. In 2010, the board voted unanimously that marijuana should be removed from Iowa schedule 1.

Today, there are a total of 40 states and three federal jurisdictions that have enacted some kind of law recognizing either the whole plant cannabis or components of the plant as medicine. These laws prove beyond doubt that cannabis has accepted medical use in treatment in the United States. There is federal case law directly on point.

Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987):

> We add, moreover, that the Administrator's clever argument conveniently omits any reference to the fact that the pertinent phrase in section 812(b)(1)(B) reads "*in the* United States," (emphasis supplied). We find this language to be further evidence that the Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.

Grinspoon v. DEA, 828 F.2d 881, 887 (1st Cir. 1987):

> Unlike the CSA scheduling restrictions, the FDCA interstate marketing provisions do not apply to drugs manufactured and marketed wholly intrastate. Compare 21 U.S.C. § 801(5) with 21 U.S.C. § 321 (b), 331, 355(a). Thus, it is possible that a substance may have both an accepted medical use and safety for use under medical supervision, even though no one has deemed it necessary to seek approval for interstate marketing.

The state of Washington has accepted the manufacture and marketing of cannabis for medical use wholly intrastate. The state of Washington has a right to do this under the federal Controlled Substances Act. There is federal case law directly on point.

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.

The Oregon case was about using schedule 2 drugs to assist people in committing suicide. The question was whether the state can determine the accepted medical use of controlled substances.

Federal scheduling is by administrative rule. If the administrative agency cannot make a rule, neither can it maintain an existing rule, that makes illegitimate a medical standard for care and treatment of patients that is specifically authorized under Washington state law. And, this makes perfect sense, because we don't think of authorized medical use as the "abuse" of controlled substances.

Recommendations:

1. The state of Washington should remove marijuana from schedule 1 because the state of Washington and 39 other states have accepted some form of medical use of marijuana in treatment. Leaving marijuana in schedule 1 which says it is not medicine and defining it elsewhere in the law as medicine is not good public policy.

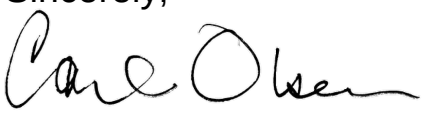
2. The state of Washington should not place marijuana in another schedule until the state of Washington has met with the U.S. Department of Justice to discuss the options.

3. The state of Washington should file for an injunction in federal court to enjoin the enforcement of federal schedule 1 where it interferes with the accepted medical use of marijuana in the state of Washington.

Conclusion:

Thank you for this opportunity to participate in discussing the question of marijuana scheduling in the state of Washington.

Sincerely,



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