NOTE

Proving Personal Use: The Admissibility of Evidence Negating Intent to Distribute Marijuana

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Against the backdrop of escalating state efforts to decriminalize marijuana, U.S. Attorneys' Offices continue to bring drug-trafficking prosecutions against defendants carrying small amounts of marijuana that are permitted under state law. Federal district courts have repeatedly barred defendants from introducing evidence that they possessed this marijuana for their own personal use. This Note argues that district courts should not exclude three increasingly common kinds of "personal use evidence" under Federal Rules of Evidence 402 and 403 when that evidence is offered to negate intent to distribute marijuana. Three types of personal use evidence are discussed in this Note: (1) a defendant's possession of a state-issued medical marijuana license, (2) evidence that a state has legalized possession of marijuana for recreational purposes, and (3) evidence that a defendant suffers from a disease that marijuana arguably treats. Part I examines each of these three categories of personal use evidence and contends that district courts are likely to confront disputes over such evidence with increasing frequency. Part II analyzes objections to the admissibility of personal use evidence on direct examination, focusing primarily on Rules 402 and 403. Part III responds to those objections and argues that the evidence is probative of intent to distribute in federal marijuana-trafficking prosecutions.

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Introduction

In the spring of 2011, DEA Agents searched the home of a Michigan resident named Ricky Brown.[1] They suspected Mr. Brown of selling illegal drugs.[2] The agents found 2.1 ounces of marijuana and a firearm in his house.[3] The United States Attorney's Office charged Mr. Brown with possession of marijuana with intent to distribute and possession of a firearm in furtherance of a drug-trafficking crime.[4] At first glance, this fact pattern seems unremarkable—a standard enforcement action furthering the United States' "War on Drugs." But one factual wrinkle transforms Ricky Brown's case from a mundane drug-trafficking prosecution into the harbinger of a larger conflict about to break out in the federal court system.

Mr. Brown held a medical marijuana card issued under the Michigan Medical Marihuana Act,[5] and the amount of the drug he possessed (2.1 ounces)[6] was well within the amount allowed for personal use under the state medical marijuana law (2.5 ounces).[7] Although a medical marijuana license granted under state law does not serve as a defense to a federal possession charge,[8] the district court in Mr. Brown's case went beyond reiterating that established federal preemption principle.[9] The judge granted a

1. Brief for Plaintiff-Appellee at 4–5, United States v. Brown, No. 13-1761 (6th Cir. Apr. 2, 2014), 2014 WL 1400248 [hereinafter Government Appellate Brief].

2. *Id.* at 4–5.

3. *Id.* at 5.

4. *Id.* at 5–6; *see* 18 U.S.C. § 924(c)(1)(A) (2012) (possession of a firearm in furtherance of drug trafficking); 21 U.S.C. § 841(a)(1), (b)(1)(D) (2012) (possession with intent to distribute).

5. Michigan Medical Marihuana Act §§ 1–10, Mich. Comp. Laws Ann. §§ 333.26421–.26430 (West 2014).

6. *See* Government Appellate Brief, *supra* note 1, at 5.

7. Mich. Comp. Laws Ann. § 333.26424(a) (West 2014) ("[T]he qualifying patient [may] possess[ ] an amount of marihuana that does not exceed 2.5 ounces of usable marihuana . . . . ").

8. *See infra* notes 15–22 and accompanying text.

9. United States v. Brown, No. 11-20281-D1 (E.D. Mich. May 10, 2012) [hereinafter Brown Order] ("Evidence, testimony, questioning or arguments regarding Michigan's state or

motion in limine[10] barring Mr. Brown from mentioning either his medical card or its tendency to show that he possessed the small amount of marijuana found in his home for personal use.[11] This excluded evidence would have been crucial to Mr. Brown's defense on both the charge of possession with intent to distribute and the charge of possession of a firearm in furtherance of a drug-trafficking crime.[12] The district court excluded this critical "personal use evidence" based on its interpretation of Federal Rules of Evidence 401, 402, and 403.[13]

Before analyzing the admissibility of personal use evidence[14] in federal marijuana-trafficking prosecutions, it is important to distinguish three conversations with which this Note does not engage. This Note does not examine (1) whether a defendant can offer a state medical marijuana license as a defense to federal drug possession charges or related questions of federal preemption,[15] (2) the "medical necessity" of marijuana,[16] or (3) normative questions about whether marijuana should be legal. A brief examination of these related topics, however, provides a useful foundation for this Note's central analysis of the admissibility of personal use evidence in federal marijuana-trafficking prosecutions.

First, federal courts have consistently held that state marijuana legalization efforts have no impact on federal laws that criminalize the possession of marijuana.[17] The Controlled Substances Act ("CSA") classifies marijuana as

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local laws on medical marijuana will not be allowed at trial."), *appeal docketed*, No. 13-1761 (6th Cir. May 31, 2013).

10. For a detailed explanation of motions in limine, see generally Jeffrey F. Ghent, Annotation, *Modern Status of Rules as to Use of Motion in Limine*, 63 A.L.R. 3d 311 (1975).

11. *See* Brown Order, *supra* note 9.

12. *See* 18 U.S.C. § 924(c)(1)(A) (2012); 21 U.S.C. § 841(a)(1), (b)(1)(D) (2012).

13. Brown Order, *supra* note 9; *see* Fed. R. Evid. 401; Fed. R. Evid. 403; Government's Motion in Limine to Preclude Certain Evidence, Questioning and Testimony, United States v. Brown, No. 11-20281-D1 (E.D. Mich. Feb. 9, 2012) [hereinafter Brown Motion in Limine].

14. For purposes of this Note, "personal use evidence" is defined as evidence regarding the amount of marijuana permitted under state medical- or recreational-use laws and evidence that a defendant suffers from a disease that marijuana arguably treats. *See infra* note 30 and accompanying text.

15. Legal commentators have thoroughly addressed these federal preemption questions, especially in the months following *Gonzales v. Raich*, 545 U.S. 1 (2005). *See, e.g.*, Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 Cornell J.L. & Pub. Pol'y 507 (2006); *see also infra* notes 17–23 and accompanying text.

16. *See, e.g.*, United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) ("[A] medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. . . . [T]he defense is unavailable.").

17. *See, e.g.*, *Raich*, 545 U.S. at 29 (stating in the context of a conflict between the California Compassionate Use Act and the federal CSA that the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail").

a prohibited Schedule I drug.[18] Therefore, even if a state law legalizes marijuana for medical or recreational use, the CSA still authorizes federal prosecution by operation of preemption doctrine[19] and the Supremacy Clause.[20] Commentators agree that the "seminal case of *Gonzales v. Raich* affirmed the constitutionality of the CSA even as applied to extremely localized marijuana-related activities."[21] Consequently, this Note does not argue that personal use evidence, like the possession of a medical marijuana card in Mr. Brown's case, qualifies as even minimally probative evidence in a federal prosecution for marijuana possession.[22] Rather, this Note examines the evidence in the separate context of prosecution for trafficking or distribution.[23]

Second, this Note does not examine whether federal marijuana-trafficking defendants may rely on the affirmative defense of medical necessity. The medical necessity defense—in the context of marijuana prosecutions—is a variation of the common law necessity defense that applies "where physical forces beyond the actor's control rendered illegal conduct the less of two evils."[24] In *United States v. Oakland Cannabis Buyers' Cooperative*, the Supreme Court held that "medical necessity is not a defense to manufacturing and distributing marijuana."[25] The Court reasoned that "in the Controlled Substances Act, the balance already has been struck against a medical necessity exception."[26] In the wake of *Oakland Cannabis*, federal courts no longer entertain medical necessity arguments in marijuana-trafficking cases, and this Note does not argue that personal use evidence should be admitted as probative on the question of medical necessity.[27] It argues that personal use evidence makes *intent to distribute* less likely.

Third, this Note does not take a position on whether marijuana should be legal or whether marijuana has positive medical applications. The debate over these issues has come to the forefront of our national consciousness as

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18. 21 U.S.C. § 812 (2012).

19. *E.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 261 (2000) ("If state law purports to authorize something that federal law forbids or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule.").

20. U.S. CONST. art. VI, cl. 2.

21. Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 9 (2013).

22. *See* Controlled Substances Act, 21 U.S.C. § 841 (2012).

23. *See* 18 U.S.C. § 924(c)(1)(A) (2012); 21 U.S.C. § 841(a)(1), (b)(1)(D) (2012).

24. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001).

25. *Id.* at 494.

26. *Id.* at 499.

27. *See, e.g.*, United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, 945 (9th Cir. 2010) ("The federal government has not recognized a legitimate medical use for marijuana . . . and there is no exception for medical marijuana . . . under the federal Controlled Substances Act." (citation omitted)); United States v. Scarmazzo, 554 F. Supp. 2d 1102, 1109 (E.D. Cal. 2008) ("Federal law prohibiting the sale of marijuana is valid, despite any state law suggesting medical necessity for marijuana.").

medical marijuana laws have proliferated[28] and since Colorado and Washington legalized marijuana for recreational purposes during the 2012 elections.[29] Given that these normative and scientific questions lend themselves primarily to the fields of political science, economics, and medicine, this Note confines its scope to analyzing the admissibility of personal use evidence in federal marijuana-distribution cases.

This Note argues that district courts should not exclude personal use evidence under Rules 402 and 403 when that evidence is offered to negate intent to distribute in federal marijuana-trafficking prosecutions. The Note discusses three types of personal use evidence: possession of a state-issued medical marijuana card, evidence that a state has legalized possession of recreational marijuana, and evidence that a defendant suffers from disease symptoms that marijuana arguably alleviates.[30] Part I examines each of these three categories of personal use evidence and contends that district courts will increasingly confront disputes over such evidence. Part II analyzes objections to the admissibility of personal use evidence, focusing primarily on Rules 402 and 403 and using Mr. Brown's case as a helpful illustration. Part III responds to those objections and argues that personal use evidence is probative of intent to distribute.

I. Three Scenarios in Which Proving Personal Use Is Critical

Given that drug-trafficking cases in which defendants can plausibly argue a personal use defense typically involve small amounts of marijuana,[31] it might appear that federal courts will have few opportunities to consider the admissibility of personal use evidence like Mr. Brown's medical marijuana card. Federal prosecutors ostensibly have more important priorities than prosecuting small-time drug offenders.[32] The Justice Department has stated that it will not prioritize enforcement efforts in states that have legalized the

28. *See, e.g.*, California Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (West 2007); Michigan Medical Marihuana Act §§ 1–10, Mich. Comp. Laws Ann. §§ 333.26421–.26430 (West Supp. 2014).

29. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. Times, Nov. 8, 2012, at P15, *available at* http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html.

30. More categories of personal use evidence undoubtedly exist, but this Note argues that these three categories in particular will likely confront district courts adjudicating marijuana-trafficking prosecutions. *See infra* Part I.

31. Ricky Brown's case, for example, involved only 2.1 ounces of marijuana. *See* Government Appellate Brief, *supra* note 1, at 5. A defendant charged with distribution of over 100 kilograms of marijuana, on the other hand, obviously could not raise a plausible personal use theory. *See* United States v. Rivas, 573 F. App'x 566 (6th Cir. 2014).

32. Eric Holder has attempted to shift the Department of Justice's priorities away from low-level drug prosecutions. *Holder Calls for New Approach to Prosecuting Low-Level Drug Crimes*, PBS NewsHour (Aug. 12, 2013), http://www.pbs.org/newshour/bb/law-july-dec13-holder_08-12.

possession and cultivation of small amounts of marijuana.[33] This Part therefore examines the significance of personal use evidence.

Despite the Justice Department's stated enforcement priorities, this Part argues that there are at least three scenarios in which federal courts will confront disputes over the admissibility of personal use evidence with increasing frequency. Section I.A discusses the scenario in which Mr. Brown's case falls: marijuana-trafficking prosecutions in states that have legalized medical marijuana. Section I.B introduces the scenario of federal marijuana-trafficking prosecutions in states where the drug has been legalized for recreational use. Section I.C considers a scenario in which a defendant—prosecuted in a state that has not legalized medical marijuana—can demonstrate that she suffers from an illness that marijuana arguably treats.

A. *Trafficking Prosecutions in States that Have Legalized Medical Marijuana*

Despite the Justice Department's recent attempts to shift enforcement efforts away from low-level drug offenses,[34] federal prosecutors continue to bring marijuana-trafficking cases involving relatively small amounts of marijuana in states that have legalized medical marijuana.[35] These prosecutions establish that federal courts must still settle disputes over the admissibility of personal use evidence in small-quantity cases.[36] And if states continue to legalize medical marijuana, it follows that more defendants in marijuana-trafficking cases will attempt to negate intent to distribute with their validly issued state medical marijuana licenses.

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33. For example, the DOJ has issued memoranda indicating that drug prosecutions in states like Washington and Colorado will not be a department priority. *See, e.g.*, Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf; *see also* Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

34. *See supra* notes 32–33 and accompanying text. The National Association of Assistant United States Attorneys ("NAAUSA"), however, has opposed Holder's "softer" drug priorities. *See* Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, N.Y. TIMES, Jan. 30, 2014, at A13, *available at* http://www.nytimes.com/2014/01/31/us/politics/white-house-seeks-drug-clemency-candidates.html (discussing the NAAUSA's opposition to Holder's position on drug sentencing reform).

35. *See infra* note 45; *see also* Alex Kreit, Opinion, *Federal Drug Policy Should Focus on Big Cases*, N.Y. TIMES, (Jan. 14, 2014, 5:10 PM), http://www.nytimes.com/roomfordebate/2014/01/14/should-drug-enforcement-be-left-to-the-states/federal-drug-policy-should-focus-on-big-cases ("And yet, federal prosecutions aren't reserved for drug kingpins. Plenty of low- and mid-level drug offenders . . . find themselves in federal court.").

36. *See* Letter from Jeffrey S. Niesen et al., Defense Counsel, to Eric Holder, Att'y Gen., U.S. Dep't of Justice (Feb. 26, 2014), *available at* https://american-safe-access.s3.amazonaws.com/documents/Holder_Letter.pdf (stating that federal prosecutors in Washington state are ignoring the Cole memorandum and prosecuting "legitimate medical cannabis patients" who are complying with state law).

As of this writing, twenty-three states and the District of Columbia have legalized medical marijuana, seven since 2012, including three in 2014.[37] Additional states have ballot initiatives or legislation pending that would legalize medical marijuana.[38] Polls show that a majority of doctors support medical marijuana.[39] State laws legalizing medical marijuana have been on the books for less than ten years; most states have only recently adopted policies allowing their residents to apply for medical marijuana cards.[40] As the drug gains wider acceptance in states that have already legalized it, and as additional states enact similar laws, cardholders like Mr. Brown are increasingly likely to face federal marijuana-trafficking prosecutions—even in cases involving just a small amount of marijuana. The admissibility of personal use evidence in low-quantity trafficking prosecutions will substantially influence the outcomes of such cases.

Cases brought by federal prosecutors in recent years reinforce this point. Prosecutors charged Mr. Brown, for example, with two different marijuana-trafficking felonies based on his possession of a mere 2.1 ounces of marijuana—an amount well within the 2.5 ounces allowed under the relevant Michigan medical marijuana law.[41] By comparison, Mr. Brown could have carried nearly three times that amount in New Mexico,[42] four times that amount in California,[43] and nearly *eight times that amount* in Oregon and Washington.[44]

Mr. Brown's case is not an outlier.[45] Federal prosecutors continue to bring drug-trafficking prosecutions even when law enforcement recovers

37. *See State Medical Marijuana Laws*, Nat'l Conf. St. Legislatures (Nov. 13, 2014), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

38. *States with Pending Legislation to Legalize Medical Marijuana*, ProCon.org (Jan. 5, 2015), http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481 (collecting sources).

39. Donna Fuscaldo, *Survey: 53% of Doctors Support National Legalization of Medical Marijuana*, Fox Bus. News (Apr. 29, 2014), http://www.foxbusiness.com/personal-finance/2014/04/29/survey-53-doctors-support-national-legalization-medical-marijuana ("Medical marijuana . . . is still not widely prescribe[d] by doctors across the country—despite the majority of doctors . . . supporting its use. According to a survey by online medical resource WebMD, 69% of doctors and 52% of patients polled say marijuana delivers benefits.").

40. *See supra* note 37 and accompanying text.

41. *See supra* notes 6–7 and accompanying text.

42. N.M. Stat. Ann. § 26-2B-3 (Supp. 2007) (allowing possession of an "adequate supply"); N.M. Code R. § 7.34.2.7(D) (West, Westlaw through Jan. 1, 2015) (limiting an "adequate supply" to "six (6) ounces").

43. California Compassionate Use Act, Cal. Health & Safety Code Ann. § 11362.77(a) (West 2007) (allowing possession of "no more than eight ounces of dried marijuana").

44. Or. Rev. Stat. § 475.320(1)(a) (2013) (allowing possession of "six mature marijuana plants and 24 ounces of usable marijuana"); Wash. Rev. Code § 69.51A.040(1)(a) (2014) (authorizing the possession of "twenty-four ounces of useable cannabis" for medical purposes).

45. *See, e.g.*, United States v. Bobadilla-Pagán, 747 F.3d 26, 29 (1st Cir. 2014) (charging defendant with possession with intent to distribute and with possessing a firearm in furtherance of a drug trafficking offense when law enforcement recovered 7.4 ounces of marijuana

only a small amount of marijuana. This practice is particularly common in cases where the government files related weapons charges. In *United States v. Firestack-Harvey*, five residents of a family farm were indicted on the same charges as Mr. Brown for growing a small amount of marijuana and owning a shotgun and hunting rifle.[46] The district court granted a motion in limine barring the defendants from mentioning both their compliance with Washington medical marijuana laws and their possession of a medical marijuana card.[47] In *United States v. Duong*,[48] the defendant faced the same two distribution and firearm charges. The defendant, who lived in a state that had legalized medical marijuana, possessed *less than half an ounce* of marijuana.[49] Such an amount, if properly prescribed, would have been permitted in all of the twenty-four jurisdictions that have legalized medical marijuana.[50] Nevertheless, the defendant in *Duong* faced the same two marijuana-trafficking and firearm charges as Mr. Brown and the defendants in *Firestack-Harvey*.

In short, federal prosecutors continue to bring a considerable number of small-quantity marijuana-trafficking cases, even as marijuana legalization efforts have proliferated.[51] A defendant's ability to introduce evidence establishing personal use is crucial to his or her defense in these cases.

B. *Trafficking Prosecutions in States that Have Legalized Recreational Use*

While the preceding Section establishes that federal prosecutors bring an appreciable number of marijuana-trafficking prosecutions even when only small quantities of the drug are involved, it deals solely with a scenario in which a defendant possesses a validly issued state medical marijuana card. Section I.B presents a second, related scenario reinforcing the significance of personal use evidence given the advent of state laws legalizing recreational marijuana use. The growing support for legalization indicates that even defendants who are not prescribed the drug for medical purposes will attempt to introduce evidence that they possessed a drug quantity permissible under their states' recreational use law, thus negating intent to distribute.

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and a gun from his car); United States v. Madina, 474 F. App'x 919, 920 (4th Cir. 2012) (per curiam) (charging defendant with possession with intent to distribute marijuana and with possessing a firearm in furtherance of a drug trafficking offense when law enforcement found approximately five ounces of marijuana on his person and a shotgun in his car); United States v. Firestack-Harvey, No. CR-13-24-FVS, 2014 WL 1682863 (E.D. Wash. Apr. 29, 2014); United States v. Duong, No. 3:10-CR-9 VLB, 2011 WL 2413521 (D. Conn. June 10, 2011); *see also supra* note 37 and accompanying text.

46. Superseding Indictment at 2–3, United States v. Firestack-Harvey, No. CR-13-24-FVS (E.D. Wash. May 6, 2014); *see* 18 U.S.C. § 924(c)(1)(A) (2012); 21 U.S.C. § 841(a)(1), (b)(1)(D) (2012).

47. Order Re Affirmative Defenses, United States v. Firestack-Harvey at 8–11, No. CR-13-24-FVS (E.D. Wash. May 7, 2014) [hereinafter Firestack-Harvey Order].

48. 2011 WL 2413521 (D. Conn. June 10, 2011).

49. *Duong*, 2011 WL 2413521, at *2 ("In addition to the loaded firearm, officers also located and seized approximately 13.7 grams of marijuana . . . . ").

50. *See supra* notes 37, 42–44 and accompanying text.

51. *See supra* notes 41, 45 and accompanying text.

Just a few years ago, marijuana legalization seemed fanciful.[52] Not anymore.[53] Voters in Colorado and Washington made history in 2012 when they adopted the first laws making "it legal to smoke pot recreationally, without any prescription or medical excuse."[54] Now, even some states "in the conservative South[ ] are considering decriminalizing the drug or legalizing it for medical or recreational use."[55] Members of both major parties favor legalization: "the two states considered likeliest . . . to follow Colorado and Washington in outright legalization of the drug are Oregon, dominated by liberal Democrats, and Alaska, where libertarian Republicans hold sway."[56] Furthermore, the Obama administration issued guidelines in early 2014 "intended to give banks confidence that they will not be punished if they provide services to legitimate marijuana businesses . . . even though it remains illicit under federal law."[57] The national momentum behind states' efforts to legalize possession of small amounts of recreational marijuana raises the possibility that even more trafficking defendants will introduce personal use evidence relating to recreational marijuana than evidence involving medical marijuana.

C. *Patients Who Use Illegal Medical Marijuana to Treat Debilitating Disease*

The previous two scenarios consider defendants only in states that have legalized marijuana for medical or recreational use. While the number of those states is fast increasing,[58] neither scenario speaks to whether the admissibility of personal use evidence affects defendants in the states that have not yet legalized marijuana. Part I.C addresses prosecutions in those states by introducing a final scenario involving personal use evidence. This scenario involves defendants who use marijuana to treat illness even though their state has not legalized medical marijuana.[59] A defendant would admit her

52. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx (noting that "only 12% [of Americans] favored legalization" when Gallup first polled the question in 1969).

53. *Id.* ("And now for the first time, a clear majority of Americans (58%) say the drug should be legalized.").

54. Healy, *supra* note 29, at P15.

55. Rick Lyman, *Pivotal Point Is Seen on Legalizing Marijuana*, N.Y. TIMES, Feb. 27, 2014, at A1, *available at http://www.nytimes.com/2014/02/27/us/momentum-is-seen-as-more-states-consider-legalizing-marijuana.html*. ("Alabama, Georgia and South Carolina are among the states considering [medical marijuana legalization] laws.").

56. *Id.*

57. Serge F. Kovaleski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES, Feb. 15, 2014, at A10, *available at* http://www.nytimes.com/2014/02/15/us/us-issues-marijuana-guidelines-for-banks.html.

58. *See supra* notes 52–56 and accompanying text.

59. *See How Many People in the United States Use Medical Marijuana?*, PROCON.ORG (2012), http://medicalmarijuana.org/view.answers.php?questionID=00119 (projecting based

illegal *possession* under both state and federal law, but she would negate *intent to distribute* by showing that marijuana relieves the symptoms of her illness, thereby increasing the likelihood that she possessed the drug only for personal use.

This scenario will play out in federal court with increasing frequency if medical applications for marijuana continue to gain mainstream acceptance. Many state legislatures have undertaken rigorous fact-finding missions to determine whether marijuana has positive medical applications. A number of policymakers have concluded that the drug does relieve the symptoms of several debilitating diseases.[60] Any of the millions of patients who suffer from one of these diseases[61] could present evidence regarding her illness and treatment regimen to negate intent to distribute if she, like Mr. Brown, faced prosecution for marijuana-trafficking based on possession of a small amount of the drug.[62]

A New York judge battling cancer recently illustrated how personal use evidence would militate against intent to distribute. In a letter to his state's legislature,[63] Judge Gustin L. Reichbach explained his illegal marijuana use by stating that with his disease, "[n]ausea and pain are constant companions. One struggles to eat . . . . [Sleep] becomes increasingly elusive. Inhaled marijuana is the only medicine that gives me some relief from nausea, stimulates my appetite, and makes it easier to fall asleep."[64] If marijuana's medical applications gain wide acceptance, defendants with symptoms like Judge Reichbach's will certainly attempt to introduce those symptoms as evidence that they too possessed marijuana for symptom relief, not distribution.

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on an extrapolation from the number of legal medical marijuana users and 2011 census statistics that there are hundreds of thousands of illegal medical marijuana users in states that have not passed medical marijuana laws).

60. *See, e.g.*, N.J. STAT. ANN. § 24:6I-1 (West 2014) (concluding that marijuana can relieve pain or help treat "other symptoms associated with certain debilitating medical conditions" including cancer, glaucoma, HIV, multiple sclerosis, and wasting syndromes).

61. *See, e.g.*, OFFICE OF POPULATION AFFAIRS, HEPATITIS C: THE FACTS 2 (2012), *available at* http://www.hhs.gov/opa/pdfs/hepatitis-c-fact-sheet.pdf ("An estimated 3.2 million people in the United States are living with chronic hepatitis C infection . . . according to the Centers for Disease Control and Prevention."); *U.S. Statistics*, AIDS.GOV, http://aids.gov/hiv-aids-basics/hiv-aids-101/statistics (last updated Dec. 2, 2014) ("More than 1.2 million people in the United States are living with HIV infection . . . . ").

62. *See* Kreit, *supra* note 35.

63. Gustin L. Reichbach, Op-Ed., *A Judge's Plea for Pot*, N.Y. TIMES, May 17, 2012, at A27, *available at* http://www.nytimes.com/2012/05/17/opinion/a-judges-plea-for-medical-marijuana.html ("I did not foresee that after having dedicated myself for 40 years to a life of the law . . . my quest for ameliorative and palliative care would lead me to marijuana.").

64. *Id.*

II. Objections to the Admissibility of Personal Use Evidence on Direct

The three scenarios presented above establish that the admissibility of personal use evidence[65] in federal marijuana-trafficking prosecutions is not only crucial to a defendant's case, but also a question that federal courts will confront with increasing frequency. The remainder of this Note therefore examines the admissibility of personal use evidence under the Federal Rules of Evidence. Part II considers government objections that have been raised to exclude personal use evidence from trial. Section II.A analyzes an objection to personal use evidence based on Rule 402. Section II.B considers an objection under Rule 403.

Ricky Brown's case provides a typical example of the government's strategy for excluding personal use evidence in low-quantity marijuana-trafficking prosecutions.[66] In *Brown*, the government made a motion in limine under Rules 402 and 403 to "preclude [Mr. Brown] from making any reference, including any evidence, testimony, [or] questioning," to three issues: "state or local laws regarding medical marijuana," "[t]he 'medical necessity' of marijuana," and Mr. Brown's "beliefs about such laws or marijuana."[67] The government offered two distinct lines of reasoning to support this motion: (1) under Rule 402, these "issues are irrelevant to whether the Government can prove the crimes charged in the indictment, and do not support any cognizable defense to the charges," and (2) under Rule 403, these issues "are also prejudicial."[68]

A. *Government Rule 402 Objections to Personal Use Evidence*

District courts have granted government motions in limine to exclude personal use evidence in marijuana-trafficking prosecutions under Rules 401 and 402.[69] Those rules establish that only relevant evidence is admissible, and evidence is relevant only if it has some "tendency to make a fact [of consequence] more or less probable."[70] Federal prosecutors advance three arguments supporting the conclusion that evidence of a defendant's state

65. For purposes of this Note, "personal use evidence" is defined as evidence regarding the amount of marijuana permitted under state medical or recreational use laws and evidence that a defendant suffers from disease symptoms that marijuana arguably treats. *See supra* note 30 and accompanying text

66. *See supra* notes 1–13 and accompanying text. Although the admissibility of personal use evidence in low-quantity marijuana-trafficking prosecutions is still an emerging issue, *see supra* notes 31–33, other prosecutors have already adopted strategies similar to the government's strategy in *Brown*. *See, e.g.*, Motion in Limine Regarding Medical Marijuana at 6–7, United States v. Firestack-Harvey, No. CR-13-24-FVS (E.D. Wash. Apr. 30, 2014) [hereinafter Firestack-Harvey Motion in Limine].

67. Brown Motion in Limine, *supra* note 13, at 5.

68. *Id.*

69. Firestack-Harvey Order, *supra* note 47, at 11; Brown Order, *supra* note 9.

70. Fed. R. Evid. 401(a); Fed. R. Evid. 402 ("Irrelevant evidence is not admissible.").

marijuana license and compliance with state law are irrelevant in a prosecution for possession with intent to distribute.[71]

First, the government argues that testimony regarding a state medical marijuana law—including the amount of marijuana permitted—is irrelevant because it "is indisputable that state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana."[72] This argument does not address whether state medical marijuana laws might relate to the mens rea elements of possession with *intent to distribute* or possession of a firearm in furtherance of a *drug-trafficking* crime.[73] The government's argument relates solely to simple possession.

Second, the government asserts that evidence related to compliance with state medical marijuana laws is irrelevant because the Supreme Court has established that "medical necessity is not a defense to manufacturing and distributing marijuana."[74] This argument implicitly assumes that evidence of state medical marijuana law is only probative of one potential "fact of consequence" in a trafficking prosecution: whether marijuana establishes a necessity defense. The government reasons that since the Supreme Court has foreclosed marijuana-trafficking defendants from relying on the medical necessity defense, personal use evidence makes no fact of consequence more or less likely and should therefore be excluded under Rule 402.[75]

Third, the government moves to exclude testimony about compliance with state marijuana laws because "mistake of law" is not a defense to possession with intent to distribute.[76] Consequently, a defendant cannot assert that she relied in good faith on state laws legalizing marijuana.[77] Again, this argument implicitly assumes that evidence of compliance with state medical marijuana laws is only offered to support a mistake of law defense. It does not address whether possession of a state-issued marijuana license or other personal use evidence might satisfy Rule 402 by making intent to distribute more or less likely.

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71. *See* Firestack-Harvey Motion in Limine, *supra* note 66; Brown Motion in Limine, *supra* note 13.

72. *See* Brown Motion in Limine, *supra* note 13, at 6 (quoting United States v. Hicks, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) (internal quotation marks omitted)).

73. 18 U.S.C. § 924(c)(1)(A) (2012); 21 U.S.C. § 841(a)(1), (b)(1)(D) (2012). The court in *Firestack-Harvey* did, however, acknowledge that personal use evidence might be relevant for this "limited purpose." Firestack-Harvey Order, *supra* note 47, at 9.

74. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001); *see supra* notes 25–27 and accompanying text.

75. *See, e.g.*, Firestack-Harvey Motion in Limine, *supra* note 66, at 4–7; Brown Motion in Limine, *supra* note 13, at 7–8.

76. *See, e.g.*, Firestack-Harvey Order, *supra* note 47, at 5–6; Brown Motion in Limine, *supra* note 13, at 8.

77. *See, e.g.*, Firestack-Harvey Order, *supra* note 47, at 6; Brown Motion in Limine, *supra* note 13, at 9.

B. *Government Rule 403 Objections to Personal Use Evidence*

District courts have also sustained government objections to personal use evidence in marijuana-trafficking cases based on Rule 403. Rule 403 states that a judge "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[78] Federal prosecutors support motions in limine to exclude personal use evidence by arguing unfair prejudice, confusion of the issues, and incitement of jury nullification.[79]

The government argues, and at least one district court has recognized, that admitting personal use evidence regarding a defendant's compliance with state law would "confuse the jury with respect to whether compliance with the state [law]" amounts to an affirmative defense to the crime of possession with intent to distribute.[80] Jurors could easily misunderstand the complicated federalism doctrines that allow state marijuana laws to coexist alongside the federal prohibition codified in the Controlled Substances Act.[81] The government also contends that this type of issue confusion is "irrelevant and prejudicial" to the United States, and thus Rule 403 precludes the admission of personal use evidence.[82]

Federal prosecutors further assert that personal use evidence violates Rule 403 because it misleads the jury by inciting jury nullification.[83] Jury nullification is a jury's "deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[84] A trial judge "may block defense attorneys' attempts to serenade a jury with the siren song of nullification,"[85] and courts have noted that personal use evidence "could tempt the jury to disregard federal law."[86] One federal prosecutor has supported a motion in limine by claiming that "[t]he only purpose

78. Fed. R. Evid. 403.

79. *See, e.g.*, United States' Response to Defendant's Motion to Present Affirmative Defenses at 12–13, United States v. Gregg, No. CR-13-24-FVS (E.D. Wash. Dec. 24, 2013) [hereinafter Firestack-Harvey Response]; Brown Motion in Limine, *supra* note 13, at 9–11.

80. *See* Firestack-Harvey Order, *supra* note 47, at 10; Brown Motion in Limine, *supra* note 13, at 10.

81. *See supra* notes 17–21 and accompanying text.

82. Firestack-Harvey Response, *supra* note 79, at 2, 12–13; *see also* Firestack-Harvey Order, *supra* note 47, at 9–10;.

83. *See* Firestack-Harvey Response, *supra* note 79, at 12–13; Brown Motion in Limine, *supra* note 13, at 10.

84. Black's Law Dictionary 989 (10th ed. 2014).

85. United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993).

86. Firestack-Harvey Order, *supra* note 47, at 10; *accord* Brown Order, *supra* note 9.

for introducing" evidence of state marijuana law "is to invite jury nullification."[87] The government therefore asserts that even if evidence of compliance with state marijuana law was relevant under Rule 402, the danger of unfair prejudice, confusion of the issues, and potential for jury nullification presented by such personal use evidence substantially outweighs its limited probative value, necessitating exclusion under Rule 403.[88]

III. Responses to Government Personal Use Evidence Objections

Defense attorneys representing clients charged with small-quantity marijuana-trafficking offenses can raise several arguments in answer to the government's attempt to exclude personal use evidence under Rules 402 and 403. Part III presents several such arguments. Section III.A responds to Rule 402 objections raised by the government. Section III.B responds to Rule 403 objections.

A. *Response to Rule 402 Objections Raised by the Government*

A defendant responding to a Rule 402 objection must first identify the fact of consequence that the evidence makes more or less likely.[89] Relevance is a relational concept—nothing is "relevant" in a vacuum—so the proponent of any item of evidence must establish the element of the charge or defense on which the evidence is probative.[90] A number of the government's Rule 402 objections implicitly assume that evidence of state marijuana laws is solely probative of necessity or mistake of law defenses.[91] A defendant must prove those assumptions false by offering an alternate purpose for the personal use evidence. Once the proponent identifies a proper purpose, "a district court . . . may not exclude the evidence if it has the slightest probative worth."[92]

Evidence that a defendant accused of marijuana-trafficking had a medical marijuana license, possessed an amount permitted by a state recreational use law, or had a medical motive for possession is probative of the mens rea element of the crimes of possession with intent to distribute and possession of a firearm in furtherance of a drug-trafficking conspiracy.[93] If a defendant proves she complied with state laws regulating recreational marijuana use, a jury could infer that the defendant more likely possessed the drug for personal use than for distribution. Similarly, if a defendant offers evidence that she had a state-issued medical card or that she illegally used marijuana to

87. Brown Motion in Limine, *supra* note 13, at 10.

88. *Id.* at 9–10.

89. Fed. R. Evid. 401; Fed. R. Evid. 402.

90. *See* Richard O. Lempert, Samuel R. Gross & James S. Liebman, A Modern Approach to Evidence 215–23 (5th ed. 2013) (discussing Rules 401 and 402).

91. *See supra* notes 73–75 and accompanying text.

92. United States v. Whittington, 455 F.3d 736, 738–39 (6th Cir. 2006).

93. 18 U.S.C. § 924(c)(1)(A) (2012); 21 U.S.C. § 841(a)(1), (b)(1)(D) (2012).

treat an illness, a jury could infer that the defendant did not have intent to distribute given her plausible reason for personal use.

By arguing that personal use evidence is relevant to the mens rea element of marijuana-trafficking crimes, defense attorneys can render the government's federal supremacy, mistake of law, and medical necessity arguments inapposite. A defendant accused of distribution acknowledges the supremacy of federal law by admitting guilt on a simple possession charge; she offers evidence of compliance with state law solely to negate intent to distribute marijuana.[94] At least one district court otherwise hostile to personal use evidence acknowledged its relevance for this "limited purpose."[95] By arguing that the evidence relates to mens rea, a defendant can refute the assumption that such evidence is probative only of the disapproved mistake of law and medical necessity defenses.

B. *Response to Rule 403 Objections Raised by the Government*

A defendant accused of marijuana trafficking must begin her response to a Rule 403 objection by noting that a court should only exclude otherwise relevant evidence under that rule when the probative value of the evidence is *substantially outweighed* by the danger of unfair prejudice.[96] The burden of establishing substantial unfair prejudice is not on the proponent—in this case a defendant offering personal use evidence—but rather on the government.[97] Given the tendency of personal use evidence to negate the mens rea element of marijuana-trafficking crimes,[98] the government bears a heavy burden in attempting to exclude the evidence. Defendants should be prepared to respond to both the government's confusion of the issues and jury nullification arguments under Rule 403.

Defendants can address concerns about issue confusion and jury nullifaction by stipulating that compliance with state marijuana laws or a medical motive for marijuana use do not present a defense to federal possession charges.[99] Counsel can explain in her opening statement and closing argument, and the judge can explain in jury instructions, that while the defendant admits criminal liability for *possession*, she disputes having the intent to distribute required for a *trafficking* conviction. While jury nullification can

94. This approach does not present a defense to simple possession, but given the much stricter federal penalties for drug-trafficking crimes, this might be a defense attorney's best option.

95. Firestack-Harvey Order, *supra* note 47, at 9.

96. *See* FED. R. EVID. 403; *see also* GROSS ET AL., *supra* note 90, at 239–40 (discussing Rule 403's proponent-friendly balancing test).

97. *See, e.g.*, United States v. Tse, 375 F.3d 148, 164 (1st Cir. 2004).

98. *See supra* notes 94–96 and accompanying text.

99. *See, e.g.*, Brief of Appellant Ricky Brown at 46, United States v. Brown, No. 13-1761 (6th Cir. Feb. 3, 2014) (conceding the illegality of possession under federal law).

be a valid concern in federal possession cases,[100] Rule 403's proponent-friendly balancing test supports introduction of personal use evidence as probative of the issue of mens rea in a distribution case.[101]

A marijuana-trafficking defendant can bolster her response to a government Rule 403 objection by appealing to the trial judge's ability to issue a limiting instruction to the jury. Both prosecutors and judges often rely on limiting instructions to justify the admission of what can be the most prejudicial evidence available against a defendant: evidence of prior crimes, wrongs, or acts under Rule 404(b).[102] Defense attorneys could argue that if a limiting instruction can control the jury's use of Rule 404(b) evidence—evidence that can be far more unfairly prejudicial than personal use evidence in a marijuana-trafficking case—a limiting instruction could similarly mitigate the risk of issue confusion or jury nullification. Given the high probative value of personal use evidence as to mens rea, and given the trial judge's ability to control the presentation of evidence, district courts should admit personal use evidence over the government's objection.

Conclusion

District courts should not exclude "personal use evidence" under Federal Rules of Evidence 402 and 403 when such evidence is offered for the purpose of negating intent to distribute in federal marijuana-trafficking prosecutions. Given the proliferation of state marijuana laws, district courts will confront such disputes over evidence with increasing frequency, and the admissibility of evidence regarding medical use and compliance with state law is essential to a defendant's ability to disprove mens rea in distribution cases.

100. *See, e.g.*, Paul Butler, Op-Ed., *Jurors Need to Know that They Can Say No*, N.Y. Times, Dec. 20, 2011, at A39, *available at* http://www.nytimes.com/2011/12/21/opinion/jurors-can-say-no.html.

101. *See supra* notes 96–98 and accompanying text.

102. Fed. R. Evid. 404(b) ("Evidence of a crime, wrong, or other act . . . may be admissible for . . . proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."); 22B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5249, at 201 (2014) ("The principal device for controlling the use of other crimes, wrongs, or acts is the limiting instruction.").