

Federal Judge Says No To Washington Family's Medical Marijuana Defense

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A federal judge won't allow [a family of a medical marijuana patients from Washington state](#) to defend themselves against drug trafficking charges by arguing their pot plants were for medical purposes.

U.S. District Judge Fred Van Sickle of the Eastern District of Washington on Tuesday rejected the planned medical marijuana defense of Larry Harvey, 70, his wife Rhonda Firestack Harvey, 55, and three others facing trial next week, saying they could not argue that growing marijuana was for medical purposes and legal under Washington state law.

"The intent of the defendants is not relevant to the issues," Van Sickle said. "There's this concept of reliance on state law and the like. That's not relevant either."

Because the federal government considers marijuana illegal, federal courts generally don't allow evidence that the drug may have been used for medical purposes, even when medical marijuana is legal under a state's law, as it is in Washington. The Harveys, their son, Rolland Gregg, 33; Gregg's wife Michelle, 35; and family friend Jason Zucker, 38, sought to describe their doctor-recommended medical marijuana cultivation at their upcoming trial on federal drug charges.

"You can tell a portion of the truth, just a bit of the truth and only the truth they want you to tell," said Kari Boiter, the Washington state coordinator for the medical marijuana advocacy group Americans for Safe Access, who accompanied Larry Harvey at Tuesday's hearing. "Forget 'the truth, the whole truth, and nothing but the truth,'" Boiter added.

The group claims they were growing 74 medical marijuana plants for their personal use at the Harveys' rural home near Kettle Falls, Washington. Defense attorneys said the pot patch complied with state law.

Nevertheless, the federal government has charged each with six felonies, including manufacturing, possession and distribution of marijuana, as well as possessing a firearm in furtherance of drug trafficking.

The family kept numerous firearms at the home, in the wilderness of northeast Washington state, near the U.S.-Canadian border, for hunting and defense, their lawyers said. They have encountered black bears, cougars and coyotes at their front door on several occasions, according to the lawyers.

"It doesn't matter that we used the shotgun to hunt turkeys and the hunting rifle for deer," Rhonda Harvey said in a statement to the media last week.

Federal prosecutors say the presence of firearms shows the defendants were involved in drug trafficking.

Defense attorneys argue that the defendants were not "perceived to be violent in any way" and that the guns had nothing to do with the cultivation of medical cannabis.

The home was raided by state authorities on Aug. 9, 2012, according to court documents. State law enforcers found 74 plants growing near the home. Under the presumption that the family was growing this cannabis as a collective, rather than individually, officers seized 29 cannabis plants so that the family would be compliant with state law, which limits collective crops to no more than 45 plants. State authorities did not press charges or seize anything else.

A week later, federal authorities conducted a more comprehensive raid, seizing the Harveys' remaining marijuana plants, as well as about five pounds of raw cannabis and some marijuana-infused edibles from the freezer. The feds also seized a 2007 sedan, several hundred dollars, firearms and some personal belongings.

"This is not the kind of spectacular haul that the DEA is typically called in for, "the family's attorneys wrote in [a letter to Attorney General Eric Holder](#) in February, urging him to reconsider the charges. "Just the opposite, the evidence seized is consistent with the type of strict medical dosage that occurs with a doctor's supervision."

Washington legalized medical marijuana in 1998 and recreational marijuana in 2012. Still, federal law classifies marijuana a Schedule I substance ["with no currently accepted medical use."](#)

Michael Ormsby, the U.S. attorney for the region, filed a court motion last week requesting "any evidence of medical purposes as well as the defendants' belief that they were lawfully engaged in marijuana cultivation" be inadmissible at trial. Ormsby argued that the family's purpose for growing marijuana is not the issue. Rather, he said, the "knowing or intentional manufacturing of marijuana" is what matters.

Defense attorneys argue that there is an "equal justice disparity" created by federal drug laws that contradict state laws.

"Here you have a single family facing a combined 60 years in mandatory minimum sentences for medical marijuana in the same state that plans to allow cannabis distribution on a scale unlike anyone has seen before," the defense attorneys wrote to Holder.

In August, Deputy Attorney General James Cole issued [guidelines for all U.S. attorneys](#), saying it's "not an efficient use of federal resources to focus [medical marijuana] enforcement efforts on seriously ill individuals." Cole's memo also outlined what the federal government still regards as prosecution priorities, including "preventing violence and the use of firearms in the cultivation and distribution of marijuana."

Larry Harvey, a recently retired commercial truck driver of 30 years, ate marijuana-infused cookies to ease symptoms related to gout, chronic pain and inflammation, according to his attorneys. Rhonda Harvey suffers from osteoarthritis and has undergone joint and bone surgeries. Medical cannabis eased her inflammation and pain, the lawyers said. Rolland Gregg and Zucker used medical marijuana to treat back injuries. Michelle Gregg used cannabis for appetite stimulation due to wasting brought on by a medical condition she hasn't disclosed.

In March, Holder announced support for sentencing reform that would reduce prison time for [some nonviolent drug crimes](#). Last week, a White House official told Yahoo News that President Barack Obama may grant clemency to "[hundreds and perhaps thousands](#)" of people who have been jailed for nonviolent offenses.

Harvey family lawyers argue that the defendants were "clearly abiding by the rest of the priorities laid out in the latest Cole memo" and the U.S. attorney should therefore drop the charges.

Last week, during pretrial hearings, the five defendants rejected plea deals offered by the prosecution that would have reduced their maximum prison sentences to three years. Without the deals, they each face maximum penalties that range up to 40 years to life in federal prison.

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Attorney General Eric Holder
Department of Justice
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Dear Mr. Holder,

We, the undersigned attorneys, are writing to express our concern regarding the current charging decisions of the United States Attorney's Office (USAO) in the Eastern District of Washington. We strongly believe that the USAO is acting outside the boundaries of guidelines handed down by the Department of Justice for cases involving state legal marijuana cultivation. Contrary to DOJ policy and without consideration for state law, the USAO has filed numerous indictments against legitimate medical cannabis patients who were obeying Washington's law, including the clients we are representing in Harvey et al.

As recently as August 29, 2013 in a memorandum from Deputy Attorney General James Cole, the DOJ reiterated that individuals in compliance with state marijuana laws will not be subject to federal prosecution. A similar policy has been in effect since October 19, 2009 when then Deputy Attorney General David Ogden first issued instruction on this topic. Mr. Cole later released a statement in June 2011 that was intended to clarify the original Ogden memo. If the USAO applies the standards set forth in any of these DOJ directives, the Harvey et al. indictment would be summarily dismissed.

In a meeting with the United States Attorney in late 2012, a member of the defense team went to painstaking lengths to explain the exact nature of the defendants' medical marijuana usage. A dual-board certified doctor who is internationally recognized as being an expert witness on cannabis as medicine described in detail how the amount and various forms of marijuana seized is clearly indicative of patient consumption. Unfortunately, the USAO insists on proceeding with this unnecessary indictment at great expense to taxpayers and against the DOJ's direct orders.

Out of five defendants charged, four are members of the same family; a mother and father, their son and daughter in law, plus a close family friend. All of the patients involved had a valid recommendation from a Washington state physician that authorizes the use of medical marijuana. If this case were tried in any other court of law with jurisdiction over this issue, we would be able to present a complete and provable defense that would inevitably lead to full exoneration of our clients. In line with these facts, two months after the federal raid of the Harvey property and in the weeks immediately leading up to Initiative 502 taking effect in Washington, Stevens County Prosecutor Tim Rasmussen submitted a column to the local newspaper announcing that he was joining other prosecutors in Washington's most populated counties in dropping all marijuana cases consistent with state law.

That is where the United States Attorney apparently decided to pick up where Mr. Rasmussen left off. With the defendants clearly abiding by the rest of the priorities laid out in the latest Cole memo, the lone deciding factor in this case seems to be the Harvey family's enthusiasm for hunting and need to protect themselves from an assortment of wild animals that often frequent the mountainous rural area where their 34-acre property is located.

Larry Harvey is nearly 70 years old and recently retired after 30 years as a commercial truck driver. Having encountered black bears, cougars and coyotes at their front door on several occasions, a loaded handgun was stored in the dresser of the master bedroom, just in case his wife, Rhonda, needed to protect herself while Larry was away for work. Limited to social security for income, the Harvey's pride themselves on cutting corners in every way imaginable— down to burning wood to save money on electricity and hunting wild game to keep their family fed throughout the year. Rhonda also tends a garden full of vegetables next to the house.

Further down the road out of sight, about a quarter-mile away and roughly a thousand vertical feet into rocky, uneven terrain is the field where a few dozen cannabis plants were spotted from an aircraft overhead. You cannot see the Harvey's home from the area where the plants were growing nor can you see the field from the immediate vicinity of the house. This information is crucial when considering the Government's theory that the defendants were in possession of a firearm in furtherance of a drug trafficking crime. The only thing more flimsy than the ties between the guns in this case and the medical marijuana in question is the assertion that these defendants are run-of-the-mill drug traffickers.

There are a few basic facts that make the sale and distribution of cannabis highly improbable in this case. First, federal agents confiscated 45 plants, roughly five pounds of raw cannabis and a freezer full of butter, cookies and marijuana-infused teas. This is not the kind of spectacular haul that the DEA is typically called in for. Just the opposite, the evidence seized is consistent with the type of strict medical dosage that occurs with a doctor's supervision.

Furthermore, the existence of an outdoor-only garden anywhere near the Canadian Border - without so much as a greenhouse for cover - is an overt indicator that production was limited to one harvest per year. Bearing in mind, of course, that a single annual crop was designed to serve the collective needs of four family members and a close friend, all of them legal Washington state medical marijuana patients. If the immature cannabis plants that were confiscated had actually made it to harvest, the total weight of the dried flowers would have likely limited each patient to a supply of no more than five ounces per month. Considering one to two ounces are needed to make a pound of butter, it's easy to understand how a cookie at night and some tea in the morning could quickly diminish one's supply. The point being, of course, that there would be no cannabis left over to sell or distribute because these patients needed all of it and then some to properly treat their medical conditions.

Bringing the conversation back to the latest Cole Memo issued by the DOJ, there are no allegations about distribution to minors and no money ever changed hands, so there are no funds to give to criminal enterprises, gangs or cartels. Likewise, there was little incentive to divert the crop elsewhere, especially out of state and there is no indication of any other illegal activities. No one was driving impaired and there were no adverse public health consequences or environmental dangers. There is not one shred of proof that these defendants are perceived to be violent in any way. On the contrary, as explained above, the use of firearms had absolutely nothing to do with the cultivation of cannabis, even if there had been any leftover product to distribute. Simply put, this is a mom and pop on a family homestead near a National Wildlife Refuge in the Northeastern corner of Washington, where the nearest town is 10 miles in any direction.

In the Western District of Washington, meanwhile, both the geographic and political terrain stand in stark contrast to what we just described. While the United States Attorney for Eastern Washington is zealously pursuing cases involving as little as 15 plants, his counterpart in Western Washington has taken a "hands off" approach, allowing a commercial industry to develop. Where defendants in Eastern Washington are being systematically deprived of a defense due to the charging decisions of the USAO, similarly situated individuals in Western Washington have been given a green light of sorts, with the United States Attorney for Western Washington yet to charge a single case where a valid medical marijuana defense would apply in state court. Where commercial outlets are largely permitted in Western Washington, the USAO in Eastern Washington is subjecting individual patients to mandatory minimum prison sentences for private cultivation. This creates an equal protection problem of epic proportions, as does the recent passage of Initiative 502 by Washington voters.

U.S. District Judge James K. Bredar cited the passage of legalization initiatives in both Washington and Colorado in his decision to hand down lighter sentences related to a large-scale marijuana distribution ring in Maryland. Most notably, Bredar pointedly referred to “equal justice” concerns created by the federal government’s decision to not pursue criminal cases against dispensaries and others in accordance with state law. In his precedent-setting ruling, Bredar went on to say, “it’s indisputable that the offense is not regarded with the same seriousness it was 20 or 30 years ago, when the sentencing guidelines...which are still in use, were promulgated.”

Like Bredar points out, Washington provides a prime example of the equal justice disparity created by federal drug laws that are grossly out of line with shifting public opinions on cannabis. Here you have a single family facing a combined 60 years in mandatory minimum sentences for medical marijuana in the same state that plans to allow cannabis distribution on a scale unlike anyone has seen before. In the very city where the Harvey family is set to stand trial, an ordinance was recently passed to establish groundbreaking licensing requirements for aspiring entrepreneurs in the existing medical marijuana field, as well as those planning to enter the emerging I-502 marketplace. These conflicting realities cannot co-exist without the sort of equal protection quandary that Bredar warns about.

The present-day dichotomy in Washington is so troubling that Congress is calling for a better solution. When inviting you and Mr. Cole to testify at a Senate Judiciary hearing in September, Committee Chairman Patrick Leahy said “it is important, especially at a time of budget constraints, to determine whether it is the best use of federal resources to prosecute the personal or medicinal use of marijuana in states that have made such consumption legal.” Adding fuel to the fire, 18 members of Congress penned a letter to President Obama this month, calling on him to reschedule marijuana.

Likewise, the unintended consequences of federal drug laws have become a hot topic on Capitol Hill. With the Bureau of Prisons consistently at 140 percent capacity due to a swelling population of non-violent drug offenders, a bipartisan coalition is poised to pass sweeping criminal justice reforms that limit the use of mandatory minimum sentences. Your office has also responded accordingly, urging prosecutors to avoid triggering automatic prison terms in cases like Harvey et al. by electing not to list the quantity of drugs seized when filing federal charges. This is one of many bold, new approaches unveiled as part of the DOJ’s “Smart on Crime” initiative that deserve a round of applause.

Equally commendable are your remarks at the annual meeting of the American Bar Association in San Francisco, where you publicly admitted, “we must face the reality that, as it stands, our system is in too many respects broken. The course we are on is far from sustainable. And it is our time – and our duty – to identify those areas we can improve in order to better advance the cause of justice for all Americans.”

Of equal importance in this discussion is President Obama’s recent callout for clemency applicants. If the goal is to greatly reduce the number of non-violent drug offenders in federal prison, why is the USAO in Eastern Washington so eager to prosecute the Harvey family and other law-abiding citizens, with the ultimate consequence being a mandatory minimum prison sentence?

In conclusion, we ask you to consider whether the Harvey et al. indictment truly advances the cause of justice. When deferring to prosecutorial discretion in recent policy memos, is this the outcome you had in mind? Please encourage the United States Attorney for Eastern Washington to carefully consider all of the options before him and whether there are more appropriate solutions available for resolving this case.

Respectfully,

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