STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2019-045

December 20, 2019

The Honorable Kim D. Hammer
State Senator
1201 Military Road PMB 285
Benton, AR 72015

Dear Senator Hammer:

This is in response to your request for an opinion concerning Amendment 98 to the Arkansas Constitution, which establishes the right of qualifying Arkansans to possess and use medical marijuana.

Your request states that a standard condition of probation in Arkansas for felony offenders is that they cannot violate federal law. When that condition is in place, Arkansas probationers are unable to utilize their medical marijuana cards without fear of facing the potential revocation of their probation. In this regard, you have asked the following questions:

1) In those instances, should probation offices, prosecuting attorneys' offices and circuit courts—all state entities—take steps to revoke probation for individuals who test positive for marijuana in spite of the fact that they have medical marijuana cards issued by Arkansas pursuant to Amendment 98?

2) Furthermore, are probation officers and other state officials under any obligation to report probationers who test positive for medical marijuana to federal authorities?

RESPONSE

If, in your first question, you are asking whether the law compels probation officers, prosecuting attorneys, and circuit courts to take steps to revoke probation

in the situation you describe, the answer is "no." Those entities have discretion in how they choose to address probation violations. If, on the other hand, you are asking how I believe they should exercise their discretion, such a question does not involve interpretation of state law, and as such, it falls outside the scope of an opinion from this office.[1] Therefore, insofar as your first question is concerned, this opinion will be limited to a discussion of the relevant law.

In response to your second question, no, there is no legal obligation for probation officers, prosecuting attorneys, or judges to report probationers who test positive for medical marijuana to federal authorities.

DISCUSSION

A general overview of the applicable law may be helpful before turning to your specific questions. Amendment 98 to the Arkansas Constitution, the Arkansas Medical Marijuana Amendment of 2016 ("Amendment 98"), legalized the possession and use of medical marijuana under state law for certain qualifying individuals.[2] The federal Controlled Substances Act ("CSA") prohibits the possession and distribution of marijuana, and there is no exception for marijuana used for medical purposes.[3] Therefore, Amendment 98 is not a shield to federal criminal prosecution under the CSA.[4]

Regarding conditions of probation, you write that a standard condition of probation in Arkansas for felony offenders is that they do not violate federal law. Judges have broad discretion to fashion such conditions as they believe are appropriate in a given case.[5] Thus, in some cases, a judge may explicitly state that a probationer shall not violate federal law. However, you may also be referring to Ark. Code Ann. § 5-4-303(b), which states, "The court shall provide as an express

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[1] *See* Ark. Code Ann. § 25-16-706 (Repl. 2014) (requiring the Attorney General to render opinions to legislators and other state officials on certain matters of state law).

[2] Ark. Const. amend. 98 (Repl. 2019).

[3] *See* 21 U.S.C. §§ 841(a), 844(a). *See also Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that application of CSA provisions criminalizing the manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes does not violate the Commerce Clause).

[4] *See, e.g.*, *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006).

[5] *See* Ark. Code Ann. § 5-4-303 (Supp. 2017).

condition of every suspension or probation that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation."[6] Although § 5-4-303(b) does not explicitly mention federal law, the effect, of course, is that probationers cannot violate most federal laws without also violating a condition of their probation.

With this general overview of the law in mind, I turn to your specific questions.

Question 1: In those instances, should probation offices, prosecuting attorneys' offices and circuit courts—all state entities—take steps to revoke probation for individuals who test positive for marijuana in spite of the fact that they have medical marijuana cards issued by Arkansas pursuant to Amendment 98?

Whether or not a person's probation can or should be revoked is highly dependent on the factual circumstances of the individual case. That said, I can speak generally about the law as it applies to the scenario you have described.

If a probationer tests positive for tetrahydrocannabinol (THC), the principal psychoactive ingredient in marijuana, a court could make a determination that the probationer had possessed marijuana in violation of federal law.[7] Possession of marijuana is a federal offense punishable by fines and imprisonment.[8] Therefore, regardless of whether the condition in place expressly forbade violation of federal law or whether it prohibited the probationer from committing an offense punishable by imprisonment, a court could find that a probationer who tested positive for THC had violated a condition of his or her probation.

However, even if a court determines that a probationer has violated a condition of his or her probation, revocation of probation does not automatically follow. A court has wide discretion in dealing with probation violations, and there are a

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[6] *Id.* at § 5-4-303(b).

[7] *See, e.g., United States v. Hancox*, 49 F.3d 223, 225 (6th Cir. 1995) (holding that use of a controlled substance constitutes possession of the substance); *United States v. Blackston*, 940 F.2d 877, 891 (3d Cir. 1991) (holding that a positive drug test is circumstantial evidence that a defendant was in possession of the drug for which he or she tested positive). Even though these holdings relate to "possession" for purposes of 18 U.S.C. § 3583(g)(1), the federal statute relating to supervised release following imprisonment, I see no reason why a judge could not apply this same reasoning for purposes of 21 U.S.C. § 844(a).

[8] *See* 21 U.S.C. § 844(a).

number of potential sanctions the court could impose. The court may continue the period of probation, lengthen the period of probation within the limits set by Ark. Code Ann. § 5-4-306, increase the fine within the limits set by Ark. Code Ann. § 5-4-201, impose a period of confinement to be served during the period of probation, or impose any conditions that could have been imposed upon conviction of the original offense.[9] Of course, revocation of probation is also an option if the court finds by a preponderance of the evidence that the probationer has inexcusably failed to comply with a condition of his or her probation, in this case, the condition not to violate federal law or to refrain from committing any acts punishable by imprisonment.[10]

I should also point out that the court is not the only entity you mention that is entitled to exercise discretion. Like the court, prosecuting attorneys are generally vested with discretion in handing prosecutorial matters.[11] Probation officers also have flexibility and some discretion in dealing with probation violations. For instance, the Department of Community Correction[12] (DCC) has the authority to sanction probationers administratively without utilizing the revocation process.[13] The DCC uses an intermediate sanctions grid, which guides probation officers in determining the appropriate response to probation violations.[14] Thus, if a probationer tested positive for THC in violation of a condition of probation, the probation officer could consult the grid to determine the appropriate course of action. There are a number of intermediate sanctions available to the probation officer, including those listed in Ark. Code Ann. § 16-93-306(d)(3).[15] It is my understanding that probation officers use the grid, court guidance, and direction from their supervisors to guide their decisions.

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[9] Ark. Code Ann. § 16-93-309(a) (Supp. 2017).

[10] Ark. Code Ann. § 16-93-308(d).

[11] *See, e.g.*, *Webb v. Harrison*, 261 Ark. 279, 281, 547 S.W.2d 748, 749 (1977) ("A prosecuting attorney and a circuit judge both have great discretion in performing their duties. The prosecutor has the discretion to file charges and the discretion to ask the court to dismiss charges.").

[12] Now known as the Division of Community Correction, an agency of the newly created Department of Corrections. *See generally* 2019 Ark. Acts No. 910, § 644.

[13] Ark. Code Ann. § 16-93-306(d)(1).

[14] *See* Ark. Code Ann. § 16-93-306(d)(2)(A).

[15] *See* Ark. Code Ann. § 16-93-306(d)(3).

Thus, if a probationer uses marijuana in violation of federal law, probation officers and prosecutors could take steps to initiate the probation revocation process, and a judge could ultimately decide to revoke probation. Such decisions, however, fall within those entities' discretion.

Question 2: Furthermore, are probation officers and other state officials under any obligation to report probationers who test positive for medical marijuana to federal authorities?

No. I am not aware of any law that requires probation officers or other state officials to report to federal authorities Arkansas probationers who test positive for THC because of their use of medical marijuana pursuant to Amendment 98.

Sincerely,

LESLIE RUTLEDGE
Attorney General