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### **ASSIGNMENTS OF ERROR**

1. The trial court erred by refusing to allow Mr. Otis to present his medical marijuana defense.
2. The trial court violated Mr. Otis' constitutional right to due process.
3. The trial court violated Mr. Otis' constitutional right to compulsory process.
4. The trial court violated Mr. Otis' constitutional right to present a defense.
5. The trial court erred by finding that "[t]he parties agree that the statement dated October 20, 2005 and allegedly signed by Mr. King's treating physician, Dr. Robert Rakita, does not completely conform to the statutory definition." Memorandum Opinion and Order Re Motion in Limine (dated 12/31/07), Supp. CP.
6. The trial court erred by finding that "[t]he documentation provided to law enforcement by Mr. Otis, while in writing, did not conform to the statute and, by itself, is insufficient to raise the affirmative defense provided under the Medical Use of Marijuana Act." Memorandum Opinion and Order Re Motion in Limine (dated 12/31/07), Supp. CP.
7. The trial court erred by ruling that Dr. Rakita's note did not qualify as "valid documentation" under the medical marijuana act.
8. The trial court erred by concluding that "valid documentation must be in possession of the caregiver in advance of questioning or request by law enforcement and must be presented to law enforcement at the time of request. The documentation cannot be provided after the fact as proposed herein by the Defendants." Memorandum Opinion and Order Re Motion in Limine (dated 12/31/07), Supp. CP.
9. The trial court erred by granting the state's motion in limine to preclude Mr. Otis from presenting a medical marijuana defense.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To determine whether evidence is sufficient to support an affirmative defense, a trial court must evaluate the evidence most strongly in favor of the accused person. Mr. Otis presented sufficient evidence to raise an affirmative defense under the medical marijuana act. Should the trial judge have allowed Mr. Otis to present his affirmative defense to a jury? Assignments of Error Nos. 1-9.
2. To present a medical marijuana defense, an accused person must have “valid documentation,” consisting of a doctor’s statement that the potential benefits marijuana would likely outweigh the health risks for a particular patient. The statute does not require the statement to use particular words to convey the doctor’s professional opinion. Should the trial judge have allowed the defense because Mr. Otis had a doctor’s statement that implicitly conveyed the doctor’s professional opinion that the benefits of marijuana outweigh the health risks? Assignments of Error Nos. 1-9.
3. The medical marijuana defense requires the accused person to “[p]resent his or her valid documentation to any law enforcement official who questions the [provider].” The plain language of the statute does not require the documentation to be presented immediately. Should the trial court have allowed the defense because Mr. Otis was able to present valid documentation to any law enforcement official who questioned him? Assignments of Error Nos. 1-9.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Earl Otis and Stephanie McCartney with Manufacture of Marijuana. CP 20; RP (7/19/07) 2-3. Both stated that they were growing it for their friend, Ronald King, Jr., who needed it to keep his appetite up since he suffered from several symptoms of AIDS. Supp. CP, Facts Stipulation (Attachment A, page 1; Attachment B, page 1; Attachment C, page 2; Attachments H, I, J, and K); Supp. CP, Offer of Proof, pages 1-17.

During execution of a search warrant, Mr. Otis and Ms. McCarty gave officers a letter dated December 21, 2007, written by Dr. Robert Rakita of Virginia Mason Medical Center. Supp. CP, Facts Stipulation (Attachment A, page 1; Attachment B, page 1; Attachment C, page 2). The note reads as follows:

Mr. King should be able to use marijuana for appetite stimulation. He has tried Marinol, but it is not effective for him and he has lost weight.  
Supp. CP, Facts Stipulation (Attachment H).

Mr. Otis and Ms. McCarty also gave the officers a note from Mr. King:

11/14/05

I Ronald Dean King Jr. am Terminally Ill with the AIDS VIRUS. And I am designating Earl Otis as my Caregiver. In accordance with Chapter 69.51A.040 RCW. On this day Monday November 14th 2005.

Donald D. King, Jr.  
Earl G. Otis, Jr.

Supp. CP, Facts Stipulation (Attachment J).

Both defendants sought to use a medical marijuana defense at trial. Supp. CP, Offer of Proof; Supp. CP, Defense Response to Motions in Limine. Ms. McCarty (through counsel) requested appointment of an expert to help both her client and Mr. Otis establish that the marijuana was no more than a 60-day supply necessary for the patient's personal medical use. RP (11/29/07) 2. The trial judge deferred ruling on the request, pending resolution of the prosecution motion in limine to prohibit Mr. Otis and Ms. McCarty from presenting their defense. RP (11/29/07) 2; Supp. CP, Motion in Limine.

To support its offer of proof, the defense submitted additional information from Dr. Rakita. Supp. CP, Offer of Proof. First was a letter from the doctor, which reads as follows:

Mr. King has been a patient of mine, off and on, since 2000. A question has been raised regarding his usage of marijuana for medical purposes. As can be seen from his medical records, we had discussed this on multiple occasions in 2000, and again in 2005. He indicated that this was very helpful to improve his appetite and reduce his nausea. For him, the medical benefits outweigh the risks.

Supp. CP, Offer of Proof, page 5.

Also included in the offer of proof were several medical reports regarding Mr. King, including the following:

He also had significant diarrhea, possibly related to nelfinavir, for which he takes Imodium. He also has chronic nausea

and loss of appetite. Marijuana has been very effective for this in the past and previously I had written a letter for him, and he would like another one. He has taken Marinol and finds that it is not that effective anymore. He has taken prochlorperazine and that is not effective either. He is also known to be hepatitis A and B immune. Supp. CP, Offer of Proof, October 20, 2005 Final Report.

He continues to smoke marijuana under the medical marijuana program.

Supp. CP, Offer of Proof, October 17, 2000 Final Report.

He is still smoking and also has been smoking marijuana which he says has dramatically improved his weight.

Supp. CP, Offer of Proof, July 20, 2000 Final Report.

He does smoke marijuana which he says markedly increases his appetite and improves his nausea to a much greater effect than Marinol does. This has been a problem for him because he is on probation and thus he requests a letter indicating that it is okay for him to have a medical supply of marijuana.

Supp. CP, Offer of Proof, June 1, 2000 Final Report.

The court issued a Memorandum Opinion and refused to allow Mr. Otis to assert a medical marijuana defense. Supp. CP, Memorandum Opinion and Order Re Motion in Limine (December 31, 2007). Judge Wood ruled that the note from Dr. Rakita did not meet the statutory requirements for "valid documentation," and refused to allow the parties to supplement the note with the medical records and other documentation.<sup>1</sup> The parties waived their right to trial and entered a stipulation. Based on this stipulation, the court found Mr. Otis guilty as charged. CP 6; Supp. CP, Facts Stipulation. This timely appeal followed. CP 5.

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<sup>1</sup> The court also indicated that the parties agreed that the documentation did not conform to statutory definitions. Supp. CP, Memorandum Opinion and Order Re Motion in Limine, page 3.

## ARGUMENT

### **THE TRIAL JUDGE SHOULD HAVE ALLOWED MR. OTIS TO PRESENT HIS MEDICAL MARIJUANA DEFENSE TO A JURY.**

Under the Fourteenth Amendment to the United States Constitution, a state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319 at 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). This includes the right to introduce evidence that is relevant and admissible. *State v. Lord*, 161 Wn.2d 276 at 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be established beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn.App. 404 at 410, 88 P.3d 435 (2004).

In evaluating whether the evidence is sufficient to support an affirmative defense, trial court must interpret the evidence most strongly in favor of the defendant. *State v. Ginn*, 128 Wn.App. 872 at 879, 117 P.3d 1155 (2005). RCW 69.51A.040 creates an affirmative defense to crimes “relating to marijuana.” Under the statute, “any designated provider who assists a qualifying patient in the medical use of marijuana,

will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter.” RCW 69.51A.040(2).

In this case, only the provisions relating to “valid documentation” are at issue. *See* Memorandum Opinion and Order Re Motion in Limine (dated 12/31/07), Supp. CP. Among other things, a designated provider must “[p]resent his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.” RCW 69.51A.040(3)(c). Valid documentation includes “[a] statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient...” RCW 69.51A.010(5)(a).<sup>2</sup>

A. Dr. Rakita’s note qualifies as “valid documentation” under RCW 9.51A.010(5)(a).

The meaning of a statute is a question of law reviewed *de novo*.

*State Owned Forests v. Sutherland*, 124 Wn.App. 400 at 409, 101 P.3d

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<sup>2</sup> The statute has since been amended, substituting “patient may benefit from the medical use of marijuana” for “potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient.” *See* 2007 c 371 Section 3, effective July 22, 2007.

880 (2004). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789 (2004). If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875 at 879, 133 P.3d 934 (2006) (“Plain language does not require construction.”)

The plain language of RCW 69.51A.010(5)(a) does not require documentation to contain the exact language of the statute; nor does it require documentation to be substantially in the form of the statute. The operative language—“[a] statement... which states that...” — says nothing about “exact language” or “substantial compliance.” Nor does the definition contain any other words restricting “valid documentation” to those statements containing particular phrasing or format. From this, it can be presumed that such restrictions are not intended. *Sutherland, supra; Punsalan, supra*. Instead, under the plain language of the statute, a doctor’s statement that generally conveys the required information—that the benefits of marijuana outweigh the health risks—qualifies as “valid documentation.”

The same result would apply even if the statute were determined to be ambiguous. First, it is an “elementary rule” of statutory construction

that the use of certain language in one instance and different language in another establishes a difference in legislative intent. *Spain v. Employment Sec. Dep't*, \_\_\_ Wn.2d \_\_\_, 185 P.3d 1188 (2008). The legislature has repeatedly demonstrated that it is capable of imposing inflexible requirements on written documents, going so far as to regulate style and font size in some contexts. *See, e.g.*, RCW 10.96.020 (“Criminal process issued under this section *must contain the following language* in bold type on the first page of the document...”); RCW 26.09.165 (“All court orders containing parenting plan provisions or orders of contempt, entered pursuant to RCW 26.09.160, *shall include the following language*...”); RCW 47.36.200 (“[T]he department shall adopt by rule a uniform sign or signs for this purpose, *including at least the following language*, ‘MOTORCYCLES USE EXTREME CAUTION’”); RCW 64.36.028 (“The timeshare interest purchase agreement *must contain the following language* in fourteen-point bold face type...”); RCW 70.95.630 (“A person selling vehicle batteries at retail in the state shall... Post written notice which must be at least eight and one-half inches by eleven inches in size and *must contain the universal recycling symbol and the following language*...”).<sup>3</sup>

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<sup>3</sup> Emphasis has been added to the quoted portion of each statute.

The legislature has also repeatedly imposed a requirement that certain notices and other documents substantially comply with a particular statutory form. For example RCW 6.21.030, RCW 7.08.030, RCW 9.96.020, RCW 9A.16.110, RCW 11.40.030, RCW 17.28.100, RCW 18.27.114, RCW 19.138.040, and RCW 28A.343.330 all require notices and other documents to be “in substantially the following form...”

The difference between the medical marijuana act’s definition of “valid documentation” and the wording used in the numerous statutes referenced above establishes that “valid documentation” need not contain specific language, or be substantially in a particular form. *Spain v. Employment Sec. Dep’t, supra*. Accordingly, the plain language of the statute allows doctors to draft “valid documentation” using their own phrasing and terminology.

Second, a fundamental rule of statutory construction is that courts must interpret legislation consistently with its stated goals. *Tunstall v. Bergeson*, 141 Wn.2d 201 at 211, 5 P.3d 691 (2000). To ascertain legislative intent, courts look to the statute’s declaration of purpose. *Donohoe v. State*, 135 Wn. App. 824 at 844, 142 P.3d 654 (2006). Such declarations are “useful in determining how the legislative body intended the entire statute to operate,” and “can be crucial to the interpretation of a

statute.” *Food Servs. of Am. v. Royal Heights*, 123 Wn.2d 779 at 788, 871 P.2d 590 (1994).

RCW 69.51A.005 sets forth the purpose and intent of the medical marijuana act, and reads as follows:

The people of Washington [S]tate find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

Therefore, the people of the state of Washington intend that:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, may benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

Persons who act as designated providers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana...

RCW 69.51A.005.

The phrase “valid documentation” should be interpreted broadly to ensure that legitimate providers “shall... not be found guilty of a crime.”

RCW 69.51A.005. *Tunstall v. Bergeson*. Accordingly, documentation that implies rather than states a physician's professional opinion that the

potential benefits of marijuana outweigh the health risks must fit within the definition. *Tunstall v. Bergeson*.

Third, the rule of lenity requires criminal statutes to be construed in the manner most favorable to the accused person. *State v. Gonzales Flores*, 164 Wn.2d 1 at 17, 186 P.3d 1038 (2008); *State v. Jackson*, 61 Wn.App. 86 at 93, 809 P.2d 221 (1991). The policy underlying the rule of lenity is “to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *Jackson, supra*, at 93. Applying this rule, the statute must be read to allow for “valid documentation” that varies from the language of the statute.

In this case, the documentation consisted of a handwritten note signed by Dr. Robert M. Rakita, M.D., the Section Head of Virginia Mason’s Section of Infectious Disease. Supp. CP, Facts Stipulation. The note reads, in relevant part, that Mr. King “should be able to use marijuana for appetite stimulation.” Supp. CP, Facts Stipulation, Attachment H. Taken in a light most favorable to Mr. Otis, this note qualifies as “valid documentation,” because the required professional opinion is implicit in Dr. Rakita’s note. *Ginn, supra*. A reputable physician would not write that a patient “should be able to use marijuana for appetite stimulation” if the doctor believed that the medical benefits did not outweigh the risk.

Likewise, a reputable physician would not express a personal (as opposed to a professional) opinion on the medical use of marijuana on her or his employer's letterhead. Finally, Virginia Mason can be presumed to have hired a reputable physician to head its Section of Infectious Disease.

The trial court held that Dr. Rakita's note "did not conform to the statute and, by itself, is insufficient to raise the affirmative defense..." Memorandum Opinion and Order Re Motion in Limine (dated 12/31/07), p. 4, Supp. CP.<sup>4</sup> This was error. Dr. Rakita's note qualified as "valid documentation," and should have permitted Mr. Otis to raise the defense.

The trial judge's reliance on *State v. Shepard*, 110 Wn. App. 544, 41 P.3d 1235 (2002). In *Shepard*, the defendant did not have valid documentation; the patient's physician wrote only that "the potential benefits of the medical use of marijuana *may* outweigh the health risks for this patient." *Shepard*, at 547, *emphasis added*. Division III held that the physician's ambivalence (evidenced by use of the word "may") disqualified the patient: "The statute requires a stronger showing on necessity than simply 'may.'" *Shepherd*, at 552.

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<sup>4</sup> The court noted that "[t]he parties agree that the statement... does not completely conform to the statutory definition." Memorandum Opinion and Order Re Motion in Limine (dated 12/31/07), p. 3, Supp. CP. However, the court did not examine whether or not "complete" conformity was required. Additionally, no defense agreement that the language didn't conform to the statutory requirements can be seen from the record.

Here, by contrast, Dr. Rakita unambiguously stated that Mr. King “should be able to use marijuana...” Supp. CP, Facts Stipulation, Attachment H. Taken in a light most favorable to Mr. Otis, the note directs law enforcement, the court system, and any other interested person to allow Mr. King to use marijuana for medical purposes. As noted above, the statement conveys the doctor’s opinion that the benefits of marijuana outweigh the risks for Mr. King. The note contains no reservations; this is confirmed by Mr. King’s medical records and by Dr. Rakita’s subsequent correspondence.

Accordingly, the conviction must be reversed and the case remanded to the superior court for a new trial, with instructions to permit Mr. Otis to raise the defense.

B. “Valid documentation” need not be presented immediately upon questioning by law enforcement.

Applying a similar analysis, the statute does not require a provider’s “valid documentation” to be shown immediately upon request. First, the plain language of the statute (a provider must “[p]resent his or her valid documentation to any law enforcement official who questions the [provider]”) specifies the persons to whom documentation must be shown, but does not impose a time frame within which presentation must occur. RCW 69.51A.040(3)(c); *Christensen, supra*; *Sutherland, supra*.

Second, a difference in language between this statute and other statutes suggests that presentation of “valid documentation” need not be immediate. *Spain v. Employment Sec. Dep't, supra*. By omitting the word “immediately” from the statute, the legislature is presumed to have meant something different from those statutes where action must be taken immediately. *See, e.g.*, RCW 2.08.190 (certain “rulings and decisions shall be in writing and shall be filed immediately with the clerk”); RCW 6.01.050 (“the sheriff shall immediately give written notice”); RCW 7.08.030 (“the clerk of the court shall immediately give notice”); RCW 9A.82.140 (“the court immediately shall enter an order setting a date for hearing”); RCW 9.92.066 (“The Washington state patrol and any such local police agency shall immediately update their records”).

Third, the requirement should be interpreted broadly to effectuate the purpose of the statute. Broad interpretation will ensure that legitimate providers are not “found guilty of a crime” because of technical deficiencies in their documentation. RCW 69.51A.005; *Tunstall v. Bergeson*.

Fourth, the rule of lenity requires that the provision be interpreted in favor of the accused person. Under such an interpretation, an accused person need not present “valid documentation” immediately upon request. *Gonzales Flores*.

In this case, Mr. Otis should have been permitted to raise the medical marijuana defense even if Dr. Rakita's note was not "valid documentation." Mr. King was a qualified patient who had been approved for medical marijuana by a reputable physician prior to the date of the arrest. Mr. Otis had been designated Mr. King's caregiver, and had a note from Mr. King's doctor which, even if technically deficient, clearly established a good faith basis for a medical marijuana defense. Finally, he was able to present "valid documentation" (including additional information from Dr. Rakita and from Mr. King's medical records) to the court, and to any law enforcement official who questioned him, even if Dr. Rakita's note was, by itself, technically insufficient.

*Dicta* from two Court of Appeals cases suggest a contrary result; however, those cases should not control here. First, Division II has suggested that a person must possess "valid documentation" before the police become involved. *State v. Butler*, 126 Wn. App. 741 at 750-51, 109 P.3d 493 (2005). In *Butler*, however, the defendant could not present any evidence that he was even a qualified patient: "Butler made no attempt, either at the pretrial hearing or at the trial, to offer any documentation from his physician concerning his medical condition or his medical necessity for marijuana." *Butler*, at 751. Without evidence establishing as a threshold matter that the defendant was a qualified patient, the absence

of “valid documentation” was irrelevant. By contrast, Mr. Otis was able to establish that Mr. King was a qualified patient, and he was able to present “valid documentation” – if not in the form of Dr. Rakita’s note, then at least in the form of additional evidence presented before the trial court heard the state’s motion in limine.

Division III has held that a person may become qualified as a patient even after police involvement. *State v. Hanson*, 138 Wn. App. 322, 157 P.3d 438 (2007). In *Hanson*, the defendant was not present when police served a search warrant on his hotel room. The next day, he went to his doctor and obtained written authorization to use marijuana, and then went to the police station. Division III held that he was able to satisfy the statute’s requirements:

[W]e find nothing in the statute that requires that the documentation be posted or that the qualifying patient obtain the documentation in advance, although that is no doubt a preferable practice.... On this record, Mr. Hanson was questioned when he went to the police station the day after the raid. He went to the police voluntarily and provided valid documentation. That was the first day police “questioned” him regarding his medical marijuana use. He then satisfied the provisions of the Medical Marijuana Act. *Hanson*, at 327.

Division III was not required to determine whether “valid documentation” must be immediately presented at the time of police questioning. Instead, it (implicitly) assumed the statute imposed such a requirement and held that the defendant met the requirement by submitting

his “valid documentation” at the time he was questioned. Accordingly, the language in *Hanson* suggesting that presentation must occur immediately after police questioning is *dicta*, and should not control here.

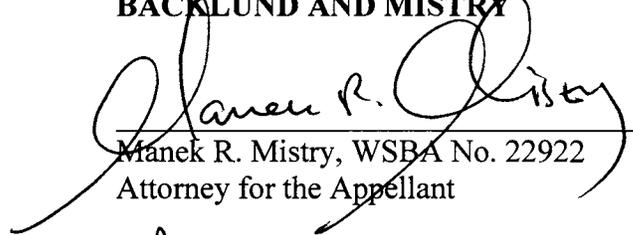
Even if Dr. Rakita’s note did not technically qualify as “valid documentation,” Mr. Otis was ultimately able to produce “valid documentation.” Regardless of whether Mr. Otis would have been able to persuade a jury that he met the other requirements of the statute, the trial court should not have prevented him from asserting the defense based on the “valid documentation” requirement. He should have been allowed to present a medical marijuana defense, and the trial court erred by preventing him from raising the defense. His conviction must be reversed, and the case remanded for a new trial, with instructions to allow the defense on retrial.

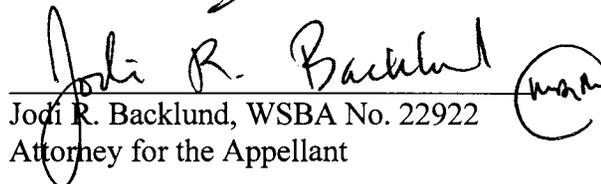
**CONCLUSION**

For the foregoing reasons, the conviction must be reversed and the case remanded to the superior court for a new trial, with instructions to allow Mr. Otis to present his medical marijuana defense.

Respectfully submitted on September 29, 2008.

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