

FILED
COURT OF APPEALS
DIVISION II

09 JUL 10 PM 12:15

STATE OF WASHINGTON
BY DM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 38412-4

STATE OF WASHINGTON,

Respondent.

vs.

ROBIN LAWRENCE STEPHENS,

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

MICHAEL GOLDEN
PROSECUTING ATTORNEY
Law and Justice Center
345 W. Main St. 2nd Floor
Chehalis WA 98532
360-740-1240

By: Eric Smith # 27961
for Douglas P. Ruth, WSBA 25498
Deputy Prosecuting Attorney

P.M. 7-9-2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 1

I. MR. STEPHENS'S WAIVER OF A JURY TRIAL WAS MADE VOLUNTARILY, INTELLIGENTLY, AND KNOWLEDGABLY.....1

II. THE TRIAL COURT PROPERLY REFUSE DO ADMIT EVIDENCE REGARDING THE AFFIRMATIVE DEFENSES OF SUBSTANTIAL COMPLIANCE AND MEDICAL NECESSITY.....4

A. THE SUBSTANTIAL COMPLIANCE DOCTRINE IS NOT PART OF THE MEDICAL MARIJUANA DEFENSE.....5

B. THE TRIAL COURT PROPERLY REFUSED TO CONSIDER THE MEDICAL NECESSITY DEFENSE AND EVIDENCE SUPPORTING IT.....12

CONCLUSION 21

TABLE OF AUTHORITIES

Washington Cases

<u>City of Seattle v. Public Employment Relations Com'n.</u> , 116 Wn.2d 923, 809 P.2d 1377 (1991)	7
<u>GESA Federal Credit Union v. Mutual Life Insurance Co.</u> , 105 Wn.2d 248, 713 P.2d 728 (1986).....	5
<u>Internet Community & Entertainment Corp. v. State.</u> , 148 Wn.App., 795, 201 P.3d 1045 (2009)	7
<u>Mayer v. City of Seattle</u> , 102 Wn.App. 66, 10 P.3d 408 (2000).....	6
<u>State v. Adams</u> , 148 Wn.App. 231, 198 P.3d 1057 (2009)	8, 19
<u>State v. Butler</u> , 126 Wn.App. 741, 109 P.3d 493 (2005)	6
<u>State v. Diana</u> , 24 Wn.App. 908, 604 P.2d 1312 (1979)	14
<u>State v. Dunn</u> , 82 Wn.App. 122, 128, 916 P.2d 952, 955 (1996).....	6
<u>State v. Ginn</u> , 128 Wn.App. 872, n.7, 117 P.3d 1155, 1160 (2005)	11
<u>State v. Hanson</u> , 138 Wn.App. 322, 157 P.3d 438 (2007)	6, 10
<u>State v. Lane</u> , 40 Wash.2d 734, , 246 P.2d 474 (1952)	1
<u>State v. Larson</u> , 119 Wash. 123, 204 P. 1041 (1922).....	6
<u>State v. Pierce</u> , 134 Wn.App. 763, 142 P.3d 610 (2006)	4
<u>State v. Public Utility District No. 1 of Douglas County</u> , 83 Wn.2d 219, 517 P.d 585 (1974).....	13
<u>State v. Read</u> , 147 Wn.2d 238, 53 P.3d 26, 29-30 (2002)	5
<u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994)	2
<u>State v. Thomas</u> , 123 Wn.App. 771, 98 P.3d 1258 (2004)	4
<u>State v. Vanderpool</u> , 99 Wn.App. 709, 995 P.2d 104 (2000)	6
<u>State v. Williams</u> , 93 Wn.App. 340, 968 P.2d 26 (1998)	21
<u>State v. Woo Won Choj</u> , 55 Wn.App.895, 781 P.2d 505 (1989)	2
<u>State v. Yates</u> , 64 Wn.App. 345, , 824 P. .2d 519 (1992)	4

Federal Cases

<u>Astoria Federal Savings. and Loan Association v. Solimino</u> , 501 U.S. 104, 111 S.Ct. 2166, (1991).....	13
<u>City of Milwaukee v. Illinois and Michigan</u> , 451 U.S. 304, 101 S.Ct. 1784, (1981)	13
<u>Mobil Oil Corp. v. Higginbotham</u> , 436 U.S. 618, 98 S.Ct. 2010, (1978)...	13
<u>Sowell v. Bradshaw</u> , 372 F.3d 821, (6 th Cir. 2004).....	3
<u>U.S. v. Cochran</u> , 770 F.2d 850, (9 th Cir. 1985).....	3
<u>United States v. Cochran</u> , 770 F.2d 850 (9th Cir. 1985).	2

Statutes

RCW 69.51A	5, 14
RCW 69.51A.005	18
RCW 69.51A.010	9
RCW 69.51A.040	8, 15
RCW 69.51A.040(3).....	8
RCW 69.51A.040(3)(c).....	7

STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

I. MR. STEPHENS'S WAIVER OF A JURY TRIAL WAS MADE VOLUNTARILY, INTELLIGENTLY, AND KNOWLEDGABLY.

Mr. Stephens makes two challenges to his conviction. The first alleges that the trial court erred in accepting his jury waiver. Mr. Stephens claims that his waiver was not made knowingly because the trial court did not inform him that a jury's verdict must be unanimous. This challenge is unsupported and does not warrant reversal of his conviction.

The right to a jury trial is bestowed upon defendants by the Sixth and Fourteenth Amendments of the U.S. Constitution. Defendants may waive this right if the waiver is voluntary, knowing and intelligent. State v. Lane, 40 Wash.2d 734, 737, 246 P.2d 474 (1952). To meet these requirements, a defendant does not need to be informed of all aspects of the right. Unlike the right to remain silent and the right to confront witnesses, a judge's colloquy is not required for a valid waiver. Instead, only a personal expression by the defendant of the waiver is necessary. State v. Stegall, 124

Wn.2d 719, 725, 881 P.2d 979 (1994); United States v. Cochran, 770 F.2d 850, 853 (9th Cir. 1985).

In addition to these constitutional requirements, CrR 6.1(a) requires that defendants make all waivers of the right to a jury trial in writing and receive the approval of the trial court. Compliance with this rule constitutes strong evidence of a validly waived right. State v. Woo Won Choi, 55 Wn.App.895, 903, 781 P.2d 505 (1989). Similarly, an attorney's representation that his client's waiver was knowing, intelligent, and voluntary is a consideration in determining the validity of a waiver. State v. Woo Won Choi, 55 Wn.App. at 903.

In light of these considerations, Mr. Stephens' waiver was valid. While Mr. Stephens observes that the trial court did not inform him that the jury's verdict must be unanimous, he cites no legal authority that the trial court had to inform him of this aspect of the right. Nor does he provide any reason why he might have thought that his guilt could have been determined by less than a unanimous jury verdict. This is the rule in Washington, where he has been a resident since 2005, and in Arizona, his previous state of residency. RP 70, 82; Ariz. Const. art. II, § 23 ("In all criminal

cases the unanimous consent of the jurors shall be necessary to render a verdict.”). Regardless, the unanimity requirement is not essential knowledge for a defendant to possess for him to validly waive his right. U.S. v. Cochran, 770 F.2d 850, 853 (9th Cir. 1985) (recommending but not requiring district courts to advise defendants that the jury verdict must be unanimous before accepting a jury waiver); Sowell v. Bradshaw, 372 F.3d 821, 833 (6th Cir. 2004).

The record also supports the conclusion that Mr. Stephens provided a voluntary, intelligent, and knowledgeable waiver. Before making the waiver, Mr. Stephens' counsel discussed with him the constitutional right. RP 1. Mr. Stephens then executed a written waiver provided to him by his counsel. *Id.* The trial court also addressed with him the meaning of waiving the right, including the significant differences between a bench and jury trial. RP 2. The court noted that a bench trial takes the decision-making authority away from 12 people and gives it to the judge. RP 3. Afterward, Mr. Stephens acknowledged that he had received an explanation of the right he was waiving and that he was doing so freely. RP 3. Based upon the law previously cited, these proceedings satisfy the

requirements for a valid waiver. State v. Pierce, 134 Wn.App. 763, 770, 142 P.3d 610 (2006).

II. THE TRIAL COURT PROPERLY REFUSE DO ADMIT EVIDENCE REGARDING THE AFFIRMATIVE DEFENSES OF SUBSTANTIAL COMPLIANCE AND MEDICAL NECESSITY.

Next, Mr. Stephens challenges the trial court's decisions barring consideration of the affirmative defenses of medical necessity and the medical marijuana. His arguments lack support.

A defendant has the right to present a defense if it is supported by relevant and admissible evidence. State v. Thomas, 123 Wn.App. 771, 778, 98 P.3d 1258 (2004). To introduce an affirmative defense, the defendant must first present sufficient evidence of facts supporting the defense. State v. Yates, 64 Wn.App. 345, 351, 824 P.2d 519 (1992). Evidence is sufficient to permit introduction of a defense if the trier of fact could reasonably infer the existence of the facts needed to use it. Yates, 64 Wn.App. at 351. In determining whether to consider a defense, a trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. State v. Read, 147 Wn.2d 238, 242-243, 53

P.3d 26, 29-30 (2002). Challenges to the admission of evidence are reviewed for abuse of discretion.

A. THE SUBSTANTIAL COMPLIANCE DOCTRINE IS NOT PART OF THE MEDICAL MARIJUANA DEFENSE.

Initially, Mr. Stephens argues that the trial court should have applied the substantial compliance doctrine to the Medical Marijuana Initiative, RCW 69.51A, to find that he had established the affirmative defense in his case. He claims that he substantially complied with the elements of the affirmative defense. He is incorrect.

Mr. Stephens' argument is based upon his claim that the Medical Marijuana Initiative is a remedial statute because it does not affect a substantive or vested right. He is correct that remedial acts are those that relate to practice, procedure, or remedies and that do not affect a substantive or vested right. GESA Federal Credit Union v. Mutual Life Insurance Co., 105 Wn.2d 248, 255, 713 P.2d 728 (1986). But the Medical Marijuana Initiative does not fit this description. The Initiative creates an affirmative defense to crimes involving the possession of marijuana. The Initiative provides an avenue for defendants to preserve their liberty and avoid other punitive consequences for behavior that would

otherwise be criminal. Simply, it excuses criminal conduct. State v. Hanson, 138 Wn.App. 322, 332, 157 P.3d 438 (2007). These are not marks of a procedural act. And while the Initiative may allow defendants to treat their illnesses in a manner that was otherwise not available to them, the Initiative primarily creates a very detailed and specific legal structure for these individuals to escape criminal liability. The law primarily affects substantive criminal rights, not the procedure, practice, or remedies for the treatment of illnesses.

In any case, substantial compliance is not a defense to a penal statute. State v. Vanderpool, 99 Wn.App. 709, 711-712, 995 P.2d 104, 105-106 (2000). Criminal statutes must be given a literal and strict interpretation. State v. Dunn, 82 Wn.App. 122, 128, 916 P.2d 952, 955 (1996); State v. Larson, 119 Wash. 123, 125, 204 P. 1041 (1922). By analogy, the doctrine is inapplicable to an affirmative defense as well. Just as the state must prove each element of a crime, a defendant must prove the facts necessary to establish a defense. Mayer v. City of Seattle, 102 Wn.App. 66, 76, 10 P.3d 408 (2000); State v. Butler, 126 Wn.App. 741, 749, 109 P.3d 493 (2005). Here specifically, Washington voters adopted a carefully defined statutory defense containing specific elements for establishing the defense. The law gives no indication that the

legislature intended that trial courts apply the affirmative defense to facts not fully establishing these elements contrary to the general rule for criminal statutes. Internet Community & Entertainment Corp. v. State, 148 Wn.App., 795, 807, 201 P.3d 1045 (2009) (Statutes that define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process).

Even if this court finds that the substantial compliance doctrine applies to the medical marijuana defense, Mr. Stephens did not provide sufficient evidence to assert that doctrine. One element of the medical marijuana defense is the requirement that a defendant "present 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). Mr. Stephens did not substantially comply with this requirement.

A party establishes substantial compliance with a statute when he shows actual, but not procedural, compliance with the act. City of Seattle v. Public Employment Relations Com'n, 116 Wn.2d 923, 928, 809 P.2d 1377, 1380 (1991). Mr. Stephens did not

provide evidence of actual compliance. The record is devoid of any evidence that he presented "valid documentation" to a law enforcement official. RCW 69.51A.040(3). The only related evidence presented was that Dr. Carter on September 18, 2008 issued an authorization for use of marijuana. RP 41. There is no testimony in the record that the physician or Mr. Stephens presented this authorization to an officer. This is not substantial compliance with RCW 69.51A.040(3)(c).

Additionally, Mr. Stephens did not substantially comply with the statute because he obtained the authorization four months after the date of the crime. RP 54. The Initiative requires that the defendant present the form when requested by law enforcement personnel. RCW 69.51A.040; *Hanson*, 138 Wn.App. at 326; *Butler*, 126 Wn.App. at 750-51; *State v. Adams*, 148 Wn.App. 231, 236, 198 P.3d 1057 (2009). Not only did Mr. Stephens fail to have the authorization in advance of the crime, he failed to produce valid documentation when confronted with the crime, and even prior to the state charging the crime. CP 1 (Information). Although he testified that his medical conditions were "pretty painful," that they prevented him from sleeping, and that marijuana was the only drug

that relieved that pain without causing similarly detrimental affects, he failed to obtain an authorization for marijuana use over the two years he resided in Washington prior to the crime. RP 68-69. In fact, he initially testified that he did not see a doctor after he moved from Arizona in 2005, and then testified he wasn't sure if he had seen a physician or not after arriving in Washington. RP 82-83.

Mr. Stephens' failure to present any evidence showing presentation of an authorization to the state undermines his substantial compliance defense. This is not a procedural insufficiency. The Legislature did not require that "qualifying patients" merely establish that they suffer from a medical condition that benefits from the use of marijuana, as the Legislature might have done. The medical marijuana defense requires more than mere proof of a defendant's condition, such as the insanity or involuntary intoxication defenses require. Instead, the Initiative specifically requires that qualifying patients have and present to an officer "valid documentation," a record which it describes in detail in the statute. RCW 69.51A.010. When Mr. Stephens failed to fulfill this requirement, his lack of compliance was not merely procedural, it violated a substantive part of the statute. The record shows that

Mr. Stephens did not substantially comply with this required conduct.

Mr. Stephens cites State v. Hanson, 138 Wn.App. 322, 157 P.3d 438 (2007) to support of his argument. It does not. In that case, Mr. Hanson was not present when the police executed a search warrant and found marijuana plants at his hotel. The following day to the raid, Mr. Hanson obtained an authorization and presented it to the law enforcement jurisdiction that had executed the search. The trial court found that Mr. Hanson's exercise of the affirmative defense was untimely, but Division Three of this court disagreed. The court overturned the decision.

The Hanson decision does not recognize the substantial compliance doctrine as a defense in the context of medical marijuana. Instead, Division Three found that the defendant had actually complied with the Initiative. The court, after listing the Initiative's requirements for a "qualifying patient," found that, "the authorization rejected by the trial court satisfies these requirements." *Hanson*, 138 Wn.App. at 326. And later, "Mr. Hanson went to the police station the day after this raid and presented the police with a valid authorization. That seems to be

all the Medical Marijuana Initiative requires. The court's findings suggest that the authorization must be posted. But we do not find that requirement in the statutes."

Hanson, 138 Wn.App. at 327. The court did not need to resort to a substantial compliance doctrine to find that Mr. Hanson had complied with the act. It examined the statutory elements and then found that he had truly and fully met with these elements.

This is not true of Mr. Stephens. He did not present "valid documentation" to officers when asked at the time of execution of the search warrant.¹ As this court noted in *Hanson*, these circumstances constitute a violation of the law that is not excused by the Medical Marijuana Initiative. *Hanson*, 138 Wn. App. At 327. This division's decisions in *Butler* and State v. Ginn, support the same conclusion. *Butler*, 126 Wn.App. at 750-51; State v. Ginn, 128 Wn.App. 872, 880 n.7, 117 P.3d 1155, 1160 (2005). Mr. Stephens' conduct was simply, and significantly, different from Mr.

¹ Although unargued by Mr. Stephens, division three's ruling in *State v. Adam*, 148 Wn.App. 231, 236, 198 P.3d 1057 (2009), might be offered in support of Mr. Stephens' argument. But this ruling is also distinguishable from the facts of this case. In *Adams*, the defendant possessed valid documentation under the Initiative at the time of the crime, but was unable to present it to the officers making the arrest, largely due to conduct of the law enforcement officers. *Adams*, 148 Wn.App. at 236-38. Here, Mr. Stephens did not have possession of the required documentation at the time of the crime and was not prevented by the state from either obtaining or presenting that documentation.

Hanson's. Where Mr. Hanson complied with the stated elements of the Initiative, Mr. Stephens did not comply, or even substantially comply, with them. Mr. Stephens did not provide a prima facie case for a substantial compliance defense. Consequently, this court should confirm the trial court's conviction.

B. THE TRIAL COURT PROPERLY REFUSED TO CONSIDER THE MEDICAL NECESSITY DEFENSE AND EVIDENCE SUPPORTING IT.

In a similar argument, Mr. Stephens argues that the trial court erred by not considering a medical necessity defense. Again, Mr. Stephens failed to both establish that a defense exists and, if it does, present sufficient evidence that he satisfied the defense.

This court addressed Mr. Stephens' argument in this division's *Butler* ruling. As Mr. Stephens acknowledges, in *Butler* this court held that Washington does not recognize a common law defense of medical necessity for use of marijuana, and in the alternative, that Initiative 692 abrogated the common law defense. *Butler*, 126 Wn.App. at 747-48. Mr. Stephens invites this court to reconsider its holding. There is no reason to do so.

The Washington Supreme Court examined the doctrine of statutory abrogation of common law in State v. Public Utility District

No. 1 of Douglas County, 83 Wn.2d 219, 517 P.d 585 (1974). The Washington Supreme Court observed that as a general rule, the legislature is assumed to be aware of established common law rules applicable to a statute's subject matter. PUD No. 1, 83 Wn.2d at 222.² Where "the provisions of that statute are so inconsistent with the common law that both cannot simultaneously be in force, the state will be deemed to abrogate the common law." *Id.* For a statute to abrogate a common law rule, it is not necessary for a legislature to affirmatively proscribe in the statute the rule, but it must "speak directly" to the question addressed by that rule. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791 (1981); Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104, 108, 111 S.Ct. 2166, 2170 (1991). A statute doesn't need to address every issue of the common law rule, but if it does speak directly to the question, courts may not supplement the legislature's statutory answer such that the statute is rendered meaningless. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-626, 98 S.Ct. 2010, 2015 (1978). "A statute which is

² Although the statute examined here was enacted by initiative through a vote of the people, the statutory construction analysis presented herein applies equally to initiatives as it does to acts adopted by the legislature. Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762(2000). Further, as Mr. Stephens observes, the legislature in 2007 amended the act to clarify it's purpose and scope.

clearly designed as a substitute for the prior common law must be given effect. *PUD No. 1*, 83 Wn.2d at 221.

The common law defense of necessity has three parts:

"(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defense dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear."

State v. Diana, 24 Wn.App. 908,914, 604 P.2d 1312 (1979) (citing Section 3.02 of the Model Penal Code (Proposed Official Draft A, 1962)). In light of these elements, it is difficult to see how the legislature and voters could more directly speak to the issue of whether medical necessity excuses the possession of marijuana than is stated in RCW 69.51A. The Initiative states,

"If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged 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. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions." RCW 69.51A.040.

Beyond this clear statement, the structure of the Initiative shows that it directly addresses the justification provided by the medical necessity defense in the context of illegal possession of marijuana. The affirmative defense elements established by the Initiative supplant the factors necessary to claim the medical necessity defense. As noted, the medical necessity defense requires that "the harm... sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." The Initiative, in RCW 69.51A.010(4), adopts and standardizes this calculation when it defines the maximum amount of marijuana permitted and the "terminal or debilitating

medical conditions" that justify medical use of marijuana. Through these provisions, the voters performed the balancing required by the necessity defense and has determined that the harm produced by the delineated medical conditions are greater than the harm derived from possession of less than a 60-day supply of marijuana.

Similarly, the third prong of the medical necessity defense is adopted and standardized by the Initiative. The purpose and intent of the Initiative clarifies that for defendants meeting the requirements of the Initiative, the medical justification for use of marijuana is absolute. The voters and legislature make clear that the medical benefits derived from the use of marijuana by qualifying patients is paramount to the goals of the criminal law to prohibit that use.

Thus, while the voters and the legislature did not specifically proscribe assertion of the medical necessity defense, they did speak directly to the defense's object and purpose. Through the Initiative, the voters and the legislature did not simply modify or fill a gap in the common law. They set out a carefully defined statutory defense that replaced the common law elements with statutory ones. By so doing, they indicated an implicit intention to provide

the exclusive relief to criminal liability when any other relief or defense is inconsistent with the one they created. The medical necessity defense is a conflicting defense that is abrogated by the Initiative.

The conflict between the Initiative and the medical necessity defense is clear once the more detailed and specific requirements for assertion of the statutory defense is recognized. While both defenses might be available to some patients, for many only the medical necessity defense will justify their conduct. For instance, patients possessing more than a sixty-day supply, or who lack valid documentation of the medical benefit to their use, or who have received documentation from a unlicensed physician are able to obtain protection from prosecution under the medical necessity defense where the Initiative would not offer them shelter.

Thus, judicial recognition of a medical necessity defense in addition to the statutory defense would excuse a much broader range of conduct than is allowed by the Initiative. It is clear from the language of the Initiative that the medical necessity defense goes beyond what the legislature expressly described as the purpose of the Initiative. The legislature specifically identified its

purpose in adopting the Initiative in terms of "terminal or debilitating illnesses," "qualifying patients," and "designated providers," all terms defined in the Initiative but not recognized in the common law defense. RCW 69.51A.005. These terms define the scope of the statutory affirmative defense. Allowing defendants the option to assert a medical necessity defense that is potentially applicable to a much broader range of individuals, illnesses, and amounts of marijuana would render these terms meaningless and frustrate the balance sought by the voters through the act. If the trial court had permitted Mr. Stephens to introduce the defense, it would have rendered meaningless the provision of the Initiative requiring presentation of valid documentation to a law enforcement official. Certainly, the legislature did not intend this. The legislature is presumed to know the law at the time of adoption of a statute. *PUD No. 1*, 83 Wn.2d at 221. If it had wanted a greater range of conduct excused, it would have adopted the medical necessity defense in statute, or at least have expressly saved the defense from abrogation. It did not do so.

In light of this, this court's ruling in *Butler* need not be re-examined. This court correctly acknowledged that it had no

authority to substitute the common law defense for the one adopted by the legislature when the two are in opposition. Because the Medical Marijuana Initiative is a more limited affirmative defense, it supersedes the former common law defense.

In any case, Mr. Stephens did not establish at trial, and not now on appeal, that there was sufficient evidence to support a medical necessity defense. He failed to establish the second prong of the defense, that no other law provides exceptions or defenses dealing with the specific situation involved. When Division Three applied the necessity defense to the possession of marijuana in Diana, the electorate had yet to adopt Initiative 692. But today, that statute provides an avenue for an individual to avoid suffering a greater harm than the law prohibiting possession avoids. This legal alternative was available to Mr. Stephens. He could have legally possessed and used marijuana to treat his pain if he had in advance of possessing the marijuana received an authorization from a physician. Mr. Stephens arrived in this state in 2005. He had time to comply. Under the law, he could have even presented a previously obtained authorization to law enforcement officials at a later date. See State v. Adams, 148 Wn.App. 231, 236, 198 P.3d

1057 (2009). But again, he failed to fulfill the statutory requirements.

Thus, even if this court applies the medical necessity defense it should arrive at the same conclusion as its ruling in Butler. After adoption of the Initiative, Mr. Stephens was precluded from justifying his medical use of marijuana except through the process adopted by Initiative 692. Both under the doctrine of statutory abrogation of the common law and the necessity defense, the reach of the common law defense extends no further than the scope of the voter adopted Initiative.

In the final analysis, Mr. Stephens sought for the trial court to be guided by part of the Initiative – its purpose and intent – but not by other provisions of the statute – the specific conduct required to assert the defense. This was not an option. The medical marijuana affirmative defense exists not because it negates an element of the crime of possession of marijuana, as the insanity or involuntary intoxication defenses do. The affirmative defense excuses conduct that would otherwise be criminal in order to achieve a policy goal. Consequently, the legislature and the people, may place any constitutionally appropriate restrictions and

requirements upon assertion of the defense. Having done so, a trial court cannot apply either the substantial compliance defense or the medical necessity defense if the defenses produce a result inconsistent with the Initiative's provisions. It must apply the requirements of the Initiative and seek guidance from the Initiative's purpose only when those requirements are ambiguous. Mr. Stephens makes no claim that this is the case. Instead, his claim is that he should not be required to strictly meet the requirements of the Initiative. To that extent, his arguments are political and his redress, as this court has recognized, is in the political arena and not in a court of law. State v. Williams, 93 Wn.App. 340, 347, 968 P.2d 26 (1998).

CONCLUSION

For the foregoing reasons, this court should affirm Robin Lawrence Stephen's conviction.

RESPECTFULLY submitted this 9 day of July, 2009.

MICHAEL GOLDEN
Lewis County Prosecuting Attorney

by: *Douglas P. Ruth* 27961
for DOUGLAS P. RUTH, WSBA 25498
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 38412-4
Respondent,)	
vs.)	
)	
ROBIN LAWRENCE STEPHENS,)	DECLARATION OF
Appellant.)	MAILING
)	
)	
)	

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 9, 2009 the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

John A. Hays
Attorney at Law
1402 Broadway Suite 103
Longview WA 98632

DATED this 9th day of July 2009, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office

STATE OF WASHINGTON
BY 
09 JUL 10 PM 12:15
COURT OF APPEALS
DIVISION II

Declaration of
Mailing