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A. IDENTITY OF PETITIONER

Petitioner William Kurtz asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Kurtz seeks review of the January 31, 2012 unpublished decision affirming his conviction. *See* Exhibit 1, Slip Opinion, *State v. Kurtz*, # 41568-2-II.

C. ISSUES PRESENTED FOR REVIEW

Should this Court overrule *State v. Butler, State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005)?

D. STATEMENT OF THE CASE

William A. Kurtz was charge with one count of manufacturing marijuana and one count of possession of marijuana with the intent to deliver. CP 24-41. Both counts were alleged to have occurred on March 1, 2010.

Prior to trial the State asked the Court to exclude any evidence of the medical marijuana or medical necessity defenses at trial. 10/25/10 RP at 1-22. The defense objected and stated that Kurtz had a qualifying

condition and an authorization for medical marijuana from Dr. Greg Carter. Exhibits 1 and 2, RP 22-38.

The trial judge ruled that neither defense could be presented to the jury. 10/25/10 RP at 69-72. She found that, because Kurtz did not have a signed authorization on the date that he was arrested (he got the authorization after his arrest), he was not entitled to the statutory defense. In addition, she found that the decision in *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005) prevented Kurtz from presenting the medical necessity defense. *Id.*

In the Court of Appeals, Kurtz argued that *Butler* should be overturned. That Court refused to do so. See Slip Opinion at 2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *Is State v. Butler wrongly decided and should this Court overrule it?*

This a question of substantial public importance. RAP 13.4(b)(4).

Division III recognized that “necessity” could be a defense to a prosecution for possession of marijuana in 1979. *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979). In that case, the defendant claimed that marijuana had an ameliorative effect on his symptoms of multiple sclerosis. That Court said:

To summarize, medical necessity exists in this case if the court finds that (1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease. To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.

Id. at 916.

Division II adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878 (1994). In that case, the defendant testified that he had suffered from intractable back pain for years. Although he had asked many doctors about medications including marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. *Id.* at 574-75. For that reason, the trial judge questioned the doctor's credibility and forbid Cole from presenting the necessity defense to a jury. This Court reversed the trial court and found that, because Cole had presented some evidence to establish each of the elements of the necessity defense, he should have been allowed to present that defense to a jury. *Id.* at 578-79. The court stated:

As noted in *Diana*, Cole's interest in preserving his health must be balanced against the State's interest in regulating the drug involved. It is for the trier of fact to determine by a preponderance of the evidence whether Cole's actions were justified by medical necessity.

Id. at 580.

Division I has not directly addressed the question. But in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), the trial court gave a necessity instruction after Pittman presented evidence that she supplied marijuana to another person who used it to treat his glaucoma. The defense was presented to the jury but the jury rejected the defense. Pittman appealed and argued that the trial court's necessity instruction did not correctly state the law. The Court declined to reverse but had no quarrel with the opinion in *Diana*, supra.

In 1997, this Court decided *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In that case, Seeley, a very ill cancer patient, filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the controlled substances act. *Id.* at 785. Seeley was affected by that decision because, by placing marijuana on Schedule 1, doctors could not prescribe him marijuana. He framed his challenge under the state privileges and immunities clause and the state equal protection clause. The Supreme Court ultimately concluded only that:

The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances. It is clear not only from the record in this case but also from the long history of marijuana's treatment under the law that disagreement persists concerning the health effects of marijuana use and its effectiveness as a medicinal drug. The evidence presented by the Respondent is insufficient to convince this court that it should interfere with the broad judicially recognized prerogative of the legislature.

Id. at 805.

Following *Seeley*, this Division II decided *State v. Williams*, 93 Wn. App. 340, 968 P.2d 26 (1998). In that case, this Court determined that classification of marijuana as a Schedule I drug meant that it had “no accepted medical use.” *Id.* at 347. Thus, its use could never form the basis of a medical marijuana defense. *Id.*

In 1998, however, the people passed Initiative 692 which authorized patients with terminal or debilitating illnesses to use marijuana for medical purposes based upon their treating physician’s professional opinions. That Initiative is now codified at RCW 69.51A. The statute specifically states:

The People of Washington State 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, would 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 primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and

Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005. This legislation, thus, expressly adopted the fact that marijuana does have accepted medical uses, effectively overturned the *Williams* decision and should have revived the medical necessity defense with regard to marijuana.

In 2005, however, Division II disagreed. In *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), that court was asked to review a trial

court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, the court was of the view that “Washington does not recognize a common law defense of medical necessity for the use of marijuana.” *Id.* at 496. Paradoxically, the court also concluded that the Medical Marijuana Act was inconsistent with the common law and, thus, superceded the common law defense of medical necessity. *Id.* at 750. The court held that enactment of the Initiative meant that the *only* avenue for raising a medical marijuana defense was via the statute. Because Butler had not strictly complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

Butler is incorrect in its conclusion that Washington does not recognize a common law defense of medical necessity for the use of marijuana. As discussed above, for many years Washington did recognize a common law medical marijuana defense. See *Diana, Cole and Pittman*, *supra*. The *Williams* court did not disagree. It simply held that after *Seeley*, no one could establish such a defense because the Legislature had determined that marijuana had no medicinal value.

The Medical Marijuana Act did not supercede the common law as described in *Diana, Cole and Pittman*. It actually reaffirmed the law by making it clear *legislatively* that marijuana has medicinal value. Thus, it

not only revived the common law, it provided another statutory defense that is entirely consistent with that common law.

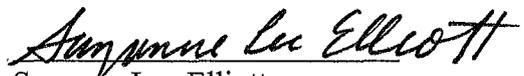
There is simply no reason why the statutory defense and common law defense cannot and do not co-exist. There is nothing in the statute that indicates the Initiative was designed to preempt the field. The Initiative was drafted and passed before this Court decided *Williams*. Thus, the common law defense was alive and well at the time. The drafters could have referenced the common law and superceded it had they intended to do so. But, they did not.

In short, this Court should reverse its *Butler* decision and hold that the both the statutory and common law defenses co-exist.

F. CONCLUSION

For the reasons stated above review should be granted.

Respectfully submitted this 27th day of February, 2012.


Suzanne Lee Elliott
WSBA #12634

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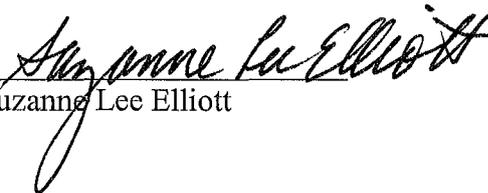
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I declare under penalty of perjury that on February 27, 2012, I placed a copy of this document in the U.S. Mail, postage prepaid, to be served upon:
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Suzanne Lee Elliott

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ANDREW KURTZ,

Appellant.

No. 41568-2-II

UNPUBLISHED OPINION

VAN DEREN, J.—William Kurtz appeals his convictions for manufacturing marijuana and for possessing more than 40 grams of marijuana. He also appeals the calculation of his offender score. We affirm his convictions but remand for resentencing.¹

On March 1, 2010, police executed a search warrant at Kurtz's home. They located and seized growing and processed marijuana. They also located a marijuana growing operation.

The State charged Kurtz with manufacturing marijuana and possessing more than 40 grams of marijuana. Kurtz proffered medical authorizations for use of marijuana to establish an affirmative defense to the charges, as allowed by RCW 69.51A.040(2). But those authorizations were not signed until October 15, 2010, and October 21, 2010, respectively, after the date the marijuana was discovered and seized. The State moved to exclude those authorizations. The trial court granted the State's motion, relying on *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005).

¹ A commissioner of this court initially considered Kurtz's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

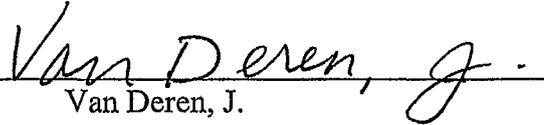
A jury found Kurtz guilty as charged. The trial court calculated his offender score for each conviction as one, using the other conviction as an “other current offense” under RCW 9.94A.525(1). Kurtz appeals from both his convictions and his sentence.

First, Kurtz argues that we should reverse our decision in *Butler* because we concluded incorrectly that the Medical Use of Marijuana Act, chapter 69.51A RCW, superseded the common law medical necessity defense established in *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979), and *State v. Cole*, 74 Wn. App. 571, 578-79, 874 P.2d 878 (1994). But in *Seeley v. State*, 132 Wn.2d 776, 805, 940 P.2d 604 (1997), and *State v. Williams*, 93 Wn. App. 340, 347, 968 P.2d 26 (1998), the courts held that, as a schedule I controlled substance, marijuana had no accepted medical use and its use could not form the basis of a medical necessity defense. Thus, by the time the Act was passed, there was no common law medical necessity defense to a charge involving marijuana. *Butler* therefore correctly concluded that the Act was the controlling law on affirmative defenses to a charge involving marijuana. And under *Butler*, the trial court did not err in excluding the medical authorizations for Kurtz’s use of marijuana because Kurtz had not obtained those authorizations before the marijuana was discovered and seized. *Butler*, 126 Wn. App. at 750-51.

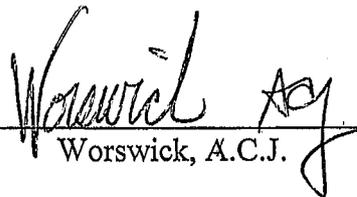
Second, Kurtz argues that the trial court erred in not treating his conviction for possession and manufacture of marijuana as the same criminal conduct when calculating his offender score. *State v. Bickle*, 153 Wn. App. 222, 234-35, 222 P.3d 113 (2009). The State concedes that he is correct. We accept the State’s concession and remand for resentencing.

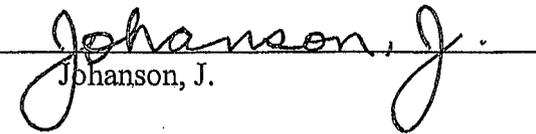
We affirm Kurtz's conviction but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Van Deren, J.

We concur:


Worswick, A.C.J.


Johanson, J.