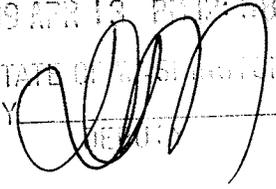


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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

ROBIN LAWRENCE STEPHENS,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter.

2. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it refused to admit evidence to support the affirmative defenses of substantial compliance and medical necessity.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter?

2. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if it refuses admit evidence to support of a legally and factually available affirmative defense?

STATEMENT OF THE CASE

Factual History

As of May of 2007, the defendant Robin Stephens and his wife Virginia have lived for a number of years with their then 17-year-old teenage daughter on a small farm in rural Lewis County where the defendant takes care of about 20 stock animals. RP 67-68. The farm includes the family home, as well as a barn and outbuildings. *Id.* The defendant is semi-retired and suffers constant, debilitating knee and back pain originating from a work injury that occurred a number of years previous. RP 68-70, 75-77. Since the defendant's injury, he has undergone reconstructive surgery in an attempt to alleviate his back and knee pain. RP 68-69. A number of different physicians have also prescribed different narcotic pain medications in an attempt to treat the defendant's pain. *Id.* These medications include codeine, percocet, percodan, and oxycontin, as well as other opiates. *Id.* Neither the surgery nor the drugs have provided effective pain relief, and all of the drugs cause the defendant serious side effects including nausea and vomiting. RP 75-77.

While the defendant suffers from debilitating back and knee pain, his wife suffers from constant, debilitating pain because of osteoarthritis. She also has glaucoma. RP 76-77, 85-86. Her doctors have prescribed a number of narcotic medications in order to treat her pain, including codeine, percocet,

percodan, oxycodone, hydrocodone, as well as other opiates. RP 85-89. All of these medications make her sick and cause nausea and vomiting. RP 90. In addition, she is schizophrenic and receives a stipend from Social Security. RP 76-77. The defendant takes care of her and sees that she takes her medications as prescribed by her doctors. *Id.*

A number of years ago, both the defendant and his wife tried smoking marijuana as an analgesic to control their constant pain. RP 68-69, 73, 88-89. The defendant's wife also uses it to control her glaucoma. *Id.* They have both found that the use of marijuana controls their pain better than the opiates their physicians have prescribed, and it has none of the deleterious side effects that their opiate use causes, such as nausea and vomiting. *Id.* They use about one ounce of marijuana per week, and up until 2007 the defendant was forced to purchase it from local drug dealers. RP 73. The defendant did not like associating with the people who sell marijuana, and in 2007, he decided to try to grow marijuana for his and his wife's personal use. RP 71. They did not sell or give it to anyone else and their daughter did not know that the defendant was growing marijuana in a locked room in the barn. RP 78.

In April of 2007, a person came out to the defendant's home in order to clean some carpets. CP 29-30. During this process, he saw what he believed to be growing marijuana. *Id.* He later reported this to the Lewis

County Sheriff's Office, who went out to the defendant's residence and spoke with the defendant's wife. CP 39-40. Although the defendant's wife admitted that the defendant was growing marijuana at their residence, she initially refused to consent to a search. CP 29-31. The deputies then applied for a search warrant, and as they did, the defendant's wife changed her mind and agreed to a search. *Id.* However, the officers declined her invitation, and only searched the residence after a judge issued a search warrant. *Id.* During the execution of this warrant, the deputies found a locked room in the defendant's barn which contained a small marijuana grow. *Id.*

Procedural History

By information filed June 14, 2007, the Lewis County Prosecutor charged the defendant with one count of manufacture of a controlled substance within 1000 feet of a school bus route stop, and one count of unlawful use of drug paraphernalia. CP 1-2. On September 4, 2008, the court called this case for trial before a jury. RP 1. At that time, one of the defendant's attorney stated that the defendant would waive his right to a jury trial. RP 1. The initial discussion concerning the defendant's waiver of his right to a jury trial went as follows:

THE COURT: You may be seated.

MR. MEAGHER: Good morning, your Honor, State versus Robin Lawrence Stephens, 01-1-399-6. I'm Brad Meagher for the State. Mr. Stephens is here today represented by Doug Hiatt and Jeff

Steinborn. Matter is scheduled thins morning for jury trial. The state's ready.

THE COURT: The record should reflect that we have had an in chambers conference that kind of broke up with a discussion about whether we were going to have jury trial. What is the status of that?

MR. HIATT: We're going to waive jury. I have got a blank order that I just executed that basically just says trial by jury is waived. And may I approach?

THE COURT: Yes. Has your client signed it?

MR. HIATT: Probably a good thing. There is not really a spot for him here, your Honor, but I'll have him sign right under mine.

THE COURT: Well, that's the way we usually do it.

MR. HIATT: I discussed it with him, he understands he's waiving an important constitutional right.

RP 1.

In fact, the document referred to herein bears the signature of both the defendant and one of his attorneys, and states the following:

IT IS HEREBY ORDERED: Trial by jury is waived.

CP 13.

Following counsel's initial statements and the entry of this document, the court engaged in the following colloquy with the defendant:

THE COURT: You are Robin L. Stephens?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Stephens, have you heard, understood, and agree with everything your attorney told me so far?

THE DEFENDANT: Yes, sir.

THE COURT: I need to just reiterate a couple of things. Mr. Hiatt and Mr. Steinborn have, I'm sure, talked with you, but you have an absolute right to have any criminal case tried by a jury. It will be by a jury unless you given that right up in writing which I'm told you have done here. I want to make sure you understand a couple of things.

First thing is obvious, and that is if you have trial without a jury, then one person, it would be me in this instance, will make the decision on your guilty or innocence, it won't be twelve people. Some people in some cases view that as an advantage, and apparently, that's to your advantage here. The second and not so obvious issue is in a nonjury trial there may be evidence questions that come up to determine should the judge or the jury hear the evidence that is being objected to or not. Well, obviously, in a nonjury trial. I'm going to hear what the evidence is and I'm going to decide whether it is admissible or not. If I decide it's not admissible, I'm supposed to, and will, ignore the evidence that's not admitted. That can seem a little odd at first blush. But we as judges are supposed to be able to do that and I can tell you that I think I do. But I just want to make sure that you're aware of that. Was that all explained to you?

THE DEFENDANT: Yes, sir.

THE COURT: You wish to waive jury then?

THE DEFENDANT: Yes.

THE COURT: I'll approve the waiver.

RP 2-3.

After the court accepted the defendant's waive and dismissed the jury, the defense agreed to stipulate that on the day alleged, the defendant was manufacturing marijuana at his residence in rural Lewis County, and that there was a school bus stop within 1000 feet of the barn that held the grow

operation. RP 4-8, 18-19. The defendant also stipulated to the admission of the state's various exhibits. RP 6-8. However, the defendant did not stipulate that the school bus stop enhancement applied, and the defense argued that (1) the defendant substantially complied with the statutory requirement for possessing medical marijuana, and (2) that an affirmative defense of medical necessity applied. RP 10-22.

At this point, the state moved *in limine* to preclude both defenses, arguing that (1) up to the point the sheriff's office searched and found the marijuana grow, neither the defendant nor his wife had an authorization under RCW 69.51A allowing their possession or use of marijuana for medical purposes, and even though they later obtained the authorizations, the law does not allow for a "substantial compliance defense," and (2) that a defense of medical necessity is not available because under the medical marijuana statute, the defendant could legally possess marijuana if he met the requirements of the statute. RP 14.

In response to the state's motion *in limine*, the court instructed the defense to put on its evidence by way of offer of proof as to its affirmative defenses. RP 14-16. At this point, the defense called four witnesses: Dr. Gregory Rogers, Robin Stephens, Virginia Stephens, and Ariel Stephens. RP 37, 67, 85, 91. Dr. Rogers gave detailed testimony concerning the medical use of marijuana and how it physiologically works as an analgesic. RP 37-

66. He also testified that in the defendant and his wife's cases, (1) it was far safer to use and more effective than the opiates they had previously been prescribed, and (2) it had fewer side effects. *Id.* The defendant and his wife then testified to the information set out in the preceding Factual History. *See* Factual History. Finally, the defendant's daughter testified that she did not know her father had a marijuana grow in the barn. RP 91-93.

Following this testimony, the court granted the state's motion in limine. RP 119-123. The court further found that based upon the defendant's stipulated facts, the defendant was guilty of manufacture of marijuana. *Id.* However, the court found that the affirmative defense to the school zone enhancement was proven. *Id.* As a result, the court did not apply the enhancement. *Id.* The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 52-62.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER.

Under the United States Constitution, Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington Constitution, Article 1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a “crime,” conviction of which could result in any imprisonment. *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if “knowingly, intelligently and voluntarily made.” *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981).

The waiver of the right to jury trial must either be made in writing or made orally on the record. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. *State v. Donahue*, 76 Wn.App. 695, 697,

887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver de novo. *State v. Vasquez*, 109 Wn.App. 310, 34 P.3d 1255 (2001). Finally, in examining an oral waiver of the right to jury made in violation of the requirement under CrR 6.1, “every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary.” *State v. Wicke, supra*.

For example, in *State v. Williams*, 23 Wn.App. 694, 598 P.2d 731 (1979) the defendant’s were convicted in a superior court bench trial de novo of illegally taking shellfish. The record contained no written waiver of jury trial and no colloquy between the defendant and the court. The defendants thereafter appealed, arguing that the state had failed to meet its burden of showing that they had knowingly, intelligently, and voluntarily waived their rights to a jury trial. The Court of Appeals agreed, holding as follows:

State v. Jones, 17 Wn.App. 261, 562 P.2d 283 (1977), held that a criminal defendant’s right to trial by jury is not waived unless a written waiver is filed by defendant himself. *In re Reese*, 20 Wn.App. 441, 580 P.2d 272 (1978), softened the rule in holding that an express and open waiver of jury trial in open court and appearing in the record constitutes substantial compliance with CrR 6.1(a). This interpretation was upheld by our Supreme Court following a consolidated appeal in *State v. Wicke, supra*. Under the present state of the law, where there is no written waiver of a jury trial, substantial compliance with CrR 6.1(a) requires some colloquy between the court and the defendant personally. The absence of such a colloquy in the record of the present case dictates reversal of the convictions.

State v. Williams, 23 Wn.App. at 697-698.

In a recent case, *State v. Borboa*, 124 Wn.App. 779, 102 P.3d 183 (2004), the defendant appealed his exceptional sentence, arguing that under the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court had denied him his right to jury trial when it imposed a sentence in excess of the standard range based upon judicially determined aggravating facts. In this case, a jury convicted the defendant of first degree kidnaping, second degree assault of a child, and first degree rape of a child. The jury had also returned a special finding that the defendant had committed the kidnaping with sexual motivation. Under RCW 9.94A.712, the court imposed sentences of life in prison, and then declared a minimum mandatory term in excess of the applicable range based upon deliberate cruelty and particular vulnerability because of age.

While the defendant's case was on appeal, the Supreme Court issued the decision in *Blakely* and the defendant then argued that the minimum mandatory sentence in excess of the applicable range violated his right to jury trial. The state responded by arguing that even if *Blakely* applied, the defendant had waived his right to a jury determination on the aggravating factors when he admitted one of the factors in his initial brief. However, the Court of Appeals rejected this argument, holding as follows:

Although a defendant can waive his Sixth Amendment right to

jury trial, he or she must do so knowingly, voluntarily, and intelligently. Borboa was tried by a jury and sentenced before Blakely was decided. He did not know of or agree to forgo his right to have a jury find the facts needed to support a sentence above the standard range. Thus, he did not knowingly, voluntarily, or intelligently waive his Sixth Amendment right to have a jury find such facts.

State v. Borboa, 124 Wn.App. at 792 (footnotes omitted).

In the case at bar, the defendant was at least aware that he did have the right to trial by jury, since the written waiver so states. However, both the shortness of the colloquy and the failure of the trial court to adequately inform the defendant of the nature of the jury waiver show that the waiver in this case was no more effective than that in *Borboa*. In fact, the colloquy in this case does not reveal whether or not the defendant understood that under the Washington constitution, there had to be complete jury unanimity in order to enter a guilty verdict. This state constitutional right varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict. *See State v. Gimarelli*, 105 Wn.App. 370, 20 P.3d 430 (2001); *State v. Klimes*, 117 Wn.App. 758, 73 P.3d 416 (2003). Absent advice on this important component of the right to jury trial under Washington Constitution, Article 1, § 21, the state in this case cannot meet its burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this court should reverse the conviction and remand for a new trial

before a jury.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED ADMIT EVIDENCE TO SUPPORT THE AFFIRMATIVE DEFENSES OF SUBSTANTIAL COMPLIANCE AND MEDICAL NECESSITY.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because

the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments to present a defense.

In the case at bar, the defendant also argues that the trial court denied him his right under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, to present factually and legally available affirmative defenses of substantial compliance with the law and medical necessity. The following sets out these arguments.

(1) The Trial Court Erred When it Refused to Recognize a Substantial Compliance Defense.

In 1998, the citizens of Washington State passed initiative 692,

known as the Medical Use of Marijuana Act and later codified as RCW 69.51A. The act provides an affirmative defense to qualifying patients who grow, possess, or use marijuana. Subsection (1) of this statute states:

(1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver 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. 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(1).

Under the language of this statute, a “qualifying patient who is engaged in the medical use of marijuana” “shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner” provided that the person meets “the requirements provided in this chapter.” Subsection (2) sets out the “requirements provided in this chapter” and states:

(2) The qualifying patient, if eighteen years of age or older, shall:

(a) Meet all criteria for status as a qualifying patient;

(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

(c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her

medical use of marijuana.

RCW 69.51A.040(2).

Since this act is only ten years old, case law is in its infancy on the application of this act, and those cases decided have created more confusion than they have clarification. Recognizing this problem, in the 2006-2007 session, the legislature passed ESSB 6032, which states the following in its initial intent section.

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, 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; 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.

The language of this statement of intent makes it clear that the Act is remedial, as its intent is to reduce human suffering. The legislature, in ESSB 6032, revealed the remedial intent of the Act by adding the following language to the original initiative.

The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution. This act is also intended to provide clarification to law enforcement and to all participants in the judicial system.

ESSB 6032 (2007), Section 1.

A statute is remedial if it relates to a practice, procedure, or remedies and does 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). Washington courts have already determined that citizens of Washington do not have vested constitutional right to possess medical marijuana. *See Seely v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). Moreover, it has long been the practice of this state to liberally construe remedial legislation to accomplish legislative purpose and intent. *GESA Federal Credit Union*,

supra at 255. Under these legal standards, the legislative statements combined with the original Medical Marijuana Act's intent make it clear that this statute is remedial in nature.

In the *GESA* case, the court was called upon to interpret a remedial statute and determine whether or not "substantial compliance" with the statutory requirements was sufficient to allow application of the statute even though the party seeking application of the legislation had committed technical but harmless procedural errors. In addressing this issue, the court held that requiring a party to forfeit the benefit of a remedial statute based upon technical violations in the face of substantial compliance, "is not only unjust, but inconsistent with the very purposes of the statute," and it "amounts to the exaltation of form over substance." *GESA Federal Credit Union, supra* at 255. Similarly, in the case at bar, the Lewis County Superior Court also "exalted substance over form" when it refused to allow the defendant to argue that his substantial compliance with the obviously remedial Medical Marijuana statute constituted a defense. The decision in *State v. Hanson*, 138 Wn.App. 322, 157 P.3d 438 (2007), supports this conclusion.

In *State v. Hanson, supra*, Division III of the Court of Appeals held that the fact that a person who was growing marijuana for medicinal purposes did not have an authorization from a physician at the time the police found

the marijuana did not bar the defendant from using a medical marijuana defense at trial, if the defendant later acquired an authorization from a physician. The court stated:

We find nothing in the statute that requires documentation be posted or that the qualifying patient obtain the documentation in advance.

State v. Hanson, 138 Wn.App. at 322.

The facts in *Hanson* are similar to those in the case at bar. In both cases, the defendants were growing marijuana for medicinal purposes. In both cases, the defendants did not have a medical authorization at the time the police found the marijuana. Finally, in both cases, the defendants obtained the appropriate authorization prior to trial. Thus, in the case at bar, the trial court should have recognized the defendant's substantial compliance defense as the court recognized in *Hanson*. The failure to do so denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

(2) The Trial Court Erred When it Refused to Recognize a Medical Necessity Defense.

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

legally excused under the common law defense of necessity. That Court agreed, stating the following:

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.

State v. Diana, 24 Wn.App. at 916.

In *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878 (1994), this division of the court of appeals adopted the reasoning of *Diana* in a case in which the defendant testified that (1) he had suffered from intractable back pain for years, (2) that his use of marijuana treated his pain better than the medication his physicians had prescribed, and (3) although he had asked many doctors about the medical use of marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. For that last reason, the trial judge questioned the doctor's credibility and precluded the defendant from presenting the necessity defense to a jury. This Court reversed the trial court and found that because the defendant 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. This 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.

State v. Cole, 74 Wn.App. at 580.

Division I of the Court of Appeals has not directly addressed the question whether or not a defendant may argue medical necessity in the medicinal use of marijuana. However, in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), Division I did address an argument that a trial court had given an improper jury instruction defining the medical necessity defense. In this case, the defendant had presented evidence that she supplied marijuana to another person for the treatment of that person's glaucoma. The court did allow the defendant to argue medical necessity, although the jury rejected the defense and convicted the defendant. On appeal, the defendant argued that the trial court's instruction on medical necessity did not correctly state the law. While the court rejected this argument, it expressed no quarrel with the opinion in *Diana* that the defense was legally available.

In 1997, the Washington Supreme Court decided a related case by the name of *Seeley v. State, supra*. In that case, the defendant was a very ill cancer patient who filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the controlled

substances act. He argued that he was adversely affected by that legislative classification because it prevented his physicians from prescribing him marijuana, which effectively treated the side effects he suffered from cancer treatment. In this case, the defense framed the challenge under the state privileges and immunities clause and the state equal protection clause. The Supreme Court ultimately concluded the following on that argument:

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.

Seeley v. State, 132 Wn.2d at 805.

In *State v. Williams*, 93 Wn. App. 340, 968 P.2d 26 (1998), this court held that it was bound by the decision in *Seeley*, which this court ruled upheld the classification of marijuana as a Schedule I drug, thus meaning that marijuana had “no accepted medical use.” *State v. Williams*, 93 Wn.App. at 347. Thus, this court held that the use of marijuana could never form the basis of a medical necessity defense.

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. As was quoted previously, this Act constitutes a specific recognition by the people of the State of Washington that there are accepted medical uses for marijuana. Thus, this legislation undercuts the premise upon which the *Williams* case was decided. As a result, the decision in *Williams* should not longer be considered good law.

This court's decision in *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), stands in contravention of the specific intent of the people of this state in passing the Medical Marijuana Act and it undercuts the decision in *Williams*. In *Butler*, a defendant appealed a trial court's holding that medical necessity was not a recognized defense to a charge of possession of marijuana. Citing *Williams*, this Court took the view that "Washington does not recognize a common law defense of medical necessity for the use of marijuana." *State v. Butler*, 126 Wn. App. at 496. Paradoxically, this 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. Thus, this court reasoned that since the defendant had not strictly

complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

The decision in *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*. Indeed, the decision in *Williams* court did not disagree with this conclusion. Rather, it simply held that after *Seeley*, no one could establish such a defense because the Legislature had determined that marijuana had no medicinal value.

In fact, 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. Thus, the decision in *Butler* is in error.

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*. As a result, the common law defense was alive and well at this time. The drafters could have

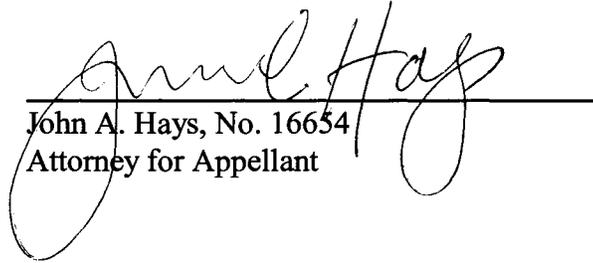
referenced the common law and superceded it had they intended to do so. But, they did not. Consequently, this Court should reverse its decision in *Butler* and hold that both the statutory and common law defenses of medical necessity co-exist. Thus, in the case at bar, the trial court's refusal to allow the defense to present and argue medical necessity denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

CONCLUSION

This court should reverse the defendant's conviction and remand for a new trial with instructions to allow the defendant to present the affirmative defenses of substantial compliance and medical necessity.

DATED this 10th day of April, 2009.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 69.51A.040
Qualifying Patients' Affirmative Defense

(1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver 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. 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.

(2) The qualifying patient, if eighteen years of age or older, shall:

(a) Meet all criteria for status as a qualifying patient;

(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

(c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.

(3) The qualifying patient, if under eighteen years of age, shall comply with subsection (2)(a) and (c) of this section. However, any possession under subsection (2)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.

(4) The designated primary caregiver shall:

(a) Meet all criteria for status as a primary caregiver to a qualifying patient;

(b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply;

(c) Present a copy of the qualifying patient's valid documentation

required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information;

(d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and

(e) Be the primary caregiver to only one patient at any one time.

