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IN THE SUPREME COURT OF FLORIDA

<p><b>STATE OF FLORIDA,</b></p> <p>Petitioner,</p> <p>v.</p> <p><b>GEORGE SOWELL,</b></p> <p>Respondent.</p>
--

Case No. 92-514

ON APPEAL FROM THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE NORML FOUNDATION  
ON BEHALF OF RESPONDENT GEORGE SOWELL

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PRELIMINARY STATEMENT

Respondent George Sowell, Appellant in the First District Court and Defendant in the Trial Court, shall be referred to as "Mr. Sowell" or as the "Respondent." The "Petitioner" is the State of Florida, and shall be referred to as the "State" or as the "Petitioner." References to the Record on Appeal and the Trial Transcript shall be referred to as "R" and "T," respectively, and shall be followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

The NORML Foundation adopts the Statement of the Case and Facts appearing in Mr. Sowell's brief.

## SUMMARY OF ARGUMENT

The Legislature of the State of Florida has not abolished the defense of medical necessity because it did not clearly and unambiguously repudiate the defense of medical necessity.



## ARGUMENT

### ISSUE

WHETHER A COMMON LAW DEFENSE OF MEDICAL NECESSITY REMAINS VIABLE IN LIGHT OF THE 1993 LEGISLATIVE AMENDMENTS TO SECTION 893.03(1)(d) OF THE FLORIDA STATUTES? (Restated)

The Florida courts recognize that a common law defense survives statutory enactments and deletions when the legislature does not abolish the common law defense in unambiguous and unequivocal terms. See Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA 1991), rev. denied, 589 So. 2D 292 (Fla. 1991); Carlisle v. Game and Fresh Water Fish Commission, 354 So. 2D 362 (Fla. 1977). The Florida legislature did not abolish the medical necessity defense addressed in Jenks when the legislature amended section 893.03(1)(d) Fla. Stat. Consequently, a seriously ill patient like Mr. Sowell who meets all requirements for the medical necessity defense listed in Jenks, may continue to use marijuana therapy to treat his serious health problems related to glaucoma and nausea and weight loss from medications connected to kidney transplant.

Jenks and other significant cases listed in Mr. Sowell's brief have accepted and allowed necessity as a defense. LaFave and Scott have addressed the necessity

defense as:

The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is by virtue of the defense of necessity justified in violating it.

W.R. LaFave & A.W. Scott, Jr., 1 Substantive Criminal Law §5.4 at 627 (1986).

The defense of medical necessity is a more particular application of the necessity defense. Jenks, at 679. The elements of the medical necessity defense are: 1) Mr. Sowell did not intentionally cause the circumstance which lead to the unlawful act; 2) Mr. Sowell could not accomplish the same objective using a less offensive alternative; and 3) the evil sought to be avoided was more heinous than the unlawful act done to avoid it. Id.

Mr. Sowell has suffered from glaucoma since 1977 and was prescribed medicine which caused kidney failure. (T. 76-77). Naturally, Mr. Sowell did not intentionally cause his glaucoma and his kidney failure.

In 1982, Mr. Sowell received a kidney transplant. (T. 77). He diligently followed doctors' orders and used all medications prescribed to him for glaucoma and his kidney

transplant. (T. 76-77). Nonetheless, the medications failed to mitigate, stabilize, or otherwise effectively treat his glaucoma and increasing loss of sight. The anti-rejection medicine prescribed to Mr. Sowell to prevent his body from rejecting his kidney transplant caused extreme nausea. (T. 76-77). Medications to control the nausea did not provide Mr. Sowell any relief (T. 77-78); indeed, the medications caused him to rapidly sink from 200 pounds to a life-threatening weight of 112 pounds, Mr. Sowell's Brief on the Merits, p.1. As a last resort to save his eyes and his life, Mr. Sowell decided to test marijuana as medication. (T. 77). He tried to gain access to medical marijuana without success (T. 78-79); consequently, he cultivated his supply. Mr. Sowell consulted with his physicians about his use of marijuana and doctors recommended he continue to smoke marijuana for its medical benefits. (T. 78).

Research studies and rapidly accumulating anecdotal evidence demonstrate that tens of thousands of seriously ill patients who fail to respond to conventional drug and surgical therapies do respond to marijuana.<sup>1</sup> Moreover, marijuana is less toxic and less costly than conventional

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<sup>1</sup>Lester Grinspoon, M.D., et al., Marihuana, The Forbidden Medicine.

medicines.<sup>2</sup>

The best established medical use of smoked marijuana is as an anti-nauseant<sup>3</sup> and is more effective than both conventional prescription anti-nauseants and the synthetic cannabinoid "THC," marketed as Marinol, Id. Currently, many oncologists recommend marijuana to their patients despite prohibition. Thousands of glaucoma patients could halt the progress of this disease (which is the leading cause of blindness in the United States) by smoking

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<sup>2</sup>American Public Health Association, Resolution 9513: Access to Therapeutic Marijuana/Cannabis (Washington, DC: APHA Public Policy Statements, 1995); Commonwealth Department of Human Services and Health, The Health and Psychological Consequences of Cannabis Use (Canberra, Australia: Australian Government Publishing Service, 1994), pp. 185-199; Federation of American Scientists, Medical Use of Whole Cannabis (Washington, DC: Statement of the FAS, 1994); National Academy of Sciences Institute of Medicine, Marijuana and Health (Washington, DC: National Academy Press, 1982), pp. 139-151; Lester Grinspoon, M.D., et al., Marihuana, The Forbidden Medicine (second edition) (New Haven, Connecticut: Yale University press, 1997); John P. Morgan, M.D., et al., Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence (New York City: Lindesmith Center, 1997), pp. 17-25.

<sup>3</sup>R.C. Randall, Cancer Treatment & Marijuana Therapy (Washington, D.C.: Galen Press, 1990), pp. 217-243; Kevin Zeese, Marijuana: Medical Effectiveness is Proven by Research (Falls Church, Virginia: Common Sense for Drug Policy, 1997.) See also Vincent Vinciguerra, M.D., et al., "Inhalation Marijuana as an Antiemetic for Cancer Chemotherapy," New York State Journal of Medicine, pp. 525-27. Rick Doblin, et al., "Marihuana as Antiemetic Medicine: A Survey of Oncologists' Attitudes and Experiences," Journal of Clinical Oncology: July 1991, pp. 1275-80; John P. Morgan, M.D., et al., Marijuana Myths, Marijuana Facts: A Review of the Scientific Evidence, p. 20.

marijuana since marijuana reduces intraocular pressure.<sup>4</sup> Marijuana also reverses dangerous weight loss, as Mr. Sowell demonstrates. AIDS patients suffering from the "wasting syndrome," a rapid and seemingly irreversible loss of weight benefit from appetite stimulation of smoking marijuana.<sup>5</sup> Clinical and anecdotal evidence also points to the effectiveness of marijuana as a therapeutic agent in the treatment of a variety of spastic conditions such as multiple sclerosis, paraplegia, epilepsy, and quadriplegia. A number of animal studies and a handful of carefully controlled human studies have supported marijuana's ability to suppress convulsions. A summary of these findings was published by the National Academy of Sciences' Institute of Medicine in 1982.<sup>6</sup> Research also shows that the following afflictions are alleviated via

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<sup>4</sup>National Academy of Sciences Institute of Medicine, Marijuana and Health, pp. 140-151; Commonwealth Department of Human Services and Health, The Health and Psychological Consequences of Cannabis Use, pp. 191-99.

<sup>5</sup>Commonwealth Department of Human Services and Health, The Health and Psychological Consequences of Cannabis Use, p. 195; Richard Kaslow, M.D., et al., "No Evidence for a Role of Alcohol or Other Psychoactive Drugs in Accelerating Immunodeficiency in HIV-1 Positive Individuals," Journal of The American Medical Association, June 16, 1989, pp.3424-29.

<sup>6</sup>National Academy of Sciences Institute of Medicine, Marijuana and Health, pp. 145-146.

marijuana treatment: chronic pain due to migraine headaches, phantom limb pain, and fibromyalgia; alleviates depression and anxiety; halts asthma attacks; and reduces symptoms of pruritus. See, Grinspoon, Lester, *Marijuana, the Forbidden Medicine* (1993).

Many prestigious medical groups acknowledge marijuana's medical properties including the American Medical Association, American Public Health Association, American Cancer Society and the New England Journal of Medicine. The response among the medical community on the therapeutic value of medical marijuana ranges from advocating medical marijuana research to demanding immediate prescriptive access and the uninhibited right of physicians to discuss and/or recommend marijuana therapy to patients.

The American Academy of Family Physicians "[Supports] the use of marijuana ... under medical supervision and control for specific medical indications." 1996-1997 AAFP Reference Manual - Selected Policies on Health Issues. The American Medical Association (AMA) has stated that it "believes that effective patient care requires the free and unfettered exchange of information on treatment alternatives and that discussion of these alternatives between physicians and patients should not subject either

party to criminal sanctions." Council on Scientific Affairs Report #10: Medical Marijuana.

In addition, the American Public Health Association has assumed the stance that:

Understanding that marijuana has an extremely widely acute margin of safety for use under medical supervision... [and] concluding that greater harm is caused by the legal consequences of its prohibition than possible risks of medicinal use; therefore [the APHA] encourage[s] research of the therapeutic properties of various cannabinoids and combinations of cannabinoids, and ... urges the administration and Congress to move expeditiously to make cannabis available as a legal medicine.

Resolution #9513: "Access to Therapeutic Marijuana/Cannabis."

Closer to home, the Florida Medical Association has stated that "The FMA urges the state and federal governments and U.S. Public Health Service to open limited access to medical marijuana by reopening the investigational new drug [Compassionate IND] program to new applicants." FMA Resolution #97-61.

Using marijuana is safe and has a low potential for abuse. Dr. Lester Grinspoon, (Psychiatry Professor at Harvard Medical School) documented conclusions reached by earlier researchers that moderate use of marijuana causes no physical or psychological harm to the users. Marijuana Reconsidered, (Second Edition 1977). Dr. Grinspoon also

concluded that marijuana is not addictive, has never been shown to have caused death of any user, does not produce psychosis, does not lead to the use of other drugs such as heroin and does not lead to criminal or other violent behavior and is not an aphrodisiac. Id.

It is practically impossible to consume a lethal dose of marijuana. An article in the August, 1994 issue of The Atlantic Monthly Magazine noted that:

Although misuse of over the counter medications such as aspirin, acetaminophen and antihistamines each year kills hundreds of Americans, not a single death has ever been attributed directly to smoking or consuming marijuana in the 5,000 years of the plant's recorded use. Marijuana is one of the few therapeutically active substances known to man for which there is no well-defined fatal dose. It has been estimated that a person would have to smoke a hundred pounds of marijuana a minute for fifteen minutes in order to induce a fatal response.

Schlosser, Eric, "Reefer Madness," The Atlantic Monthly, August, 1994 at 48.

In contrast, the class of legally prescribed drugs cannot claim such an impressive safety record. On Wednesday, April 15, 1998, The Washington Post newspaper reported an article from the Journal of the American Medical Association (JAMA) which was released the same day. According to the newspaper, JAMA announced the conclusion of a comprehensive study which determined that



appropriately prescribed and taken legal medications are a leading cause of death in the United States:

More than 2 million Americans become seriously ill every year because of toxic reactions to correctly prescribed medicines taken properly, and 106,000 die from those reactions, a new study concludes. That surprisingly high number makes drug side effects at least the sixth, and perhaps even the fourth, most common cause of death in this country.... If the findings are accurate, then the number of people dying each year from drug side effects may be exceeded only by the numbers of people dying from heart disease, cancer and stroke, and may be greater than the number dying from lung disease, pneumonia or diabetes.

The Washington Post Newspaper, April 15, 1998.

The Drug Enforcement Agency's Chief Administrative Law Judge Francis Young observed, "Marijuana has been accepted as capable of relieving distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record." Judge Young recommended "that the Administrator transfer marijuana from Schedule I to Schedule II, to make it available as a legal medicine."<sup>7</sup>

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<sup>7</sup>In the Matter of Marijuana Rescheduling Petition, Docket 86-22, Opinion, Recommended Ruling, Finding of Fact, Conclusions of Law, and Decision of Administrative

Twenty-five states have enacted laws recognizing marijuana's therapeutic value.<sup>8</sup> Unfortunately, states are severely limited by federal law in their ability to provide medical marijuana to those who need it. Thus, the many thousands of Americans suffering from illnesses and conditions best treated by marijuana cannot legally procure their medicine because of federal prohibition. Additionally, federal officials have threatened to sanction physicians who recommend or prescribe marijuana in compliance with state laws.<sup>9</sup>

It is critical to separate this public health issue from the "war on drugs." This is a question of whether seriously ill patients should be allowed to use marijuana as a medicine without criminal sanction. The common law

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Law Judge, September 6, 1988 (Drug Enforcement Agency, Washington, D.C., 1988)

<sup>8</sup>Alabama (S. 559); Arizona (Proposition 200); California (Proposition 215); Connecticut (H.B. 5217); District of Columbia (Bill No. 4-123); Georgia (H.B. 1077); Iowa (S.F. 487); Illinois (H.B. 2625); Louisiana (H.B. 1187); Massachusetts (H. 2170); Minnesota (H.F. 2476); Montana (H.B. 463); New Hampshire (S.B. 21); New Jersey (A.B. 819); New Mexico (H.B. 329); New York (S.B. 1123-6); Rhode Island (H.B. 79.6072); South Carolina (S.B. 350); Tennessee (H.B. 314); Texas (S.B. 877); Vermont (H.B. 130); Virginia (S.B. 913); Washington (S.B. 6744); West Virginia (S.B. 366); Wisconsin (A.B. 697)

<sup>9</sup>George Annas, "Reefer Madness -- The Federal Response to California's Medical-Marijuana Law."

defense of medical necessity is essential to protect sick and dying people from being criminally convicted for using medical marijuana to avoid blindness, overcome life-threatening weight loss, extreme nausea, and many other ailments.

Statutes are to be construed strictly so as to preserve common law principles which have not been clearly and unambiguously repudiated. Carlisle v. Game and Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1977).

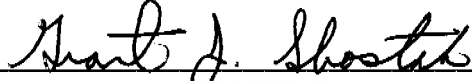
In making the amendments to 893.03, Fla. Stat., the legislature did not clearly and unambiguously repudiate the defense of medical necessity. As such, First District Court of Appeal's ruling that the necessity defense remains viable should be affirmed.

#### **CONCLUSION**

Based on the foregoing, The NORML Foundation respectfully requests this Honorable Court to affirm the decision of the District Court of Appeals as reported at Sowell v. State, 23 Fla. L. Weekly D 549 (Fla. 1st DCA

February 27, 1998), \_\_\_ So. 2d \_\_\_, and the order of the trial court be reversed.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was deposited in the U.S. Mail this 27<sup>th</sup> day of April, 1998 to the following:

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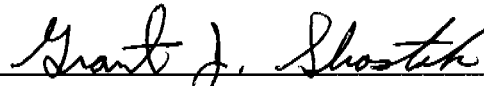
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