IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

GEORGE SOWELL,

Respondent.

CASE NO. 92,514

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, George Sowell, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent.

The record on appeal consists of three volumes, not numbered in accordance with Rule 9.210(b), Fla. R. App. P. (1997). This brief will therefore adopt designations to the record utilized in the direct appeal. Reference to each respective volume will be followed by any appropriate page number within the volume.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent was charged by information on November 2, 1995, with the manufacture of a controlled substance, to wit cannabis, in violation of F.S. 893.13(1)(a). (R. 16). At the time of his arrest, the Respondent was in possession of approximate 65-70 cannabis plants which would yield one-quarter to one-half pound of "smokable" material. (T. 35-36).

Prior to trial, the court granted the State's motion to preclude presentation of a medical necessity defense to the

charge based upon changes to F.S. 893.03 which deleted language to the effect that certain controlled substances were recognized as being currently accepted for limited medical use and treatment despite their high potential for abuse. (T. 18). Appellant thereafter waived jury trial and was found guilty as charged. (T. 87).

The lower court withheld adjudication and certified to the First District Court of Appeal the question of whether the Legislature had abrogated the common law defense of medical necessity as applied to Schedule I drugs.[1]

The First District Court of Appeal reversed the lower courts' ruling precluding the defense, finding that the defense of medical necessity as recognized in Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA), rev. denied, 589 So. 2d 292 (Fla. 1991) remained viable under the limited circumstances of Jenks and that the lower court should have permitted the Appellant to pursue the theory of medical necessity. In so ruling, the Court stated:

> This statute catalogues various controlled substances within several schedules, and places marijuana (cannabis) within a Schedule I listing at section 893.03(1)(c). Other groups of Schedule I substances are listed as section 893.03(1)(a)-(d), and the subsection (1) introduction to this listing state that Schedule I substances have "a high potential for abuse" and "no currently accepted medical use in treatment," and that "use under medical supervision does not meet accepted safety standards." Jenks

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[1] The State argued that the question had been improperly accepted for review by the District Court based upon the certification because no procedural vehicle existed to permit it, but acknowledged the Respondent was entitled to direct appeal of his conviction and sentence.

explains that this language merely indicates that these substances are not generally available for medical use, but that it does not preclude such use in instances of medical necessity. Jenks further refers to language which was in the section 893.03(1)(d) listing of another Schedule I substance, and which provided that:

> Notwithstanding the aforementioned fact that Schedule I substances have no currently accepted medical use, the Legislature recognizes that certain substances are currently accepted for certain limited medical use in the United States but have a high potential for abuse.

This language has since been deleted from section 893.03(1)(d), and the question in the present case is whether this statutory change[2] impacts the medical necessity defense recognized in Jenks.

The doctrine of medical necessity is a particular application of the common law defense of necessity. Jenks. The common law pertains in Florida by legislative enactment,[3] and statutes are to be construed strictly so as to preserve common law principles which have not be clearly and unambiguously repudiated. E.g., Carlile v. Game and Fresh Water Fish Commission, 354 So. 2d 362 (Fla. 1977). Inference and implication will not substitute for clear expression, and any statutory derogation of the common law should be explicit. Id. The "limited medical uses" language which was formerly contained in section 893.03(1)(d) did not directly address the medical use of marijuana or the defense of medical necessity, and under established rules regarding the preservation of the common law the chapter 93-92 amendment to section 893.03(1)(d) does not affect the defense of medical necessity. Indeed, the existence of this provision was not critical to the decision in Jenks, which was more fundamentally predicated on the understanding that the "no currently accepted medical use" language in the subsection (1) introduction relates to general medical

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[2] Chapter 93-92, Laws of Florida, enacted this amendment while adding an additional substance to the schedule I listing in section 893.03(1)(d), and leaving marijuana (cannabis) in the listing at section 893.03(1)(c). Chapter 93-92 also deleted an archaic reference in section 893.03(1) to a statute which had authorized a marijuana prescription program which had been discontinued several years before the decision in Jenks.

[3] Section 2.01, Florida Statutes.

availability, and does not preclude the common law defense. As in Jenks, the appellant should have been allowed to pursue the defendant of medical necessity.

The First District Court of Appeal certified the following question as one of great public importance:

> Whether the chapter 93-92, Laws of Florida, Amendment to section 893.03(1)(d), Florida Statutes, effects a clear and unequivocal abrogation of the common law defense of medical necessity as recognized in Jenks, and as applied to a seriously ill individual who cultivates marijuana solely for personal use to obtain medical relief?

This appeal ensues.

SUMMARY OF ARGUMENT

ISSUE I.

The defense of medical necessity is a variation of the common law defense of necessity which involves a weighing of evils which result from the choice of obeying a law and causing a harm versus the violation of the law and the harm which results therefrom and the benefit to the actor. An individual claiming this defense must prove by the preponderance of the evidence which included competent and substantial medical corroboration that the conduct is reasonably believed to be necessary, the benefits obtained must be greater than the harm sought to be avoided by the law involved, the claimant had no viable legal alternative, and the claimant did not cause the harm he now seeks to avoid. The defense is not recognized where the legislature has acted to forestall its application under the circumstances in which it is claimed.

The District Court below erred in holding that the common law defense of medical necessity remained viable under Jenks v. State, infra. The Jenks Court specifically relied upon a former version of F.S. 893.03 which contained a provision which established the Legislature recognized that certain schedule I drugs were currently accepted for medical use in treatment, albeit under controlled circumstances. The statute, however, was amended following the Jenks decision and the language relied upon in Jenks was deleted, thus indicating that the Legislature, after a review of current scientific evidence, had determined that *no*

accepted use for medical treatment existed as applied to schedule I drugs. This statutory amendment is clear evidence of the Legislature's acting to preclude application of the defense as applied to schedule I substances.

The District Court's reliance upon Jenks was also misplaced given the fact that the cases are distinguishable in terms of whether the claimants met their respective burdens of proof. In Jenks, the trial court as the finder of fact, the sole arbiter of whether the evidence supports the finding of an affirmative defense, determined that the Jenks had satisfied the elements of the defense. Below, the District Court improperly substituted its opinion on the evidence for that of the finder of fact and improperly determined that the Respondent had meet his burden of proof. This finding, however, is refuted by the evidence below. The record is devoid of any competent substantial evidence with regard to the medical efficacy of the use of marijuana in the Respondent's treatment, nor has the Respondent established that the use of marijuana for treatment of his conditions is generally accepted by the relevant scientific community in accordance with Frye v. United States, infra. The record also does not establish that the Respondent had no viable legal alternatives, or that the benefit resulting to him by violating State narcotics laws outweighed the harm which results from such a violation.

The Petitioner asserts that the District Court below has sought to usurp Legislative prerogative by invading the sphere afforded that body in determining which conduct is to be deemed

illegal for the benefit of society as a whole. For all of these reasons, the lower court should be reversed.

ARGUMENT

ISSUE I

WHETHER A COMMON LAW DEFENSE OF MEDICAL NECESSITY REMAINS VIABLE WHERE THE LEGISLATURE HAS ACTED TO EXCLUDE THE DEFENSE UNDER THE CIRCUMSTANCES ASSERTED BY THE CLAIMANT? (Restated)

The District Court below has certified the question[4] as to whether a common law defense of medical necessity, which it found to exist in Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA), rev. denied, 589 So. 2d 292 (Fla. 1991) under § 893.03, Florida Statutes (1989), remains viable in the face of subsequent statutory amendments. The Petitioner will argue that the District Court below improperly found that the defense existed and that it applied under the circumstances of this particular case.

The defense of necessity is a creation of the common law in which an individual, faced with the pressure of physical forces, is confronted with a choice between two evils so that he may either violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and produce a different or equal amount of harm. For reasons of social policy, if the harm resulting from compliance with the law is greater than that which will result from the violation of it, the individual is justified in violating the law under this

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[4] The State has reworded the question as phrased by the District Court of Appeal which improperly makes findings of fact and which, as worded, begs an answer.

defense. LaFave & Scott, Criminal Law, 2d Edition, § 5.4 (West 1986). Thus, "one who, under the pressure of circumstances, commits what would otherwise be a crime may be justified by "necessity" in doing as he did and so not be guilty of the crime in question." Id. at 441.

The Model Penal Code, section 3.02, formulates the elements of the common law defense of necessity as follows: 1)conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justified, provided that: a) the harm or evil to be avoided by such conduct is greater than the harm which is sought to be avoided by the law defining the conduct charged; and b) neither the Code or the law defining the offense provides exceptions to the defense dealing with the specific situation involved; and, c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. Where the claimant acts negligently or was reckless in bringing about the situation requiring a choice of evils or harms, or in appraising the necessity for his conduct, the justification is unavailable.

The defense of medical necessity is a variation of the general defense of necessity. Cases which have discussed the defense of medical necessity, whether in its common law or statutory codified form, have recognized that the defense is comprised of the following elements comparable to those for the general necessity defense: the claimant must reasonably believe the conduct complained of is necessary, the benefits of the

conduct must be greater than the harm sought to be avoided by the law violated, no viable alternatives exist, and the defendant did not create the situation he now seeks to avoid. State v. Diana, 24 Wash. App. 908, 604 P. 2d 1312 (Wash. Div. 3 1979); People v. Bordowitz, 155 Misc. 2d 128, 588 N.Y.S. 2d 507 (N.Y. Crim. 1991). These cases, however, also recognize that where the legislature has considered the defense but rejected its application in the type of situation at issue, justification does not lie. State v. Hanson, 468 N.W. 2d 77 (Minn. App. 1991); State v. Tate, 102 N.J. 64, 505 A. 2d 941 (N.J. 1986); Commonwealth v. Berrigan, 509 Pa. 118, 501 A. 2d 226 (Pa. 1984).

In all cases dealing with affirmative defenses, the defendant/claimant bears the burden of establishing the existence of a viable defense to the charges. Gonzalez v. State, 571 So. 2d 1346 (Fla. 3d DCA 1991). For a defense of necessity, the defendant bears the burden of establishing the existence of the defense by a preponderance of the evidence. Commonwealth v. Berrigan, supra; State v. Diana, supra. With regard to the claim of medical necessity, this burden may only be met where there is medical corroboration of the conditions claimed and efficacy of the treatments involved. State v. Cole, 74 Wash. App. 571, 874 P. 2d 878 (Wash. App. 1994); State v. Diana, supra. The determination of whether the evidence presented is sufficient to meet this burden of proof is one which is exclusively for the trier of fact. State v. Hastings, 118 Idaho 864, 801 P. 2d 563 (Idaho 1991); Gonzalez v. State, supra. The facts found by the

trier of fact under this standard must be supported by competent, substantial evidence. Pic N' Save Cent. Florida, Inc. v. Department of Business Regulation, Div. of Alcoholic Beverages and Tobacco, 601 So. 2d 245, 249 (Fla. 1st DCA 1992).

The District Court in the instant case held that the legislature has not clearly and unambiguously made clear its intention to preclude the existence of the medical necessity defense, it remained viable under Jenks. The Petitioner asserts, however, that its conclusion is incorrect.

In Jenks, a husband and wife who were AIDS sufferers, appealed their convictions for cultivation of marijuana and possession of drug paraphernalia. The record in that case reflected that the Jenks had sought, but were unable to obtain, the drug legally. At trial, an affidavit of their treating physician was presented, as was testimony from Robert Randall a glaucoma sufferer who had used marijuana to reduce intraocular pressure, and a doctor who had successfully treated over fifty patients with marijuana. The Jenks Court rejected the State's argument that F.S. 893.03 (1989) was inconsistent with, and therefore precluded, assertion of the defense of medical necessity. The Court, after noting that the statute specifically found that schedule I drugs had a high potential for abuse, had no currently accepted medical use in treatment in this country, and did not meet accepted safety standards for medical use except as provided for in § 402.36, held that:

> ...subsection (1)(d) provides,

> Notwithstanding the aforementioned fact that Schedule I substances have no currently accepted medical use, the Legislature recognizes that certain substances are currently accepted for certain medical uses in treatment in the United States but have a high potential for abuse.
>
> The state argues that section 893.03 permits no medical use of marijuana whatsoever. In fact, all that subsection (1) states is that marijuana is not *generally* available for medical use. Subsection (1)(d), however, clearly indicates that Schedule I substances may be subject to *limited* medical uses. It is well-established that a statute should not be construed as abrogating the common law unless it speaks unequivocally, and should not be interpreted to displace common law more than is necessary. We conclude that section 893.03 does not preclude the defense of medical necessity under the particular facts of this case. (Citations omitted).
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> Jenks v. State, 582 So. 2d at 679.

The Jenks Court therefore found that because the legislature recognized that some medical uses of marijuana existed, the legislature could not have intended to abrogate the common law defense. Furthermore, the Jenks Court specifically concluded that the Jenks had met their burden of proving the defense based upon the uncontradicted evidence that the Jenks' lives were in danger if their symptoms were not controlled, they did not set out to contract the disease they suffered from, and that no other drug was as effective in their treatment.[5]

The District Court's reliance upon Jenks in its decision below was misplaced. In 1993, after Jenks was decided, the legislature

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[5] This last factor was not supported by competent substantial evidence, however, given the court's notation that the Jenks' doctor testified that another drug was more effective but that it could cause problems with infection in AIDS patients.

acted to amend F.S. 893.03. In its classification scheme, the Florida Legislature's placement of drugs within the schedule generally parallels the federal scheme. SB 272, staff analysis. HB 561, with its companion bill SB272, was designed to make a number of changes, "based on advancing medical technology and practical considerations." Schedule I drugs were thereafter defined as substances which are strictly regulated and cannot be prescribed because of their high potential for abuse and the fact that they have no currently accepted medical use in the United States and no accepted safety for use. Dronabinol, a synthetic form of THC, the primary component of marijuana, is listed as a schedule II controlled substance which "has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence." F.S. 893.03(2). The statute was thus amended to *delete recognition* of the existence of any medical use for marijuana whatsoever, while making the use of a synthetic version permissible with medical prescription. This was done only after the examination of current medical research, establishing that the Legislature was withdrawing any approval of a medical use for marijuana.

Contrary to the lower court's characterization of the Jenks decision, that court specifically relied upon that portion of the statute which was deleted in 1993, to wit, subsection 1(d) which recognized that certain substances in schedule I had recognized

limited uses for treatment in the United States as referenced to F.S. 402.36, the Cancer Therapeutic Research Act of 1981, which funded a program to facilitate research in the use of marijuana in the treatment of glaucoma and chemotherapy side effects. F.S. 402.36 provided that the Legislature believed, at that time, that recent research had shown that the use of cannabis *may* alleviate ill effects from chemotherapy and glaucoma and that further research was deemed necessary under strictly controlled circumstances. However, the Legislature saw fit to repeal F.S. 402.36 in 1984, thus making clear its intention that it no longer felt that research was necessary to evaluate claims that marijuana might have a limited medical use and clearly indicates that the Legislature was satisfied that no medical use should be permitted even under strictly controlled circumstances.

The State also asserts that the Jenks Court, and thus the lower court, also misinterpreted the significance of the fact that F.S. 893.03 formerly found that there might be some limited medical use of marijuana and the current statute finds that there is no currently recognized medical use for the drug. Simply put, the fact that at some future time a use might be found does not equate to a recognition that there is such a present use or, for that matter, ever will be such a use. Other states with similarly worded statutes and research programs available comparable to that formerly in effect in Florida which have dealt with claims of medical necessity have soundly rejected the claim that the wording of the statute or existence of a research

program support establish legislative recognition of a medical necessity defense.

In State v. Whitney, 96 Wash. 578, 637 P. 2d 956 (Wash. 1981), for example, the court held that the establishment of a research program "does not manifest a legislative finding that there is an accepted medical use for the drug, but rather a finding that there may be such a use." 637 P. 2d at 583. The sole exception to criminal liability was found to exist within the research program and this did not in effect constitute a reclassification of the drug. Similarly a New Jersey Court, in State v. Tate, 102 N.J. 64, 505 A. 2d 941 (N.J. 1986), recognized the part of the legislature in both defining the scope of common law defenses and in its classification of drugs within the controlled substances schedule. The New Jersey Code, like Florida's, places marijuana as a schedule I drug with a high potential for abuse with no recognized medical use and no recognized standards for safe use. The New Jersey Court held that because the Code provides for the sole exception to the use of schedule I drugs, a valid prescription, the legislature had thus prevented the assertion of a necessity defense except under those circumstances.

In another case, Seeley v. State, 132 Wash. 776, 940 P. 2d 604 (Wash. 1997), a defendant suffering from terminal cancer claimed a necessity defense contending that smoking marijuana was more effective in controlling the side effects of chemotherapy than synthetic THC. Like the Florida statute, the Washington drug classification statute parallels the federal provisions. In

Washington, all schedule I drugs are illegal except for those used in research. A Washington research program to determine if marijuana was effective in treating nausea caused by chemotherapy was discontinued when THC was synthesized and approved for use by the FDA. While funding for medical research was restored several years later, the statute retained marijuana as a schedule I drug (one with a high potential for abuse and no currently recognized medical use or accepted safety for use in supervised medical treatment), while placing a synthetic form of THC, Marinol, in schedule II. The court rejected constitutional challenges to the classification scheme finding that it was rationally related to a legitimate purpose and also rejected Seeley's claim that he had a fundamental right to use marijuana for medical purposes free from the lawful exercise of governmental power.

The Alabama Court, in Kauffman v. State, 620 So. 2d 90 (Ala. App. 1992), addressed a trial court's refusal to consider a common law medical necessity defense asserted by a defendant who claimed that he used marijuana to treat muscle spasms from paraplegia. There, the legislature enacted a therapeutic research act to study the use of the drug in alleviating the effects of chemotherapy and glaucoma under strictly controlled conditions; however, Kauffman was not a participant in that program. The Alabama statute is comparable to that involved in this case, as it specifically states that marijuana lacks accepted safety for use and has no accepted medical use.

The Alabama court found that the language contained in the statute, which is identical to that in F.S. 893.03, constituted clear evidence of the legislature's intent to exclude the medical necessity defense asserted and also held that the trial court properly excluded it as a matter of law, citing to State v. Hanson for the proposition that "the defense of medical necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs." 620 So. 2d at 93.

The State asserts that the forgoing cases establish that the District Court was erroneous in finding that the same language in F.S. 893.03 did not constitute clear evidence of the legislature intent to preclude a medical necessity defense.[6]

The State further asserts that the District Court's opinion erred in implicitly finding that the Respondent had met his burden of proof to establish existence of the defense, assuming that such a defense was not statutorily abrogated. As previously stated, the proponent of an affirmative defense bears the burden of establishing the existence of such a defense by the preponderance of the evidence. Thus, the defense must be

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[6] The State anticipates that the Respondent will argue that no program was available to him, so that he had no legal alternative available to him. The record does not establish that he exhausted all legal alternatives. Federal programs existed to which the Respondent could have applied (see R. 93, 98 in which Drs. Patton and Walker discuss application to the FDA by a qualified ophthalmologist for regulated use since they themselves would not qualify) and F.S. 499.018 was also in effect, so that programs may indeed have existed in this State.

supported by competent substantial evidence.[7] It is undisputed that a claimed medical necessity defense must be supported by corroborating medical evidence. State v. Diana, supra.; People v. Bordowitz, supra.; State v. Cole, supra. In this case, the defendant produced no competent medical corroboration whatsoever. The record below reflects that the Respondent and his wife testified; however, they do not qualify as medical experts and the weight to be afforded their testimony must suffer diminishment by virtue of their clear motive to testify in a favorable fashion. The record does contain letters of the Respondent's doctors, Drs. Patten and Walker, who informed him of the possibility of an authorized ophthalmologist applying to the FDA for the right to participate in the prescription of marijuana. These doctors informed the Respondent that they were not licensed in that specialty and would not qualify. The record is devoid of any indication that he attempted to follow through with their recommendation to obtain the drug legally through an FDA approved program.

Dr. Cofer, another doctor whose letter appears in the record, states that the Respondent is the only patient he has ever had who has used marijuana for the claimed medical reason, thus indicating that alternative medications are both available and deemed effective for treatment. Significantly, Dr. Cofer also

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[7] Black's Law Dictionary defines preponderance of the evidence as the "greater weight of evidence, or evidence which is more credible and convincing to the mind...that which best accords with reason and probability..."

stated that the use of marijuana to reduce intraocular pressure "is not a generally accepted method" of treatment. (R. 98). Thus, none of the medical experts relied upon by the Respondent in his proffer of evidence had any experience in the use of marijuana to treat the conditions, glaucoma and kidney transplantation, claimed by the Respondent. More crucially, none set forth any recognized scientific basis to support use of the drug in treating the medical conditions the Respondent had to establish the claimed defense. See: State v. Pittman, 88 Wash. App. 188, 943 P. 2d 713 (Wash. App. 1997), rejecting testimony of a purported expert who sought to testify regarding the use of marijuana in the treatment of cancer as his opinion was without scientific basis. While the Pittman Court permitted Robert Randall, the same person who the defendant sought to rely upon below, to testify as to his personal experience with and knowledge of the use of marijuana in the treatment of glaucoma, the opinion does not explore the nature of the challenge to that testimony. In this case, the record is devoid of any testimony by Randall to establish his credentials to testify and the State specifically challenged Randall's ability to testify as an expert in any area. (R. 5-6, 10, 18, 57-59). The court, which is the trier of fact, based upon the proffer set forth by the defendant, ruled that Randall could not testify as to the claimed use for nausea, but could testify regarding glaucoma, *assuming* the defendant was able to set forth an sufficient predicate. (T. 58). No sufficient predicate was laid.

Finally, the Respondent relied upon the recommendations of an administrative law judge to the DEA regarding reclassification of marijuana. (R. 51-92). The Respondent did not inform the lower court that the DEA rejected this recommendation specifically concluding that "scientifically reliable evidence showed that currently available therapies are more effective and do not carry with them the same risks which are attributable to marijuana." Seeley v. State, 940 P.2d at 798. This judicial opinion is thus of no precedential value.

Thus, an inadequate predicate was laid to support admission of any expert testimony whatsoever since no competent evidence from medical experts was presented to the court to establish that: the use of marijuana to treat kidney transplantation and glaucoma was generally accepted in the relevant scientific community, the asserted experts had personal knowledge of the Respondent's medical history and that other available legal medications were not as effective, that the experts had personal experience in the use of marijuana in the treatment of kidney transplantation and glaucoma and their opinions that its use was effective was based on scientific evidence, or that the defendant had actually taken steps recommended by his doctors that he seek assistance in obtaining the drug legally through an ophthalmologist participating in a licensing program operated by the FDA. Thus, the evidence presented by the defendant in support of his defense of medical necessity did not establish the existence of the defense by a preponderance of the evidence.

The State further asserts that the testimony which the Respondent sought to present at trial would be properly excluded on the grounds that the scientific evidence at issue qualified as novel scientific evidence and the evidence would not satisfy the requirements of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) which require the proponent of such evidence to establish that it is reliable in that it is generally accepted by the relevant scientific community. Robinson v. State, 610 So. 2d 1288 (Fla. 1992), citing Correll v. State, 523 So. 2d 562 (Fla. 1988), cert. denied, ___U.S.___, 114 S. Ct. 1205, 127 L. Ed.2d 553 (1994). While this precise issue was not addressed below, due to the trial court's ruling precluding presentation of the defense, it is of significance to this Court's analysis of the issue presented, as this Court may consider any matter relevant to the case pending before it. Nothing in the evidence presented by the defendant established that the use of marijuana in treating glaucoma or the side effects of kidney transplantation was generally accepted in the relevant scientific community. To the contrary, the defendant's own doctor stated in written correspondence that the use of marijuana in treating glaucoma was not generally accepted as a form of treatment by the medical field. The failure of the defendant to establish a sufficient predicate to support admission of the evidence barred its presentation under Frye and other general principles controlling the admission of evidence. The trial court properly exercised its authority in precluding admission of this evidence.

Finally, the State asserts that the trial court properly refused to consider the defense when it is evaluated in terms of the balancing of harms analysis which controls presentation of a necessity defense. The assertion of a medical necessity defense has been rejected where a compelling state interest in regulating the use of controlled substances has been recognized. In Commonwealth v. Hutchins, 575 N.E. 2d 741 (Mass. 1991), for example, the court rejected a defendant's appeal of a trial court's ruling precluding admission of a medical necessity defense at a bench trial. Hutchins claimed the defense asserting that the use of marijuana alleviated his medical condition of scleroderma accompanied by Raynaud's phenomena which had been unsuccessfully treated with numerous legal therapies and medications. There, Hutchins established that he had made numerous unsuccessful attempts to obtain marijuana legally. His experts testified that while they could not confirm that use of the drug led to medical remission, it did, in their opinions, alleviate his symptoms. The Hutchins Court, however, rejected defense finding that the alleviation of Hutchins' symptoms would not clearly and significantly outweigh the potential harm to the public were the court to find the violation of the Massachusetts' drug law not punishable due to the reasonably negative impact such a ruling would have on drug laws in the state. The State respectfully contends that the alleviation of the Respondent's symptoms with marijuana in this case does not substantially outweigh the harm which will be caused by the violation of the

narcotics laws of this State, particularly in view of the availability of comparable legal treatment in the form of programs which permit use of the drug, as well as, synthetic forms of THC.[8]

The State urges this Court to follow the example set by the courts of other states considering the issue which have refused to usurp the role of the legislature by finding a defense to violation of state drug laws, on the grounds that the use of marijuana involves issues of safety, health, and community morals which are uniquely within the police power of the state to resolve and which, if ruled upon "would be a judicial usurpation of a legislative prerogative." Spillers v. State, 245 S.E. 2d 54, 55 (Ga. 1978). See also: Kauffman v. State, supra.; State v. Hanson, supra.

Judicial deference to the legislative prerogative is particularly appropriate where scientists differ as to the effect of marijuana in medical treatment, because the legislature is free to adopt the opinion of those scientists who find marijuana harmful and the courts should not seek to substitute their

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[8] Marijuana is complex mixture composed of over 400 chemicals which increases to 2,000 when smoked. Among the 400 chemicals, there are at least 61 identified cannabinoids, the active ingredients in marijuana. Many of the remaining ingredients in the drug have not been studied and it is impossible to produce a plant in which the amounts of the chemical ingredients may be consistently quantifiably measured so as to meet recognized standards for accepted safety for use in treatment under medical supervision. Seeley v. State, 940 P.2d at 617.

opinion for that of the legislature. State v. Dickamore, 592 P. 2d 681 (Wash. Div. 3 1979).

As recognized by this Court in Hamilton v. State, 366 So. 2d 8 (Fla. 1978), the legislature has a great deal of discretion in determining what measures are necessary for the protection of the public and the Court "will not, and may not, substitute its judgment for that of the Legislature insofar as the wisdom or policy of the act is concerned." Id. at 10. The State asserts that the Florida Legislature has determined that no accepted medical use exists for marijuana and has done so for the protection of the public. Given this fact, the courts of this State should not attempt to substitute their judgment for that of the Legislature on the appropriate uses of this or other schedule I drugs.

Furthermore, the State points to the danger in accepting the applicability of such a defense as applied to drugs with a high potential for abuse. As discussed in Kauffman v. State, such a ruling results in a new rule of law "which instructs all future actors faced with the same conflict of values." 620 So. 2d at 92. The creation of such a new rule of law by the District Court below, opens the door to the assertion of a medical necessity defense by numerous claimants and places the burden on the courts to decide where and when such a claim is meritorious or without merit. The State urges the Court to consider that if such a defense is to be cognizable, its parameters are matters for the Legislature to determine and the Legislature has found that

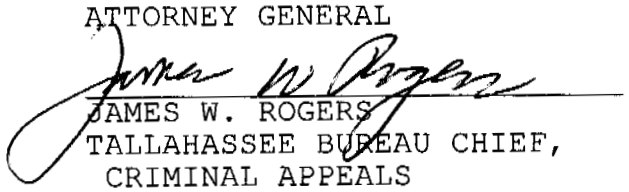
except in authorized medical programs, the possession, use, or manufacture of schedule I drugs is expressly prohibited.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative the decision of the District Court of Appeal reported at Sowell v. State, 23 Fla. L. Weekly D549 (Fla. 1st DCA February 27, 1998), ___ So. 2d ___ should be disapproved, and the order entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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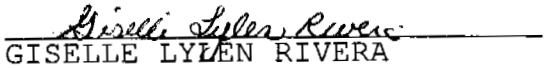
CRIMINAL APPEALS
FLORIDA BAR NO. 325791



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to John F. Daniel, Esquire, P.O. Box 2547, Panama City, Florida, 32402, this 30 day of April, 1998.

Giselle Lyler Rivera
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Attorney for the State of Florida

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

GEORGE SOWELL,

Respondent.

CASE NO. 92,514

APPENDIX TO
PETITIONER'S INITIAL BRIEF ON THE MERITS

petition seeking a belated appeal pursuant to Florida Rule of Appellate Procedure 9.140(j). Finding the petition sufficient on its face, we directed the state to show cause why the requested relief should not be granted. The state's response does not attempt to refute the factual representations contained in appellant's sworn petition. Accordingly, based upon our recent decision in *Trowell v. State*, Case No. 95-3082 (Fla. 1st DCA Jan. 20, 1998) [23 Fla. L. Weekly D307] (en banc), we grant the request for a belated appeal, and remand to the trial court. Within thirty days of the date of the mandate in this case, appellant's trial counsel shall file a notice of appeal, as required by Florida Rule of Appellate Procedure 9.140(b)(5). Should trial counsel fail to comply, this court's mandate will be treated as the notice of appeal. *See* Fla. R. App. P. 9.140(j)(5)(D). If appellant qualifies for appointed counsel, the trial court shall appoint counsel to represent appellant on appeal.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions. (ALLEN, WEBSTER and PADOVANO, JJ., CONCUR.)

* * *

Criminal law—Error to refuse to permit defendant to pursue medical necessity defense to charge of cultivating marijuana—Question certified whether the Chapter 93-92, Laws of Florida, amendment to section 893.03(1)(d), effects a clear and unequivocal abrogation of the common law defense of medical necessity as recognized in *Jenks*, and as applied to a seriously ill individual who cultivates marijuana solely for personal use to obtain medical relief?

GEORGE SOWELL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 96-1317. Opinion filed February 19, 1998. An appeal from Circuit Court for Washington County. Don T. Sirmons, Judge. Counsel: John F. Daniel, Panama City, for Appellant. Robert A. Butterworth, Attorney General, and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) The appellant challenges a judgment entered upon a finding that he was guilty of cultivating marijuana, and argues that he should have been allowed to pursue the medical necessity defense recognized in *Jenks v. State*, 582 So. 2d 676 (Fla. 1st DCA), *rev. denied*, 589 So. 2d 292 (Fla. 1991). We conclude that this defense remains viable under the limited circumstances described in *Jenks*, and that the trial court should have allowed the appellant to pursue the theory of medical necessity.

At the bench trial in this case the appellant admitted cultivating marijuana, and made a proffer of evidence consistent with the elements of the medical necessity defense as delineated in *Jenks*. However, the state anticipated this theory and had obtained a pretrial ruling from the court that such a defense would not be allowed. In so ruling the court accepted the state's assertion that the defense could not be maintained in light of a statutory change pertaining to the medical use of certain controlled substances under section 893.03, Fla. Stat.

This statute catalogs various controlled substances within several schedules, and places marijuana (cannabis) within a Schedule I listing at section 893.03(1)(c). Other groups of Schedule I substances are listed at section 893.03(1)(a) - (d), and the subsection (1) introduction to this listing states that Schedule I substances have "a high potential for abuse" and "no currently accepted medical use in treatment," and that "use under medical supervision does not meet accepted safety standards." *Jenks* explains that this language merely indicates that these substances are not generally available for medical use, but that it does not preclude such use in instances of medical necessity. *Jenks* further refers to language which was in the section 893.03(1)(d) listing of another Schedule I substance, and which provided that:

> Notwithstanding the aforementioned fact that Schedule I substances have no currently accepted medical use, the Legislature recognizes that certain substances are currently accepted for certain limited medical uses in treatment in the United States but have a high potential for abuse.

This language has since been deleted from section 893.03(1)(d), and the question in the present case is whether this statutory change[1] impacts the medical necessity defense recognized in *Jenks*.

The doctrine of medical necessity is a particular application of the common law defense of necessity. *Jenks*. The common law pertains in Florida by legislative enactment,[2] and statutes are to be construed strictly so as to preserve common law principles which have not been clearly and unambiguously repudiated. *E.g., Carlile v. Game and Fresh Water Fish Commission*, 354 So. 2d 362 (Fla. 1977). Inference and implication will not substitute for clear expression, and any statutory derogation of the common law should be explicit. *Id.* The "limited medical uses" language which was formerly contained in section 893.03(1)(d) did not directly address the medical use of marijuana or the defense of medical necessity, and under established rules regarding the preservation of the common law the chapter 93-92 amendment to section 893.03(1)(d) does not affect the defense of medical necessity. Indeed, the existence of this provision was not critical to the decision in *Jenks*, which was more fundamentally predicated on the understanding that the "no currently accepted medical use" language in the subsection (1) introduction relates to general medical availability, and does not preclude the common law defense. As in *Jenks*, the appellant should have been allowed to pursue the defense of medical necessity.

Although we conclude that *Jenks* continues to be controlling authority as to the application of the medical necessity defense in this context, we certify the following issue, which is raised by the present case, as a question of great public importance:

> WHETHER THE CHAPTER 93-92, LAWS OF FLORIDA, AMENDMENT TO SECTION 893.03(1)(D), FLORIDA STATUTES, EFFECTS A CLEAR AND UNEQUIVOCAL ABROGATION OF THE COMMON LAW DEFENSE OF MEDICAL NECESSITY AS RECOGNIZED IN *JENKS*, AND AS APPLIED TO A SERIOUSLY ILL INDIVIDUAL WHO CULTIVATES MARIJUANA SOLELY FOR PERSONAL USE TO OBTAIN MEDICAL RELIEF?

The appealed order is reversed and the case is remanded. (MINER and MICKLE, JJ., CONCUR; ALLEN, J., CONCURS WITH WRITTEN OPINION.)

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[1]Chapter 93-92, Laws of Florida, effected this amendment while adding an additional substance to the Schedule I listing in section 893.03(1)(d), and leaving marijuana (cannabis) in the listing at section 893.03(1)(c). Chapter 93-92 also deleted an archaic reference in section 893.03(1) to a statute which had authorized a marijuana prescription program which had been discontinued several years before the decision in *Jenks*.

[2]Section 2.01, Florida Statutes.

(ALLEN, J., concurring.) I concur in the majority opinion except as to the certified question. I do not join in certification because there appears to be no legitimate basis upon which to treat the section 893.03(1)(d) amendment as clearly and unequivocally addressing the defense of medical necessity.

* * *

Dissolution of marriage—Child custody—Modification—Error to modify rotating custody arrangement established by agreement of parties to one in which mother had primary residential custody absent finding that there had been substantial change in circumstances and that child's welfare would be promoted by change

JOHN WILLIAM VOORHIES, Appellant, v. SHERRIE HODGINS VOORHIES, Appellee. 1st District. Case No. 97-2007. Opinion filed February 19, 1998. An appeal from an order of Circuit Court for Holmes County. Judge Russell A. Cole. Counsel: Charles M. Wynn, Marianna, for Appellant. Bonnie K. Roberts, Bonifay, for Appellee.

(PER CURIAM.) The father challenges an order changing custody of the parties' minor son from shared custody between the