IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 92,514

GEORGE SOWELL,

Respondent.

_____/

ON CERTIFIED QUESTION FROM THE
FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent does not dispute the State's recitation of the facts, but finds it necessary to supplement them as follows. After the trial court had ruled that a medical-necessity defense was no longer available for the charges against the Respondent, it permitted him to proffer evidence which would have supported that defense. The Respondent testified that he was diagnosed with glaucoma about 1977. He took prescribed drugs for that condition, but they did not work.

In 1982 he developed kidney failure which he attributed to the glaucoma drugs. He had a kidney transplant that year at Shands Hospital in Gainesville, Florida. He began taking medicine to keep him from rejecting the transplant. This medicine caused him nausea. He was also prescribed medicine to control the nausea but this medication failed to work. His weight dropped from about 200 pounds to 112 pounds. Prior to the kidney transplant he had begun using marijuana to control his glaucoma. After the transplant he also found that marijuana controlled his nausea. His weight thereafter went up to about 155 or 160. His doctors were aware that he was using marijuana and told him to continue what he was doing. He attempted to obtain marijuana by legal means through state and federal agencies, but was unable to do so. (RII 76-80).

SUMMARY OF THE ARGUMENT

The district court of appeal correctly determined that the defense of medical necessity to marijuana use still applies in Florida. The Legislature must speak unequivocally in order to abrogate the common-law defense of necessity as applied to marijuana use, but it has never done so. The Legislature is presumed to be cognizant of the decision in *Jenks v. State,* 582 So.2d 676 (Fla. 1st DCA 1991), which expressly states that the Legislature must speak unequivocally in order to abolish such a common-law defense. The fact that the Legislature reenacted Section 893.03, Florida Statutes subsequent to the *Jenks* decision without abolishing the defense means that the interpretation given to the statute in *Jenks* became the accepted construction.

The Respondent established a predicate for the admission of expert testimony regarding the effectiveness of marijuana in treating glaucoma by testifying without objection, other that relevancy, that he suffered from that disease. The district court properly concluded that the Respondent had established the elements of a medical-necessity defense.

ARGUMENT

THE LEGISLATURE HAS NOT ABOLISHED THE COMMON-LAW DEFENSE OF NECESSITY AS IT RELATES TO THE USE OF MARIJUANA.

In its brief the State makes a three-pronged attack on the decision of the district court of appeal. One prong of

its argument is that *State v. Jenks,* 582 So.2d 676 (Fla. 1st DCA 1991), the decision on which the district court relied, was wrongly decided. It argues alternatively (actually its first argument) that the rationale of *Jenks* ceased to exist after the 1993 amendments to Section 893.03, Florida Statutes, and that no medical-necessity defense for marijuana use can now be maintained in Florida. This argument challenges the rationale of the district court's opinion in the present case. Finally, the State argues that for various reasons the Respondent has not met the requirements of a necessity defense if one still exists for marijuana use.

The facts in *Jenks v. State, supra,* were stated by that court as follows:

> Kenneth Jenks inherited hemophilia from his mother, and contracted the acquired immune deficiency syndrome (AIDS) virus from a blood transfusion in 1980. He unknowingly passed it to his wife, Barbara Jenks. Mrs. Jenks' health began to decline rapidly. Her weight dropped from 150 to 112 pounds during a three week period as a result of constant vomiting, and she was hospitalized at least six times for two to three weeks at a time. Although she had been prescribed over a half-dozen oral medications for nausea, none of them worked. When given shots for nausea, she was left in a stupor and unable to function. Likewise, when Mr. Jenks started AZT treatment, he was not able to eat because the medication left him constantly nauseous. He also lost weight, although not as dramatically as his wife.
>
> When the Jenks began participating in a support group sponsored by the Bay County Health Department, a group member told them how marijuana had helped him.

> Although initially reluctant, Mr. and Mrs. Jenks tried marijuana and found that they were able to retain their AIDS medications, eat, gain weight, maintain their health, and stay out of the hospital. They asked their treating physician about prescribing the drug, but were unable to obtain a legal prescription. The Jenks decided to grow two marijuana plants to insure its availability, avoid the expense of buying it on the street, and reduce the possibility of arrest.
>
> On March 29, 1990, the Jenks were arrested and charged with manufacturing (cultivating) cannabis, pursuant to Section 893.13, Florida Statutes (1989), and possession of drug paraphernalia, a violation of Section 893.147, Florida Statutes (1989). The Jenks admitted to cultivating the marijuana and advised officers at the scene that they each had AIDS and used the marijuana to relieve their symptoms.

582 So.2d at 677. The trial court, however, refused to recognize their defense of medical necessity.[1] The district court of appeal concluded, however, that the trial court erred, stating:

> The state argues that section 893.03 permits no medical uses 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. *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla.1977) (quoting 30 Fla.Jur. *Statutes*

[1] As the State has pointed out in its brief, at 9, the defense of medical necessity is merely an application of the common-law defense of necessity. *See also Jenks, supra*, 582 So.2d at 679.

> § 130 (rev. ed. 1974); *State v. Egan*, 287 So.2d 1, 6-7 (Fla.1973); *Sullivan v. Leatherman*, 48 So.2d 836, 838 (Fla.1950) (en banc). We conclude that section 893.03 does not preclude the defense of medical necessity under the particular facts of this case.
>
> Moreover, we conclude that the Jenks met their burden of establishing this defense at trial. The elements of the defense have previously been addressed by trial courts in *United States v. Randall*, 104 Daily Wash.L.Rep. 2249 (Super.Ct.D.C. Nov. 24, 1976), and in Florida in *State v. Mussika*, 14 F.L.W. 1 (Fla. 17th Cir.Ct. Dec. 28, 1988), which both involved the medically necessary use of marijuana by people with glaucoma. Those elements are as follows: 1. That the defendant did not intentionally bring about the circumstance which precipitated the unlawful act; 2. That the defendant could not accomplish the same objective using a less offensive alternative available to the defendant; and 3. That the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it.

582 So.2d at 679.

One well respected legal authority discussed the defense of necessity as follows:

> 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 a violation of it, he is by

> virtue of the defense of necessity justified in violating it.

1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.4 at 627 (1986).

The authors give the following examples of the application of the necessity defense in Section 5.4(c):

> **(c) Examples of the Defense.** Although the cases are not numerous, the defense of necessity has been held applicable in a number of situations. The master of ship forced by a storm to take refuge in a port in order to save the lives of those on board is not guilty of violating an embargo law forbidding entry into that port. Sailors who on the high seas refuse to obey the captain's orders are not guilty of mutiny when their object is to force the captain to return the unseaworthy vessel to port for necessary repairs. A doctor who performs an abortion upon a young-girl rape victim in order to prevent her from becoming a physical and mental wreck has been held not guilty of the crime of abortion under a statute punishing one who "unlawfully" produces a miscarriage. A parent who withdraws his child from school because of the child's feeble health is not guilty of violating the school law which provides for compulsory attendance unless excused by the school board. A police officer speeding after a fleeing criminal, or an ambulance driver on the way to the hospital with an emergency case, is not guilty of violating the speed laws. A police officer who plays a hand at cards in order, by disarming suspicion, to catch and arrest a gambler is not guilty of violating the gambling laws. *A glaucoma victim who shows that smoking marijuana is medically beneficial to his eye condition is not guilty of using and possessing marijuana.* A prisoner who departs from prison is not guilty of prison-escape if the prison, through no fault of the prisoner, is afire—"for he is not to be hanged because he would not stay to be burnt."

> In addition to these decided cases, the Model Penal Code commentaries suggest that the defense is available in these situations: a person intentionally kills one person in order to save two or more; a firefighter destroys some property in order to prevent the spread of fire to other property; a mountain climber lost in a storm takes refuge in a house and appropriates provisions; a ship (or airplane) captain jettisons cargo to preserve the ship or plane and its passenger; a druggist dispenses a drug without the required prescription to alleviate suffering in an emergency.

Id. at 631-32 (footnotes omitted, emphasis added).

In its brief, at page 14, the State obliquely contends that *Jenks* was wrongly decided. It asserts that the *Jenks* court misinterpreted the significance of language in Section 893.03, Florida Statutes (1989). It then goes on to discuss decisions of courts of other states which, it contends, correctly interpreted statutes which are essentially the same.

The courts of other states which have reached the issue have indeed come to differing conclusions as to whether a medical-necessity defense is available to a charge of marijuana possession. Appellate courts of the states of Washington and Idaho, as well as of Florida, have concluded that the necessity defense is available in such a case.[2] On the other hand, courts in Minnesota, Massachusetts, Alabama

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[2] *State v. Diana*, 24 Wash. App. 908, 604 P.2d 1312 (1979); *State v. Hastings*, 118 Idaho 864, 801 P.2d 563 (1991); *Jenks v. State*, *supra*.

and New Jersey have concluded that it is not available in such a case.[3]

Whether the defense is available in Florida must be decided in the context of established Florida principles regarding statutory changes to the common law. Statutes in derogation of the common law are subject to strict interpretation. *Southern Attractions v. Grau,* 93 So.2d 120, 123 (Fla. 1956). The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. *City of Hialeah v. State ex rel. Morris,* 136 Fla. 498, 183 So. 745, 747 (1938). In *State ex rel. Grady v. Coleman,* 133 Fla. 400, 183 So. 25 (1938), this Court stated:

> Criminal statutes in derogation of the common law must be strictly construed and if there is any doubt as to their meaning the courts should resolve it in favor of the citizen. . . .

183 So. at 31.

The Respondent submits that the district court of appeal was correct in both *Jenks* and the present case in determining that there has been no clear and explicit abrogation of the common law of necessity by the Legislature as applied to the use of marijuana. The Legislature is presumed to be cognizant of the judicial construction of a statute when contemplating making changes in the statute. *State ex rel. Quigley v. Quigley,* 463 So.2d 224, 226 (Fla.

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[3] *State v. Hanson,* 468 N.W.2d 77 (Minn. Ct. App. 1991); *Commonwealth v. Hutchins,* 410 Mass. 726, 575 N.E.2d 741 (1991); *State v. Kauffman,* 620 So.2d 90 (Ala. 1992); *State v. Tate,* 102 N.J. 64, 505 A.2d 941 (1986).

1985). Indeed, when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment. *Burdick v. State,* 594 So.2d 267, 271 (Fla. 1992); *Grimes v. State,* 64 So.2d 920, 921 (1953).

In the case *sub judice* Section 893.03 was reenacted subsequent to the decision of the First District Court of Appeal in *Jenks*. The Legislature is presumed to have known in 1993 when it reenacted that provision that the *Jenks* court required an amendatory statute to "speak[] unequivocally" in order to abolish the defense of necessity for marijuana use. Section 893.03 was amended by Chapter 93-92, Laws of Florida. That Act provides, in pertinent part, as follows:

CHAPTER 93-92

Committee Substitute for
House Bill No. 561

An act relating to substance abuse; amending s. 893.03, F.S., relating to controlled substance standards and schedules; deleting methyldihydromorphinone from Schedule I; moving mecloqualone within Schedule I to increase penalties applicable thereto; providing technical changes to update and clarify the schedules; reenacting ss. 893.08(1)(b) and 893.13, F.S., relating to distribution of certain substances at retail without a prescription by a registered pharmacist and to prohibited acts and penalties, to incorporate the amendment to s. 893.03, F.S., in references thereto; amending s. 893.135, F.S., relating to trafficking in a controlled substance; providing editorial clarifications;

correcting cross-references; providing penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 893.03, Florida Statutes, 1992 Supplement, is amended to read:

. . . .

(1) SCHEDULE I.—A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards ~~except for such uses provided for in s. 402.36.~~ The following substances are controlled in Schedule I:

. . . .

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances or which contains any of their salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

. . . .

(d) ~~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. Accordingly,~~ Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of methaqualone <u>or mecloqualone</u>, including any of its salts, isomers, optical isomers,

salts of their isomers, and salts of these optical isomers~~, is controlled in Schedule I.~~

. . . .

Ch. 93-92, § 1, Laws of Fla.

This Act can by no stretch of the imagination be regarded as speaking unequivocally that a necessity defense to marijuana use was being abolished. There are two changes on which the State relies. One is the deletion of the Section 893.03(1) language "except for such uses provided for in s. 402.36." This change merely deleted a reference to a provision which had been repealed in 1984, long before *Jenks* was decided. Thus it is difficult to see how it could be considered as being addressed to *Jenks* at all, much less being unequivocal. The change to Section 893.03(1)(d) likewise does not constitute the requisite unequivocal change to the common law. It explicitly addresses nothing more than methaqualone and mecloqualone.

If the Legislature had wanted to abolish the necessity defense for marijuana use it could have said so in no uncertain terms. That is what the *Jenks* court said it had to do in order to accomplish this. It did not do so. Instead, it reenacted Section 893.03 without rejecting the *Jenks* gloss on it, and in doing so adopted the *Jenks* construction in accordance with well-settled rules of statutory construction.

The State further contends that even if medical necessity is still a viable defense to charges based on

marijuana use, the district court erred in implicitly finding that the Respondent had met his burden of proof for this defense. In particular the State argues that he failed to provide sufficient corroborating medical evidence. The State ignores the fact that the Respondent had proffered the deposition testimony of Robert Randall as an expert regarding the effect of treating glaucoma with marijuana and that the trial court was prepared to accept this as expert testimony if the medical-necessity defense had been allowed to proceed. The trial court had viewed Randall's video deposition. The court recognized that Randall had been permitted to so testify in numerous other cases and found him qualified as an expert on the subject. (RII 56-58). The State contends that no sufficient predicate was laid for his testimony. The trial court stated that Randall's testimony would be subject to a predicate being established that the Respondent suffered from glaucoma. The Respondent testified himself on proffer, without objection from the State (apart from relevancy), that he suffered from glaucoma. (RII 78, 86). This satisfied the requirement for a predicate.

The State also contends that the evidence the Respondent sought to present at trial, presumably the testimony of Randall, failed to satisfy the requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). However, the State failed to raise this objection in the trial court (RII 56, 57), and it accordingly was waived.

This was not a matter where the trial court ruled in the State's favor at trial.

Finally the State contends that the medical-necessity defense in this case, as a matter of law, fails to satisfy the balancing-of-harms analysis. In order to establish this defense it is necessary for the defendant to show that the harm prevented by commission of the otherwise prohibited act was greater than the harm done. LAFAFE & SCOTT, *supra*, § 5.4(d)(4), at 636. The State contends that the harm done is *per se* greater than the harm prevented merely because the Legislature has prohibited marijuana possession. This argument ignores the entire basis for the necessity defense. In every case where the defense might be applied, whether the facts might involve the destruction of property, the taking of a life, etc., the Legislature has prohibited the conduct in question. Thus, it is not sufficient to look to the harm generally sought to be prevented by the statute in question. The actual harm done in the *particular case* is the proper scope of inquiry. LAFAVE & SCOTT, *supra*, § 5.4(d)(4), at 636 n.45. Here the State apparently would require a person to go blind from glaucoma rather than using marijuana if faced with that choice. The Respondent suggests that that is not the law and that the district court of appeal correctly applied the medical-necessity defense.

CONCLUSION

The certified question should be answered in the negative and the judgment of the district court of appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on Giselle L. Rivera, Esq., Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 by U.S. mail this 24 day of April, 1998.

_____
JOHN F. DANIEL
ATTORNEY FOR RESPONDENT