IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

GEORGE SOWELL,

Respondent.

CASE NO. 92,514

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, readopts the preliminary statement and designations previously set forth in its initial brief.

STATEMENT OF THE CASE AND FACTS

The Petitioner also readopts the statement of the case and facts as set forth in its initial brief.

SUMMARY OF THE ARGUMENT

The fact that the Legislature amended F.S. 893.03 following issuance of the District Court's opinion in Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA 1991) is clear evidence of the Legislature's intention to exclude a medical necessity defense to schedule I drugs.

The State was not obligated to challenge evidence excluded by the trial court on the grounds that it failed to meet the requirements of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) to preserve the claim. It also was not obligated to object to the sufficiency of evidence submitted on a proffer to preserve the issue of whether a medical necessity defense was cognizable. The trial court did not rule on the question of whether a sufficient predicate was laid to support presentation and instruction on the defense and the District Court may not

properly substitute its opinion on the evidence for that of the trier of fact.

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?

In his answer brief, the Respondent asserts that the fact that the Legislature revised F.S. 893.03 immediately following the decision rendered in Jenks v. State, 582 So. 2d 676 (Fla. 1st DCA 1991) does not indicate intent to exclude the defense of medical necessity. The State disagrees. "In construing legislation, courts should not assume that the legislature acted pointlessly." Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 825 (Fla. 1985); A.A. v. Rolle, 604 So.2d 813, 817 (Fla. 1992). Thus, it is incorrect to assume, as the Respondent does, that legislative amendments made after Jenks were merely to eradicate reference to another statute which had no impact upon that decision since it was repealed two years prior to that decision. Such an interpretation does, in fact, assume that the legislature acted pointlessly.

Principles of statutory construction support the State's position that the Legislature amended F.S. 893.03 in direct response to the District Court's decision in Jenks. As held by this Court in Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985),

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change

> thereof. United States ex rel. Guest v. Perkins, 17 F.Supp. 177 (D.D.C. 1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. Gay v. Canada Dry Bottling Co., 59 So. 2d 788 (Fla. 1952).

See also: A.A. v. Rolle, supra, where statutory amendments subsequent to decisions led the Court to recede from its prior opinions since the amendments were deemed expression of the Legislature's intent on the subject. Here, it is apparent that the Legislature specifically acted to eliminate any recognition of a possible medical use for marijuana following the District Court's decision in Jenks. This action must be taken as clear indication of the Legislature's interpretation of the law on this point.

The defendant also contends that any contention by the State that the evidence sought to be admitted does not satisfy the requirements of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) is waived since it was not raised below. This argument is simply misplaced as it ignores the fact that no objection to the evidence on this ground was necessary since the trial court ruled that it was not admissible. To require the State to first raise the issue and then require the parties to engage in a Frye hearing which would involve the presentation of numerous experts, as well as, the expenditure of needless high costs, the waste of judicial resources in view of the court's ruling is ludicrous at best. Had the court ruled that the evidence of such a defense would be admissible, then and only then, would the State be

required to make appropriate objection to its admissibility thus triggering the need for a Frye hearing.

Finally, the Respondent also asserts that the District Court properly found a sufficient predicate was established to support the presentation of the defense, where the State did not object to the defendant's proffer. This argument again 'places the cart in front of the horse.' The purpose of the proffer is to preserve the issue of the trial court's denial of the defense, not to determine the sufficiency of the evidence to support that defense. The State was not required to make objection to the sufficiency of the evidence on the proffer. Such objection would only be required where the court determined it was appropriate to allow a defendant to assert the defense and the defendant then attempted to present evidence sufficient to support its presentation. The argument also fails to address the fact that by its holding, the District Court improperly substituted its opinion on the facts for that of the trier of fact, the lower court.

The State, for the reasons asserted above and in its initial brief therefore asks this Court to reverse the decision below.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the question presented herein should be answered in the negative, the decision of the District Court of Appeal should be disapproved, and the ruling entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR PETITIONER
[AGO# L98-1-3104]

CERTIFICATE OF SERVICE

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

Giselle Lylen Rivera
Giselle Lylen Rivera
Attorney for the State of Florida

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