No. 77534-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 31286-7-II

STATE OF WASHINGTON,

Respondent,

v.

SHARON TRACY,

Petitioner.

BRIEF OF AMICI WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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A. ISSUES PRESENTED

1. Whether a court must allow a defendant to present her statutory medical marijuana defense to a jury at trial, where the defendant has offered some evidence, viewed in the light most favorable to her, that tends to prove each element of her defense as a "qualifying patient."

2. Whether the content of a written statement issued by a licensed physician practicing outside of Washington can meet the plainly stated requirements of RCW 69.51A.010(5)(a), where the relevant provisions of law do not require a patient's "valid documentation" to be in a particular format or to be issued by a physician licensed by the State of Washington.

B. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers ("WACDL") is a statewide, non-partisan, non-profit corporation of nearly 700 members. One of the stated goals of the organization is to improve the quality of justice in this state and to protect the constitutional rights of individuals accused of crimes. The issues raised in this case and accepted for review affect the rights of accused persons.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, non-partisan, non-profit organization dedicated to the preservation and defense of constitutional and civil liberties, including the fundamental freedoms recognized by the courts and enshrined in the Bill of Rights. The ACLU endorsed Initiative 692, the Washington State Medical Use of Marijuana Act ("the Act"), and continues to support the Act and the right of the people of Washington to permit the use of marijuana for medical purposes.

This appeal presents important issues of first impression regarding the proper construction of the Act. Moreover, the outcome of this case will affect large numbers of seriously ill persons, their caregivers, and their physicians, all of who depend on having a clear understanding of the statute to make decisions about their medical care and avoid criminal liability.

C. STATEMENT OF THE CASE

The briefs of the parties demonstrate that Sharon Tracy has serious medical problems. She has hip deformities and migraine headaches. Her colon ruptured and she underwent eight corrective surgeries. As a result, two different doctors, one in California and one in Oregon, rendered opinions that she would benefit from the use of medical marijuana and that

those benefits would outweigh any risk to her. Notwithstanding her medical conditions and the opinions of her doctors, Tracy was arrested and charged with both manufacturing and possession of marijuana. The trial court granted the State's pretrial motion in limine to exclude all evidence of Tracy's medical authorizations to use marijuana to alleviate her symptoms.

D. ARGUMENT

Amici observe that the trial courts of this state have repeatedly applied a hyper-technical interpretation of the law to exclude the presentation of evidence that supports the patients' defense under the Act, despite the fact that both the state and federal constitutions protect the accused's right to present a defense. Even where patients and their caregivers possess the documentation required by the statute, courts have forbidden these defendants from presenting any evidence or arguing their defense at trial, based on factual findings that should have been made by a jury. See, e.g., *State v. Mullins*, 128 Wn. App. 633, 116 P.3d 441 (2005) (defendant prohibited from presenting a "caregiver" defense to the jury because court found he was not responsible for enough of qualifying patient's care); *State v. Shepherd*, 110 Wn. App. 544, 41 P.3d 1235 (2002) (defendant prohibited from presenting his defense to the jury because the

documentation stated that use of marijuana "may" outweigh the health risks as opposed to "would likely").[1]

Because patients must admit to law enforcement that they possess marijuana in order to comply with RCW 69.51A.040(2)(c), barring them from raising their statutory defense essentially guarantees conviction. This violates the state and federal constitutions, fundamentally conflicts with the intention of Washington's voters in passing I-692, and frustrates their purpose: to protect Sharon Tracy and other seriously ill patients who are using marijuana as part of their medical treatment based on the medical judgment of their treating physicians. See Exhibit 1, Declaration of Dr. Robert Killian.[2]

In addition, the trial courts' imposition of unauthorized legal barriers to the use of medical marijuana is causing unnecessary impairment of medical treatment for many people. As demonstrated by the attached declaration of attorney Douglas Hiatt, there appear to be

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[1] The State will likely argue that because marijuana is a Schedule I drug, it has no accepted medical uses. That issue is not before this Court and is contradicted by the Act, the orders issued by the Medical Quality Assurance Commission pursuant to RCW 69.51A.070, and the opinions of the physicians who provide medical marijuana authorizations. *See also, People v. Spark*, 121 Cal. App. 4th 259, 16 Cal. Rptr. 840, 847 (2004) (a physician's determination that a patient suffers from a qualifying condition under California's Compassionate Use Act of 1996 is not to be second-guessed by jurors).

[2] This Court may consider "legislative facts" to help determine the proper interpretation of a statute. *State ex. rel. T.B. v. CPC Fairfax Hospital*, 129 Wn.2d 439, 918 P.2d 497 (1996). Dr. Killians's declaration is particularly useful because he sponsored and was involved in drafting the Initiative.

numerous instances where medical marijuana patients have been charged with drug violations despite their efforts, and the efforts of their physicians, to comply with the Act. See Exhibit 2, Declaration of Douglas Hiatt. These patients either have been jailed or risk incarceration if convicted. In some cases, the State has sought to forfeit the patient's property. See Hiatt Dec., ¶ 3. This Court needs to affirm that the principles governing the presentation of this defense are no different from those governing other statutory and common law defenses.

1. Sharon Tracy and other patients have a state and federal constitutional right to present a defense to criminal charges.

Before examining the specifics of Washington's medical marijuana statute, amici believe it is important to review the constitutional principles at stake here. In its recent decision in *Holmes v. South Carolina*, -- U.S. --, 126 S. Ct. 1727, -- L. Ed. 2d -- (May 1, 2006), the Supreme Court affirmed that while state and federal rulemakers have broad latitude under the United States Constitution to establish rules excluding evidence from criminal trials, this latitude is subject to limits. Both the Due Process Clause of the Fourteenth Amendment and the Compulsory Process or Confrontation Clause of the Sixth Amendment guarantee criminal defendants "a meaningful opportunity to present a complete defense." The Court also affirmed that this right is impermissibly abridged by

evidence rules that infringe upon the interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. See also Wash. Const. art. I, § 22.

As discussed more fully below, despite the fact that the voters of this state overwhelmingly[3] agreed that physicians ought to be allowed to determine whether their patients would benefit from the medical use of marijuana, the trial and appellate courts appear to be construing the statute so narrowly as to render the medical opinions of licensed physicians meaningless, certainly inferior to those of prosecutors and police officers.[4] The result is that seriously ill and injured patients, many of whom have not only done everything required by the statute but also taken additional, unnecessary steps to try ensure their compliance with the Act, are being arrested, jailed, charged and convicted of drug violations.

For example, in *State v. Ginn*, 128 Wn. App. 872, 117 P.2d 1155 (2005), Ginn obtained a medical marijuana authorization from her treating physician. She then contacted Detective Rodney Ditrich of the Thurston County Narcotics Task Force and asked him to inspect her medical marijuana plants in Olympia, Thurston County, to confirm that she was operating within the requirements of the statute. The County's response

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[3] I-692 was passed by a margin of 59% - 41% of the vote.

was to arrest, jail, and prosecute Ginn. She was convicted and sentenced to three years in prison after being denied the opportunity to present her defense to the jury.

It is Amici's position that the Medical Use of Marijuana Act is no different from any other affirmative defense. An affirmative defense generally is an issue of fact for resolution by the jury, not the judge. See *State v. Reid*, 98 Wn. App. 152, 162-64, 988 P.2d 1038 (1999). A defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving the jury an instruction on the defense. *State v. Janes*, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). However, in meeting that burden, the defendant must only produce "some" evidence that tends to prove the defense. *Id.* at 237 (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (plurality by Williams, J.). In ruling on motions in limine intended to exclude presentation of any evidence of a possible defense, judges must apply the same test as they would in ruling on whether to instruct the jury on the defense after presentation of the defendant's evidence at trial:

> In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge

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[4] Throughout the statute sole discretion is vested in the physicians to advise their patients based upon their medical judgment. See e.g. RCW 65.51A.005.

> the witnesses' credibility, which are exclusive functions of the jury.

State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (citing *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999)).

The only Washington medical marijuana case to properly apply this test is *Ginn*, where the Court of Appeals was required to reverse the trial court because Ginn had presented some evidence on each of the elements of the Act's "qualifying patient" defense that was sufficient, when viewed in the light most favorable to her, to go to the jury. 128 Wn. App. at 879-83. In contrast, in this case and others the trial and appellate courts appear to have determined that a patient can present a medical marijuana defense only when he or she first satisfies the judge that he or she has conclusive proof of the defense. This goes beyond the trial court's limited gate-keeping function and invades the province of the jury.

2. RCW 69.51A must be construed consistent with its remedial intent and consistent with the defendant's constitutional rights discussed above.

> a. The lower court failed to construe RCW 69.51A broadly to carry out its remedial intent and, instead, disregarded the plain language of the statute and its explicitly stated purpose, thereby unlawfully depriving Tracy of her statutory defense.

Ballot measure I-692 was enacted by the voters in 1998 to remedy a specific evil: the criminalization and punishment under Washington law of seriously ill people who use marijuana to alleviate their suffering. RCW 69.51A.005. This Court has consistently ruled that legislation enacted by the people through the ballot initiative process must be interpreted to:

> . . . ascertain the voters' intent in approving the measure . . . Where the language of the initiative is clear and unambiguous, a court may not look beyond the text of the measure; however, if the initiative is susceptible to more than one reasonable interpretation, a court may determine the voters' intent by applying canons of statutory construction . . .

Pierce County v. State, 150 Wn.2d 422, 430, 78 P.3d 640 (2003); see also *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000).

This Court has consistently ruled that remedial statutes, such as RCW 69.51A, must be interpreted broadly to effectuate their purpose and with full consideration paid to the statute's intended beneficiaries – who are, in this instance, medical marijuana patients.

> The rule in construing remedial statutes . . . is that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.

State ex rel. Winston v. Seattle Gas & Electric Co., 28 Wn. 488, 493, 68 P. 946 (1902) (citation omitted); See also, *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978) (citing *Peet v. Mills*, 76 Wn. 437, 439, 136 P. 685 (1913)); *Ingersoll v. Gourley*, 72 Wn. 462, 472, 130 P. 743 (1913); 3 C. Sands, Statues and Statutory Construction, 60.01-.02 (4th rev. ed. 1974); *Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407, 924 P.2d 13, 16 (1996).

The remedial purpose of Washington voters in passing I-692 is stated explicitly in the text of the statute:

> . . . The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
> Therefore, the people of the state of Washington intend that:
> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana[.] . . .

RCW 69.51A.005. The courts of this state are bound to comply with the voters' purpose in enacting I-692.

However, rather than give full effect to its remedial purpose, here the trial court interpreted RCW 69.51A unduly narrowly and subordinated

it to the state's controlled substances law, ignoring that I-692 partly superseded the earlier-enacted law in regard to medical marijuana treatment. Cf. *WFSE v. OFM*, 121 Wn.2d 152, 165, 849 P.2d 1201, 1208 (1993) (stating the test for implicit repealer of an earlier-enacted inconsistent statute); *Union Legislative Council v. State*, 145 Wn.2d 544, 555, 40 P.3d 656, 661 (2002). This case illustrates the problems that medical marijuana patients face when seeking to present their defense.

b. The trial court erred in excluding Tracy's physician authorization by imposing documentation requirements not present in RCW 69.51A.010(5).

The trial judge ruled, without explaining his legal analysis in reference to the relevant provisions of RCW 69.51A, that the recommendation that Ms. Tracy obtained from her California physician was without legal effect in Washington. See RP 10, 21-22. There appears to have been no serious analysis of the plain language of RCW 69.51A.010(5)(a) and no consideration of whether the statute could be read to encompass Tracy's documentation in a manner that advances its remedial purpose: the protection of medical marijuana patients from prosecution. In fact, it can be presumed that the California authorization followed California law, which requires "[w]ritten documentation by the attending physician in the person's medical records stating that the person

has been diagnosed with a serious medical condition and that the medical use of marijuana is appropriate." California Health & Safety Code §11362.715(2).

Instead, the trial court presumed that Ms. Tracy's documentation had to be set out in a particular "Washington format" and provided by a physician practicing in Washington – with no consideration as to whether the substance of her physician's recommendations met Washington's requirements. Instead, the trial court should have ruled that the threshold legal requirements for submitting the medical marijuana defense were met by Ms. Tracy's two medical authorizations, and that the weight of that evidence should be considered by the jury as a factual matter in deciding whether she had complied sufficiently to entitle her to acquittal or not. RCW 69.51A.010 (5) in its entirety requires only that "valid documentation" include:

> (a) A statement signed by a qualifying patient's physician, or a copy of the qualifying patient's pertinent medical records, which states that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for a particular qualifying patient; and
> (b) Proof of identity such as a Washington state driver's license or identicard, as defined in RCW 46.20.035.

Nothing in these documentary requirements restricts patients' valid documentation in the manner presumed by the trial court. In fact, a signed statement is not required at all if a qualifying patient's "pertinent medical records" indicate medical authorization. Id.

A plain reading of RCW 69.51A.010(5)(a) establishes only three criteria that must be met for either of Tracy's physician statements to qualify as valid documentation: (1) Tracy must be named in the document, (2) it must be signed by one of her physicians, and (3) it must indicate the physician's professional opinion that Tracy is likely to benefit from medical marijuana treatment. Whether Tracy's documents met this requirement is a factual question that the trial court improperly removed from jury consideration.

Two physicians confirmed that Tracy would benefit from using marijuana as part of her medical care. The California physician presumably followed California law, which is substantially similar to Washington's with regard to documentation requirements, and "recommended" medical marijuana. The Oregon physician also authorized medical marijuana, invoking Washington's statute, albeit after Tracy was told by a police officer that her California-obtained authorization might not be good enough. Nothing in RCW 69.51A.010(5)(a) or analogous provisions cited by amicus Washington

Association of Prosecuting Attorneys ("WAPA") supports the proposition that physicians duly licensed in other states may not recommend medical marijuana for Washington patients. To the contrary, the fact that a legend drug prescription written by a duly-licensed physician from another state bars prosecution under RCW 69.51.030 supports the proposition that a medical marijuana authorization issued by a duly-licensed physician from another state meets the requirements of the Medical Use of Marijuana Act, especially in light of the Act's remedial purpose .

There is no legal impediment to Washington patients seeking "valid documentation" from their out-of-state physicians. Whether or not the content of that documentation meets the requirements of RCW 69.51A.010(5)(a) is a factual question – just as it is in the case of documentation obtained from in-state physicians. The trial court committed reversible error by imposing restrictions found nowhere in the statute – restrictions that conflict with the statute's remedial purpose.

c. The Court of Appeals erred in applying criteria for establishing status as a "qualifying patient" in RCW 69.51A.010(3) to requirements for "valid documentation" in RCW 69.51A.010(5).

Contrary to the Court of Appeals' reading of the medical marijuana statute, the requirements for "valid documentation" under RCW 69.51A.010(5) are not dependent on the criteria for establishing status as a

"qualifying patient" under RCW 69.51A.010(3). The Court of Appeals inappropriately narrowed its reading of a remedial statute, imposed criteria from a separate and distinct provision, and disregarded the practical realities of how seriously ill people receive medical care.

To be deemed a "qualifying patient" pursuant to RCW 69.51A.010(3), a patient must be diagnosed with a qualifying illness, advised about the risks and benefits of medical marijuana treatment, and told that he or she may benefit from such treatment by a physician licensed to practice medicine under RCW 18.71. It is clear from the language used in RCW 69.51A.010(3) that this diagnosing and advising physician must be the same person. By contrast, RCW 69.51A.010(5)(a) does not require the physician who provides medical marijuana documentation to be the same physician who performed the initial diagnosis and consultation – or even to be licensed to practice medicine under RCW 18.71.

Reading such requirements into RCW 69.51A.010(5)(a) not only disregards its plain language, it also ignores how seriously ill people receive medical care. See Exhibit 1, Dec. of Dr. Killian. People suffering from serious illnesses such as AIDS, cancer and chronic pain often receive medical care from multiple or consecutive physicians and will often seek medical care outside of Washington when they have specialized needs or

are forced to seek medical care when traveling outside of the state. See, Exhibit 3, May 7, 2004 statement adopted by the full Medical Board of California clarifying implementation of California's Compassionate Use Act ("A physician who is not the primary treating physician may still recommend medical marijuana for a patient's symptoms. However, it is incumbent upon that physician to consult with the patient's primary treating physician or obtain the appropriate patient records to confirm the patient's underlying diagnosis and prior treatment history"). If RCW 69.51A.010(5) were intended to be limited to the same physician indicated in RCW 69.51A.010(3) or to itself require a physician licensed by Washington, the statute would contain such language. The fact that such strict language is not included is consistent with the statute's purpose of expanding medical treatment options and not impairing the established medical practice of providing care through a team of professionals. See Exhibit 1, Dec. of Dr. Killian.

d. The Court of Appeals erred by limiting application of Chapter 18.71 RCW in a manner that frustrates the purpose of RCW 69.51A.

The criteria for status as a qualifying patient, RCW 69.51A.010(3)(a), should be read to protect the seriously ill individuals who are the intended beneficiaries of I-692. Specifically, RCW

69.51A.010(3)(a) is intended to ensure that patients receive a competent medical diagnosis and are able to make an informed decision about medical marijuana before commencing treatment. It was not intended by the voters to raise a technical barrier to the presentation of relevant evidence.

RCW 69.51A.010(3)(a) references Chapter 18.71 RCW in its entirety, not just sections that address the application process for Washington state licensure. Neither RCW 18.71 nor RCW 69.51A.010(3)(a) bar an out-of-state physician from lawfully practicing in Washington, so long as he or she is "a practitioner licensed by another state or territory in which he or she resides," and the physician does "not open an office or appoint a place of meeting patients or receiving calls within [Washington]." RCW 18.71.030(6).

The Court of Appeals observed that Washington's "licensing scheme differentiates between physicians who are licensed in the state and those who are licensed in another state but are permitted to practice medicine in Washington." *State v. Tracy*, 128 Wn. App. 388, 397, 115 P.3d 381 (2005) (emphasis in original omitted). The court also acknowledged, though, that physicians licensed by other states and territories are licensed for the purpose of practicing medicine in Washington. *Id.* Where the court erred is in its reliance on a distinction

made by a particular subsection of another statute that is irrelevant in application to RCW 69.51A.010(3)(a). Nothing in RCW 69.51A.010(3)(a) restricts patients from seeking a diagnosis and advice from any of the licensed physicians permitted to practice medicine under RCW 18.71. Presumably, the text would specify Washington-licensed physicians if that were the intent of the statute. RCW 69.51A.010(3)(a) only requires that qualifying patients have seen a physician who is licensed in a manner recognized under 18.71 RCW, which itself recognizes that a Washington-issued license is not, in all situations, required to practice medicine.

The Court of Appeals' opinion runs contrary to its statement that courts must "interpret statutes to avoid strained and absurd results." 128 Wn. App. At 396 (citing *Strain v. W. Travel, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003), *review denied*, 150 Wn.2d 1029 (2004)). Under the lower court's reading of the medical marijuana statute, a California-licensed physician would be permitted to perform an organ transplant or other high-risk surgery in Washington, but the same physician would be barred from recommending medical marijuana treatment for a Washington patient. Nothing in the text of 69.51A.010(3)(a) or RCW 18.71 requires that outcome, and indeed that outcome conflicts with the purpose of RCW 69.51A.

E. CONCLUSION

The trial court incorrectly presumed that Tracy's physician documentation obtained in California could not meet the requirements set out in RCW 69.51A.010(5)(a). The Court of Appeals upheld this ruling by applying criteria inapplicable to the statute's requirements for valid documentation and narrowing its interpretation of the statute in a manner that frustrates the fundamental purpose of the Medical Use of Marijuana Act. Whether or not Tracy's physician statement met the requirements of RCW 69.51A.010(5)(a) was a factual question that she was entitled to present to a jury. Nothing in the Court of Appeals' restrictive interpretation of RCW 69.51A alters the fact that Tracy was denied a constitutionally adequate trial. This case should be remanded for a full trial and jury determination of each element of Tracy's statutory defense under RCW 69.51A.

Respectfully submitted this 18th day of May, 2006.

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EXHIBIT 1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHARON TRACY, Petitioner.	No. 77534-6 Court of Appeals No. 31286-7-II DECLARATION OF DOUGLAS HIATT

I, DOUGLAS HIATT, declare under penalty of perjury under the laws of the State of Washington:

1. I have been a practicing member of the Washington State Bar Association since 1991. My involvement with medical marijuana cases predates the passage of the Washington State Medical Use of Marijuana Act, Chapter 69.51A of the Revised Code of Washington, in 1998. I worked with Volunteer Attorneys for People With AIDS beginning in 1996, accepting medical marijuana cases *pro bono*. I am currently a member of the medical marijuana working group chaired by Seattle City Councilman Nick Licata and Seattle City Attorney Tom Carr, seeking to develop protocols for law enforcement officers concerning medical marijuana cases. Since re-entering

private practice from public defense in 2001, I have appeared in the majority of felony cases where medical marijuana has been offered as a defense.

2. In the following cases, I appeared or associated as counsel, and I resolved the case by a misdemeanor plea, diversion, outright dismissal by the State of Washington, or avoidance of criminal charges via negotiation. All of these cases involved qualifying patients who had doctors' recommendations for the use of medical marijuana for their conditions. These prosecutions had devastating effects on the seriously ill patients attempting to comply with the requirements of the Medical Use of Marijuana Act.

a. *State of Washington v. Bruce Buckner*, Grays Harbor County Superior Court Cause No. 01-1-00592-1;

b. *State of Washington v. Monte Levine*, Kitsap County Superior Court Cause No. 01-1-00999-9, and parallel civil asset forfeiture proceeding;

c. *State of Washington v. Stephen Lomax*, Kitsap County Superior Court Cause No. 02-1-00962-8;

d. *State of Washington v. Robert Knight*, Kitsap County Superior Court Cause No. 02-1-01591-1;

e. *State of Washington v. Nancy Knight*, Kitsap County Superior Court Cause No. 02-1-01592-0;

f. *State of Washington v. Mark Spohn*, King County Superior Court Cause No. 02-1-02573-7 SEA;

g. *State of Washington v. Ralph Wilson*, King County Superior Court Cause No. 02-2-14640-6 SEA;

h. *State of Washington v. Brian Holtzman*, King County Superior Court Cause No. 02-1-06959-9 SEA;

i. *State of Washington v. Angie Byers*, King County Superior Court Cause No. 03-1-07383-7 SEA;

j. *State of Washington v. Russell McGilvra*, Stevens County Superior Court Cause No. 03-1-00250-4;

k. *State of Washington v. Mark Sides,* Pacific County Superior Court Cause No. 03-1-00015-7;

l. *State of Washington v. Vicki Preinesberger*, Pacific County Superior Court Cause No. 03-1-00084-0;

m. *State of Washington v. Mary Neumeyer*, Thurston County Superior Court No. 03-1-02091-9;

n. *State of Washington v. Terrance Creech*, Thurston County Superior Court Casue No. 03-1-02091-9;

o. *State of Washington v. Leonard Hayley*, Thurston County Superior Court Cause No. 04-1-00931-0;

p. *State of Washington v. James McGee*, Mason County, patient's home raided, criminal charges not filed;

q. *State of Washington v. Lillian Davis*, Thurston County Superior Court Cause No. 04-1-1721-5;

r. *State of Washington v. James Barber*, Whitman County, patient's home raided, criminal charges not filed;

s. *State of Washington v. Harvey Maki*, Grays Harbor County Superior Court Cause No. 03-2-01802-0 (forfeiture proceeding against patient's home);

t. *State of Washington v. Mark Spohn*, King County Superior Court Cause No. 05-1-08470-3; and

u. *State of Washington v. Elizabeth Namyniuk*, Okanogan County, patient's home raided, criminal charges not filed.

3. In the following medical marijuana cases I am attorney of record or have appeared as associated counsel. All are charged as felonies, or will be charged as felonies, and some involve parallel civil asset forfeiture proceedings[1]:

a. *State of Washington v. Angela Wilson,* Skagit County Superior Court Cause No. 03-1-00255-0;

b. *State of Washington v. Richard Kane,* Cowlitz County Superior Court Cause No. 04-1-00707-8;

c. *State of Washington v. Richard Kane,* Cowlitz County Superior Court Cause No. 04-1-01517-8;

d. *State of Washington v. Richard Kane,* Cowlitz County Superior Court Cause No. 06-1-00330-3;

e. *State of Washington v. Richard Kane,* Cowlitz County Drug Task Force Case No. A06-3198 (civil asset forfeiture);

f. *State of Washington v. Geary Hayes*, Pierce County Superior Court Cause No. 06-1-00506-8;

g. *State of Washington v. Katy Rourke*, Snohomish County Superior Court Cause No. 05-1-02218-8;

h. *State of Washington v. Katy Rourke*, Snohomish County Narcotics Task Force Case No. TF05-033 (civil asset forfeiture);

i. *State of Washington v. Richard Taylor*, Stevens County Superior Court, civil asset forfeiture and felony filing pending;

j. *State of Washington v. Robby Powell,* Skagit County Superior Court Cause No. 03-1-00254-1;

k. *State of Washington v. Vincent Preinesberger,* Pacific County Superior Court Cause No. 03-1-00085-0; and

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[1] I am aware of several other cases about to be filed. Of course, there may be other cases pending of which I am unaware.

l. *State of Washington v. Patricia Elvig*, Grays Harbor County Drug Task Force Case No. DTF-2003-147 (civil asset forfeiture).

4. In addition, these cases are post-judgment and in various stages of appeal:

a. *State of Washington v. Harvey Maki*, Grays Harbor County Superior Court Cause No. 04-1-00044-3;

b. *State of Washington v. Jessica Colpitt*, Thurston County Superior Court Cause No. 03-1-01571-1;

c. *State of Washington v. Monica Ginn,* Thurston County Superior Court Cause No. 02-1-00799-0; and

d. *State of Washington v. Sharon Tracy,* Skamania County Superior Court Cause No. 03-1-00050-5.

5. In my practice I see a tremendous need for clarification of the Medical Use of Marijuana Act as ambiguities present in the Act have been read to require hyper-technical compliance with this compassionate, remedial statute. Furthermore, in my experience, these types of prosecutions have significant financial and health consequences for seriously or terminally ill patients. Patients routinely continue to be subject to full-blown drug task force raids during which their homes are invaded, property seized, and asset forfeitures initiated. Disregarding valid documentation from licensed physicians, prosecutors continue proceedings against patients even after confirming the authenticity of the physician's authorization. Most of these cases have lasted a year or more due to the lack of guidance from published appellate cases. Thus, there is substantial difficulty in evaluating and negotiating medical marijuana cases in order to obtain a just outcome for

patients who have made every effort to comply with the law. This Court's guidance is needed for all those who utilize the Act – doctors, patients, caregivers, defense counsel, police agencies, prosecutors, and the lower courts.

DATED this 17th day of May, 2006.

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EXHIBIT 2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHARON TRACY, Petitioner.	No. 77534-6 Court of Appeals No. 31286-7-II DECLARATION OF ROBERT K. KILLIAN, M.D.

I, ROBERT K. KILLIAN, M.D., declare under penalty of perjury under the laws of the State of Washington:

1. I am a physician licensed to practice medicine by the Washington State Department of Health. A significant part of my practice involves the treatment of patients suffering from HIV/AIDS and chronic hepatitis.

2. In 1998, I sponsored Washington State Initiative 692 with the intention of protecting patients who choose, with their physician's advice, to treat certain serious health conditions by the medicinal use of marijuana. In the course of my practice and discussions with my patients, I observed that many patients suffering from life-threatening medical conditions, such as wasting syndrome and chronic pain associated with illness such as AIDS and

hepatitis B and C, benefited from the medicinal use of marijuana. While marijuana treatment is not a cure for AIDS or chronic hepatitis, it has enabled many of my patients to avoid complications related to their illnesses and to tolerate medically other treatments, with little or no negative health impacts. The same effect has been noted in the treatment of patients suffering from cancer, wasting diseases, chronic pain related to physical trauma, and many other serious health problems.

3. It is common and accepted medical practice for physicians to base treatment recommendations on the medical histories of patients as established by other qualified medical professionals. It is also common and accepted practice in Washington for out-of-state physicians to prescribe medications for their patients visiting Washington or their patients who may be residents of Washington. The reverse is also true: as a Washington medical professional, I have treated and prescribed medication for my patients who are traveling in other parts of the country or even internationally, and I even have prescribed for my patients who happen to be residents of other states.

4. In rural counties, this ability to seek medical care across state, and even national, boundaries is crucial to the lives of seriously ill residents of Washington. In the case of very ill patients, such as those intended to be protected by the medical marijuana law and rulings of the Medical Quality Assurance Commission, it is also common for individuals to be treated by a

team of physicians who are often from different states. It was the intention of I-692 to protect *any* patient in Washington who had a valid illness.

5. As drafted, I-692 is intended to continue the policy and practice in Washington of permitting patients to receive a full range of medical attention, including advice concerning medical marijuana treatment, from their physicians – whether licensed by Washington or a competent licensing body in another state or Canada.

DATED this 17th day of May, 2006.

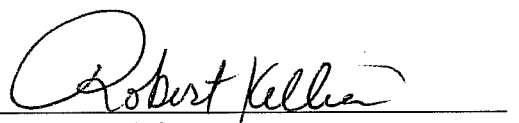

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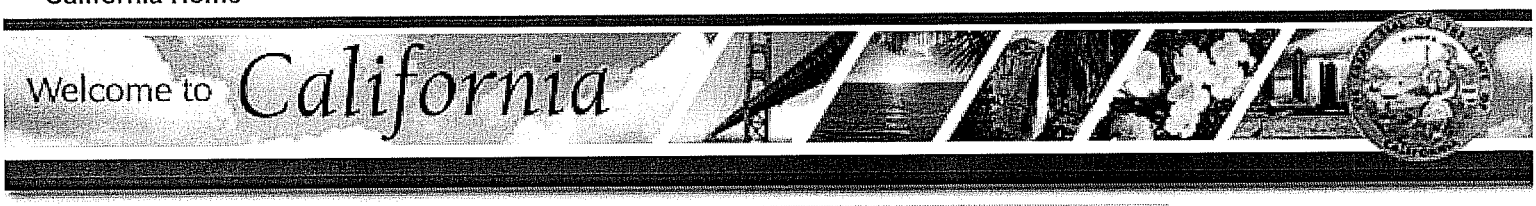
EXHIBIT 3



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Medical Marijuana

This statement was adopted by the full Medical Board on May 7, 2004. For more information, please see our news release dated May 13, 2004.

On November 5, 1996, the people of California passed Proposition 215. Through this Initiative Measure, Section 11362.5 was added to the Health & Safety Code, and is also known as the Compassionate Use Act of 1996. The purposes of the Act include, in part:

> "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; and
>
> (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."

Furthermore, Health & Safety Code section 11362.5(c) provides strong protection for physicians who choose to participate in the implementation of the Act. - "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes."

The Medical Board of California developed this statement since medical marijuana is an emerging treatment modality. The Medical Board wants to assure physicians who choose to recommend medical marijuana to their patients, as part of their regular practice of medicine, that they WILL NOT be subject to investigation or disciplinary action by the MBC if they arrive at the decision to make this recommendation in accordance with accepted standards of medical responsibility. The mere receipt of a complaint that the physician is recommending medical marijuana will not generate an investigation absent additional information indicating that the physician is not adhering to accepted medical standards.

These accepted standards are the same as any reasonable and prudent physician would follow when recommending or approving any other medication, and include the following:

1. History and good faith examination of the patient.
2. Development of a treatment plan with objectives.
3. Provision of informed consent including discussion of side effects.
4. Periodic review of the treatment's efficacy.
5. Consultation, as necessary.
6. Proper record keeping that supports the decision to recommend the use of medical marijuana.

In other words, if physicians use the same care in recommending medical marijuana to patients as they would recommending or approving any other medication, they have nothing to fear from the Medical Board.

Here are some important points to consider when recommending medical marijuana:

1. Although it could trigger federal action, making a recommendation in writing to the patient will not trigger action by the Medical Board of California.

2. A patient need not have failed on all standard medications, in order for a physician to recommend or

approve the use of medical marijuana.

3. The physician should determine that medical marijuana use is not masking an acute or treatable progressive condition, or that such use will lead to a worsening of the patient's condition.

4. The Act names certain medical conditions for which medical marijuana may be useful, although physicians are not limited in their recommendations to those specific conditions. In all cases, the physician should base his/her determination on the results of clinical trials, if available, medical literature and reports, or on experience of that physician or other physicians, or on credible patient reports. In all cases, the physician must determine that the risk/benefit ratio of medical marijuana is as good, or better, than other medications that could be used for that individual patient.

5. A physician who is not the primary treating physician may still recommend medical marijuana for a patient's symptoms. However, it is incumbent upon that physician to consult with the patient's primary treating physician or obtain the appropriate patient records to confirm the patient's underlying diagnosis and prior treatment history.

6. The initial examination for the condition for which medical marijuana is being recommended must be in-person.

7. Recommendations should be limited to the time necessary to appropriately monitor the patient. Periodic reviews should occur and be documented at least annually or more frequently as warranted.

8. If a physician recommends or approves the use of medical marijuana for a minor, the parents or legal guardians must be fully informed of the risks and benefits of such use and must consent to that use.

Physicians may wish to refer to CMA's ON-CALL Document #1315 titled "The Compassionate Use Act of 1996", updated annually for additional information and guidance (http://www.cmanet.org/bookstore/freeoncall2.cfm/CMAOnCall1315.pdf?call_number=1315&CFID=745764&CFTOKEN=27566287).

Although the Compassionate Use Act allows the use of medical marijuana by a patient upon the recommendation or approval of a physician, California physicians should bear in mind that marijuana is listed in Schedule I of the federal Controlled Substances Act, which means that it has no accepted medical use under federal law. However, in Conant v. Walters (9th Cir.2002) F.3d 629 the United States Court of Appeals recognized that physicians have a constitutionally-protected right to discuss medical marijuana as a treatment option with their patients and make oral or written recommendation for medical marijuana. However, the court cautioned that physicians could exceed the scope of this constitutional protection if they conspire with, or aid and abet, their patients in obtaining medical marijuana.

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail and by email one copy of the foregoing pleading on the following:

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5/18/06
Date