IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	**No. 1 CA-CR 16-0703**
Appellee,	**Yavapai County Superior Court No. P1300CR201400328**
vs.	
RODNEY CHRISTOPHER JONES,	
Appellant.	

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

A.R.S.

ARGUMENT

The Appellant, by and through undersigned Counsel, hereby Replies to the state's Answering Brief ("Answering Brief"). The Appellant incorporates the facts, argument and law cited in his Opening Brief into this Reply, and reaffirms his request for relief. Nothing stated in the Answering Brief should prevent that relief.

I. Cannabis does meet the AMMA's Definition of "Usable Marijuana".

In its Answering Brief, the state argued that permitting possession or use of cannabis (1) would not serve the AMMA's spirit and purpose, (2) would run contrary to Arizona's statutory scheme concerning cannabis, and (3) would result in absurdities. (Answering Brief, pg. 4).

However, the AMMA's "purpose," per A.R.S.§ 36-2801(8) was to define "Marijuana" as *all parts of any plant of the genus cannabis* whether growing or not, and the seeds of such plans. (Italics added).

To further define the AMMA's "purpose," A.R.S. § 36-2801(15) defines "Usable Marijuana" as the dried flowers of the marijuana plant, *and any mixture or preparation thereof*, but does not include the seeds, stalks and roots of the plant and does not include the weight of any non-marijuana ingredients combined with marijuana and prepared for consumption as food or drink. (Italics added). Both

the plain language of the AMMA and the proponents' and voters' broad intent in passing it demonstrate intent to protect patients' ability to treat their debilitating medical conditions with marijuana extracts. An extract from the marijuana plant is an example of a "preparation thereof."

Thus, this simple immutable fact: cannabis comes from – and is part of – the marijuana plant. "What's in a name? That which we call a rose by any other name would smell as sweet." (Excerpt from "Romeo and Juliet," by William Shakespeare).

In its Response, the state gave short shrift to the conflict between A.R.S. §36-2801(8) which clearly defined marijuana as "all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant," and A.R.S. §13-3401(4),(19),(20) which provided that marijuana extract, or cannabis, is a narcotic drug, and thus outside of the protections of the AMMA. The definition of marijuana under the AMMA, which includes marijuana extract, *trumps* the definition of cannabis, or marijuana extract under A.R.S. 13-3401, because it is the more specifically worded statute.

The specific language of A.R.S. § 36-2801(15) of the AMMA defined "Usable Marijuana" as "dried flowers of the marijuana plant, *and any mixture or preparation thereof*." This would necessarily include cannabis.

> When interpreting a statute, we follow the rules of statutory construction and first look to the statutory language. State v. Williams, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993); Patterson v. Mahoney, 219 Ariz. 453, 456, ¶ 9, 199 P.3d 708, 711 (App. 2008). If the language is clear and unequivocal, it is determinative. Patterson, 219 Ariz. at 456, ¶ 9, 199 P.3d at 711.

(State ex rel. Montgomery v. Woodburn, 231 Ariz. 215, 216, 292 P.3d 201, 202 (Ct. App. 2012).

Concerning the conflict between the AMMA and the criminal code definitions, the state wrote:

> Here, this Court should read the AMMA and the criminal code *in pari materia*: the criminal code sets forth the illegality of cannabis and marijuana while the AMMA creates a limited immunity for the possession of "usable marijuana."

(Answering Brief, pg. 19).

Black's Law Dictionary defines "in pari materia" means "in the same matter," and "on the same matter or subject. Statutes in pari materia are to construed together"

However, the two statutes are *irreconcilable*. They directly conflict, thus cannot be construed together.

> When "two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute." UNUM Life Ins. Co., 200 Ariz. at 333 ¶ 29, 26 P.3d at 516.

(State v. Jones, 235 Ariz. 501, 503, 334 P.3d 191, 193 (2014)).

Thus, when analyzing the conflict between the AMMA and the criminal code definitions the definitions in the special statute (the AMMA) are inconsistent with those of a general criminal statute. The definitions in the AMMA control:

> "Statutes that are in pari materia should be read together and harmonized if at all possible, Peterson v. Flood, 84 Ariz. 256, 326 P.2d 845 (1958). When statutes relate to the same subject matter, the later enactment, in the absence of any express repeal or amendment therein, is held to have been enacted in accord with the legislative policy embodied in the earlier statute, Frazier v. Terrill, 65 Ariz. 131, 175 P.2d 438 (1947); U.S. v. State of Arizona, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935). *In so far as the provisions of a special statute are inconsistent with those of a general statute on the same subject, the special statute will control*, Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959); Whitfield Trans., Inc. v. Brooks, 81 Ariz. 136, 302 P.2d 526 (1956). The general statute remains applicable, however, to all matters not dealt with in the specific statute ..."

(State ex rel Larson v. Farley, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) italics added).

In addition, the Rule of Lenity requires any inconsistency in statute to be resolved in favor of the Defendant:

> Matters of statutory interpretation such as this involve questions of law, which we review de novo. State v. George, 206 Ariz. 436, P6, 79 P.3d 1050, 1054 (App. 2003). In construing a statute, we strive to effectuate the legislature's intent in enacting it. State v. Fell, 203 Ariz. 186, P6, 52 P.3d 218, 220 (App. 2002). In order to discern and give effect to the legislature's intent, we look to the plain language of the statute. George, 206 Ariz. 436, P6, 79 P.3d at 1054. If the language is unclear, we "'consider other factors such as the statute's context, history, subject matter, effects and consequences, spirit, and purpose.'" *Id.*, quoting Fell, 203 Ariz. 186, P6, 52 P.3d at 220. If that

> endeavor nevertheless leaves a statute "'susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.'" State v. Tarango, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996), quoting State v. Pena, 140 Ariz. 545, 549-50, 683 P.2d 744, 748-49 (App. 1983), aff'd, 140 Ariz. 544, 683 P.2d 743 (1984).

(State v. Sanchez, 209 Ariz. 66, 68, 97 P.3d 891, 893 (Ct. App. 2004).

> We may resolve doubt surrounding ambiguous statutes by resorting to statutory interpretation. Hayes v. Cont'l Ins. Co., 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994). In attempting to determine and give effect to the legislature's intent, we consider the statute's context, language, subject matter, historical background, spirit, and purpose. *Id.* When a statute is "susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant." State v. Tarango, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996) (citation omitted). However, we will apply the rule of lenity "only if, after considering the plain language of the statute and employing recognized tools of statutory interpretation, the statute remains ambiguous." Cicoria v. Cole, 222 Ariz. 428, 432, P 20, 215 P.3d 402, 406 (App. 2009).

(State v. Munoz, 224 Ariz. 146, 148, 228 P.3d 138, 140 (Ct. App. 2010).

Much of the state's Answering Brief appears to be boilerplate arguments, very similar to the Yavapai County Attorney's arguments in the Trial Court, which appear prejudiced by the underlying belief that *no* amount of marijuana should be legal. That is not the intent of the Legislature. In support of the state's arguments, the Answering Brief is complete with cherry-picked information from outside sources. The state wrote:

> Here, reading cannabis into the definition of "usable marijuana" upsets the AMMA's careful balance. Cannabis is far more potent than leafy marijuana. See *Floyd*, 120 Ariz. at 360 (explaining that cannabis has greater concentrations of the psychoactive agent delta-9-tetrahydrocannabinol than leafy marijuana).

(Answering Brief, pg. 18)

Any argument which is based on marijuana potency is an emotional appeal regarding the *dangers of marijuana*, akin to the film "Reefer Madness." It has nothing to do with this Appeal.

In addition, Floyd is a 39-year-old case, which has no application in Arizona post-AMMA.

The state wrote:

> If Appellant's definition prevailed, an RQP could obtain 2.5 ounces of THC resin (cannabis)—the equivalent of more than 5.5 pounds of dried marijuana flowers or 7,080 joints—every two weeks.

(Answering Brief, pg. 22).

The state is ignoring the fact that the Appellant received his marijuana at a legal dispensary in Phoenix. The legal dispensary *gave* the legal-in-Maricopa-County cannabis sample to the Appellant:

> Appellant agreed to waive his rights and told Officer Kjellstrom that an employee at a marijuana dispensary[1] in Phoenix had given him the

[1]There is no dispute in this case that the Appellant received his marijuana at a legal dispensary in Maricopa County.

cannabis for free.

(Answering Brief, pg. 2).

The state's dire prediction that any legal dispensary and user would plot to violate the AMMA, to the tune of 5.5 pounds ("7,080 joints—every two weeks") is merely the-sky-is-falling rhetoric.

The Appellant did not violate the law by possessing a small amount of legal cannabis the legal dispensary gave him for free. Arguments made after the fact over cannabis' role in Arizona's statutory scheme should *not* be at the expense of someone trying to obey the law. The Appellant went to prison for trying to obey the law.

2. The conflicting Superior Courts' interpretation regarding the AMMA violates equal protection of the law.

The state did not directly address the fact that the conflicting laws, §13-3401 and §36-2801, are not being applied uniformly in Arizona: if you are in Maricopa County, possession of an extract of marijuana under the AMMA is legal[2], but if you enter Yavapai County it is not. This disparate application of law

[2] The Maricopa County case which was submitted to the Trial Court by the Defense in this case as part of the Defense Motion to Dismiss stated: "Injunction presents a prima facie case for the medical treatment of nine-year-old Zander with medical marijuana administered in a form of plant material combined with extracted CBD in oil form." (Welton v. St. of Arizona, pg. 2).

within the state of Arizona is a serious Due Process problem:

> Due process requires that criminal offenses be defined in terms of sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute because a person should not be required, at the risk of his liberty, to speculate as to the meaning of a criminal statute. State v. Limpus, 128 Ariz. 371, 625 P.2d 960 (App.1981). Equal protection of the laws guarantees like treatment to all persons who are similarly situated; however, the Fourteenth Amendment does not deny a state the power to classify in the adoption of police law, and a legislative classification will not normally be set aside if any set of facts rationally justifying it is demonstrated to or perceived by the courts. State v. Kelly, 111 Ariz. 181, 526 P.2d 720 (1974), cert. denied 420 U.S. 935, 95 S.Ct. 1143, 43 L.Ed.2d 411 (1975). *Thus, "[a] statute which prescribes different degrees of punishment for the same acts committed under like circumstances by persons in like situations is violative of a person's right to equal protection of the laws*." People v. Calvaresi, 188 Colo. 277, 534 P.2d 316, 318 (1975). A statute which is defined in terms so vague as to render it incomprehensible to a person of ordinary intelligence violates due process. State v. Limpus, *supra*.

(State v. Walton, 133 Ariz. 282, 288 (Ct. App. 1982, italics added).

CONCLUSION

For the reasons stated above, the Appellant requests this Court vacate the convictions in the case, and remand the case to the Trial Court for a new trial.

"The language of the AMMA and its ballot materials make clear that proponents and votes intended the AMMA to provide access to medicine for debilitating medical conditions without fear of criminal prosecution. The AMMA does not limit the form in which that medicine can be administered. *Nor does it prohibit the use of extracts, such as CBD oil*."
(Welton v. St. of Arizona, pg. 6, italics added).

Finally, it is further requested that this Court search the record for fundamental error. (St. v. Powell, 5 Ariz App. 51, 423 P. 2d 127 (1967)).

Respectfully submitted this August 9, 2017.

By____//S//_____

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