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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION 1**

STATE OF ARIZONA)
)
 APPELLANT,)
)
 vs.)
)
 STANLEY KENT KEMMISH)
)
 APPELLEE.)
 _____)

1 CA-CR 17-0417

La Paz County Superior Court
Case No.: CR2016-00241

APPELLEE’S RESPONSE BRIEF

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1 **STATEMENT OF CASE AND FACTS**

2 Appellee adopts Appellant’s Statement of the Case. The parties stipulated to
3 the facts to be considered at the Evidentiary Hearing/Oral Argument that took
4 place on May 25, 2017. Those stipulated facts were:
5

- 6 1. Defendant, Stanley Kemmish, was stopped by Arizona DPS Troopers
7 Keeling and Laurel on August 24, 2016 at approximately 8:49 p.m.
8
- 9 2. The traffic stop occurred on Interstate 10 eastbound at milepost 15, within
10 the jurisdiction of this Court.
- 11 3. Defendant’s vehicle was stopped for failing to have two required headlamps.
12
- 13 4. Prior to the traffic stop, Defendant’s vehicle was observed by the DPS
14 troopers traveling eastbound with only the left headlamp illuminated.
- 15 5. At the time the DPS troopers observed Defendant driving, it was after dark.
- 16 6. While making contact with Defendant as part of the traffic stop, the DPS
17 troopers noticed an odor that they recognized, based upon their training and
18 experience, as marijuana emanating from the interior of Defendant’s vehicle.
19
- 20 7. While Defendant was searching for his registration in his glove
21 compartment, the DPS troopers observed in plain sight a white pipe with
22 black residue.
23
24
25

- 1 8. After observing the pipe, the DPS troopers asked Defendant to exit his
2 vehicle and informed him they would be conducting a probable cause search
3 of his vehicle.
4
- 5 9. After being informed that the DPS troopers intended to search his vehicle,
6 Defendant admitted that the pipe was his. Defendant also admitted that he
7 had medical grade marijuana that he purchased in California.
8
- 9 10. When asked if he had a medical marijuana card, Defendant responded that
10 he had a document that permitted him to purchase medical marijuana in
11 California.
12
- 13 11. When asked to retrieve the document, Defendant produced a physician's
14 recommendation from California.
- 15 12. Defendant's physician's recommendation was valid at the time of the stop.
- 16 13. Defendant's physician's recommendation was obtained pursuant to
17 California's Compassionate Use Act.
18
- 19 14. A search of Defendant's vehicle located marijuana and marijuana/THC wax.
- 20 15. The amount of marijuana and marijuana/THC wax found in Defendant's
21 vehicle was consistent with personal use.
22
- 23 16. Defendant's physician's recommendation is not a state issued identification
24 card from California. Aside from the physician's recommendation,
25 Defendant was carrying an identification card from the same health care

1 provider establishing his use of medical marijuana. The identification card
2 was not issued by a state agency from the State of California.

3
4 17. That the probable cause relied upon by the DPS troopers to search
5 Defendant's vehicle was based upon the odor of marijuana and the pipe
6 observed by the DPS troopers.

7
8 18. Defendant applied for the ability to use medical marijuana for Chronic Pain
9 and Depression.

10 19. Defendant has researched the difference between a physician's
11 recommendation and the "state" issued ID card. To obtain a "state" ID card
12 after obtaining a physician's recommendation letter, the only requirements
13 are to fill out an application (no medical information required), provide
14 proof of county residency, present a valid government ID, and pay \$100.00.

15
16 20. Section 11362.715(a)(2) of the California Health and Safety Code provides a
17 person seeking an identification card is required provide to the county health
18 department, or its designee, "written documentation by the attending
19 physician the person's medical records stating that the person has been
20 diagnosed with a serious medical condition and that the use of marijuana is
21 appropriate."
22

23
24 Aside from these stipulations, the parties also stipulated to the following facts
25 prior to and during the argument:

1 21. Mr. Kemmish fits the definition of a visiting qualifying patient.

2 22. The DPS officer only arrested Mr. Kemmish for Possession of Narcotic
3
4 Drugs and Possession of Drug Paraphernalia.

5 (Transcript of the hearing, page 5, line 13 – page 7, line 14.) In addition to those
6 stipulations, the Appellant made the following statement during oral argument:

7 “I’m not disputing that the defendant does not have a legitimate basis for having
8 his medical marijuana card issued to him. I’m not disputing that his regist – that
9 his recommendation is in – somehow invalid under California law, . . . ”

10 (Transcript of the hearing, page 48, lines 1 – 5.) Appellee’s letter and card were
11 attached as exhibits to the Motion to Dismiss and are included in the Appendix.
12

13
14 *Index of Record, Item 21, and Appendix to Appellee’s Response Brief.*

15
16 **ISSUE PRESENTED FOR REVIEW**

- 17 **I. Did the trial court err by finding that a “doctor’s letter of**
18 **recommendation” under California’s Compassionate Use Act is**
19 **equal in force, effect, or significance to a registry card issued by**
20 **the Arizona Department of Health Services?**
- 21 **II. Was the “doctor’s letter of recommendation”, possessed by**
22 **Appellee, substantial compliance with AMMA such as there was**
23 **no probable cause to conduct the search of Appellee’s property?**
24
25

1 STATEMENT OF LAW AND ARGUMENT

2 **I. Appellee’s letter of recommendation from his doctor, and Health**
3 **Facility Medical Marijuana Card, allowed him to possess and use**
4 **medical marijuana in Arizona.**

5 **A. California’s Compassionate Use Act of 1996**

6 California Health and Safety Code (HSC) § 11362.5 is known, and cited to,
7 as the Compassionate Use Act of 1996. Appellee has attached copies of the
8 relevant statutes from the California Health and Safety Code. *Appendix page*).
9

10 HSC § 11362.5(b)(1) states that the purposes of the Compassionate Use Act of
11 1996 are as follows:

12 (A) To ensure that seriously ill Californians have the right to obtain
13 and use marijuana for medical purposes where that medical use is
14 deemed appropriate and has been recommended by a physician
15 who has determined that the person’s health would benefit from
16 the use of marijuana in the treatment of . . .

17 (B) To ensure that patients . . . who obtain and use marijuana for
18 medical purposes upon the recommendation of a physician are not
19 subject to criminal prosecution or sanction.

20 . . .

21 (d) Section 11357, relating to the possession of marijuana, and Section
22 11358, relating to the cultivation of marijuana, shall not apply to a
23 patient . . . who possesses or cultivates marijuana for the personal
24 medical purposes of the patient upon the **written or oral**
25 **recommendation or approval of a physician.**

HSC § 11362.5 (Emphasis added).

In California, a qualified patient only needs the oral or written
recommendation of a physician in order to possess or use medical marijuana. *Id.*

1 Appellee possessed such a recommendation and was allowed to possess, purchase,
2 and use medical marijuana in California. The Appellant concedes this point.
3

4 HSC § 11362.7 states: For purposes of this article, the following definitions
5 shall apply:
6

7 (a) **“Attending physician”** means an individual who possesses a
8 license in good standing to practice medicine or osteopathy issued by
9 the Medical Board of California or the Osteopathic Medical Board of
10 California and who has taken responsibility for an aspect of the
11 medical care, treatment, diagnosis, counseling, or referral of a patient
12 and who has conducted a medical examination of that patient before
13 recording in the patient's medical record the physician's assessment of
14 whether the patient has a serious medical condition and whether the
15 medical use of marijuana is appropriate.

16 (f) **“Qualified patient”** means a person who is entitled to the
17 protections of Section 11362.5, but who does not have an
18 identification card issued pursuant to this article.
19

20 (i) **“Written documentation”** means accurate reproductions of those
21 portions of a patient's medical records that have been created by the
22 attending physician, that contain the information required by
23 paragraph (2) of subdivision (a) of Section 11362.715, and that the
24 patient **may** submit to a county health department or the county's
25 designee as part of an application for an identification card. (Emphasis
added).

21 *HSC § 11362.7.* (Emphasis added).
22

23 While the definition of “written documentation” includes language that
24 medical records **may be** submitted as part of an application for an identification
25 card, HSC § 1362.71(f) makes it clear that an identification card is not necessary in

1 California in order to possess and purchase medical marijuana for medical use.

2 *HSC § 1362.71*. That statute states: “It shall not be necessary for a person to
3 obtain an identification card in order to claim the protections of Section 11362.5.
4

5 *Id.*

6 In 2004, California passed legislation for the establishment of a voluntary
7 program for the issuance of identification cards to qualified patient who voluntarily
8 apply to the program. *HSC § 11362.71*. California’s Medical Marijuana
9 Identification Card (MMIC) system is voluntary. In fact, California has two
10 systems, one run by the Department of Health, and one run by health facilities. A
11 MMIC is not required in order to possess or use medical marijuana in the state of
12 California. The MMIC system was implemented in order for law enforcement
13 officers to have an easier method to determine if a person has the right to possess
14 marijuana. *HSC § 11362.71(2)*. The only requirement for a citizen of California to
15 possess and use medical marijuana is an oral or written recommendation from a
16 doctor who possesses a license in good standing to practice medicine or osteopathy
17 issued by the Medical Board of California or the Osteopathic Medical Board of
18 California.
19
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1 **B. Arizona Medical Marijuana Act**

2 In 2010, the voters of Arizona passed proposition 203 -- otherwise known as
3 the Arizona Medical Marijuana Act (AMMA). Proposition 203 was codified as
4 A.R.S. § 36-2801 et.seq.
5

6 A.R.S. § 36-2811 is entitled: Presumption of medical use of marijuana;
7 protections; civil penalty. The relevant portions of that statute state that:
8

9 (A) there is a presumption that a qualifying patient is engaged in the
10 medical use of marijuana pursuant to this chapter. (1) The
11 presumption exists if the qualifying patient: (a) is in possession of a
12 registry identification card; (b) is in possession of an amount of
13 marijuana that does not exceed the allowable amount of marijuana.

14 (B) A registered qualifying patient is not subject to arrest, prosecution,
15 or penalty in any manner: (1) for the registered qualifying patient's
16 medical use of marijuana pursuant to this chapter, if the patient does
17 not possess more than the allowable amount.

18 (H) Mere possession of a registry identification card may not
19 constitute probable cause or reasonable suspicion, nor may it be used
20 to support the search of the person or property of the person
21 possessing the identification card.

22 *A.R.S. § 36-2811.*

23 A.R.S. § 36-2801 contains the definitions for the AMMA. Relevant
24 definitions are:
25

1. "Allowable amount of marijuana"

(a) With respect to a qualifying patient, the "allowable amount of
marijuana" means:

1 (i) Two-and-one-half ounces of usable marijuana.

2 8. "**Marijuana**" means all parts of any plant of the genus cannabis
3 whether growing or not, and the seeds of such plant.

4 9. "**Medical use**" means the acquisition, possession, cultivation,
5 manufacture, use, administration, delivery, transfer or transportation
6 of marijuana or paraphernalia relating to the administration of
7 marijuana to treat or alleviate a registered qualifying patient's
8 debilitating medical condition or symptoms associated with the
9 patient's debilitating medical condition.

10 13. "**Qualifying patient**" means a person who has been diagnosed by
11 a physician as having a debilitating medical condition.

12 14. "**Registry identification card**" means a document issued by the
13 department that identifies a person as a registered qualifying patient,
14 registered designated caregiver or a registered nonprofit medical
15 marijuana dispensary agent.

16 15. "**Usable marijuana**" means the dried flowers of the marijuana
17 plant, and any mixture or preparation thereof, but does not include the
18 seeds, stalks and roots of the plant and does not include the weight of
19 any non-marijuana ingredients combined with marijuana and prepared
20 for consumption as food or drink.

21 17. "**Visiting qualifying patient**" means a person:

22 (a) Who is not a resident of Arizona or who has been a resident of
23 Arizona less than thirty days.

24 (b) Who has been diagnosed with a debilitating medical condition by
25 a person who is licensed with authority to prescribe drugs to humans
in the state of the person's residence or, in the case of a person who
has been a resident of Arizona less than thirty days, the state of the
person's former residence.

18. "**Written certification**" means a document dated and signed by a
physician, stating that in the physician's professional opinion the
patient is likely to receive therapeutic or palliative benefit from the
medical use of marijuana to treat or alleviate the patient's debilitating

1 medical condition or symptoms associated with the debilitating
2 medical condition. The physician must:

3 (a) Specify the qualifying patient's debilitating medical condition in
4 the written certification.

5 (b) Sign and date the written certification only in the course of a
6 physician-patient relationship after the physician has completed a full
7 assessment of the qualifying patient's medical history.

8 *A.R.S. § 36-2801.*

9 As stated above, in order to use or possess medical marijuana in Arizona, a
10 qualifying patient must possess a registry identification card. A.R.S. § 36-2804.03
11 sets out the requirements for the AZ Department of Health to issue registry cards.
12

13 A.R.S. § 36-2804.03 (C) addresses medical marijuana users from another
14 state. That subsection states: “A registry identification card, or its equivalent, that
15 is issued under the laws of another state, district, territory, commonwealth or
16 insular possession of the United States that allows a visiting qualifying patient to
17 possess or use marijuana for medical purposes in the jurisdiction of issuance has
18 the same force and effect when held by a visiting qualifying patient as a registry
19 identification card issued by the department, except that a visiting qualifying
20 patient is not authorized to obtain marijuana from a nonprofit medical marijuana
21 dispensary.
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1
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3 **C. Statutory Interpretation**
4

5 Appellee fits the definition of “visiting qualifying patient” under 36-
6 2801(17). The issue is whether or not the letter of recommendation from his
7 doctor in California fits the definition of a “registry identification card, or its
8 equivalent, issued under the laws of another state.”
9

10 In determining that issue, the trial court cited *Mendelsohn v. Superior Court*
11 *in and for Maricopa County*, 76 Ariz. 163, 261 P.2d 983 (1953), for its holding on
12 statutory construction. The Mendelsohn Court stated:
13

14
15 The cardinal principle of statutory interpretation is that the intent
16 of the legislature is to be ascertained and followed. The second, at
17 least in Arizona, is that statutes shall be liberally construed to effect
18 their objects and to promote justice, Section 1-101, A.C.A.1939.
19 These principles of interpretation take precedence over all others, the
20 remaining rules being only ancillary and used to assist in the proper
21 application of the two first set forth, (citation omitted). **The court
when construing a statute should give it a sensible construction,
such as will accomplish the legislative intent and if possible avoid
an absurd conclusion or avoid making the statute invalid** (citation
omitted). . . .

22 Another established rule of statutory construction is that **words
23 and phrases in a statute are to be accorded their obvious and
24 natural meaning**. A corollary of this is the rule that the legislature is
presumed to express its meaning in as clear a manner as possible.

25 *Id* @ 169-170, 988-989. (Emphasis added).

1
2 The legislature was clear when it crafted A.R.S. § 36-2804.03 (C). Arizona
3 has given medical marijuana users from other states the ability to possess and use
4 medical marijuana. Appellant’s position is that the phrase “a registry card” at the
5 beginning of the statute means a card issued by the department of health services.
6 However, that reading of the statute is absurd and would make the statute invalid.
7 Subsection C deals with qualifying patients coming into Arizona from another
8 state. How could a person from another state possess a registry card from
9 Arizona? In addition, further on in subsection C the legislature discusses a registry
10 card “issued by the department.” If the first phrase required what Appellant
11 proposes, the legislature would also have included the language “issued by the
12 department” after the first phrase.
13
14

15
16 The legislature meant exactly what the trial court found when it crafted
17 subsection C. A person from another state with a registry card, or its equivalent, is
18 given the same force and effect as a registry card issued to a qualifying patient in
19 Arizona by the Department of Health Services. That is the obvious and natural
20 meaning of the statute.
21

22 Subsection C, as it applies to a medical marijuana patient from California
23 would read as follows: A person with an identification card - HSC § 11362.7 (c),
24 or a qualified patient - HSC § 11362.7 (f), that allows that person to possess or use
25 marijuana for medical purposes in California has the same force and effect as a

1 registry identification card issued by the department – A.R.S. 36-2801 (14), except
2 that person is not authorized to purchase marijuana from a dispensary. Another
3 way to read the statute, as it applies to Appellee, is contained in Exhibit #4 from
4 the hearing, item #31 in the record. That exhibit states:

6 “A County issued California Medical marijuana identification Card, Health
7 Provider Identification Card, or Physician’s Letter of Recommendation issued
8 pursuant to California’s Compassionate Use Act that allows Stanley K. Kemmish
9 to possess or use marijuana for medical purposes in California has the same force
10 and effect as an AMMA registry identification card issued by the AZ Dep’t of
11 Health, except that Mr. Kemmish is not authorized to obtain marijuana from a
12 nonprofit medical marijuana dispensary.” *Index of Record, item #31, Appendix.*

15 In *State v. Maestas*, 1 CA-CR 15-0724 (Ariz.App. 2017) this Court
16 addressed the issue of the state legislature adding to the prohibitions of the AMMA
17 and criminalizing the possession and use of medical marijuana on public college
18 and university property. This Court held that the Voter Protection Act is a
19 provision of the Arizona constitution that limits the Legislature’s authority to
20 repeal or modify laws enacted by voters. *Id.* @ ¶8. The Court stated that in
21 interpreting a voter-approved measure, the Court should give effect to the intent of
22 the electorate that adopted it, and in doing so interpret the words according to their
23 nature, obvious and ordinary meaning. *Id.* @ ¶11. When the language is clear and
24
25

1 unambiguous and thus subject to only one reasonable meaning, we apply the
2 language without resort to other means of statutory construction. *Id.* . . . Generally,
3 when the Legislature expresses a list, we assume the exclusion of items not listed.
4
5 *Id.* @ ¶12.

6
7 Appellant cites *State v. Abdi*, 236 Ariz. 609, 343 P.3d 921 (Ariz. App. 2015),
8 to indicate that this Court, in its dicta, has determined that A.R.S. § 36-2804.03
9 (C) means that only out of state qualifying patients with registry cards are afforded
10 the protections of AMMA. That is an incorrect reading of the case. The *Abdi* case
11 stands for the premise that A.R.S. § 36-2804.03 (C) only applies to patients from
12 out of state, not out of state caregivers. However, there is language in *Abdi* that
13 does cut against Appellant’s argument that an out of state qualifying patient is
14 required to have a registry card to possess marijuana. The *Abdi* Court stated:
15
16

17 A.R.S. section 36–2804.03(C) expressly applies only to visiting
18 patients; it makes no reference to a “visiting designated caregiver.” *Id.*
19 **The choice of wording in a statute rests with the legislature, and**
20 **we will not read a provision into A.R.S. § 36–2804.03(C) to**
21 **include visiting authorized caregivers when the legislature has**
22 **chosen not to do so.** *City of Phoenix v. Butler*, 110 Ariz. 160, 162,
23 515 P.2d 1180, 1182 (1973) (“The choice of the appropriate wording
24 rests with the Legislature, and the court may not substitute its
25 judgment for that of the Legislature.”) (citation omitted); *State v.*
Roscoe, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996) (“**A well**
established rule of statutory construction provides that the
expression of one or more items of a class indicates an intent to
exclude all items of the same class which are not expressed.”)

1 Id @ 612-613, 924-925. (Emphasis added).

2 The propaganda that was included in the voter initiative expressly mentioned
3 the fact that California only required a recommendation from a doctor to get
4 medical marijuana. Still knowing that, the Legislature did not write into the statute
5 language prohibiting the use of the “doctor’s letter of recommendation” in order to
6 possess or use medical marijuana in Arizona by a qualifying patient from another
7 state.
8

9
10 Appellant would want this Court to do exactly what it has said it is
11 prohibited from doing in *Abdi*, that is to read into the statute something that is not
12 present. A registry card, or its equivalent, was included in the statute to cover
13 qualifying patients from states that require registry cards and states that do not
14 require registry cards. A qualifying patient should not be discriminated against just
15 because the minimum requirement to possess and use medical marijuana in their
16 home state is different than Arizona. As the trial court held, the word “equivalent”
17 has more to do with the impact the documentation will have rather than what the
18 documentation actually is, a letter or card.
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1 **II. As there was substantial compliance with AMMA, there was no**
2 **probable cause to conduct the search of Appellee’s property.**

3 This issue was absent from the trial court’s ruling. *Index of Record, Item*
4 *#27.*

5 If the Court finds that Appellee’s recommendation letter is not the equivalent
6 of an Arizona Registry Identification Card, the evidence seized in this matter
7 should still be suppressed as the officer had no probable cause to continue his
8 search through Appellee’s property once presented with what the officer believed
9 was a “valid” letter of recommendation allowing the use of medical marijuana.
10

11
12 Recently, the Arizona Supreme Court decided two conflicting cases about
13 using the odor of marijuana to establish probable cause for a search in light of the
14 recent passage of AMMA. *State v. Cheatham*, 240 Ariz. 1, 375 P.3d 66 (Ariz.
15 2016); *State v. Sisco*, 239 Ariz. 532, 373 P.3d 549 (Ariz. 2016). In *Sisco*, the Court
16 stated:
17

18
19 Given Arizona's general prohibition against marijuana possession and
20 use, it is reasonable for officers to conclude that criminal activity is
21 occurring when they see or smell marijuana, thereby satisfying
22 probable cause. In this respect, registered qualifying patients are not
23 denied Fourth Amendment rights or privileges based on their medical
24 marijuana use; they are simply treated like the broader public.
25 Moreover, as we have explained, probable cause can be dispelled by
indicia of AMMA-compliant marijuana possession and use. Under the
standard we adopt, registered qualifying patients are not denied Fourth
Amendment rights or privileges, nor are they “subject to arrest,
prosecution or penalty in any manner,” for their medical use of
marijuana. § 36–2811(B)(1).

1 We reject the “odor (or sight) plus” standard adopted by the court of
2 appeals and urged by Sisco. Instead, **the general proscription of**
3 **marijuana in Arizona and AMMA's limited exceptions thereto**
4 **support finding probable cause based on the smell or sight of**
5 **marijuana alone unless, under the totality of the circumstances,**
6 **other facts would suggest to a reasonable person that the**
7 **marijuana use or possession complies with AMMA.** This “odor (or
8 sight) unless” standard comports with the Fourth Amendment
9 standard prescribed in *Gates* and gives effect to AMMA's exceptions
10 by precluding officers or magistrates from ignoring indicia of
11 AMMA-compliant marijuana use or possession when assessing
12 probable cause.

13 *Id.* at 555. (Emphasis added).

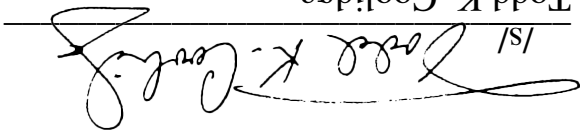
14 As Appellee was in possession of a “facially valid” recommendation letter
15 from his doctor in California, probable cause was no longer present for the search
16 based on the odor of marijuana. The officer thought the letter was valid and did
17 not arrest Appellee for Possession of Marijuana, only Possession of Narcotic Drug
18 and Possession of Drug Paraphernalia. The officer should have stopped searching
19 and obtained a warrant, or Appellee’s consent, to conduct the search. Based on the
20 lack of probable cause, the suppression of all substances seized by the officer is the
21 proper remedy.
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CONCLUSION

THEREFORE, for the reasons given above, Appellee hereby requests that this Court affirm the trial court's dismissal of the charges, or in the alternative, suppress all evidence found as there was no probable cause to conduct the search in this matter.

RESPECTFULLY SUBMITTED THIS 13th day of November, 2017.


/s/ Todd K. Coolidge
Todd K. Coolidge
Attorney for Defendant