

Supreme Court No. _____
Court of Appeals No. 22504-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY D. ACKERSON,

Appellant.

**MEMORANDUM OF AMICUS
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
IN SUPPORT OF APPELLANT'S MOTION FOR DIRECT
REVIEW**

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I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, non-partisan, non-profit organization with over 20,000 members dedicated to the preservation and defense of civil liberties. The ACLU endorsed Washington's Medical Use of Marijuana Act ("the Act"), which was approved as ballot measure I-692 by 60% of the state's voters in 1998.¹

The ACLU is requesting consideration of this amicus memorandum in the instant case, but is aware that several cases raise the same issues (including State v. Ginn, Court of Appeals Case No. 31386-3-II, in which a direct review motion was recently denied by the Commissioner). The ACLU is fully familiar with the record and the parties' briefs in these cases, as well as the parties' motions for direct review in both cases. The ACLU also has special expertise in the broad policy issues that affect the hundreds of seriously ill individuals throughout the state who treat debilitating and terminal illnesses with medical marijuana. We provide the public with information regarding the Act, in our electronic brochure entitled "The Washington Medical Use of Marijuana Act: A Guide for Patients, Caregivers, Physicians, Law Enforcement, and the Public" and regularly consult with patients, caregivers, government officials and defense attorneys concerning medical marijuana issues.

¹ The Act is codified at RCW 69.51A.

The trial courts in these cases have violated well-established law regarding the admissibility of expert testimony, and in doing so they have wholly undermined the statutory protections enacted into law by the Act. For this reason, these appeals present important questions of first impression and fundamental issues of individual rights under the Washington and federal constitutions. Therefore, the ACLU urges the Court to accept direct review.

II. STATEMENT OF THE CASE

Amicus adopts the appellant's statement of the case and also urges the Court to consider the facts set forth in Ackerson's Motion for Discretionary Review, filed in the Court of Appeals. Those facts include: a) the physician whose testimony was excluded is licensed in Washington; b) she had 17 years of experience as a physician; c) she had been treating Ackerson for 9 years and diagnosed him with a condition for which medical marijuana use is authorized (intractable pain); d) she had experience authorizing the use of medical marijuana by her patients; and e) she was familiar with medical literature regarding what constitutes a 60-day supply of medical marijuana. The trial court acknowledged that the treating physician was an expert but excluded all testimony regarding Ackerson's medical authorization for using marijuana solely on the basis that the physician's testimony "lacked foundation" regarding the amount of a 60-day supply.

III. REASONS WHY DIRECT REVIEW SHOULD BE GRANTED

These proceedings raise fundamental and urgent issues of broad public importance that should be heard by this Court pursuant to RAP 4.2(a) (4) for the following reasons:

- A. The lower court misinterpreted the Act and wrongly excluded admissible expert and fact testimony offered by the defendant-patients.
- B. The lower courts failed to interpret the Act as remedial legislation in the manner required by this Court's prior rulings, and instead restricted the Act's intended effect by barring defendant-patients from presenting evidence of their protected status at trial.
- C. The lower court's ruling barring the defendant-patient from presenting any evidence of protected status at trial deprived the defendant-patient of his constitutional right to due process and trial by jury.

The urgency of this appeal arises from the legal uncertainties affecting patients who use marijuana as medication. They and their caregivers rely on the language of the Act to determine the rules they must follow in order to obtain legal protection for their use of medicinal marijuana. However, when the trial courts engraft requirements on the Act that are not present in its plain language, patients face a constant threat of arrest, prosecution and interruption of their legally authorized treatment due to the lack of clear guidance concerning implementation of the Act. The impact of these disruptions is increased hardship among individuals suffering from debilitating medical conditions and, for those facing terminal illnesses, greater suffering and the possibility of hastened death.

A. The lower court misinterpreted the Act and wrongly excluded admissible expert and fact testimony offered by the defendant-patients.

The Act vests discretion to authorize medical marijuana treatment solely in physicians treating patients who they have diagnosed as suffering from qualifying illnesses. RCW 69.51A.005, RCW 69.51A.010(3)(b). To prove authorized use, patients who are over 18 years of age must:

- (a) Meet all criteria for status as a qualifying patient [set out at RCW 69.51A.010(3)];
- (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
- (c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.

RCW 69.51A.040(2). The trial judges in *Ackerson* and *Ginn* barred patients from presenting proof at trial of their protected status under the Act by imposing evidentiary burdens that have no basis in applicable law and conflict with the statute's remedial purpose.

The lower court in *Ackerson* erred by excluding all factual testimony, lay opinion testimony, and expert testimony offered by the defense regarding the patient-defendant's personal 60-day supply of medical marijuana under RCW 69.51A.040(2)(b). The trial judge both misread the Court Appeals' ruling in *State v. Shepherd*, 110 Wn. App. 544, 552, 41 P.3d 1235 (2002), which she

understood to require expert testimony, and diverged from well established case law addressing the admissibility of expert medical testimony under ER 702.

Nothing in *Shepherd* or the Act limits patients to presenting only expert testimony to prove their personal 60-day medical needs, nor can a careful reading of *Shepherd* lead to that conclusion. Ackerson's offer to testify alone was sufficient proof to make a prima facie showing of his 60-day supply under the Act. But Ackerson did not rest on his testimony alone to support submitting the medical authorization theory to the jury. Ackerson's treating physicians also were able to provide admissible testimony regarding the defendant-patient's medicinal usage based on information gathered during their treatment of the defendant-patient. *See* ER 803(a) (medical diagnosis and treatment exception to the hearsay rule). Either person's testimony provided prima facie evidence of Ackerson's medical marijuana use over a 60-day period sufficient to present evidence of his authorization at trial.

Likewise, there was no rational basis for the trial judge to find Ackerson's treating physician – a licensed medical doctor authorized by the Act to advise patients on the medical use of marijuana and familiar with the relevant medical literature – was not qualified as an expert witness on this medical issue. *See Walker v. Bangs*, 92 Wn. 2d. 854, 858-59, 601 P.2d 1279 (1979); *Keegan v. Grant County PUD*, 34 Wn.App. 274, 283, 661 P.2d 146 (1983); RCW 69.51A.010(3)(d) and (e). In both *Walker* and *Keegan*, the appellate courts

reversed the trial courts' exclusion of expert testimony because the "basic requisite qualifications" of ER 702 were established. *Keegan*, 34 Wn.App. at 283. It violated ER 702 for the trial courts to impose additional "foundational" requirements such as being licensed in this state before allowing the jury to hear the expert testimony. The trial courts' reasons for excluding the testimony were not "fairly debatable" when the witnesses' experience was sufficient to meet the requirements of the evidentiary rule. *Accord, Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 64, 955 P.2d 621 (2000) (rejecting plaintiffs' claims that only nurses can testify to standard of care for nurses).

As a licensed medical doctor, Ackerson's treating physician possessed the "knowledge, skill, experience, training, or education" under ER 702 to provide expert testimony on the relevant medical issue here. *State v. Rangitsch*, 40 Wn. App. 771, 778-79, 700 P.2d. 382 (1985). Moreover, the record shows that the physician had specialized knowledge and experience regarding medical marijuana. See, *Seybold v. Neu*, 105 Wn.App. 666, 680, 19 P.3d 1068 (2001) ("So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, he or she will ordinarily be considered qualified to express an opinion with respect to such procedure or problem,") Any doubts that the trial judge might have had regarding the physician's certitude or literature that she had referred to affected the weight rather than the admissibility of her testimony. *In re Young*, 24

Wn.App. 392, 397, 600 P.2d 1312 (1979) (rejecting claim that expert's testimony was "speculative"); *Keegan, supra*, 34 Wn.App. at 283-84.

Both the physician's and Ackerson's testimony was admissible under the established test for opinion testimony. *State v. Ortiz*, 119 Wn.2d 294, 308-11, 831 P.2d 1060 (1992). In *Ortiz*, this Court recognized that a tracking expert's experience qualified him to testify as a lay witness about inferences from the facts, and as an expert about his opinions reached based on "practical experience and acquired knowledge." The same conclusion is inescapable in Ackerson's case. Two questions must be answered in determining a patient's 60-day supply amount: (1) how much medical marijuana does the patient use for his personal, medical use over a relevant period, and (2) how much marijuana did the patient possess that was in the form necessary for his personal, medical use. *See* RCW 69.51A.040(3)(b). Both questions could be answered either by fact testimony requiring no "scientific, technical, or other specialized knowledge" or by the expert testimony of a medical professional familiar with the patient's treatment practices.

B. The lower court failed to interpret the Act as remedial legislation in the manner required by this Court's prior rulings, and instead restricted the Act's intended effect by barring defendant-patients from presenting evidence of their protected status at trial.

The Act is remedial legislation. "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 Wash. 488, 493, 68 P. 946 (1902) (citation omitted); *See also, Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401,407, 924 P.2d 13, 16 (1996).

Yet, the lower courts have required rigidly formalistic documentation requirements, irrelevant proof, and set evidentiary barriers that are nowhere in the Act or other applicable law. The purpose of the Act, rather than advanced by the courts, has been frustrated by restrictive misinterpretation of its provisions. This has led predictably to serious confusion among and between patients, caregivers and law enforcement agencies charged with implementing the Act.

C. The lower court's ruling barring the defendant-patient from presenting any evidence of protected status at trial deprived the defendant-patient of his constitutional right to due process and trial by jury.

The right of a defendant to have exculpatory evidence heard by a jury is guaranteed by Article I, §§ 21 and 22 of the Washington Constitution and the 6th Amendment of the federal constitution.

The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise this provision of our Constitution, found also in varying language in all the Constitutions of the Union, state and federal, treasured by a free people for generations as one of the principal safeguards of their liberties, would be rendered void and utterly fail in the purpose which our people have always believed it was intended to accomplish.

State v. Strasburg, 60 Wash. 106, 118, 110 P. 1020 (1910).

The Court has also interpreted Article I, § 3 of the Washington Constitution and the 14th Amendment to the federal constitution to require that criminal defendants be permitted to present evidence of their innocence to a jury as a matter of due process.

... [T]his right of trial by jury which our Constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury ... there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our Constitution.

Id. at 116, 117.

“It is the jury, not the court, which is the fact-finding body.” *Sehlin v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 38 Wn. App. 125, 134-35, 686 P.2d 492 (1984). Ackerson offered relevant proof that was admissible on any number of theories. Yet, the trial judge improperly excluded testimony based on the weight, credibility and sufficiency of the defendant-patients’ evidence, rather than its admissibility. This denied Ackerson, and the defendant/patients in similar cases, of their legally authorized evidence refuting the State’s charges and deprived the jury of its constitutionally mandated role.

IV. CONCLUSION

The lower courts’ misinterpretations of the Act are ongoing and have created substantial uncertainty for patients and caregivers and confusion among officials charged with implementing the medical marijuana law. The courts’

departure from the intent and plain meaning of the Act calls into question whether *any* authorized patient or caregiver is protected, even when they follow the requirements of the Act to the letter. The *Ackerson* trial judge was quite correct when she stated that medical marijuana patients have been placed in an untenable situation.² We ask that the Court accept the patient-defendants' motions for direct review and correct the lower courts' inappropriately restrictive interpretation of the Act.

Respectfully submitted this _____th day of November, 2004.

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² “This is really a Hobson's choice [sic] for those who are relying on the medical marijuana initiative, such as I think both the defendants in this case have done, probably in good faith.”

