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A. Identity of Petitioner

Gary Don Ackerson asks this Court to accept review of the decision designated in Part B of this motion.

B. Decision

Ackerson asks this Court to review the Superior Court Judge's determination that he could not present a medical marijuana defense, pursuant to RCW 69.51A, because his doctor did not have the proper "expertise" under ER 702 to testify as "an expert in medical marijuana." In particular she found that the doctor could not present a "qualified medical opinion as to the quantity necessary to represent a 60-day supply of medical marijuana."

C. Issue Presented for Review

Is a medical doctor, licensed for 17 years and practicing in this state for 15 years, who has experience providing patients with documentation for medical authorization to possess marijuana, who has cared for a patient for 9 years, who has diagnosed the patient from conditions that can be treated by the use of marijuana to alleviate intractable pain and who has reviewed other protocols regarding the number of marijuana plants necessary to provide a patient with a "60 day supply" of marijuana, qualified to testify regarding the proper use of and dosage for the

defendant's condition and the proper number of plants necessary for a "60 day supply."

D. Statement of the Case

On February 18, 2000, Gary Ackerson was charged with manufacturing marijuana in violation of RCW 69.50.401(a)(1)(iii). He interposed an affirmative defense under the Medical Marijuana Act, RCW 69.51A. Prior to trial, the State moved in limine to preclude Ackerson's treating physician from testifying "concerning the amount of marijuana, and the number of plants, and the ideal sizes of marijuana plants to treat the defendant's illness, or debilitating condition." See Exhibit 1.

Defendant responded by submitting the attached affidavit of Dr. Leslie E. Waters, Ackerson's treating physician. Exhibit 2. Based upon that affidavit, the trial judge cited ER 702 and found that Dr. Waters did not "qualify as an expert in medical marijuana" and did not "show the basis for reaching her conclusions." Exhibit 3. Thus, the doctor's testimony regarding the proper "60 day" supply for Ackerson would be excluded. She also found that, without that evidence, Ackerson could not, as a matter of law, establish his affirmative defense under 69.51A.

E. Argument Why Review Should be Accepted

1. *This Court Should Accept Review Because the Superior Court has Committed a Probable Error that Substantially Limits Ackerson's Ability to Act. RAP 2.3(b)(2).*

The trial court's ruling has completely denied Ackerson's ability to present a valid, statutory defense to the charge. In 1998, the people of the State of Washington, by initiative, approved of the medical use of marijuana and provided that "qualifying patients" who "in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime for their possession and limited use of marijuana." RCW 69.51A.005. The Act goes on to define a qualifying patient as a person who:

- (a) Is a patient of a physician licensed under chapter 18.57 RCW;
- (b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
- (c) Is a resident of the state of Washington at the time of such diagnosis;
- (d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
- (e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3). If charged with "a violation of state law relating to marijuana" a qualifying patient "shall not be penalized if he or she is 18 years of age or older and:

- (a) Meet all criteria for status as a qualifying patient;
- (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 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). "Valid documentation" means:

- (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 identi-card, as defined in RCW 46.20.035.

RCW 69.51A.010(5).

The only dispute in this case is whether or not Dr. Waters' testimony would be admissible under the statute. The trial court committed probable error excluding Dr. Waters' testimony for several reasons.

First, nothing in RCW 69.51A requires that the qualifying patient produce the testimony of an "expert in medical marijuana." The act states only that the qualifying patients present evidence from "their physicians," that they "would benefit from the medical use of marijuana." RCW 69.51A.005. Moreover, every licensed physician in Washington is shielded from prosecution for advising patients about the use of marijuana or providing them with documentation. RCW 69.51A.030.

Dr. Waters is a licensed physician in the State of Washington. Thus, under the act she is presumptively competent to proscribe the medical use of marijuana and determine her patients' proper 60-day supply.

Moreover, nothing in ER 702 prohibits her testimony on the medical use of marijuana. That rule states that expert opinion is admissible when the witness is "qualified as an expert by knowledge, skill,

experience, training, or education” and if “scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue.”

And ER 703 provides that:

The facts or data in the particular case upon which an expert bases an opinion or influences may be those perceived by or made known to the expert at or before the hearing.

The opinion of a physician would not only be “helpful” to the jury in this case – it is *required* by the statute.

But the trial judge erred when she found that, under ER 702, the physician must be “an expert on medical marijuana” and that Dr. Waters did not have “expertise.” The Washington Appellate Courts have concluded:

A fortiori, in various fields of medicine, a physician is not incompetent to testify as an expert merely because he is not a specialist in the particular field of which he speaks.

State v. Rangitsch, 40 Wn. App. 771, 779, 700 P.2d 382 (1985).

Rangitsch is controlling here. In that case the Court found that, although the physician witness was not a “pharmacologist,”¹ he was competent to discuss the effects of cocaine on human behavior. The Court cited his medical training, a 10-month course in pharmacology, a clinical course, his experience, his professional reading, and his preparation for trial. *Id.* at 779. *See also Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d 1068 (2001) (in a medical malpractice action against an orthopedic

surgeon, it was error to exclude opinion of plastic surgeon); *Kelly v. Carroll*, 36 Wn.2d 482, 491, 219 P.2d 79 (1950) (“[D]octors with unlimited licenses are competent to give expert testimony in the entire medical field.”); *Quinton v. Farmland Industries Inc.*, 928 F.2d 335, 336 (10th Cir. 1991) (The assumption of insufficiency of general medical study to qualify physicians an expert “reflects the implausible view that such training qualifies a doctor to diagnose and treat a wide range of physical disorders in the real world but not to render expert opinions about particular examples in the courtroom, has been expressly rejected in the case of physicians.”)

In this case Dr. Waters had been treating Mr. Ackerson for 9 years. She had experience prescribing the use of medical marijuana. She had a medical degree and 17 years of practical experience. Most importantly, she had reviewed the most commonly cited protocols for proper 60-day “dosage” or supply of marijuana – the “Oakland protocols.” Exhibit 4. This is precisely the type of expertise/experience/education found sufficient in *Rangitsch* to establish a proper ER 702 foundation. *See also Tegland*, 5B Washington Practice § 702.9 at page 43 (1999) (“Ordinarily a physician who has the degree of M.D. will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist.”)

¹ The doctor, in fact, specialized in forensic pathology. *Id.* at 779.

In reality, the trial judge simply substituted her opinion for that of the physicians in this case. *In Re Japanese Electronic Products Anti-trust Litigation*, 723 F.2d 238, 276 (3rd Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986) (Courts must remain mindful that “the proper inquiry is not what the courts deem reliable, but what experts in the relevant discipline deem it to be.”) Moreover, the State provided no countervailing pretrial testimony to suggest Dr. Waters’ medical expertise was insufficient or her opinions regarding dosage were wrong.

The trial court also confused the question of whether Dr. Waters was “qualified” with the question of whether her testimony would be persuasive. At trial, the issue of Dr. Waters’ experience, methodology and application of the methodology would remain appropriate subjects for cross-examination. *See Rangitsch* at 780 (Doubts regarding the doctor’s “training and qualifications will affect the weight rather than the admissibility of his testimony.”) The prosecutor could argue to the jury that Dr. Waters’ dosage is too speculative or incomplete to prove that Ackerson’s supply of plants exceeded what he needed for a 60-day supply. But the fact that Dr. Waters’ opinions might be subject to dispute or that there might be other opinions about what constitutes a “60 day supply” does not make her testimony inadmissible.

2. *This Court Should Accept Review Because the Improper Charging of Valid Medical Marijuana Patients and Challenges to their Legal Possession and Use of Marijuana are Prevalent in the Superior*

Courts and There are Few Published Opinions to Guide the Superior Court Judges.

Although not strictly a criteria under RAP 2.3, this Court should accept review because this is a recurring issue of substantial public importance.

The voters of the State of Washington have made it clear – medical marijuana users should not be penalized in any way when they have a qualifying medical condition and proper documentation by a physician. Nonetheless, law enforcement hostility to the medical use of marijuana is prevalent and continues to produce numerous, questionable prosecutions in many Washington counties. See attached Declaration of Douglas Hiatt, attorney at law.

One need only substitute the drug prescribed in this case, marijuana, with the possession of some other drug, such as codeine, to reveal the impropriety of the prosecution's approach in these cases. The prosecution does not dispute that Mr. Ackerson suffers from intractable pain. Had the police discovered him with a bottle of codeine tablets prescribed by Dr. Waters, he would not have been arrested or charged. Had he been charged with possession of a controlled substance, he would have produced Dr. Waters' prescription. Surely, in that case, the prosecutor would never have argued that Dr. Waters was not qualified to prescribe codeine. Moreover, the prosecutor would never have argued that Dr. Waters (even though not a pharmacologist) could not assess the proper

dosage from other materials, such as the manufacturer's package insert or the Physician's Desk Reference. But, simply because this case involves marijuana, different rules were applied. This Court should accept review and affirm that the same rules should apply in medical marijuana cases.

F. CONCLUSION

This Court should grant review.

Respectfully submitted this _____ day of January, 2004.

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