Appendix

Appendix

State's Exhibit 1

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FILED PINAL COUNTY
SUPERIOR COURT
CHAD A. ROCHE

DEC 27 2012

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PINAL

JASON OSIFE, Petitioner, vs. THE HONORABLE AGNES FELTON, Judge Pro Tempore for the Justice of the Peace, Precinct No. 7 of Pinal County, Arizona Respondent. And STATE OF ARIZONA, Real Party in Interest.	**Case No. CV2012-03241** **STATE'S REPONSE TO JASON OSIFE'S SPECIAL ACTION COMPLAINT** RE: Apache Junction Justice Court Case Number TR 2012-01496

The State of Arizona, by and through the Pinal County Attorney, **JAMES P. WALSH**, and his undersigned Deputy County Attorney, requests that this Court deny and dismiss Jason Osife's Special Action Complaint. This Response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION

The State agrees that this Court has jurisdiction over this special action.

II. STANDARD OF REVIEW

The standard of review is abuse of discretion. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 180 P.3d 986 (App. 2008), *Baroldy v. Ortho Pharm. Corp.*, 157 Ariz. 574, 760 P.2d. 574 (App. 1988).

III. ISSUE PRESENTED

Whether Judge Agnes Felton abused her discretion by granting the State's Motion in Limine.

IV. FACTS

According to PCSO DR#111227008, on December 27, 2011, at about 2:01 A.M. Deputy C. Todd of the Pinal County Sheriff's Office observed a white Chevrolet Tahoe SUV traveling at a high rate of speed north bound on Gary Road near Skyline Drive. Using his radar unit, Deputy Todd clocked the Tahoe at 64 mph in a 45 mph zone. Deputy Todd pulled the Tahoe over for speeding at Gary Road and Brahman Road.

As he approached the Tahoe, Deputy Todd observed the driver roll down all four windows of the car. As the deputy asked the driver for his license, registration and insurance, he smelled a strong odor of burnt marijuana coming from the car. Deputy Todd identified the driver as Jason Osife. Deputy Todd observed that Mr. Osife's eyes were blood shot and watery. Deputy Todd asked Mr. Osife when the last time he had smoked marijuana was and Mr. Osife stated at 10:00 P.M. the previous day – just 4 hours before the stop. Mr. Osife then stated he had an Arizona Medical Marijuana Card. Mr. Osife later provided the deputy with his medical marijuana card.

Deputy Todd then conducted field sobriety tests including the horizontal gaze nystagmus (HGN) test. Deputy Todd saw multiple cues of impairment including 4 on the HGN test. Deputy Todd then placed Mr. Osife under arrest for DUI and Deputy G. T. Copeland transported him to the PCSO

substation. After arriving at the PCSO substation, Mr. Osife consented to a blood draw. Deputy Copeland drew Mr. Osife's blood that was later tested by DPS Criminalist Giang Pham. The analysis of Mr. Osife's blood indicated the presence of THC, a metabolite of marijuana.

On October 16, 2012, the State filed a motion in limine to preclude any evidence pertaining to the defendant's medical marijuana card and any statements relating to marijuana as a medicine. The defense filed a response on November 6, 2012. Oral arguments were held on November 14, 2012. Judge Felton granted the State's motion in limine precluding any testimony or evidence regarding the defendant's medical marijuana card or use of marijuana for medical reasons.

A jury trial was set for November 27, 2012. The defense requested a stay of the trial so a special action could be pursued. A stay was granted.

V. ARGUMENT

The defendant is charged with DUI – Drugs pursuant to A.R.S. 28-1381 (A)(3). The statute states that it is unlawful for a person to drive a motor vehicle in the state while there is any drug defined in A.R.S. 13-3401 or its metabolite in the person's body. Marijuana is listed in 13-3401(4). Pursuant to A.R.S. 28-1381(A)(3), the State is not required to prove any impairment; just that a prohibited drug or its metabolite was in the defendant's system while driving.

In this case, the defendant's apparent affirmative defense is that Arizona's medical marijuana provisions allow him to drive with marijuana or its metabolite in his system . The medical marijuana provisions are found in A.R.S. §§ 36-2801 thru 36-2819. Arizona's DUI statutes are not mentioned in any of these provisions. This is significant because it is presumed that if the medical marijuana act meant to address or make an exception to any of our DUI statutes, the legislature would have done so through a statute enactment. It did not do so. Where statutes include a phrase in one section and exclude it in others, courts will not read it into the excluded sections. Samaritan Health Services v. AHCCS, 178 Ariz. 534, 875 P.2d 193 (App. 1994). When

interpreting enactments, courts are not to supply meaning that is not found in the specific provision. Kiley v. Jennings, Strouss and Salmon, 187 Ariz. 136, 927 P.2d 796 (App. 1996). Absent constitutional infirmities, courts "are required to apply statutes as written." City of Flagstaff v. Mangum, 164 Ariz. 395, 401, 793 P.2d 548, 554 (1991). The judiciary should not add to a provision that which the enacting body deemed unnecessary. Werner v. Prins, 168 Ariz. 271, 812 P.2d 1089 (App. 1990).

With respect to A.R.S. § 28-1381(A)(3) DUI drug per se charge, it is not a defense that the Defendant may have had a medical marijuana written certificate or a medical marijuana card. The Defendant cannot have a valid "prescription" for marijuana as this is a controlled substance and Schedule I classified drug. A.R.S. §28-1381(A)(3) prohibits driving or being in actual physical control of a vehicle while there is any drug defined in A.R.S. § 13-3401 or its metabolite in the person's body. Marijuana is defined in our drug schedule under all of its names, i.e marijuana, cannabis and THC.

The defendant cannot argue that his written certification for medical marijuana is an affirmative defense to a §28-1381(A)(3) charge under A.R.S. § 28-1381(D). Under this statute, it is the Defendant's burden to raise an affirmative defense and prove it. The Defendant must meet all of the statutory requirements, and a written certification for medical marijuana meets none of them. The prescription drug defense found in A.R.S. § 28-1381(D) states: "A person using a drug, **as prescribed** by a medical practitioner . . . is not guilty of violating subsection A, paragraph 3 of this section." (Emphasis added.). This statute requires the Defendant to prove he has a valid prescription and that the person has taken the drug "as prescribed." Marijuana is a Schedule I drug. As such, it cannot be "prescribed" by a licensed medical practitioner. Neither the word "prescribed" nor "prescription" appear in the medical marijuana statutes. Instead the patient gets

the marijuana via a "written certification." *See*, A.R.S. §§ 36-2801(18) and 36-2804.02(A)(1). "Written Certification" as defined in A.R.S. §36-2801(18) 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 medical condition or symptoms associated with the debilitating medical condition... the physician must: (a) specify the qualifying patient's debilitating medical condition in the written certification; (b) sign and date the written certification only in the course of a physician-patient relationship after the physician has completed a full assessment of the qualifying patient's medical history."

Similarly, the Title 36 medical marijuana provisions do not contain any provisions stating that, for purposes of A.R.S. § 28-1381(D), a written certification as defined in A.R.S. § 36-2801(18) is a prescription or equivalent to a prescription. Again, it is presumed that if these provisions were making such an exception, the legislature would have said so. (i.e. added legal authority).

As stated above, A.R.S. § 28-1381(D) is an affirmative defense to driving with an illegal drug or its metabolite in one's system, and it is the Defendant's burden to raise it and prove it. Even if the "written certificate" however has dosage amounts, brand of marijuana, specific times etc. it is not a prescription. It cannot be. Marijuana is a Schedule I drug. Simply put, there is no defense under 28-1381(D), and this evidence and testimony should be precluded.

Further, the defendant cannot argue under the original marijuana initiative pursuant of section A.R.S.§ 36-2812 as an affirmative defense as this is no longer good law. As set forth in section 5, "Conditional Repeal" of the medical marijuana initiative, the affirmative defense found in A.R.S. § 36-2812 was repealed effective the date DHS started issuing the medical marijuana

certificates. This occurred back in 2011, so the affirmative defense no longer applies. In fact, the statute is no longer listed in the revised statutes. Due to its repeal and the timing of the repeal, it cannot apply to any case where the defense has an Arizona medical marijuana certificate. Any attempt by either the Defendant or his counsel to argue or make statements about his medical marijuana card are not relevant and would only mislead, confuse the jury and be a waste of time in direct violation of Rules 402 and 403 of the Arizona Rules of Evidence. For the forgoing reasons, the State asks that a Motion in Limine be granted to ensure a fair trial.

Further, evidence of the defendant's medical marijuana card and any statements relating to marijuana as medicine or illness or injury necessitating the use of marijuana is inadmissible. In this case, the defendant presented Deputy Todd with an Arizona medical marijuana card.

Additionally, statements relating to marijuana as medicine or illness or injury necessitating the use of marijuana not relevant to this case. Rule 401 of the Rules of Evidence states, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." In this case, evidence of a marijuana card or the health reasons for a medical marijuana card are not relevant to any element of any of the three charges with which the defendant is charged.

This Court must review the trial court's motion in limine ruling based on an abuse of discretion standard. A trial court has broad discretion to grant motions in limine. *Warner* at 181. "A trial court has broad discretion in the admission of evidence, and we will not disturb its decision absent an abuse of that discretion and resulting prejudice." *Baroldy* at 588. "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. N. Am. Van Lines*, 135 Ariz. 35, 40, 658 P.2d 835 (App. 1092).

Judge Felton ruled correctly and granted the State's Motion in Limine. Judge Felton did not abuse her discretion. This Court must not disturb trial court's ruling and must affirm the ruling and remand the case back to the trial court.

VI. CONCLUSION

Based on the above and the entire court record, the State requests that the defendant's special action be dismissed and denied.

RESPECTFULLY SUBMITTED this 27th day of December 2012.

JAMES P. WALSH
PINAL COUNTY ATTORNEY

By: _____ for
Michael C. Larsen
Deputy County Attorney

ORIGINAL of the foregoing was
Filed with the clerk of the
Pinal County Superior Court this
27th day of December 2012,

And delivered to:

David Wilkison
Pinal County Public Defender's Office
Attorney for Jason Osife

BY: _____
Kaye Braunbeck

Appendix

State's Exhibit 2

FILED
CHAD A. ROCHE
CLERK - SUPERIOR COURT
DATE: 4/22/13
TIME: 11:30am
BY: KS

IN THE SUPERIOR COURT

3:35 p.m. Hearing starts
4:25 p.m. Hearing ends

PINAL COUNTY, STATE OF ARIZONA

Date: 04/15/2013

THE HON GILBERTO V FIGUEROA,
Courtroom: 2C
Court Reporter: MICHELLE WELLNER

CHAD A ROCHE, CLERK
By Deputy Clerk: REGINA SIQUIEROS

JASON OSIFE, Petitioner,	**S1100CV201203241**
vs.	
THE HONORABLE AGNES FELTON, Judge Pro Tempore for the Justice of the Peace, Precinct No. 7 of Pinal County, Arizona, Respondent.	**MINUTE ENTRY ACTION:** **ORAL ARGUMENT**
And	
STATE OF ARIZONA, Real Party in Interest.	

PRESENT: Plaintiff appearing in person and by counsel, David Wilkison, Deputy Public Defender.

Respondent appearing by counsel, Michael Larsen, Deputy County Attorney.

The Court notes this matter is an Appeal from the Apache Junction Justice Court and this matter was previously brought before this Court whereby the Court provided counsel with new case law to be reviewed prior to this Court proceeding with the hearing; the Court presents statements regarding additional information received from the Court of Appeals, Division II, in regards to the matter at hand.

Counsel for Plaintiff advises the Court the information provided by the Court has been reviewed and the Plaintiff requests to proceed with argument this date.

Oral argument presented.

The Court has considered the arguments of respective counsel and while the Court FINDS counsel for Plaintiff have a lot of merit in terms of the positions taken with respect to the medical marijuana card and the distinction between a prescription and a certificate, counsel for Respondent is focused on the issue of whether or not Judge Felton abused her discretion in issuing the ruling that she did; the Court CANNOT in good faith find that Judge Felton abused her discretion; the Court FURTHER FINDS that the decision made by Judge Felton to suppress any mention of the medical marijuana card, the use of the marijuana card and/or the argument that the metabolite had no effect on the ability to drive were proper rulings and within the range of her discretion; therefore,

IT IS HEREBY ORDERED the ruling made by the Honorable Agnes Felton as to the Motion In Limine is upheld and the materials will be precluded from the Jury Trial.

Signed and filed this 22nd day of April, 2013.

JUDGE OF THE SUPERIOR COURT

Mailed/distributed copy: 4/22/13

Office Distribution:
JUDGE/FIGUEROA
PCPD/D WILKISON
COUNTY ATTORNEY/M LARSEN