

TABLE OF CONTENTS

Table of Authorities ii
Statement of the Issue Presented for Review 1
Statement of the Case 3
Routing Statement 10
Argument 10
Conclusion 26
Conditional Notice of Oral Argument 26
Cost Certificate 26

TABLE OF AUTHORITIES

FEDERAL CASES

Emry v. United States, 829 A.2d 970 (D.C. 2003) 21,25
United States v. Oakland Cannabis Buyers' Cooperative,
532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722
(2001) 13,14,15

STATE CASES

State v. Bachman, 61 Haw. 71, 595 P.2d 287 (1979) 19,25
State v. Beeson, 569 N.W.2d 107 (Iowa 1997) 11
State v. Ducheneaux, 2003 S.D. 131, 671 N.W.2d 841
(2003) 20,25
People v. Galambos, 104 Cal.App.4th 1147, 128 Cal.Rptr.2d
844 (2002) 16,25
Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982) 16
State v. Hanson, 468 N.W.2d 77 (Minn. Ct. App. 1991) . 16,25
State v. Harrison, 473 N.W.2d 242 (Iowa Ct. App. 1991) 11,18
State v. Hastings, 118 Idaho 856, 801 P.2d 563 (1999) ... 25

Commonwealth v. Hutchins, 410 Mass. 726, 575 N.E.2d 741
(1991) 19,24,25

Jenks v. State, 528 So.2d 676 (Fla. Dist. Ct. App. 1991) 25

Kauffman v. State, 620 So.2d 90 (Ala. Crim. App. 1993) 16,24

Murphy v. Commonwealth, 31 Va.App. 70, 521 S.E.2d 301
(1999) 16,25,26

State v. Ownbey, 996 P.2d 510 (Or. Ct. App. 2000) 25

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678
(2000) 15,25,26

State v. Reese, 272 N.W.2d 863 (Iowa 1978) 11

Spillers v. State, 145 Ga. App. 809, 245 S.E.2d 54
(1978) 15,25

Stefanoff v. State, 78 S.W.3d 496 (Tex. Ct. App.
2002) 19,20,25

State v. Tate, 102 N.J. 64, 505 A.2d 941 (1986) 16,17,24,25

People v. Trippet, 56 Cal.App.4th 1532, 66 Cal.Rptr.2d
559 (1997) 19,25

State v. Walton, 311 N.W.2d 113 (Iowa 1981) 11,17,18

State v. Ward, 170 Iowa 185, 152 N.W. 501 (1915) 11

State v. Williams, 93 Wash. App. 340, 968 P.2d 26
(1998) 15,20,21,25,26

STATE STATUTES

Iowa Code § 124.101(3) (1999) 14

Iowa Code § 124.201 (1999) 14

Iowa Code § 124.203 (1999) 12,14

Iowa Code § 124.204 (4) (m) (1999) 12,14

Iowa Code § 704.10 (2003) 11

OTHER AUTHORITIES

Abbie Crites-Leoni, Medicinal Use of Marijuana,
19 J.Legal Med. 273 (1998) 21,23

Asa Hutchison, Director, Drug Enforcement Administration,
Speech at Baylor University, Waco, Texas,
9/16/02, (visited June 18, 2004)
<http://www.usdoj.gov/dea/speeches/s091602.html> 22

Marcia Tierskey, Medical Marijuana: Putting the Power Where
it Belongs, 93 NWULR 547 (1999) 23

National Institute on Drug Abuse, Research Report:
Marijuana Abuse (2002) (visited June 4, 2004)
<http://www.drugfreeamerica.org/acrobat/RRMarijuana.pdf>. 22

National Institute of Medicine, Marijuana and Medicine:
Assessing the Science Base (1999) (visited June 4, 2004)
<http://www.bookshap.edu/html/marimed> 22

STATEMENT OF THE ISSUE
PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT CORRECTLY BARRED EVIDENCE OF DEFENDANT'S DEFENSE OF MEDICAL NECESSITY FOR GROWING AND INGESTING MARIJUANA BECAUSE SUCH A DEFENSE IS INCONSISTENT WITH IOWA DRUG STATUTES, AND WHETHER HE HAS MET THE REQUIREMENTS OF THE COMMON-LAW DEFENSE OF NECESSITY?

Authorities

State v. Walton, 311 N.W.2d 113 (Iowa 1981)

State v. Beeson, 569 N.W.2d 107 (Iowa 1997)

State v. Reese, 272 N.W.2d 863 (Iowa 1978)

State v. Ward, 170 Iowa 185, 152 N.W. 501 (1915)

State v. Harrison, 473 N.W.2d 242 (Iowa Ct. App. 1991)

Iowa Code § 704.10 (2003)

Iowa Code § 124.204 (4) (m) (1999)

Iowa Code § 124.203 (1999)

United States v. Oakland Cannabis Buyers' Cooperative,
532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722
(2001)

Iowa Code § 124.101(3) (1999)

Iowa Code § 124.201 (1999)

Spillers v. State, 145 Ga. App. 809, 245 S.E.2d 54
(1978)

State v. Williams, 93 Wash. App. 340, 968 P.2d 26
(1998)

State v. Poling, 207 W.Va. 299, 531 S.E.2d 678 (2000)

State v. Tate, 102 N.J. 64, 505 A.2d 941 (1986)

Kauffman v. State, 620 So.2d 90 (Ala. Crim. App. 1993)

- People v. Galambos, 104 Cal.App.4th 1147, 128 Cal.Rptr.2d 844 (2002)
- State v. Hanson, 468 N.W.2d 77 (Minn. Ct. App. 1991)
- Murphy v. Commonwealth, 31 Va.App. 70, 521 S.E.2d 301 (1999)
- Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982)
- State v. Bachman, 61 Haw. 71, 595 P.2d 287 (1979)
- Commonwealth v. Hutchins, 410 Mass. 726, 575 N.E.2d 741 (1991)
- Stefanoff v. State, 78 S.W.3d 496 (Tex. Ct. App. 2002)
- People v. Trippet, 56 Cal.App.4th 1532, 66 Cal.Rptr.2d 559 (1997)
- State v. Ducheneaux, 2003 S.D. 131, 671 N.W.2d 841 (2003)
- Emry v. United States, 829 A.2d 970 (D.C. 2003)
- Abbie Crites-Leoni, Medicinal Use of Marijuana, 19 J.Legal Med. 273 (1998)
- Asa Hutchison, Director, Drug Enforcement Administration, Speech at Baylor University, Waco, Texas, 9/16/02 (visited June 18, 2004) <http://www.usdoj.gov/dea/speeches/s091602.html>
- National Institute on Drug Abuse, Research Report: Marijuana Abuse (2002) (visited June 11, 2004) <http://www.drugfreeamerica.org/acrobat/RRMarijuana.pdf>.
- National Institute of Medicine, Marijuana and Medicine: Assessing the Science Base (1999) (visited June 4, 2004) <http://www.bookshap.edu/html/marimed>
- Marcia Tierskey, Medical Marijuana: Putting the Power Where it Belongs, 93 NWULR 547 (1999)
- State v. Ownbey, 996 P.2d 510 (Or. Ct. App. 2000)

Jenks v. State, 528 So.2d 676 (Fla. Dist. Ct. App. 1991)

State v. Hastings, 118 Idaho 856, 801 P.2d 563 (1999)

STATEMENT OF THE CASE

Nature of the Case: Following a search of defendant's residence by law enforcement officers, defendant was charged with several crimes following the discovery of marijuana. He attempted to present a defense of medical necessity, claiming he needed to use marijuana because he suffers from AIDS. The Honorable Stephen P. Carroll granted the State's motion in limine to bar that defense. After dismissal of the other charges, defendant was found guilty of the crime of manufacturing the controlled substance marijuana following a stipulated bench trial before the Honorable Bryan H. McKinley. Defendant asks this Court to recognize the defense of "medical necessity for ingesting marijuana." Defendant's Brief at 9.

Course of Proceedings and Disposition in the District Court: On October 6, 2000 members of the Floyd County Sheriff's Department went to defendant's home to arrest him pursuant to two Floyd County warrants for drug crimes. During that encounter officers discovered a large quantity of marijuana. Minutes of Evidence; App. 3-8. As a result, the Floyd County Attorney charged defendant with three drug

crimes. Count I charged defendant with failure to affix a drug tax stamp to marijuana. That crime, prohibited by Iowa Code sections 453B.1, 453B.3 and 453B.12 (1999), is a class D felony. Count II charged him with possession of the controlled substance marijuana, with the intent to deliver it. That crime, prohibited by Iowa Code sections 124.401(1)(d) and 124.204(4)(m) (1999), is also a class D felony. Finally, Count III charged the class D felony of manufacturing the controlled substance marijuana, in violation of Iowa Code sections 124.401(1)(d) and 124.204(4)(m) (1999). Trial Info.; App. 1-2.

Defendant filed on August 7, 2002 a notice of defense stating he intended to rely at trial on "the defense of medical necessity." Notice of Defense; App. 48. The State responded on August 12, 2002 with a motion in limine. The motion asserted chapter 124 of the Iowa Code, which regulates controlled substances, does not allow such a defense. The State also asserted such a defense would be prejudicial to the State. Motion in Limine; App. 49.

The district court held an evidentiary hearing on the State's motion in limine on September 30, 2002. It later issued a comprehensive order granting the State's motion and barring a defense. However, defendant was not precluded from presenting evidence of his use of marijuana to the

extent it bore on the issue of a specific intent to deliver that drug. Order filed 10/25/02; App. 83-94.

Defendant later waived his right to a jury trial and a stipulated bench trial took place on Count III, manufacturing marijuana. The other charges were dismissed, with the result being defendant no longer had a basis to present evidence of his drug use as bearing on specific intent. The district court confirmed the earlier order barring a defense of medical necessity. The court then found defendant guilty of the crime of manufacturing marijuana. Judgment Entry; App. 109-11.

On February 3, 2003 defendant was sentenced. He was given a deferred judgment and placed on probation for two years. Order for Deferred Judgment; App. 143-44. This Court later granted discretionary review. Order of 9/25/03; App. 150.

Facts: At the hearing on the State's motion in limine the defense presented the testimony of the doctor who had treated defendant for AIDS for the last three years. Tr. of 9/30/02 p. 9; App. 59. Defendant was 62 years old at the time of this hearing. Presentence Report p. 1; App. 116.

Dr. Jeffrey Meier had treated defendant since October 1999. Although defendant's disease had not progressed to "full blown AIDS," the doctor believed his virus had become

resistant to a number of medications. Consequently, the doctor prescribed a more intensive treatment regimen of AIDS medication. The doctor noted improvement in defendant after he began the new treatment during the fall of 1999. Tr. of 9/30/99 pp. 9-10; App. 59-60. But the new treatment regimen, according to the doctor, led to side effects of nausea, poor appetite, diarrhea and nerve damage. Tr. of 9/30/99 p. 10-12; App. 60-62. Nausea may be significant because vomiting AIDS medication undermines treatment. Tr. of 9/30/02 p. 21; App. 71.

Defendant complained of side effects and Dr. Meier tried a variety of options to alleviate the problems. Imodium was used to control defendant's diarrhea. Marinol was used to treat his nausea, as well as to increase his appetite. Marinol is a synthetic form of THC, and apparently lawful. Marijuana, on the other hand, contains a natural form of THC. Tr. of 9/30/02 pp. 11, 23; App. 61, 73. The use of Marinol and Imodium "helped to some degree" in treating the side effects defendant had experienced. Tr. of 9/30/02 p. 11; App. 61.

Dr. Meier testified he saw greater improvement in defendant's health in either October, or November, 1999, after defendant told him he had been using marijuana, and also claimed his symptoms "were better controlled" by that

drug. Tr. of 9/30/02 pp. 11-12; App. 61-62. The doctor testified that since November 1999 he had observed increasing improvement in defendant's physical condition. Tr. of 9/30/02 p. 12; App. 62. He attributed this improvement to defendant's use of marijuana, and believed Marinol had not been "doing the job." Tr. of 9/30/02 pp. 14-15; App. 64-65.

However, Dr. Meier conceded he had no independent verification of whether marijuana was more effective than Marinol in treating defendant's symptoms, as his only source of information was defendant's reports to him. The doctor could not even confirm if defendant had ever used the Marinol that had been prescribed. Tr. of 9/30/02 pp. 16-17; App. 66-67. The doctor testified that others, in addition to defendant, had told him marijuana was more effective than Marinol. However, the doctor was unaware of any scientific explanation for that opinion; he speculated it might result from the fact marijuana has more components than just THC. Tr. of 9/30/02 pp. 17-18, 22-23; App. 67-68, 72-73.

Dr. Meier testified he had no idea how much marijuana defendant would have to use each day to obtain the relief he claimed to have obtained from marijuana. Tr. of 9/30/02 p. 18; App. 68. The doctor conceded he was not an expert on marijuana. Tr. of 9/30/02 p. 19; App. 69.

At the hearing the State urged several grounds opposing a necessity defense. In support of its arguments, the State first introduced into the record a recent ruling in a separate drug prosecution where the trial court had ruled the same defendant could not present a medical necessity defense for marijuana. Tr. of 9/30/02 pp. 3-4, State's Exh. 1 (Ruling on Motion in Limine in Case No. FECR014870); App. 53-54, 76-82. The State first urged Iowa drug laws precluded such a defense, relying on United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001), as providing a useful framework for rejecting defendant's request. Second, the State noted that any exception to prosecution must come from Iowa drug laws. Lastly, the State urged defendant could not rely on a common-law defense of necessity to insulate his criminal activity. Tr. of 9/30/02 pp. 3-5, State's Exh. 1; App. 53-55, 76-82. The court later issued an order precluding defendant's use of a medical necessity defense. Order; App. 83-94.

At the later stipulated bench trial the parties stipulated to the minutes of evidence in this case, which included the minutes for the law enforcement officers who discovered marijuana at defendant's residence. Judgment Entry; Minute of Evidence for Joel Cannon; App. 3, 109-11.

When officers were at defendant's home on October 6, 2000 to serve arrest warrants for drug crimes, they discovered a large amount of marijuana, both harvested and still growing. Over 1.6 pounds of marijuana was found in one bag. In addition, another large bag containing three separate smaller bags of marijuana was found. Furthermore, an officer found in a greenhouse attached to defendant's home a number of growing marijuana plants. Minutes of Evidence for Joel Cannon and Rick Lynch; App. 3.

One of the officers, who had significant training and experience in drug enforcement, concluded that the amount of marijuana the officers found greatly exceeded the amount one merely would have for personal use. He believed the amount was consistent with drug trafficking. Moreover, the packaging of marijuana in three smaller bags, found in a larger bag, was also indicative that defendant had been selling drugs. Minute of Evidence for Joel Cannon; App. 3.

The defense submitted at the bench trial a copy of Dr. Meier's testimony at the earlier in limine hearing. Judgment Entry; App. 109-11. The judge at the bench trial, who was different from the judge who earlier had granted the motion in limine, confirmed that ruling and found medical necessity was not a defense to the charge. Defendant was

then convicted of manufacturing a controlled substance, marijuana. Judgement; App. 109-11.

ROUTING STATEMENT

This case should be retained by the Supreme Court because it presents a "substantial issue of first impression." Iowa R. App. P. 6.401(2)(1).

ARGUMENT

THE DISTRICT COURT CORRECTLY BARRED EVIDENCE OF DEFENDANT'S DEFENSE OF MEDICAL NECESSITY FOR GROWING AND INGESTING MARIJUANA BECAUSE SUCH A DEFENSE IS INCONSISTENT WITH IOWA DRUG STATUTES, AND HE HAS NOT MET THE REQUIREMENTS OF THE COMMON-LAW DEFENSE OF NECESSITY.

The State agrees defendant has preserved his claim. It also agrees the appropriate standard of review is for correction of errors at law. Iowa law requires defendant's request for a necessity defense be rejected and his conviction affirmed.

A. Defendant's Proffered Defense Is Inconsistent With Iowa Drug Laws.

Defendant asks this Court to grant him the right to grow and ingest marijuana because of an illness. He argues marijuana is the most efficacious means to ensure full benefit of his AIDS medication, as it allegedly reduces the effect of certain symptoms, such as nausea and diarrhea.

Defendant's Brief at 34. Defendant asks this Court to approve a common-law defense of necessity to allow use of marijuana when a medical reason is asserted to justify its use. Defendant's Brief at 10-11.

The defense of necessity has not been codified in this state. However, Iowa does recognize the common-law defense of necessity. State v. Walton, 311 N.W.2d 113, 114-15 (Iowa 1981).¹ The common-law necessity defense in Iowa is very limited, as the State is aware of only one reported decision where its use was approved. State v. Beeson, 569 N.W.2d 107, 110-11 (Iowa 1997); State v. Walton, 311 N.W.2d at 115; State v. Reese, 272 N.W.2d at 867; State v. Ward, 152 N.W. at 502 (defense approved where defendant unlawfully killed deer that was destroying his property); State v. Harrison, 473 N.W.2d 242, 244 (Iowa Ct. App. 1991). Before explaining in section B below why the common-law necessity defense does not encompass the request in this case, the State first

¹ The defense of necessity is different from the compulsion defense. State v. Walton, 311 N.W.2d at 115. The compulsion defense has been codified; it requires, in all cases, that the defendant's criminal act be compelled by another person's threat or menace of serious injury. Iowa Code § 704.10 (2003). In contrast, the threat of harm for a necessity defense need not come from another person. State v. Reese, 272 N.W.2d 863, 866 (Iowa 1978); State v. Ward, 170 Iowa 185, 152 N.W. 501, 502 (1915).

demonstrates that the defense is precluded by Iowa drug statutes.

The serious problems posed by marijuana and its abuse have been recognized by the Iowa legislature. Marijuana is classified as a Schedule I controlled substance. Iowa Code § 124.204 (4) (m) (1999). Under section 124.203, substances listed in Schedule I are substances which: (1) have a high potential for abuse; and (2) either have "no accepted medical use in treatment in the United States"; or they lack "accepted safety for use in treatment under medical supervision." Iowa Code § 124.203.

It is true marijuana is prohibited as a Schedule I controlled substance "except as otherwise provided by the rules of the board of pharmacy examiners for medicinal purposes." Iowa Code § 124.204(4)(m). This exception first appeared in the 1981 code. However, there are no rules promulgated by the Iowa board of pharmacy examiners which allow medical use of marijuana. Consequently, marijuana remains a Schedule I controlled substance and its possession is prohibited, without exception.

Defendant argues this statutory exception, even in the absence of pharmacy board rules allowing use of marijuana, indicates that Iowa drug statutes do not prohibit a common-law necessity defense. He argues the legislature has "left

the door open" to judicial recognition of the common-law defense. Defendant's Brief at 31-32. The State, however, believes the exact opposite conclusion must be reached. Recognition of a common-law defense is inconsistent with the legislature's obvious view that if marijuana is to be used for medical purposes in Iowa, such use must be authorized by pharmacy board rules.

Although not controlling, the Supreme Court's recent decision in United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) is instructive. In that case, the Supreme Court held that the federal controlled substances act prohibits a medical necessity exception to allow possession and use of marijuana, even when a person is seriously ill and lacks alternative sources for relief. Id. at 489-94, 495 n. 7, 498-99, 121 S. Ct. 1717-18, 1720, 1722. In reaching that conclusion, the Supreme Court noted that Schedule I controlled substances are the most serious substances. The only exception under the federal statute is for use of marijuana in research projects approved by the government, an exception not applicable in that case. Because the conduct in question did not fall within the only statutory exception for use of marijuana, a medical defense was unavailable. Although the Court did not rule on whether a

common-law defense of necessity can ever exist without statutory approval, it found a medical marijuana defense was inconsistent with, and disallowed by, federal drug laws. This was so because Congress had determined marijuana had no medical benefit worthy of exception, outside of approved research projects. Id. at 490-91, 494, 121 S. Ct. at 1717-18, 1722.

Defendant believes the Oakland Cannabis case is distinguishable from his case. Unlike the federal law, according to defendant, the statutory exception of section 124.204(4)(m) shows the Iowa legislature has recognized the potential use of marijuana for medical purposes, as it has authorized the pharmacy board to possibly approve such use. He believes a common-law defense is consistent with such a view, and so is allowed by statute. Defendant's Brief at 31-32. The State disagrees.

By authorizing the pharmacy board to consider if a proper medical use exists for marijuana, all that the legislature has done is to allow study by the only body the legislature has authorized to make recommendations regarding classification and regulation of controlled substances. Iowa Code §§ 124.101(3), 124.201, 124.203 (1999). An exemption does not presently exist, as there are no pharmacy board rules allowing medical use of marijuana. Thus, Iowa

drug statutes totally prohibit possession and use of marijuana, just as was true of the federal drug statute (except for approved studies). Therefore, the defense of medical necessity is inconsistent with Iowa drug laws. See Oakland Cannabis Buyers' Cooperative, Id. at 491-92, 121 S. Ct. at 1718-19.

Numerous states have refused to recognize a common-law defense for marijuana use because it is inconsistent with their drug statutes. Some have stated recognition of a medical use for marijuana is best left to the legislature, given the issues of health, safety, and police power -- all peculiarly within the legislature's purview. Spillers v. State, 145 Ga. App. 809, 245 S.E.2d 54, 55 (1978); State v. Williams, 93 Wash. App. 340, 968 P.2d 26, 29 (1998); State v. Poling, 207 W.Va. 299, 531 S.E.2d 678, 685 (2000).

Other states have considered the significance of limited statutory authorization for possible use or further study of marijuana for treatment, as bearing on whether that reflects a legislative determination marijuana has a general medical usefulness, thereby allowing a common-law defense. Contrary to defendant's argument, most courts hold that limited statutory authorization for medical use or study of marijuana does not reflect a legislative view that marijuana has a general usefulness, outside the limited statutory

provisions. Instead, courts hold the limitations evince the legislature's disagreement with broader exceptions, such as a general common-law defense of necessity. For example, in State v. Tate, 102 N.J. 64, 505 A.2d 941 (1986) the court rejected a necessity defense where the New Jersey Legislature had authorized the Commissioner of Health to consider whether marijuana should be reclassified, possibly allowing prescription of marijuana for medical treatment. However, no reclassification had ever occurred and marijuana remained fully prohibited. The New Jersey Supreme Court held that this limited exception -- unfulfilled just as Iowa's -- reflected a legislative intent to preclude a marijuana defense in any other circumstances. Id. 505 A.2d at 944-45. Other courts have reached similar conclusions. Kauffman v. State, 620 So.2d 90, 92 (Ala. Crim. App. 1993); People v. Galambos, 104 Cal.App.4th 1147, 1161, 128 Cal.Rptr.2d 844 (2002); State v. Hanson, 468 N.W.2d 77, 79 (Minn. Ct. App. 1991); Murphy v. Commonwealth, 31 Va.App. 70, 521 S.E.2d 301, 302 (1999).

As aptly quoted by the Virginia Court in Murphy v. Commonwealth: "' When a legislative enactment limits the manner in which something can be done, the enactment also evinces the intent that it should not be done another way.'" Id. 521 S.E.2d at 303, quoting Grigg v. Commonwealth, 224

Va. 356, 297 S.E.2d 799 (1982). Thus, courts should be reluctant to intervene when the legislature has demonstrated its preference. The rationale for withholding judicial involvement was explained in State v. Tate:

The [necessity] defense is based on public policy. In essence it reflects a determination that if, in defining the offense, the legislature had foreseen the circumstances faced by the defendant, it would have created an exception. It would have balanced the competing values and chosen the lesser evil. Obviously, then, the defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant. If it has in fact anticipated the choice of evils and determined the balance to be struck between the competing values, defendants and courts alike are precluded from reassessing those values to determine whether certain conduct is justified.

505 A.2d at 946.

Because the Iowa Legislature has addressed this subject and stated its position regarding how approval of medical use of marijuana should occur, this Court should decline to recognize a common-law defense of necessity.

B. Correct Application Of The Common-Law Defense Of Necessity Also Precludes Recognition Of Defendant's Defense In This Case.

In State v. Walton, the Iowa Supreme Court discussed the common-law defense of necessity. The Court stated that the rationale of the defense "lies in defendant being required to choose the lesser of two evils and thus avoiding a greater harm by bringing about a lesser harm." The

defense requires that the defendant not be personally accountable for creating the situation which arguably requires this choice. The court approved the following analytical framework for evaluating a necessity defense: "(1) the harm avoided, (2) the harm done, (3) the defendant's intention to avoid the greater harm, (4) the relative value of the harm avoided and the harm done, and (5) optional courses of action and the imminence of disaster." Walton, 311 N.W.2d at 115. Walton makes clear that a true emergency situation must exist. The Court states: "The necessity defense does not apply except in emergency situations where the threatened harm is immediate and the threatened disaster imminent. The defendant must be stripped of options by which he or she might avoid both evils." Id. If an alternative to lawbreaking is available, the defendant must pursue it. Id. at 115-16. A fear of future harm is insufficient. State v. Harrison, 473 N.W.2d at 244.

Recognizing that the imminence of harm requirement presents a problem for his claim, defendant initially asks that it be abandoned. Defendant's Brief at 37-38. However, to ignore this requirement would be to rewrite the common law. The State believes jurisdictions cited by defendant in support of the defense have ignored the appropriate limits

of the common-law defense of necessity. Other states recognize that imminent harm still must be shown to assert a necessity defense for use of marijuana. State v. Bachman, 61 Haw. 71, 595 P.2d 287, 288 (1979); Commonwealth v. Hutchins, 410 Mass. 726, 575 N.E.2d 741, 744-45 (1991); Stefanoff v. State, 78 S.W.3d 496, 501 (Tex. Ct. App. 2002) (applying statutory codification of necessity defense). Using marijuana because it is allegedly more effective than the legal drug Marinol does not raise an issue of imminent danger of harm; simply put, an emergency situation is not presented. See People v. Trippet, 56 Cal. App. 4th 1532, 1539-40, 66 Cal.Rptr.2d 559 (1997).

Defendant alternatively argues there is imminent harm, at least to a degree, because marijuana better controls his immediate problems of nausea, vomiting and diarrhea. Defendant's Brief at 38-39. Although defendant's doctor testified he believed marijuana was more effective in controlling these symptoms, he also believed there had been improvement from use of Marinol and Imodium, both lawful substances. Tr. of 9/30/02 p. 11; App. 61. A defendant may not violate the law merely because a lawful substance is less effective, when it still provides some positive relief. People v. Trippet, 56 Cal. App. 4th at 1539-40 (rejecting common-law defense for marijuana where Marinol afforded

defendant some relief, as existence of a reasonable and legal alternative defeats necessity defense); State v. Ducheneaux, 2003 S.D. 131, 671 N.W.2d 841, 845 (2003) (defendant's belief that Marinol was inferior to marijuana for treatment was insufficient justification for violating the law); Stefanoff v. State, 78 S.W.2d at 501 (the fact that "smoking marijuana was appellant's preferred coping mechanism" was insufficient to warrant necessity defense); State v. Williams, 93 Wash.App. at 346 ("A patient does not have a fundamental right to have marijuana prescribed as his preferred treatment over the legitimate objections of the State.").

Moreover, the State takes issue with the opinion of Dr. Meier that marijuana was more effective than Marinol and Imodium in treating defendant's symptoms. After initially prescribing those two medicines soon after the doctor first began to treat defendant, less than two months later the doctor concluded marijuana was more effective, after defendant told him he had been using marijuana. The doctor had no independent verification that defendant had even used the Marinol prescribed for him, and the doctor was unaware of any scientific evidence that marijuana is more effective than Marinol, which is a synthetic form of THC. Tr. of 9/30/02 pp. 16-17; App. 66-67. The doctor's belief that

marijuana was more effective is just that, a belief -- without independent support. Because defendant has failed to demonstrate an actual need for marijuana as medical treatment, he perforce cannot show grounds for a necessity defense to excuse criminal behavior. Emry v. United States, 829 A.2d 970, 973 (D.C. 2003) (although one doctor believed defendant's spasticity attacks were eased by smoking marijuana, her medical records otherwise indicated it was impossible to objectively document any clear differences in her condition when using, and when not using, marijuana).

Furthermore, contrary to the impression defendant gives in his brief, significant doubt remains regarding the usefulness of marijuana as a medical treatment. Nothing is settled in this area. State v. Williams, 93 Wash.App. at 346. Adverse effects of marijuana include memory loss, drug dependency, cognitive impairment and development of cancer. Abbie Crites-Leoni, Medicinal Use of Marijuana, 19 J.Legal Med. 273, 280-82 (1998). Mental health problems sometimes caused by marijuana include toxic psychosis, panic attacks, delusions, hallucinations, paranoia, schizophrenia and depression. Id. While marijuana's adverse effects are well documented, its positive medical effects remain largely unknown. The Food and Drug Administration and the American Medical Association do not recognize marijuana as

providing any medical benefit. Asa Hutchison, Director of Drug Enforcement Administration, Speech at Baylor University, Waco, Texas, 9/16/02 (visited June 18, 2004) <http://www.usdoj.gov/dea/speeches/s091602.html>. Any purported medical benefit that marijuana offers to HIV/AIDS patients is particularly controversial. Some hypothesize marijuana may be an effective treatment for AIDS wasting syndrome. However, studies indicate marijuana use impairs the immune system's ability to fight off infectious diseases and cancer. National Institute on Drug Abuse, Research Report: Marijuana Abuse (2002) (visited June 11, 2004) <http://www.drugfreeamerica.org/acrobat/RRMarijuana.pdf>. As AIDS patients already have weakened immune systems, marijuana use may actually accelerate destruction of a patient's immune system. See also National Institute of Medicine, Marijuana and Medicine: Assessing the Science Base (1999) (visited June 4, 2004) <http://www.bookshap.edu/html/marimed> (recommending further study into the various adverse effects of marijuana).

Additionally, the medical harm marijuana users claim is avoided by its use is not greater than the harm caused by recognition of a necessity defense. Approval of such a defense, when its merits are otherwise specious, would create an unregulated, ad hoc, post-arrest excuse

potentially available to numerous criminals whose conduct has nothing to do with any real medical need. Marijuana is a Schedule I controlled substance in this state because its abuse creates very significant problems. For instance, marijuana may serve as a gateway drug. Virtually all heroin and cocaine addicts first smoked marijuana. 19 J.Legal Med. at 280-82. Besides producing significant side effects in users, marijuana can cause destructive behavior that exacts significant social costs. For example, marijuana use significantly impairs motor skills, which can lead to automobile accidents. A study by the Department of Transportation of 182 fatal truck accidents found that 12.8% of the drivers in these accidents were under the influence of marijuana. *Id.* at 281. Marijuana addiction has also become a significant problem, as approximately 133,000 people in the United States are in treatment for marijuana abuse. Marcia Tierskey, Medical Marijuana: Putting the Power Where it Belongs, 93 NWULR 547, 565 (1999).

Given these problems, the wisdom of the Massachusetts Supreme Court may not be doubted:

In our view, the alleviation of the defendant's medical symptoms, the importance to the defendant of which we do not underestimate, would not clearly and significantly outweigh the potential harm to the public were we to declare that the defendant's cultivation of marijuana and its use for his medical purposes may not be punishable. We cannot dismiss the reasonably

possible negative impact of such a judicial declaration on the enforcement of our drug laws, including but not limited to those dealing with marijuana, nor can we ignore the government's overriding interest in the regulation of such substances.

Commonwealth v. Hutchins, 575 N.E.2d at 745. Although this defendant grows his own marijuana, others might use a necessity defense to insulate their possession of marijuana purchased from someone else. In rejecting a necessity defense, the New Jersey Supreme Court noted that judicial recognition of such a defense would promote lawbreaking. As that court stated:

The use of marijuana in the manner for which [defendant] here seeks our approval requires a supplier who necessarily obtains and supplies in contravention of statutory law. All else aside, it is inconceivable that the legislature intended to sanction this activity by conferring a blessing on the use of the illicit drug.

State v. Tate, 505 A.2d at 945.

Finally, a canvass of the many cases that have rejected a necessity defense shows that recognition of a defense in this case would open a pandora's box. Defendants have sought a necessity defense to allow use of marijuana to treat head injuries, spasms (three cases), epilepsy, multiple sclerosis, pain, effects of an automobile accident, migraines (two cases), post-traumatic stress disorder (two cases), rheumatoid arthritis, and scleroderma. All attempts were unsuccessful. Kauffman v. State, 620 So.2d at 90, 92;

People v. Galambos, 104 Cal.App.4th at 1153, 1162; People v. Trippet, 56 Cal.App.4th at 1537, 1540; Emry v. United States, 829 A.2d at 973, Spillers v. State, 145 Ga.App. At 809; Commonwealth v. Hutchins, 575 N.E.2d at 742, 745; State v. Hanson, 468 N.W.2d at 77-79; State v. Tate, 505 A.2d at 942, 945-46; State v. Ownbey, 996 P.2d 510, 511-12 (Or. Ct. App. 2000); State v. Ducheneaux, 671 N.W.2d at 842, 845; Stefanoff v. State, 78 S.W.2d at 499, 501. Murphy v. Commonwealth, 521 S.E.2d at 302; State v. Williams, 968 P.2d at 28-30; State v. Poling, 531 S.E.2d at 305-07. It is impossible to know how many more medical conditions might be cited for marijuana use if a defense were to be allowed. In contrast to the numerous jurisdictions which have rejected a necessity defense, defendant cites only three states where such a defense either is, or may be, viable at the present time. Jenks v. State, 528 So.2d 676, 679 (Fla. Dist. Ct. App. 1991); State v. Bachman, 595 P.2d at 288; State v. Hastings, 118 Idaho 856, 801 P.2d 563, 565 (1999).

This State should join the majority of jurisdictions that have considered this issue and hold there is no common-law necessity defense to grow and use marijuana for medical reasons. Such a defense would be inconsistent with our drug laws, and it does not conform to the proper scope of the common-law defense. Furthermore, defendant has failed to

even establish an actual need to use marijuana, or that he had no acceptable alternative; that failure negates necessity. Murphy v. Commonwealth, 521 S.E.2d at 302; State v. Williams, 968 P.2d at 28-30; State v. Poling, 531 S.E.2d at 305-07. Defendant's conviction should be affirmed.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm the conviction of Lloyd D. Bonjour.

CONDITIONAL NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, and in the event that appellant is granted oral argument, counsel for appellee hereby desires to be heard in oral argument.

COST CERTIFICATE

We certify that the cost of printing Appellee's Brief and Argument was the sum of \$38.75.

THOMAS J. MILLER
Attorney General of Iowa

RICHARD J. BENNETT
Assistant Attorney General