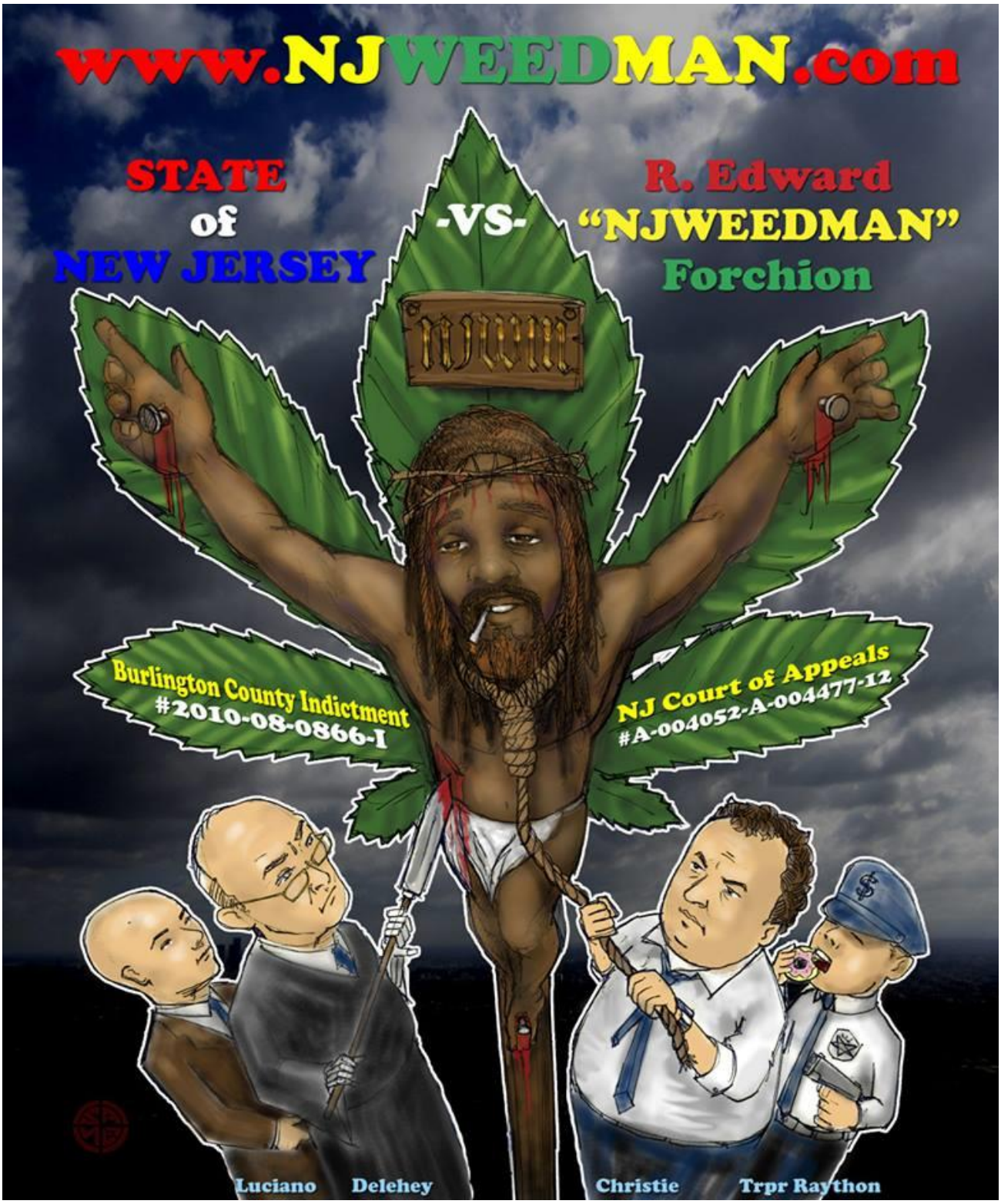

THE DEFENDANT "FORCHION" FEELS HE WAS CRUCIFIED WITH A CONSTITUTIONALLY "UNFAIR TRIAL" AND NOW APPEALS

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant
31 Clinton Street, 8th Floor
Newark, New Jersey 07101
TEL: (973) 877-1200

STATE OF NEW JERSEY	:	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-004052-12T4 (Direct Appeal) and A-004477-12 (Appeal of Violation of Probation)**
Plaintiff-Respondent,	:	
v.	:	
EDWARD R. FORCHION,	:	**CRIMINAL ACTION**
Defendant-Appellant.	:	**On Appeal From Judgments of Conviction (of a Criminal Conviction and a Violation of Probation) of the Superior Court of New Jersey, Law Division, Burlington County** **Sat Below:** **Hon. Charles A. Delehey, J.S.C., and A Jury and Judge Delehey on the Violation of Probation**

BRIEF ON BEHALF OF DEFENDANT-APPELLANT EDWARD R. FORCHION

DEFENDANT IS NOT CONFINED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Nos.

CASES CITED

STATUTES CITED

RULES CITED

CONSTITUTIONAL PROVISIONS

PRELIMINARY STATEMENT

For more than twenty years the defendant-appellant Edward R. Forchion, also known as the "New Jersey Weedman," has been very vocal medical marijuana advocate. The defendant is also a long-time practicing Rastafarian. The Rastafarian religion includes the sacramental use of cannabis—-specifically, the smoking of Ganja (marijuana).

In February of 2001, when the defendant (who was born in July of 1964) was 36 years old, he was diagnosed with a form of bone cancer which results in painful giant cell tumors. The defendant has undergone surgeries and other medical procedures to remove the tumors and ameliorate his condition. The defendant's use of marijuana shrinks or slows the growth of these painful tumors. As a result of this continued painful condition and the success of marijuana as a medicine, defendant has been a California Medical Marijuana card holder since 2006.

The defendant, being a marijuana activist, has followed changes in the marijuana laws throughout the country, but particularly in his home state of New Jersey. Several years ago the defendant left New Jersey to open and run a marijuana dispensary in California (the Liberty Bell Temple located in Los Angeles). The defendant was aware of the passage of the "New Jersey Compassionate Use Medical Marijuana Act" and its being

signed into law on January 18, 2010 by then-Governor Jon Corzine. Accordingly, when defendant came to New Jersey in April of 2010 (to visit his children during Easter break) he felt secure in bringing his required medicine (the marijuana at issue in this case). It cannot be overemphasized that the defendant was arrested three months after New Jersey had recognized marijuana as a medicine on January 18, 2010.

The defendant's arrest, prosecution, conviction and 270 day jail sentence violates the Due Process, Equal Protection, Commerce, and Full Faith and Credit Clauses of the Constitution, along with the Fourth Amendment right to be free from unreasonable searches and seizures. The statutes under which the defendant was charged (Count One: N.J.S.A. 2C:35-5a(1)/2C:35-5b(11) and Count Two: N.J.S.A. 2C:35-10a(3)) are unconstitutional and violate the First Amendment Religious Freedom Clause, along with due process and equal protection. The defendant is the future defendant hypothetized by the sharply divided (4 to 3) Supreme Court in State v. Tate, 102 N.J. 64 (1986). In addition, marijuana is improperly classified as a Schedule I drug and New Jersey's Compassionate Use Medical Marijuana Act preempts the State's criminal marijuana laws. Judge Delehey also deprived defendant of his constitutional rights by curtailing his presentation to the jury.

PROCEDURAL HISTORY

Burlington County Indictment Number 2010-08-0866-I, charged the defendant Edward R. Forchion, in Count I with possession with intent to distribute a controlled dangerous substance) (marijuana), contrary to N.J.S.A. 2C:35-5a(1) and 2C:35-5b(11), and in Count II with possession of CDS (marijuana), contrary to N.J.S.A. 2C:35-10a(3). (Da[1] 1-3).

On March 15, 2011, the Honorable Charles A. Delehey, J.S.C. denied defendant's motion to suppress. (1T50-1 to 10).

The defendant's motion to dismiss dated April 20, 2011 was denied by Judge Delehey in a memorandum of law dated September 6, 2011 (Da4 to 15).

On June 15, 2011, Judge Delehey granted the defendant's motion to proceed pro se. (2T33-13 to 15; 3T2-4 to 6), but reversed the ruling at a pretrial conference on October 19, 2011. (4T10-5 to 15).

---

[1] "Da" – Defendant's appendix to this brief.
"1T" – March 15, 2011, pretrial transcript (motion to suppress).
"2T" – June 15, 2011, pretrial transcript (motion to proceed pro se).
"3T" – July 19, 2011, pretrial transcript (motion to dismiss).
"4T" – October 19, 2011, pretrial transcript (pretrial conference).
"5T" – April 10, 2012, pretrial transcript (postponement).
"6T" – May 1, 2012 jury selection transcript.
"7T" – May 3, 2012 (Volume 2) jury selection transcript.
"8T" – May 3, 2012, trial transcript (opening statements, testimony).
"9T" – May 8, 2012, trial transcript (testimony).
"10T" – May 9, 2012, trial transcript (verdict).
"11T" – August 14, 2012, transcript of judgment of acquittal motion.
"12T" – January 16, 2013, sentencing transcript.
"13T" – March 12, 2013, VOP plea and sentence.
"14T" – September 10, 2013, resentencing (staggered jail schedule).

On January 5, 2012, Judge Delehey again reversed himself, and granted the pro se application with the condition that the defendant "will advance no arguments to the jury to suggest that marijuana is not or should not be a substance proscribed by law in the State of New Jersey" (Da16).

Trial was conducted before Judge Delehey and a jury from May 3 to 9, 2012, following which the jury found the defendant guilty of Count II, but was unable to reach a verdict on Count I. (Da18 to 20). The defendant was subsequently found not guilty of Count II following a retrial on October 18, 2012.

On January 16, 2013, Judge Delehey sentenced the defendant to a 2 year period of probation on Count II, together with various fines and a 6 month license suspension. (Da21 to 24).

Judge Delehey permitted the defendant to travel to California, directing "that this matter be transferred to Los Angeles County, California, for supervision." (12T23-7 to 12). This was to permit the defendant to receive his cancer treatments.

Judge Delehey denied defense counsel's motion for a stay of sentence. (12T25-7 to 15).

A Notice of Appeal was filed on May 1, 2013. (Da25).

On January 17, 2013, a fugitive arrest warrant was issued by Judge Delehey for the defendant. On March 12, 2013, the defendant pled guilty to a violation of probation. The same

day, Judge Delehey sentenced the defendant to 270 days in the County Jail and terminated his probation. (Da28-30). A Notice of Appeal was filed on April 29, 2013.

On March 14, 2013, the Honorable Jeanne T. Covert, J.S.C. signed an Order releasing the defendant so that he could continue with treatment. (Da33). The defendant was released after serving approximately 45 days. A Motion for Stay of Sentence Pending Appeal was denied by Judge Delehey on September 11, 2013. (Da32 and Da39). Judge Delehey ordered the defendant serve a staggered jail sentence to accommodate the defendant's medical treatment. (Da39-40). The defendant filed an Amended Notice of Appeal as to the denial of the stay of sentence, along with "Application for Permission to File Emergent Motion." On September 11, 2013, the Honorable George S. Leone, J.A.D., granted leave to file a motion for emergent relief. (Da41). In an Order filed September 23, 2013, the Appellate Division denied the stay of the nine-month VOP sentence. (Da42).

On September 24, 2013, the Supreme Court denied defendant's application for a stay "pending further review by the Supreme Court on October 1, 2013." (Da43). On October 3, 2013, the Supreme Court denied the motion for a stay of sentence. (Da44). On October 22, 2013, the Appellate Division sua sponte consolidated the direct appeal and the VOP appeal. (Da45).

On October 14, 2013, the defendant filed a "Motion to

[Withdraw THE] Guilty Plea per Court Rule 3:21-1 and on October 24, 2013, Judge Delehey denied the motion without holding an evidentiary hearing. (Da46-47).

SUPPRESSION STATEMENT OF FACTS

On April 1, 2010, at approximately 10:15 p.m., New Jersey State Trooper Kenneth Rayhon effectuated a motor vehicle stop at the intersection of Route 38 and Savory Way in Hainesport Township involving a black Pontiac Grand Am driven by the defendant for allegedly failing to stop at a red light. (1T5-25 to 6-4; 1T11-16 to 18). Trooper Rayhon asked the defendant for his credentials, and was given a rental agreement (in his daughter Channell's name) and a State of California identification. The defendant indicated he did not have a valid driver's license. (1T9-5 to 10-15).

Trooper Rayhon detected "the odor of burnt marijuana" as he was speaking with the defendant. (1T11-6 to 7). He also observed "a multi-colored glass smoking pipe on the floor board of the back seat behind the driver's seat." (1T11-10 to 12). Rayhon asked the defendant to hand him the pipe and the defendant did. (1T12-25). Rayhon arrested the defendant for possession of drug paraphernalia. (1T13-4 to 8).

The defendant was handcuffed and read his Miranda rights. (1T13-9 to 10). Rayhon searched the defendant and found approximately $2,000 in United States currency on him. (1T13-14

to 16). A records check on defendant revealed active traffic (and child support) warrants for his arrest. (1T14-23 to 15-2).

Rayhon asked the defendant to consent to a search of the vehicle and the defendant denied consent. (1T15-3 to 18). When the vehicle was towed to the Trooper barracks and Rayhon advised he would apply for a search warrant for the vehicle, the defendant indicated he has "approximately a pound of marijuana in the trunk." (1T15-25 to 16-7). A search warrant was obtained and the marijuana was found in the trunk. (1T16-10 to 18-14).

Rayhon issued summonses for failure to observe a traffic signal and driving while suspended. (1T20-22 to 24).

The defendant testified that, prior to stopping at the intersection, he was driving when he saw the trooper go by him and then make a "U-turn right next to me." (1T33-13 to 25). The defendant "got nervous" and looked at the trooper, who looked back at the defendant. (1T34-1 to 4). Out of the corner of his eye the defendant "saw the green turn signal" and he started to go. He then realized that "it was just the turn signal and not the green light and I stopped. And I was in no way out in the middle of the lane. Just I moved about three feet, four feet, something like. At the most, the front tires were across the white line." (1T34-6 to 12). The defendant was stopped at the light until it turned green. (1T35-10 to 12). The defendant did not have the hat on (and covering his dreadlocks) until the

light turned green (when he put it on). (1T40-12 to 41-2).

TRIAL STATEMENT OF FACTS[2]

Trooper Rayhon's trial testimony was consistent with his testimony at the suppression hearing. (8T46-7 to 50-22zxC).

Dr. Steven Fenichel, a Board certified family physician (9T52-9) who practices primarily as a dermatologist, testified as a fact witness[3] on behalf of the defense that he examined the defendant in 2001 and 2002. (9T45-8 to 23). Dr. Fenichel noticed that the defendant's right lower leg had "some boney swellings at the distal end of the right femur." (9T46-1 to 7). The right knee was also "much warmer to the touch." (9T46-16 to 19). Dr. Fenichel recommended an x-ray which revealed "a giant cell tumor on the bone." (9T46-20 to 25). This tumor can transform itself into "an osteogenic sarcoma and they have a very high rate of bloodborne (sic) metastasizing. Giant cell tumor, it's wrong to call them benign. Ten percent of them metastasize through the blood stream. The most common spot are the lungs and the other organs including the brain are a second." (9T47-18 to 48-2). Dr. Fenichel testified that the

---

[2] It was stipulated in Joint Exhibit 1 (J-1) that on "April 1, 2010, the defendant was authorized by the State of California to possess marijuana for medical purposes in the state of California." (8T39-20 to 40-1). It was also stipulated in Joint Exhibit 2 that the evidence seized from the trunk is marijuana in the amount of 454.27 grams. (8T40-1 to 14).

[3] Judge Delehey barred Dr. Fenichel to testify as a "marijuana medical necessity" expert witness. (9T35-14 to 17).

most common symptom "is very deep-seated pain of the bone . . . a lot of discomfort and pain." (9T48-5 to 8). Dr. Fenichel referred the defendant to an orthopedic surgeon, who "did try to surgically excise the entire bone." However, there is "a 40 percent recurrence of this cancer with surgery." (9T47-6 to 11).

Dr. Fenichel examined the defendant "two or three weeks" prior to the trial, and once again on May 7, 2012. (9T49-5 to 15). He testified that the defendant's "giant cell tumor clinically is back." (9T50-16 to 17). The boney tumors are also in evidence around the defendant's shoulders, as well, and the defendant "is getting to be studded with these painful tumors." (9T51-10 to 13). There is "chronic pain associated with giant cell tumors and also a sense of derangement when it involves a join like the knee." (9T51-18 to 24).

POINT I

N.J.S.A. 2C:35-5A(1)/2C:35-5B(11) (COUNT ONE) AND N.J.S.A. 2C:35-10A(3) (COUNT TWO) ARE UNCONSTITUTIONAL ON THE GROUNDS OF "MEDICAL NECESSITY" OR THE DEFENDANT IS EXEMPT FROM PROSECUTION DUE TO "MEDICAL NECESSITY" (EITHER UNDER NEW JERSEY LAW OR COMMON LAW); THE MARIJUANA CONVICTION MUST BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE

This issue was raised in Point V of the defendant's pretrial brief (dated April 20, 2011) in support of his pretrial motion to dismiss the indictment. (Da85; Da125 to Da128). Judge Delehey rejected the argument, writing in his opinion:

> Defendant argues that his actions are

> justified on the basis of medical necessity. This argument has already been entertained by New Jersey Courts and rejected. State v. Tate, 194 N.J. Super. 622 (Law Div.), *aff'd*, 198 N.J. Super. 285 (App. Div. 1984), *rev'd on other grounds* 102 N.J. 64 (1986). In Tate, the court determined that the Legislature intended to preclude the medical necessity defense and denied its application to a "self-help" user of marijuana. Of course, as set forth above, CUMMA now allows an affirmative defense of *medically authorized* use of marijuana. (emphasis in original; Da13).

The defendant submits that he is the future defendant hypothetized by the sharply divided (4 to 3) New Jersey Supreme Court in State v. Tate, 102 N.J. 64 (1986).

Judge Delehey improperly precluded Dr. Fenichel from testifying as an expert witness on "marijuana medical necessity." (9T35-14 to 15). In spite of this incorrect ruling, the defendant has presented abundant evidence as to his medical condition and his medical necessity of marijuana. Specifically, the defendant suffers from a form of bone cancer which results in painful giant cell tumors. (See medical report of Dr. Sant P. Chawla dated March 14, 2013; Da35-38). The defendant underwent surgeries and other medical procedures to remove the tumors and ameliorate his condition. The defendant's use of marijuana shrinks or slows the growth of these painful tumors, as evinced by the fact that the defendant has been a California Medical Marijuana card holder since the year 2006. As stated by Edward A. Alexander, M.D., pursuant to his "Physician Statement" as to

why he prescribed medical marijuana to the defendant:

> Edward Forchion has been evaluated under my medical care and reports to me that using marijuana helps relieve his symptoms. I have evaluated the risk and benefits of cannabis use as a treatment pursuant to Health and Safety Code Section 111362.5, otherwise known as Medical Use of Marijuana.
>
> I approve of my patients use of Marijuana for both medical and spiritual reasons. As a Rastafarian he uses cannabis sativa as a sacrament, a food and a medicine. I will continue to monitor his condition and provide advice on his progress. (Da89).

Dr. Steven Fenichel, a Board certified family physician (9T52-9) examined the defendant in 2001 and 2002. (9T45-8 to 23) and an x-ray revealed "a giant cell tumor on the bone." (9T46-20 to 25). Dr. Fenichel testified that the most common symptom "is very deep-seated pain of the bone . . . a lot of discomfort and pain." (9T48-5 to 8).

Dr. Fenichel referred the defendant to an orthopedic surgeon, who "did try to surgically excise the entire bone." However, there is "a 40 percent recurrence of this cancer with surgery." (9T47-6 to 11).

Dr. Fenichel saw the defendant "episodically" since 2002 and did examine the defendant "two or three weeks" prior to the trial, and once again on May 7, 2012. (9T49-5 to 15). Dr. Fenichel testified that the defendant's "giant cell tumor clinically is back." (9T50-16 to 17). The bone tumors are also

in evidence around the defendant's shoulders, as well, and the defendant "is getting to be studded with these painful tumors." (9T51-10 to 13). Dr. Fenichel testified that there is "chronic pain associated with giant cell tumors and also a sense of derangement when it involves a joint like the knee." (9T51-18 to 24).

N.J.S.A. 2C:3-2 (Necessity) provides:

> a. Necessity. Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
>
> b. Other justifications in general. Conduct which would otherwise be an offense is justifiable by reason of any defense of justification provided by law for which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

In addition to the above statutory defense, "'The common-law defense of "necessity" is often referred to as the "choice-of-evils" defense.'" State v. Romano, 355 N.J. Super. 21, 29 (2002) (quoting Tate, supra, 102 N.J. at 73). "'Conduct that would otherwise be criminal is justified if the evil avoided is greater than that sought to be avoided by the law defining the

offense committed . . .'" Ibid. The four elements for the common-law defense are:

(1) There must be a situation of emergency arising without fault on the part of the actor concerned; here, the defendant Mr. Forchion's cancer and extremely painful tumors is a medical condition without fault by defendant.

(2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm; here, without marijuana the defendant's pain is greatly increased, presenting an "imminent and compelling" expectation of harm without marijuana use.

(3) The emergency must present to reasonable opportunity to avoid the injury without doing the criminal act; here, the defendant has attempted to utilize other medical practices to relieve the pain but none are effective.

(4) The injury impending from the emergency must be of sufficient seriousness to out measure the criminal wrong; here, the relief of defendant's pain outweighs his use of marijuana (particularly since he has a valid California medical marijuana card and the State of New Jersey has also legalized medical marijuana. Quoting State v. Tate, 194 N.J. Super. 622, 628

(1984), rev'd on other grounds, 102 N.J. 64 (1986).

The defense is rooted in public policy and "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." Tate, supra, 102 N.J. at 73. Thus, "the defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant." Id. at 74. If the legislature "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. Ibid. Romano, supra, 355 N.J. Super. at 29-30.

In the case sub judice, the defendant uses marijuana for medical reasons, and he has a valid California Medical Marijuana card permitting such medical use. (Da89). Since the marijuana in question emanates from California (where the medical use is legal for the defendant), the "medical necessity" defense is applicable here.

In State v. Tate, 102 N.J. 64 (1986) the defendant, afflicted with quadriplegia, would sometimes have spasticity so severe as to render him completely disabled. Defendant Tate was prepared to present evidence that the use of marijuana provided relief from the spastic contractions regularly suffered by the

defendant, and that no other prescribable medication gives him such relief. Id. at 67. The Tate defendant raised the justification defense of "medical necessity" based on justifiable conduct under N.J.S.A. 2C:3-2(a). The trial judge denied the State's motion to strike that defense, and the Appellate Division affirmed. The Supreme Court, in a 4 to 3 decision, reversed and held that the defendant could not assert the statutory defense of necessity because his conduct was not permitted by law. Also, defendant could not assert the common-law defense of necessity. Id. at 72-73. Justice Handler dissented, stating: "It is my view that under the Code the defense of justification based on medical necessity is available with respect to the use of marijuana in the context of the limited and special circumstances that are present in this case." Id. at 76. Justices Garibaldi and Stein also dissented, ruling that the defense of medical necessity may be available to certain seriously ill persons as a legal justification to a marijuana possession charge. Id. at 95 to 96.

In the case at bar, at the time of the defendant Forchion's arrest (April 1, 2010), it was unclear as to whether New Jersey would accept other states' medical marijuana registry ID cards. This is reflected in the "Medical Marijuana Summary Chart" dated April 8, 2011) (Da129 to 145 and annexed to the Appendix below

at Da14 to Da31). In answer to the New Jersey section question: "Accepts other states Registry ID cards?" the answer is: "Unknown." (Da129).

Other jurisdictions have accepted the "marijuana medical necessity" defense. In United States v. Randall, 104 Daily Wash. L. Rptr. 2249 (D.C.Super. Ct. 1976) the defendant, charged with possession of marijuana, used marijuana to treat his glaucoma symptoms. The Court found medical necessity a defense to possession. In Washington v. Diana, 604 P.2d 1312 (Wash. App. 1979), the defendant, charged with possession of marijuana, used it for relief of the disabling spasticity associated with multiple sclerosis. The court found medical necessity existed. In both Randall and Diana the defendant used the drugs based on his own self-diagnosis—later confirmed by expert medical testimony.

As stated above, the defendant submits that he is the future defendant hypothetized by the sharply divided (4 to 3) New Jersey Supreme Court in State v. Tate, 102 N.J. 64 (1986).

For the foregoing reasons and authorities cited, the conviction must be reversed and indictment must be dismissed with prejudice.

POINT II

THE DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT EXPERT TESTIMONY ON THE ISSUES OF "MEDICAL NECESSITY" AND RELIGIOUS USE BY RASTAFARIANS; THESE DENIALS BY THE COURT BELOW AND THE OFFICE OF THE PUBLIC DEFENDER PRECLUDED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, EQUAL PROTECTION, THE RIGHT TO PRESENT A DEFENSE, AND THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL MANDATING A REVERSAL OF HIS CONVICTION AND DISMISSAL OF THE INDICTMENT WITH PREJUDICE

Defendant sought to have Dr. Steven Fenichel testify as an expert witness and Judge Delehey concluded that: "The Court specifically bars any mention of marijuana as a substance to relieve pain. The doctor did not furnish an expert report or the defendant did not, and the Court limits the testimony in that regard." (7T35-14 to 17). The Court permitted Dr. Fenichel to testify only as a fact witness as to "treatment, x-rays and confirm the condition." (7T35-18 to 20).

Defendant, who proceeded pro se with standby Public Defender counsel, submits that the Office of the Public Defender (OPD) should have ensured that an expert report was provided by Dr. Fenichel to permit him to testify as an expert as to the "marijuana medical necessity" defense. The failure to do so deprived defendant of both his federal and state constitutional right to the effective assistance of counsel.

In addition to Dr. Fenichel, the defendant wished to

present expert witnesses (Chris Conrad and Ali Ras I[4]) as to the religious necessity of marijuana use by members of the Rastafarian religion (of which defendant is a practicing member). During jury voir dire, Judge Delehey specifically inquired about Rastafarianism and marijuana:

> THE COURT: You may hear that Mr. Forchion has a marijuana prescription based on medical needs in California and that he's a Rastafarian. Is there anything about that that would make it difficult for you to be fair and impartial? (6T79-1 to 5).

This statement as to Rastafarianism was repeatedly made by the Court to the potential jurors, but was rendered meaningless without expert testimony as to Rastafarianism.[5]

One juror (a nurse) asked the judge, in response to the above question: "I'm not real familiar with Rastafarian (sic)." (6T90-22 to 23). This comment emphasized the need at trial for

---

[4] The expert witnesses that defendant sought to produce at trial are detailed in Point VI of his pretrial brief; specifically: 1) Dr. Julien Heicklien (who would have testified as to the improper classification of marijuana); 2) Chris Conrad (a religious expert); 3) Ali Ras I (a Rastafarian religious expert); 4) New Jersey State Senator Nicholas Scutari (sponsored a medical marijuana bill and a strong proponent for marijuana legalization); 5) New Jersey State Senator Bassano (supported medical marijuana bill whose testimony would explain the intent of the bill); 6) New Jersey Assemblyman Reed Gusciora (co-sponsored medical marijuana bills; his testimony would also explain the intent of the bill; and 7) Edward E. Alexander, M.D. (California License A45272) (the doctor who prescribed the defendant Forchion's medical marijuana card). (Da146-148).

[5] These include the following transcript citations: 6T79-1 to 5; 6T80-1 to 5; 6T81-1 to 4; 6T83-7 to 11; 6T84-5 to 8; 6T84-23 to 85-2; 6T85-19 to 22; 6T89-2 to 6; 6T89-21 to 23; 6T90-18 to 21; 6T114-24 to 115-2; 6T117-10 to 13; 6T120-17 to 21; 6T127-15 to 18; 6T136-11 to 14; 6T139-9 to 12; 6T141-25 to 142-3; 6T149-14 to 17; 7T20-10 to 14; 7T28-15 to 18; 7T35-18 to 23.

an expert as to the Rastafarian religion. Another juror asked: "What is a Rastafarian?" (6T116-15) and Judge Delehey asked the defendant to explain it to the juror:

> MR. FORCHION: It's a religion. I guess you'd say the most famous adherent Rastafarian is Bob Marley. It's a -- it comes into conflict with most Western laws because of the fact that marijuana is the sacrament of faith, where it is grapes, wine is with Catholicism. It's similar, same thing with Indians and peyote. And just the fact that that's the choice of sacrament whether it's legal or not, it clashes here in America.
>
> THE JUROR: Thank you.
>
> MR. FORCHION: But it would be defined as a combination of Christianity, the traditional form, and African tribal religions. (6T116-21 to 117-8).

Another juror did not know what Rastafarianism is:

> THE JUROR: I hadn't known what the word was until this juror was -- what it meant either until the jury woman here asked what the . . .
>
> THE COURT: Rastafarian.
>
> THE JUROR: Yeah, I had no idea what that was. (6T126-17 to 22).

While the defendant has the burden to demonstrate that the marijuana laws violate a constitutional provision (see City of Jersey City v. Farmer, 329 N.J. Super. 27 (App. Div. 2000), he also has an essential and fundamental right to interpose defenses based on the invalidity of the legislative act upon which the prosecution is predicated. The notion that he cannot do so in the criminal proceeding itself constitutes a basic jurisprudential misapprehension. See Federal Rule R. 2:2-3(a)(2)

(recognizes right of a defendant in a criminal matter to attack by way of defense to the charge the validity of the regulation upon which the charge is based). In State v. Hilkevich, No. A-3632-00T3 (decided March 5, 2003, cited below and annexed at Da149) the Appellate Division reversed the defendant's convictions and forty year sentence for child molestations due to the refusal of the trial judge to permit expert witness testimony that would have supported the defendant's claim that his responses to accusations when speaking on the telephone were grounded in his professional training. (Da153). In finding the preclusion of the expert testimony reversible error, the Court stated: "The possibility that defendant might have been convicted because he was improperly prevented from presenting an exculpatory witness was sufficient to support a reversal of his judgment of conviction." (Da156).

In State v. Granskie, 433 N.J. Super. 44 (App. Div. 2013), the Court held that a defendant may present expert testimony to explain how withdrawal from heroin addiction could have led him to give police a false confession. The Court ruled that withdrawal from opiate addiction is a well-recognized mental condition that could be used to explain why the defendant confessed to participating in a sexual assault and murder. "If a defendant has a recognized mental condition, of a type that could make him or her more vulnerable to giving a false

confession, the defense has the right to present an expert to explain the mental condition and to explain how and why it could affect the confession's reliability." Id. at 55.

In the unpublished Appellate Division case of State v. Leon Nelson, 2013 WL4765340 (N.J.Super.A.D., decided September 6, 2013; annexed at Da160-163), the defendant was tried for, inter alia, first-degree aggravated assault. Prior to jury selection his fourth assigned attorney by the OPD advised the court that he had twice requested, and been denied, funding with which to retain an expert to evaluate whether certain injuries inflicted during the course of an assault may have affected the defendant's mental faculties, thereby enabling him to present the defense of diminished capacity. (Da161). The Court reversed an order of the Law Division denying a petition for post-conviction relief since "An indigent defendant is entitled to counsel as well as other ancillary services as may be necessary to prepare an adequate defense. See State v. DiFrisco, 174 N.J. 195, 243-44 (2002)." (Da162). As the Nelson Court explained, "Funding for experts is required pursuant to the State Constitution and the Public Defender Act, N.J.S.A. 2A:158A-1 to -25; In re Cannady, 126 N.J. 486, 492 (1991). Before such ancillary services are funded, the OPD has "'discretionary authority to determine what services and facilities shall be provided to an indigent defendant, [and must] weigh the factors

of need and real value to the defense against the financial constraints inherent in the OPD's budget.' Cannady, supra, 126 N.J. at 493." (Da162). The Court in Nelson remanded for an evidentiary hearing at which defendant must prove that defense counsel requested funding for an expert evaluation, and was denied the services. In Cannady, supra, 126 N.J. at 497, the Court stated that when the OPD denies an application for ancillary services, "'the reasons for doing so must be reduced to writing and a copy of that statement sent to defendant.' The intent was to make decisions to grant or deny services subject to review by the trial court. Ibid." (Da163).

The defendant Forchion should have been permitted by the OPD to present expert witnesses related to religious freedom and medical necessity. The failure to do so deprived defendant of his constitutional due process and equal protection rights, right to present a defense, and right to effective counsel.

POINT III

THE DEFENDANT WAS DEPRIVED OF THE FOLLOWING FEDERAL CONSTITUTIONAL RIGHTS: THE RIGHT TO TRAVEL AND THE DUE PROCESS CLAUSE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THE COMMERCE CLAUSE, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE FULL FAITH AND CREDIT CLAUSE (U.S. CONST. ART. IV, SEC. 1), AND THE FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURE, AS HE HAS A VALID CALIFORNIA MEDICAL MARIJUANA CARD AND WAS CONVICTED AND SENTENCED TO 270 DAYS IN JAIL ONLY FOR BRINGING HIS LEGALLY PRESCRIBED MEDICINE INTO THE STATE OF NEW JERSEY

THE FREEDOM TO TRAVEL/DUE PROCESS CLAUSE VIOLATION

Freedom to travel has long been recognized as a basic right under the United States Constitution. Attorney General of New York v. Soto Lopez, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986); Memorial Hospital v. Maricopa County, 415 U.S. 250, 255, 94 S.Ct. 1076, 1080, 39 L.Ed.2d 306 (1974); Shapiro v. Thompson, 394 U.S. 618, 631, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600, 613 (1969); United States v. Guest, 383 U.S. 745, 757-758, 86 S.Ct. 1170, 16 L.Ed.2d 239, 249 (1966). In Shapiro v. Thompson, the State of Connecticut imposed as a condition to receiving welfare benefits a one year residency period. Justice Brennan wrote for the Supreme Court that any state action "which serves to penalize the exercise of that right (to travel freely), unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." 394 U.S. at 634, 89 S.Ct. at 1331, 22 L.Ed.2d at 615 (emphasis in original). The right to travel is a "virtually unconditional personal right," Shapiro, 394 U.S. at 643, 89 S.Ct. at 1331, 22 L.Ed.2d at 620, the exercise of which may not be restrained more than incidentally except under the strict scrutiny test. "The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clause of the Fifth and Fourteenth Amendments." Jones v. Helm, 452 U.S. 412, 419, 101 S.Ct. 2434, 2440, 69 L.Ed.2d 118, 124-125 (1981).

20. In 1849 Chief Justice Taney wrote in Smith v. Turner, 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702, 790 (1849) that "For all great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

In addition, it is a fundamental and well-grounded principle of constitutional construction that whenever a state action infringes upon a constitutionally protected fundamental liberty, the court must undertake highly intensified or strict scrutiny of that action. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1281, 36 L.Ed.2d 16, 40 (1973). In such cases, the State must come forward with a compelling state need, and a demonstration that the state action which supports the compelling state need is the least restrictive means available to the State under the circumstances and actually does serve the need. Attorney General of New York v. Soto Lopez, 476 U.S. at 902-903, 106 S.Ct. at 2321-22, 90 L.Ed.2d at 505. If there are other reasonable ways to achieve the state's goal, with at least one causing less burden on constitutionally protected activity, "a state may not choose the way of greater interference." Smith v. Paulk, 705 F.2d 1279, 1284 (10th Cir. 1983) citing San Antonio School District v.

Rodriguez, 411 U.S. at 16-17, 93 S.Ct. at 1287, 36 L.Ed.2d 16 (1973) and Dunn v. Blumstein, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972).

In addition, Article I, paragraph 7 of the New Jersey Constitution (which is always coterminous to the Fourth Amendment) proscribes those searches and seizures that are unreasonable. State v. Bruzzese, 94 N.J. 210 (1983).

THE COMMERCE CLAUSE VIOLATION

Article I, Section 8, Clause 3 of the United States Constitution states that the United States Congress shall have the power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (Emphasis supplied). In addition to the due process considerations, the State's action in arresting the defendant Forchion violated The Commerce Clause of the United States Constitution. The Commerce Clause is "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." South Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 104 S.Ct. 2237, 2240, 81 L.Ed.2d 71, 76 (1984).

Professor Tribe has cautioned that "[e]ven if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nevertheless be struck down if it is in 'actual conflict' with the objectives that underlie federal enactments. Thus, state action must be

invalidated if its effect is to discourage conduct that federal action seeks to encourage." Tribe, American Constitutional Law 378 (1978). The U.S. Supreme Court has held since as far back as 1897 that citizens have a right, free from unreasonable state restraints, to engage in interstate commerce, Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897). That right stems dually from Congress' determination to facilitate free trade among the states, see Frankfurter, J., writing for the Court in McLeod v. J.E. Dilworth Co., 322 U.S. 349, 330, 64 S.Ct. 1030, 1026, 88 L.Ed. 1304, 1306 (1944). "The very purpose of the commerce clause was to create an area of free trade among the several States," and from the privileges and immunities clause of the U.S. Constitution, see Crutcher v. Kentucky, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649 (1891). While not all state action which facially restrains interstate commerce necessarily contravenes federal purposes, Pike v. Bruce Church, Inc., 397 U.S. 137, 178, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970), a court must analyze the federally guaranteed rights of individuals whose commercial activities were restrained by this roadblock. See Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976), in which the court endorsed Congress' continued affirmative intention to remove all barriers to interstate commerce.

THE EQUAL PROTECTION CLAUSE VIOLATION

The Equal Protection Clause of the Fourteenth Amendment provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." The State action in arresting the defendant Forchion also violated the Equal Protection Clause of the Fourteenth Amendment, as he was permitted to possess the marijuana in the State of California.

THE FULL FAITH AND CREDIT CLAUSE VIOLATION

The full faith and credit clause of the United States Constitution provides that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, § 1. That clause directs the courts of each state to give preclusive effect to the judgments of a sister state. The federal full faith and credit statute, 28 U.S.C.A. § 1738 provides that: "judicial proceedings [of any State, Territory or Possession of the United States] * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

THE FOURTH AMENDMENT PROHIBITION AGAINST UNERASONABLE SEARCH AND SEIZURE VIOLATION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals from arbitrary (i.e., arbitrary, unbalanced, or excessive) intrusion by government officials. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

Defendant's stop, arrest, prosecution, conviction and sentencing violated the Fourth Amendment's prohibition against unreasonable search and seizure. This argument is in addition to the defendant's challenge to the initial stop and search of his vehicle under the Fourth Amendment[6] (to be raised in defendant's pro se supplemental brief). The defendant possessed a valid California medical marijuana card at the time of his arrest and he was merely bringing his medicine with him when he returned to his home state for a visit with his children. The State's actions in arresting, prosecuting, convicting and sentencing the defendant to jail violate the United States Constitution's Fifth and Fourteenth Amendment Right to Travel,

---

[6] **Defendant's arrest and conviction also violates the New Jersey Constitution Article I, Paragraph 7 which is at least coterminous to the Fourth Amendment.**

The Commerce Clause, The Due Process Clause, Full Faith and Credit Clause, the Equal Protection Clause, and the Fourth Amendment prohibition against unreasonable search and seizure, mandating reversal and dismissal of the indictment with prejudice (and the return of defendant's medicinal marijuana).

POINT IV

N.J.S.A. 2C:35-10A(3) (THE COUNT TWO POSSESSION CHARGE) ALONG WITH THE COUNT ONE POSSESSION WITH INTENT CHARGE UNDER N.J.S.A. 2C:35-5A(1) 2C:35-5b(11), ARE UNCONSTITUTIONAL AS THEY VIOLATE PRACTICING RASTAFARIANS' RIGHT TO UTILIZE THEIR RELIGIOUS SACRAMENT GANJA (MARIJUANA) UNDER THE FIRST AMENDMENT FREE EXERCISE CLAUSE, AND RIGHT UNDER ARTICLE 1, PARAGRAPHS 3 AND 4 OF THE NEW JERSEY CONSTITUTION; THE DEFENDANT'S CONVICTION MUST BE REVERSED AND THE INDICTMENT MUST BE DISMISSED WITH PREJUDICE (AND DEFENDANT'S MEDICINAL MARIJUANA RETURNED)

New Jersey's criminalization of marijuana violates the First Amendment and New Jersey State constitutional rights of practicing Rastafarians whose religious practice includes the smoking of Ganja (marijuana). This issue was raised below pretrial and was rejected by Judge Delehey in his written opinion, citing Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990). (Da12-13). An examination of the history of marijuana and the Rastafarian religion is appropriate at this juncture.

THE HISTORY OF MARIJUANA AND THE MARIJUANA LAWS

Marijuana has been used by man for over 5000 years as a natural medicine. Cannabis saliva L. was one of the first

plants to be used by man for fiber, food, medicine, and in social and religious rituals. There were approximately 20 traditional medicinal uses of cannabis in Western medicine from the mid-19th to early 20th century. In 1941, the United States Government ordered marijuana passed out of the National Formulary and the United States Pharmacopeia.

Marijuana was first regulated in the United States at the federal level by the Marijuana Taxation Act of 1937 (MTA of 1937). The MTA of 1937 "required anyone producing, distributing, or using marijuana for medical purposes to register and pay a tax." Although the Act did not make medical use of marijuana illegal, from the years 1937 through 1939 the Federal Bureau of Narcotics, under Harry Anslinger, prosecuted 3,000 doctors for "illegally" prescribing cannabis-derived medications. In 1939, the American Medical Association reached an agreement with Anslinger and stopped prescribing marijuana. In 1942 marijuana was removed from the United States Pharmacopeia.

The MTA of 1937 remains one of the toughest Jim Crow laws still being enforced; to this day African-Americans are disproportionately incarcerated. Defendant submits that, while the government knows that marijuana is safe, the marijuana laws are a major vehicle for the legalized enslavement of citizens into the all-white controlled private and public prison

industry. These marijuana laws, which enslave African-American and other minority citizens, also enrich the corporate investors in the prison industry. Today's inner cities have been transformed into war zones by these racist inspired policies. Whenever a prohibition is created, a black market will naturally appear in a capitalist culture.

When a similar thing happened in the white communities with the Prohibition era (illegalizing alcohol), the black market element (organized crime) that Prohibition created eventually led to the end of Prohibition. During the roaring 20's, from Los Angeles to New York, whites started shooting each other, with drive by shootings common. The only difference from then and now is the color the combatants. In 1933 the all-white Congress ended the "War on Alcohol" with the 21st Amendment.

THE RELIGION OF RASTAFARIANISM

Rastafarianism is a recognized religion by both the United Nations and United States. As explained in Steele v. Blackman, INS, 236 F.3d 130, 132 (3rd Cir. 2001):

> **Rastafarianism is a religion which proclaims the divinity of Haile Selassie, former Emperor of Ethiopia, and anticipates the eventual redemption of its adherents from the "Babylon" of white oppression.**
>
> **[Rastafarianism] is a religion which first took root in Jamaica in the nineteenth century and has since gained adherents in the United States. See, Mircea Eliade, Encyclopedia of Religion, 96-97 (1989). It**

> is among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country. See J. Gordon Elton, Encyclopedia of American Religions 870-71 (1991). Standard descriptions of the religion emphasize the use of marijuana in cultic ceremonies designed to bring the believer closer to the divinity and to enhance unity among believers. Functionally, marijuana—known as ganja in the language of the religion-operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity. United States v. Bauer, 84 F.3d 1549, 1556 (9th Cir. 1996) Steele v. Blackman, INS, supra, 336 F.2d at 132.

Rastafarianism first took root in Jamaica in the nineteenth century, and is based on a combination of Old Testament ideology and East African philosophy. During the 1920's, with the rise of Jamaican Nationalism and the African-American leader Marcus Garvey, the religion gained adherents in the United States (1989); See United States v. Bauer, supra, 84 F.3d at 1556; Steele v. Blackmun, supra. Most of the Rastafarian religion's followers in this country are African-American.

The Supreme Court has defined "religion" broadly. See United States v. Seeger, 380 U.S. 163, 176 (1965) (religion, for the purposes of the Selective Service statute, encompasses any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the [religious] exemption"). Rastafarianism unquestionably is within this definition.

In considering the definition of "religion," the Tenth Circuit in United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) canvassed a large number of lower court decisions to arrive at a list of attributes that typically indicate religiosity, noting that the threshold for establishing the religious nature of beliefs is low. The principals of Rastafarianism are now examined under these factors[7]:

1) **Ultimate Ideas: Religions often address "fundamental questions about life, purpose, and death," id. at 1483, and Rastafarianism does so. Like all religions, Rastafarianism has its belief in life, purpose and death. Life was created by God ("Jah Rastafari"); the purpose in life is to live peacefully with nature ("Oneness"), and many Rastafari are physical immortalists who maintain that they can live forever with Jah.**
2) **Metaphysical Beliefs: Religious beliefs often are "metaphysical" in that they "address a reality which transcends the physical and immediately apparent world." Id. Rastafarian beliefs are metaphysical in just this way, in that all things exist in three basic dimensions, the spiritual/historical aspect, the symbolic aspect and**

---

[7] The defendant Forchion, in his pretrial motions, sought to have an expert testify as to the Rastafarian religion but was denied this. This issue is raised in Point II, supra.

the Earth Movement. The Spiritual aspect is what the ancients called entering the house of Rasta. This is the metaphysical/spiritual aspect of things. It is the realm all people can enter regardless of race, color or social standing. The symbolic aspect is to look the part. In the case of Rasta it is mostly the dreadlocks. The Earth-based Movement is for addressing the issues that fueled the resurgence of Rasta as a movement. The issues which gave rise to the Rasta Movement were Capitalism, Miseducation, Racism/White Privilege and heightened Gender discrimination.

3) **Moral or Ethical System: Religions "often prescribe a particular manner of acting, or way of life, that is 'moral' or 'ethical.'" Rastafarians are expected to adhere to this type of conduct. Specifically, the principles of the Book Of Leviticus are used by Rastafarians (as with Christians).**

4) **Comprehensiveness of Beliefs: Another hallmark of "religious" ideas is that they are comprehensive. Rastafarian doctrine is also "comprehensive" in the manner defined by the Tenth Circuit: "More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and**

concerns that confront humans." The Holy Piby (written in 1924) emphasizes the return of the Black Israelites to Africa which is the true Zion.

5) Accoutrements of Religion: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is "religious":

   a. Founder, Prophet, or Teacher: Rastafarianism has a founder. Ethiopian Emperor Haile Selassie I of Ethiopia, considered by Rastas to be the Christ. Rastas see Marcus Mosiah Garvey as a prophet, seen as a second John the Baptist.

   b. Important Writings: Rastafarianism has important writings--The Holy Pipby (published in 1924) is the most important book in Rastafarian theology. The King James Bible, The Royal Parchment Scroll of Black Supremacy, the Promised Key, and Kebra Negast (translated to "Glory of The Kings" in Amharic) are also important books.

   c. Gathering Places: Generally, Rastas assert that their own bodies are the true church or temple of God. However, some Rastafarianism have created temples.

   d. Keeper of Knowledge: Rastafarianism has keepers of knowledge. "Rasta" is a term used similar to

"Reverend."

e. Ceremonies and Rituals: Rastafarianism has ceremonies and rituals. There are two types of Rasta religious ceremonies: Reasoning and Groundation. A "reasoning" is a simple event where the Rastas gather, smoke cannabis ("ganja") and discuss. A "groundation" or "binghi" is a holy day; the name "binghi" is derived from "Nyabinghi" (literally "Nya" meaning "black" and "Binghi" meaning "victory"), believed to be an ancient, and now extinct, order of militant blacks in eastern Africa that vowed to end oppression. Binghis are marked by such dancing, singing, feasting and the smoking of ganja.

In addition, reggae music expresses Rasta doctrine.

As discussed in this brief, supra, one of the most important rituals associated with Rastafarianism is the smoking of marijuana. Rastas quote the following Biblical verses in support of this practice:

1) Genesis 1:11 – "And God said, Let the earth bring forth grass, the herb yielding seed, and the fruit tree yielding fruit after his kind, whose seed is in itself, upon the earth: and it was so."

2) Genesis 1:29- "And God said, Behold, I have given you every herb-bearing seed, which is upon the face of all the earth, and every tree, in which is the fruit of a tree yielding seed; to you it shall be for meat."

3) Genesis 3:18 – ". . . thou shalt eat the herb of the field."

4) Psalms 104.14 – "He causeth the grass to grow for the cattle, and herb for the service of man."

5) Proverbs 15:17 – "Better is a dinner of herbs where love is, than a stalled ox and hatred therewith."

6) Revelation 22:2 – "the river of life proceeded to flow from the throne of God, and on either side of the bank there was the tree of life, and the leaf from that tree is for the healing of the nations."

f. Structure or Organization: Rastafarianism has structure and organization.

g. Holidays: Rastafarianism has holidays, specifically, the following important dates when groundations may take place: January 7 (Ethiopian Orthodox Christmas); March 25 (birthday of Empress Menen); April 21 (anniversary of Heile Selassie's visit to Jamaica, also known as Groundation Dag); May 25 (Africa Liberation Day); June 16 (birthday of Emperor Haile Selassie); August 17 (birthday of Marcus Garvey); September 11 (Ethiopian New Year); and November 2 (the coronation of Haile Selassie).

h. Diet or Fasting: Rastafarianism has certain rules concerning diet and fasting. Many Rastas eat limited types of meat in accordance with the dietary Laws of the Old Testament; they do not eat shellfish

or pork. Others abstain from all meat and flesh whatsoever, asserting that to touch meat is to touch death. Usage of alcohol is deemed unhealthy and seen as a tool of Babylon to confuse people. A rich alternative cuisine has developed in association with Rasta tenets, eschewing most synthetic additives, and preferring more natural vegetables and fruits such as coconut and mango.

i. Appearance and Clothing: Rastafarianism prescribes the manner in which believers should maintain their physical appearance. The wearing of dreadlocks is closely associated with the movement. The Rastafarian colors of green, gold and red (sometimes including black) are commonly sported on Rastafarian flags, badges, posters, etc. Red, black and green were the colors used to represent Africa by the Marcus Garvey movement.

j. Propagation: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is something called "mission work," "witnessing," "converting," or proselytizing. Id. at 1484. The sole "accoutrement" listed by the Tenth Circuit that

Rastafarianism does not display is an "attempt to propagate their views and persuade others of their correctness." Meyers, 95 F.3d at 1384.

While the majority in the Tenth Circuit Meyers case found Rastafarianism not to constitute a "religion" for purposes of the Religious Freedom Restoration Act (RFRA; discussed in Point V, infra; finding that defendant Meyer's beliefs were secular and that his beliefs more accurately espouse a philosophy and/or way of life rather than a "religion') the dissent disagreed, stating: "The ability to define religion is the power to deny freedom of religion." Id. at 1480.

RELIGIOUS PROTECTIONS UNDER THE FIRST AMENDMENT AND NEW JERSEY CONSTITUTION

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Article I, paragraph 3 of the New Jersey Constitution provides: "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience ..." Article I, Paragraph 4 of the New Jersey Constitution provides that "There shall be no establishment of one religious sect in preference to another ..."

The United States Constitution is the supreme law of the land (Article VII), and any statutory law must be in total agreement with the Constitution to be valid. However, "[n]o one

is bound to obey an unconstitutional law and no courts are bound to enforce it." 16th American Jurisprudence 2nd edition, Sec 177, late 2nd, Sec 256. "All laws which are repugnant to the Constitution are null and void." Marbury v. Madison, 5 U.S. (2 Cranch) 137, 174, 176, (1803).

In Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 82, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court upheld, against a First Amendment challenge, an Oregon law criminalizing peyote use, which was used in Native American religious rituals. Smith, a member of the Native American Church, ingested peyote for sacramental purposes at a church ceremony. In response to Employment Division, Congress enacted the RFRA (discussed in Point V, infra).

In 1993, the Supreme Court in Church of the Lukumi Babalu Aye, 508 U.S. 520, 531-32 (1993) applied the Smith framework to local animal-slaughter laws that were neither generally applicable nor neutral. The import of Smith and Lukumi Babalu Aye is that, where a statutory scheme does not make exceptions from the baseline regulatory of prohibitory regime, it cannot grant exceptions for secular purposes but deny exceptions for religious purposes without compelling reasons for the denial. Although the Smith rule states that religion in general or a particular religion need not be specially favored under an

otherwise generally applicable law, the converse is also true: religion must not be disfavored when the government grants exceptions to statutory prohibition.

Two cases in the lower federal courts illustrate the application of this principle. The first involved a challenge under the Free Exercise Clause to the Newark, New Jersey's Police Department's prohibition against officers wearing beards. See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir.), cert. denied, 120 S.Ct. 56 (1999). The plaintiff officers were Sunni Muslims whose religion requires adult males to wear beards. Their request for exemption from the policy was denied; the department announced a 'zero tolerance policy' for departures from the ban, except for those officers who received a "medical clearance" to wear a beard. See id. at 361. The Third Circuit held that, because because the department offered no compelling reason for the policy, the court upheld the Free Exercise claim. See id. at 366-67. See also Rader v. Johnston, 924 F.Supp. 1540, 1551-55 (D. Neb. 1996) (Court applied Smith similarly to uphold a college student's right to a religious exemption from the University of Nebraska's mandatory housing policy).

In Gonzales v. O Centro Espirita Beneficente, Uniao do Vegetal, 546 U.S. 418 (2006), the Federal Government seized a sacramental tea (ayahuasca), containing a Schedule I substance,

from a New Mexican branch of the Brazilian church Uniao do Vegetal (UDV). The United States Supreme Court found that the Government had failed to meet its burden under the RFRA that barring the substance served a compelling government interest. The Gonzales Court also disagreed with the government's central argument that the uniform application of the Controlled Substances Act (CDS) does not allow for exceptions for the substance in this case, as Native Americans are given exceptions to use peyote, another Schedule I substance.

In the Rastafarian religion, no substitute exists for cannabis; its ingestion or topical application is necessary for a Rastafarian ceremony to occur. Because cannabis is regarded as sacred, Rastafarian doctrine does not permit the substitution of any other plants or materials as sacraments during Rastafarian ceremonies, and does not permit the substitution of any other practice for the ingestion or topical application of cannabis.

The government may not make theological judgments about religious truth. See Seeger, supra, 380 U.S. at 184 ("In such an intensely personal area ... the claim of the registrant that his belief is an essential part of a religious faith must be given great weight"); see also id. at 185 (noting that "the 'truth' of a belief is not open to question"); Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981) ("It is inappropriate for a reviewing

court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity.")

Therefore, governmental decision-makers must view cannabis as central and indispensable to the Rastafarian religious practice. If wine were added to schedule 1 with no accommodation for religious use, it would be absolutely clear that the free exercise of Catholicism and Judaism was being substantially burdened. The same is true of cannabis and the Rastafarian religion. Therefore, prohibition of the Rastafarian religion's use of cannabis "substantially burden[s]" the exercise of the Rastafarian religion, within the meaning of RFRA, 42 U.S.C. § 2000bb-1(a). See e.g. United States v. Boyll, supra, 774 F. Supp. 1333, 1341 (D.N.M. 1991) ("believers who worship at the Native American Church cannot freely exercise their religious beliefs absent the use of peyote." ... "There is no dispute that [the] criminal prohibition of peyote places a severe burden on the ability of [Defendant] tofreely exercise [his] religion.") (citations omitted); see also United States v. Warner, 595 F.Supp. 595, 598 (D.N.D. 1984) ("[T]he government concedes that the use of peyote is central to, and the cornerstone of, the religious practices of the NAC. Therefore, prosecution for the use of peyote in the bona fide religious practices of the NAC would create a burden on the free exercise

of the religion of NAC members"); Wisconsin v. Yoder, 406 U.S. 205 (1972) (United States Supreme Court found that Amish children could not be placed under compulsory education past 8th grade).

Similarly here, it is necessary to focus on the particular facts relating to Rastafarianism and its use of cannabis. The government has only one arguably compelling interest in controlling the use of cannabis in Rastafarian religious ceremonies, that of protecting the members of the Rastafarian religion from harm. However, independent and scientific literature suggests the absence of harm resulting from the consumption of cannabis. No evidence exists that the use of cannabis in religious ceremonies is addictive or is otherwise likely to harm the individuals participating in the ceremonies.

New Jersey's laws criminalizing marijuana are unconstitutional as they substantially burden the Rastafarians' exercise of their religion in a manner that is not justified by a compelling governmental interest carried out in the least restrictive manner. The United States Christian/Jewish legislators have chosen their Judeo/Christian faith as the genesis of our drug laws by allowing the use of wine as a sacrament but prohibiting the use of "marijuana" as a sacrament. Rastafarians use marijuana as both a sacrament in religion and as a medicine. The religious exemptions that exist for Peyote

(utilized by American Indians) and Ayahuasca (sacramental tea utilized by a New Mexican branch of the Brazilian church Uniao do Vegetal), both Schedule I drugs, should apply to Rastafarians with marijuana.

The denial of the defendant's free religious exercise rights was exacerbated by the denial to him of a Rastafarian religious expert (an issue brought up during jury selection but then never properly presented during the trial).

The conviction must be reversed and the indictment dismissed with prejudice.

POINT V

NEW JERSEY'S CRIMINALIZATION OF MARIJUANA DEPRIVES RASTAFARIANS OF THEIR SACRAMENTAL USE OF CANNABIS IN VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA); THE CONVICTION MUST BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE

Judge Delehey rejected this argument, writing:

> THE RFRA has been held to be unconstitutional as applied to the states. City of Boerne v. Flores, 521 U.S. 507 (1997). Recently, the Eight[h] Circuit Court of Appeals reiterated the RFRA's definition of "government" has been amended to no longer include state governments. Olsen v. Mukassey, 541 F.3d 827 (8th Cir. 2008). The Olsen court dismissed the petitioner's RFRA claim, similar to the one presented here, holding that an Iowa criminal statute at issue was not subject to RFRA. Similarly, N.J.S.A. 2C:35-5, a state law, is not subject to RFRA. (Da12).

As explained in Point IV, supra, in response to Employment Division v. Smith, in 1993 Congress enacted the Religious

Freedom Restoration Act (codified at 42 U.S.C. § 2000bb) which is aimed at preventing laws that substantially burden a person's free exercise of religion. However, in 1997 the Supreme Court in City of Boerne v. P.F. Flores, 521 U.S. 507, 138 L.Ed.2d 624, 117 S.Ct. 2157 (1997) declared the RFRA unconstitutional as applied to the States. However, the scope of Boerne was limited in 2006 in Gonzales v. O Centro Espirita Beneficente, Uniao do Vegetal, supra, discussed in Point VI, infra. 546 U.S. 418 (2006), involving the Federal Government's seizure of a sacramental tea (ayahuasca). The United States Supreme Court found that the government had failed to meet its burden under the RFRA that barring the substance served a compelling government interest. In People of Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002), the Ninth Circuit ruled that the RFRA forbids prosecuting Rastafarians for using marijuana within the federal realm, such as a United States territory or a national park, thus upholding a portion of the RFRA. So marijuana (at least in United States territories), peyote (a Schedule I substance) and sacramental tea (ayahuasca) (another Schedule I substance) have been provided religious exemptions by the federal courts. Accordingly, ganja (marijuana) must be afforded the same exemption to Rastafarians.

By depriving all Rastafarians of their ability to partake in

and possess sacramental cannabis, the State of New Jersey has burdened the exercise of religion in a manner forbidden by the RFRA. The RFRA protects the religious use of marijuana by practicing Rastafarians, just as the 1919 Volstead Act (Prohibition Act) protected the religious use of alcohol in the Catholic Church.

For the foregoing reasons, the conviction must be reversed and the indictment must be dismissed with prejudice.

POINT VI

N.J.S.A. 2C:35-5A(1)/2C:35-5b(11) AND N.J.S.A. 2C:35-10A(3) ARE UNCONSTITUTIONAL AS THEY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE PEYOTE (A SCHEDULE I SUBSTANCE) IS A RECOGNIZED RELIGIOUS EXEMPTION ALONG WITH ANOTHER SCHEDULE I SUBSTANCE (AYAHUASCA TEA); PRACTICING RASTAFARIANS IN NEW JERSEY MUST BE AFFORDED THE SAME PROTECTION

Since both peyote (a Schedule I substance) and sacramental tea (ayahuasca) (another Schedule I substance) have been provided religious exemptions by the Supreme Court, the failure to do so for Rastafarians and their religious sacrament ganja (marijuana) is violative of the equal protection clause of the Fourteenth Amendment (and Fifth Amendment).

The Fifth Amendment requires the federal government accord all persons the equal protection of law; that it treat alike all persons similarly situated. "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing

that they were treated differently from others who were similarly situated to them." Campbell v. Buckley, 203 F.3d 738, 747 (10th Cir. 2000). (footnotes, quotations, and ellipses omitted), cert. denied, 121 S.Ct. 68 (2000). The principle of equal protection of law forbids selective enforcement based upon an "unjustifiable standard such as race, religion, or other arbitrary classification." United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979).

The Rastafarian religion is similarly situated to both the Native American Church ("NAC") and the O Centro Espirita Beneficiente Uniao Do Vegetal-USA ("UDV-USA") in all significant respects. All three religions use Schedule 1 substances as religious sacraments and in all three, ingestion of that substance is necessary to the proper conduct of religious ceremonies. Neither the NAC nor the UDV-USA holds special qualities or attributes that would justify defendant's more favorable treatment of them. Indeed, both the NAC and the UDV-USA have some attributes that would make each of them a less favorable candidate for permission to use their Schedule 1 substances in religious ceremonies. Unlike cannabis, both peyote and DMT are strong mind-altering substances that are temporarily debilitating and may require an attendant be present to ensure the health and safety of the sacrament's recipient. Cannabis, by contrast, is much milder and is not in any way

temporarily debilitating as both peyote and DMT can often be. See "First Report of the National Commission on Marihuana and Drug Abuse," pp. 58-61. Newcomers to the Rastafarian religion are virtually all already familiar with cannabis and therefore are not likely to confuse the religion with the effects of the sacrament. Already widespread use of cannabis in all walks of American life means neophytes to the Rastafarian religion are not likely to be drawn to the Rastafarian religion as a haven for otherwise illicit drug use as is more likely with neophytes of the other two above religions.

All persons are supposed to be treated equally, yet in New Jersey persons now identified as falling under the Medical Marijuana Compassionate Use Act are immune from prosecution for possession of marijuana, while other persons such as Rastafarians (who also use marijuana medically) will be charged with a criminal violation. This is a clear equal protection violation. Since ganja (marijuana) must be afforded the same exemption to Rastafarians, the failure to do so violates equal protection rights.

Yet another violation of the right to equal protection is the legal standing of people charged with breaking the laws that regulate alcohol and tobacco products. Those whose charges involve Controlled Substances, cultivation of marijuana for personal use, or sale between consenting adults without

complainants, for example, are dealt with much more harshly and severely than merchants who illegally sell tobacco (the number one killer drug) to minors, and alcohol related violations of motor vehicle laws.

The acts also violate equal protection since the acts, as applied, are racist. For thousands of years African have used the "herb" marijuana as a medicine and as a sacrament in numerous religions. Through the institution of slavery (1619-1865) and in spite of the First Amendment, this country was founded on Africans who were forced to abandon their native religions and accept Christianity (the faith of the enslavers). Christianity does not recognize marijuana as a sacrament and in fact banned its use. In 1484, Pope Innocent the VII banned the use of "cannabis" and decreed "cannabis" an unholy herb, Satan's weed, the herb of heathens, weed of the satanic masses, etc.

Slavery ended over 147 years ago, yet many African-Americans who reject Christianity as their faith find laws such as the 1970 Controlled Substance Act ("CSA") and N.J.S.A. 2C:35-5a(1)/b(11) and N.J.S.A. 2C:35-10a(3) prohibit them from freely exercising African based faiths by banning their religion's sacrament (marijuana).

The conviction must be reversed and the indictment must be dismissed with prejudice.

POINT VII

THE DEFENDANT'S CONVICTION UNDER N.J.S.A. 2C:35-10A(3) (POSSESSION OF MORE THAN 50 GRAMS OF MARIJUANA) MUST BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE (AND THE MEDICAL MARIJUANA RETURNED TO THE DEFENDANT) SINCE THE CATEGORIZATION OF MARIJUANA AS A SCHEDULE I DRUG VIOLATES THE DEFENDANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS THE STATUTE HAS BEEN PREEMPTED, NULLIFIED, AND RENDERED UNCONSTITUTIONAL BY THE ENACTMENT OF THE NEW JERSEY COMPASSIONATE USE MEDICAL MARIJUANA ACT ("CUMMA;" N.J.S.A. 24:6I-1 ET SEQ.)

Defendant submits that on January 18, 2010, when the State of New Jersey passed into law the CUMMA (N.J.S.A. 24:6I-3), it preempted and nullified the 2C marijuana laws (including N.J.S.A. 2C:35-10A(3)). This issue was raised in Point I of the brief filed below and Judge Delehey disagreed, writing:

> At the outset, the Court notes that CUMMA was no in effect at the time that the alleged conduct occurred in this case. CUMMA was passed into law on January 18, 2010, but did not take effect until July 1, 2010 – more than three months after the defendant's arrest. (Da8).

As to this first point by Judge Delehey, the defendant had every reason to believe that, since the CUMMA had, in fact, been passed into law on January 18, 2010, that he would come under its protections when he entered New Jersey with his medicine/religious sacrament in late March of 2010.

Judge Delehey continues:

> Moreover, defendant did not comply with any of the requirements for the medical use of marijuana under the act. Apparently, the

> defendant is not afflicted with any of the debilitating medical conditions allowing the use of medicinal marijuana. *See* CUMMA Section C, N.J.S.A. 24:6I-3. Defendant is not a registered and qualifying patient, nor did he possess a certified authorization for medical use of marijuana from a physician licensed in the State of New Jersey. *See* CUMMA Section C, N.J.S.A. 24:6I-4 and -5. Finally, defendant possessed a quantity of marijuana that far exceeded the maximum allowed under CUMMA, which is only two ounces over a 30-day period of time. *See* CUMMA Section C, N.J.S.A. 24:6I-10. In short, CUMMA was not in effect, and even if it were, Defendant failed to adhere to any of the requirements of the statute. (Da8-9).

Defendant submits that he was, in fact, "a qualifying patient" who had at the time of his arrest a legitimate California Medical Marijuana card. Under the definitions of the CUMMA (N.J.S.A. 24:6I-3), defendant must meet "one of the following conditions, if severe or chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome results from the condition or treatment thereof: positive status for human immunodeficiency virus; acquired immune deficiency syndrome; or cancer." (Emphasis supplied). Dr. Fenichel testified at trial as to the defendant's cancerous "giant cell tumor on the bone" (9T46-20 to 25) and that the most common symptom "is very deep-seated pain of the bone . . . a lot of discomfort and pain." (9T48-5 to 8). Dr. Fenichel testified as to the spread of the giant cell tumors and that defendant "is getting to be studded with these painful tumors." (9T51-10 to 13) and as to the

"chronic pain associated with giant cell tumors." (9T51-18 to 24). Defendant was (and still is) "a qualifying patient" under New Jersey's CUMMA.

In addition, defendant was denied the expert services he needed (including a medical expert to testify as to his need for his medicine—marijuana). Defendant was deprived of his due process and equal protection rights when he was arrested, convicted, and sentenced to 270 days in jail as a result of his validly possessed medicine from the State of California.

Judge Delehey also wrote: "The authority to change the classification of marijuana from a Schedule I narcotic is left to the Director of Consumer Affairs in the Department of Law and Public Safety (Director)." (Da9). Defendant submits that this Court has the power to rule the statute in question unconstitutional as violative of both the defendant's equal protection and due process rights.

Defendant also disagrees with Judge Delehey's speculation that were marijuana to be reclassified, it would be reclassified under Schedule II. (Da10). Defendant submits that there is little, if any, evidence of "high potential for abuse" or that "abuse may lead to severe psychic or physical dependence" as required for a Schedule II drug.

At the time of the writing of this brief twenty states (and the District of Columbia) have legalized marijuana for

medical use: Alaska, Arizona, California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington State. In addition, two states—Washington State and Colorado- have legalized recreational marijuana.

New Jersey's Compassionate use Medical Marijuana Act ("CUMMA") states at N.J.S.A. 24:6I-1:

> **As amended by the committee, this bill, which is designated the "New Jersey Compassionate Use Medical Marijuana Act," would add New Jersey to the list of states nationwide that have enacted laws to permit the use of marijuana for medical purposes.**
>
> **Medical research suggests that marijuana may alleviate pain or other symptoms associated with certain debilitating medical conditions. Federal law prohibits the use of marijuana; however, 99% of marijuana-related arrest in this nation are made under state law, rather than federal law, so that changing state law would provide legal protection to the vast majority of seriously ill people who use marijuana medically.**

Accordingly, the CUMMA unquestionably states that marijuana does not meet the criteria for a Schedule 1 controlled dangerous substance in New Jersey, as revealed by an examination of New Jersey Title 24, which defines and categorizes "Narcotic Drugs and Other Dangerous Substances." The drug categorization is made by the State Commissioner of Health. (N.J.S.A. 24:21-2). Controlled substances are broken down into five Schedules—

Schedule I through Schedule V, with Schedule I substances being considered to have the highest potential for abuse with "no accepted medical use in treatment in the United States." (emphasis supplied). N.J.S.A. 24:21-5.

Pursuant to N.J.S.A. 24:21-5e(10), the commissioner has categorized marijuana as a Schedule I controlled substance—one found to have the highest potential for abuse and either no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. Other Schedule I controlled substances include: 1) Heroin (24:21-5d(11)); 2) Morphine methylbromide (24:21-5d(15)); 3) Morphine methylsulfonate (24:21-5d(16)); 4) Morphine-N-Oxide (24:21-5d(17)); 5) 3,4-methylenedioxy amphetamine (24:21-5e(1)); 6) Lysergic acid diethylamide, commonly referred to as "LSD" (24:21-5e(9)); 7) Mescaline (24:21-5e(11)); and Peyote (24:21-5e(12)). Thus, the commissioner has absurdly (and without any scientific basis) placed marijuana in the same category as heroin, morphine, and L.S.D.

N.J.S.A. 24:21-3 (Authority to control) specifically grants the commissioner the authority to add "or delete or reschedule all substances enumerated in the schedules in sections 5 through 8 of this act" and applies the following criteria:

> **(1) Its actual or relative potential for abuse;**

> (2) Scientific evidence of its pharmacological effect, if known;
> (3) State of current scientific knowledge regarding the substance;
> (4) Is history and current pattern of abuse;
> (5) The scope, duration, and significance of abuse;
> (6) What, if any, risk there is to the public health;
> (7) Its psychic or physiological dependence liability; and
> (8) whether the substance is an immediate precursor of a substance already controlled under this article.

N.J.S.A. 24:21-3d had provided:

> d. The State Department of Health shall update and republish the schedules in sections 5 through 8 on a semiannual basis for 2 years from the effective date of this act and thereafter on an annual basis.

The New Jersey State Legislature amended that provision in 2007 and it now reads:

> d. The director shall update and republish the schedules in sections 5 through 8.1 of P.L. 1970, c. 226, as amended and supplemented (C. 24:21-5 through 24:21-8.1) periodically.

The National Cancer Institute[8] has ruled that marijuana does in fact have medical benefits, making it the first federal agency to do so. (See The Raw Story Article "Federal Agency recognizes pot for medical use" by David Ferguson, dated March

[8] The National Cancer Institute (NCI) is part of the National Institutes of Health (NIH), which is one of eleven agencies that compose the Department of Health and Human Services (HHS). The NCI, established under National Cancer Institute Act of 1937, is the Federal Government's principal agency for cancer research and training.

27, 2011; Da90). In 1972, the Shaffer Commission, named after former Pennsylvania Governor William Shaffer, challenged the Scheduling of marijuana as a Schedule I drug, along with the appropriateness of prosecution individuals for using it. President Nixon, after not even reading the truthful report, suppressed it. (See NORML article dated March 19, 2002; "Special Release 30 Years After Nixon's Marijuana Commission Advocated Decriminalization, Report Findings Are Still Valid Nixon Never Read His Own Report"; Da91).

The State of New Jersey has now recognized marijuana as a medicine but the State Health and Human Services Department has failed to reclassify marijuana (in spite of the fact that marijuana is both factually and scientifically not a schedule I drug).

In addition to the failure of the State of New Jersey to reclassify marijuana from a Schedule 1 drug, similarly, the federal government has failed to do so. In enacting the Controlled Substances Act (CSA) in 1970, Congress specifically identified and defined a number of substances as "controlled substances" subject to strict regulation and it assigned substances to specific schedules.

Congress took the precaution of setting up a commission to determine on which schedule, if any, cannabis should be placed. After an exhaustive study, this commission issued in March, 1972,

its report entitled; "The First Report of the National Commission on Marihuana and Drug Abuse," subtitled; "Marihuana, a Signal of Misunderstanding." This study stands as the first and foremost comprehensive scientific study ever done on the effect of cannabis on the health and safety of the United States population. It recommended that simple possession of cannabis be totally decriminalized and concluded that cannabis did not pose a significant health and safety risk to the U.S. population. Despite these findings, President Nixon used his prerogatives to place cannabis on CSA's Schedule 1 of controlled substances, which are described in the CSA rules as being "extremely dangerous." Recent documents obtained through the Freedom of Information Act recount and document President Nixon's incomplete understanding and his prejudices surrounding cannabis. These documents support already well-known attitudes of Nixon about cannabis and its use among some of his chosen enemies. Nixon had cannabis placed on the Schedule 1 of controlled substances to punish these political enemies despite having in hand the Congressionally mandated study.

Since that time cannabis users have been punished with savage severity unbecoming of a free nation, but totally in character with President Nixon's vindictive tendencies. The millions of arrests for simple possession of cannabis in the intervening years and the percentage of cannabis arrests of

all arrests for Schedule 1 substances suggest the political nature of placing cannabis on Schedule 1 of the CSA and calls into question the basic motivation of those charged with enforcing the prohibition of Schedule 1 substances.

The scheduling of cannabis stands in stark contrast to all other substances found on Schedule 1, on Schedule 2, or on any other substance found on any other schedule of the CSA in its comparative mild and benign qualities. Cannabis is not only benign in its effects upon the user, it has provable and recognized medical qualities recognized by all but the DEA who continue to promote their mantra that cannabis has no medical uses--since otherwise, it could not be a controlled substance on CSA's Schedule 1.

While the United States government has in the past impeded medical marijuana's acceptance, in October of 2009 the Obama Administration announced a shift in the enforcement of federal drug laws, stating that the administration would effectively end the Bush Administration's frequent raids on distributors of medical marijuana. See Washington Post article by Carrie Johnson "U.S. eases stance on medical marijuana" (dated October 20, 2009; annexed to the Law Division Appendix at Da57-59 and to the Appendix at Da92).

More significantly, in the "Memorandum For All United States Attorneys" from James M. Cole, Deputy Attorney General

(dated August 29, 2013; annexed at Da164-167), the United States Justice Department announced that it will not challenge state laws that legalize marijuana (see article dated August 30, 2013 "No federal challenge to pot legalization in two states" by Evan Perez, CNN Justice Reporter; Da168). This new position by the federal government allows states to freely write their own marijuana laws, and more states will invariably legalize marijuana in the near future.

Federal Administrative Law Judge Francis L. Young in In The Matter of: Marijuana Rescheduling Petition Docket No. 86-22 (1988) recommended that the DEA remove marijuana from Schedule One, stating: "Marijuana is one of the safest therapeutically active substances known to man."[9] (This Opinion was annexed to the Law Division brief at Da60-90 and is annexed to the Appendix at Da95-124). The Bush Administration, like the Nixon Administration, refused.

Among the plethora of misinformation about cannabis is the DEA's dire predictions of what would happen if the prohibition on cannabis were to be lifted. These predictions should have been forever put to rest by the experience of Alaska when these prohibitions were totally absent for a period of many months, during such time none of the DEA's dire predictions about the

[9] http://www.druglibrary.org/olsen/medical/young/young.html

effects of lifting these laws took place. What is more likely, according to many social scientists, is that the federally imposed prohibition on cannabis has had the same effect-especially on the youth-of creating a "forbidden fruit" syndrome, by which more people use the substance than would normally be the case. This is borne out in the experience of The Netherlands, which issued its own study on cannabis at the same time of the 1972 Congressional study. The Netherlands allowed for a relatively permissive approach and saw cannabis use among its young people drop markedly.

The United States government's stubborn refusal to allow challenges to its severe restrictions on cannabis (and its penchant for ignoring studies and evidence contradicting its general prohibition of cannabis) call into question whether it does so simply to perpetuate a lucrative bureaucracy built on the destruction of an otherwise innocent class of citizens who, because of their felony convictions, are robbed even of the legal means to remedy their oppression.[10]

It is apparent that when CUMMA was signed into law it nullified N.J.S.A. 2C:35-10A(3) by recognizing marijuana's

---

[10] **This injustice is multiplied infinitely by the denial of the Rastafarian and other churches' cannabis sacrament, a sacrament that has been used religiously by man throughout recorded history (the religious freedom issue is discussed in Points IV, V and VI, supra).**

medical value.[11] The conviction must be reversed and the indictment against the defendant Edward R. Forchion must be dismissed with prejudice.[12] In addition, the medicinal marijuana/religious sacrament illegally seized by the State must be returned to the defendant.

POINT VIII

THE COURT BELOW DEPRIVED DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY PRECLUDING THE DEFENDANT FROM SPEAKING TO THE JURY ABOUT THE NEW JERSEY COMPASSIONATE USE ACT AND PRECLUDING HIM FROM ARGUING THAT MARIJUANA SHOULD NOT BE A SUBSTANCE PROSCRIBED BY NEW JERSY LAW AS PART OF HIS DEFENSE AT TRIAL

While Judge Delehey permitted the defendant to proceed pro se at trial, he severely restricted his ability to present a meaningful defense to the possession charge when he barred the defendant from suggesting to the jury "that marijuana is not or should not be a substance proscribed by law in the State of New

---

[11] After New Jersey passed its medical marijuana law on January 18, 2010, the defendant, a medical marijuana card carrying person, brought his medical marijuana with him to New Jersey from California, believing that he would have some legal protection. As can be seen in the ProCon.org Medical Marijuana States and DC Summary Chart, as to whether New Jersey "Accepts other states' registry ID cards?" this is "Unknown." (Da139). Defendant submits that Judge Delehey's finding that "at the outset, the court notes that CUMMA was not in effect at the time that the alleged conduct occurred in this case. CUMMA was passed into law on January 18, 2010, but did not take effect until July 1, 2010 -- more than three months after the defendant's arrest" has no bearing. The defendant (and any reasonable individual) would have believed he would be protected on April 1, 2010, as the CUMMA had, in fact, been passed into law on January 18, 2010 (more than two months prior).

[12] The "right to travel," "commerce clause," "equal protection," "full faith and credit" and Fourth Amendment arguments are discussed in Point III, supra.

Jersey." As stated in Judge Delehey's June 5, 2012 Order: the defendant "will advance no arguments to the jury to suggest that marijuana is not or should not be a substance proscribed by law in the State of New Jersey." (Da16).

Justice Oliver Wendell Homes wrote in Horning v. District of Columbia, 254 U.S. 135 (1920) that "the jury has the power to bring in a verdict in the teeth of both the law and the facts."

At the time of the writing of this brief, at least five states (New Hampshire, Maryland, Indiana, Oregon and Georgia) permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy. The New Hampshire "nullification" bill, No. 519-23 (which took effect last year), provides: "In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy."

Article 1(6) of the New Jersey Constitution states: "In all prosecutions . . . the jury may be given the truth as evidence . . . The jury may judge the law as well as the facts."

Defendant submits that Judge Delehey erred in denying the defendant the right to argue to the jury that the CUMMA preempted the State's marijuana criminalization statutes. Defendant wanted to argue directly to the jury that the 2C

marijuana laws under which he was being prosecuted were technically and factually wrong in their classification of marijuana as a Schedule 1 drug. Marijuana is acceptable as a medicine in nearly half of the country including New Jersey. Even New Jersey's own medical marijuana (the CUMMA) law recognizes marijuana's medical value. The defendant wanted to ask the jury directly to exercise its powers to judge the law as well as the facts (per Article 1, Paragraph 6 of the New Jersey Constitution).

The defendant wanted the jury to use common sense and to consider that the State of New Jersey wanted him to stop treatment upon entering the State while his cancer would continue to grow. Judge Delehey's rulings unconstitutionally muzzled defendant's attempted defense.

The defendant wished to explain that the jury's duty was to stand as the barometer of acceptable behavior in the United States (as the Founding Fathers envisioned); namely, that in the past twenty years the citizenry has accepted that the government has lied for decades as to the classification of marijuana. The jury had the duty, obligation, and mandate from the Founding Fathers to stand up to the tyranny of government regulation and to grant freedom to the defendant based on its belief that it was the law, and not the defendant, that was wrong.

Defendant wished to advise the jurors to render a verdict

in accordance with their own conscience and to reflect what is acceptable in today's society (despite contrary political pressure to keep the marijuana laws intact.

The defendant's conviction must be reversed and, at the very least, a new trial ordered (and defendant's medicinal marijuana returned to him).

CONCLUSION

For the foregoing reasons and authorities cited, defendant-appellant Edward R. Forchion respectfully requests that this Court reverse his conviction and dismiss the indictment with prejudice.

Respectfully submitted,

Joseph Krakora
Public Defender

By: _____
John Vincent Saykanic
NJ Attorney ID Number: 045801984
Designated Counsel
Attorney for Defendant-Appellant Edward R. Forchion

Dated: March 17, 2014