

SUPREME COURT
STATE OF ARIZONA

RODNEY CHRISTOPHER JONES,

Appellant

v.

STATE OF ARIZONA,

Appellee.

No. CR-18-0370-PR

Court of Appeals

Division One

No. 1 CA-CR 16-0703

Yavapai County

Superior Court

No. P1300CR201400328

**AMICUS BRIEF OF WILL HUMBLE, FORMER DIRECTOR OF THE
ARIZONA DEPARTMENT OF HEALTH SERVICES**

[FILED WITH CONSENT OF THE PARTIES]

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TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION | 1 |
| II. | INTERESTS OF AMICUS CURIAE..... | 3 |
| III. | ARGUMENT..... | 5 |
| | <i>A. AMMA Is Premised Upon The Medical Use of Marijuana In All Forms, Including Extracts and Concentrates.</i> | 5 |
| | <i>B. The Attorney General Voiced No Concern Over Extracts And Concentrates.....</i> | 7 |
| | <i>C. The Zander Welton Nexus.</i> | 8 |
| | <i>D. ADHS Has and Still Supports the Manufacture and Medical Use Extracts And Concentrates.....</i> | 10 |
| | <i>E. The Impact of the Opinion Inadvertently Discriminates Against the Most Vulnerable Patients.....</i> | 11 |
| | <i>F. The Opinion Has Overwhelming Unintended Consequences.....</i> | 12 |
| | <i>G. Conclusion.....</i> | 13 |
| IV. | APPENDIX | 14 |

TABLE OF AUTHORITIES

STATUTES

| | |
|------------------------------|----|
| A.R.S. § 36-2801(4)..... | 5 |
| A.R.S. § 36-2801(8)..... | 5 |
| A.R.S. § 36-2802 | 6 |
| A.R.S. § 36-2805(A)(3) | 5 |
| A.R.S. § 36-2806 | 12 |
| A.R.S. § 36-2814(A)(3) | 5 |
| A.R.S. § 36-2815 | 12 |

TREATISES

| | |
|--|----|
| <i>Marijuana and Medicine Assessing the Science Base</i> , by Janet E. Joy, Stanley J. Watson, Jr., and John A. Benson, Jr., Editors, Division of Neuroscience and Behavioral Health, Institute of Medicine National Academy Press, Washington, D.C..... | 7 |
| <i>Recommendations for Best Practices Regarding Marijuana Extractions, Concentrates, Infusion Kitchens and Edible Food Products Containing Marijuana</i> | 11 |
| <i>the Medical Marijuana Verification System Dispensary Handbook</i> | 11 |

REGULATIONS

| | |
|-----------------|----|
| R9-17-316 | 11 |
| R9-17-317 | 11 |
| R9-17-319 | 11 |

I. INTRODUCTION

Upon enactment of the Arizona Medical Marijuana Act (“AMMA” or the “Act”) in 2010, the Arizona Department of Health Services (“ADHS”) embarked on the prodigious venture of designing, implementing, and managing the statewide medical marijuana program (the “Program”) as the Act required. The objective was to develop an unrivaled public health program that honors both the intent of the voters as expressed in the text of the Act and the agency’s overarching responsibility to promote, protect, and improve the health and wellness of Arizona’s residents and communities.

ADHS achieved that objective under the leadership of Mr. Will Humble, its director. Because ADHS was tasked with crafting the administrative rules (the “Rules”) governing the Program, Director Humble and his team of public health professionals turned first and foremost to the text of the Act to ascertain the meaning of its provisions. They also consulted the most current scientific and medical literature regarding the medicines of the cannabis plant (*i.e.*, cannabinoids), the findings of fact set forth in the voter initiative, and other reputable sources of information.

ADHS did not undertake these efforts in a vacuum. In developing the Program, Director Humble and his team consulted regularly with the Arizona Attorney General’s Office. Director Humble believed it was important to ensure both that ADHS and the State’s chief legal officer shared a common understanding of AMMA’s provisions and

that the regulations ADHS was charged with formulating and promulgating (the “Rules”) conformed with that interpretation.

Among the exercises that ADHS undertook in fulfilling its duties was to determine what activities fall within the scope of the legal immunities that AMMA confers upon licensed non-profit dispensaries and cardholding patients, caregivers, and dispensary agents. As relevant here, Director Humble and his team studied whether the Act’s immunity provisions embrace the medical use of the cannabis plant’s extracted resin (whether in the form of hashish or other concentrates) and preparations or mixtures of that part of the plant (including extract-infused edible and non-edible products). In consultation with the Attorney General’s Office, they concluded that AMMA’s text was not reasonably susceptible to any other interpretation. They were acutely aware that the medicine of the plant exists in its resin. They also found support for that interpretation of the Act in the scientific literature, including studies referenced explicitly in the Initiative’s findings of fact that favor the use of marijuana extracts and concentrates over smoking the whole dried flower for medical purposes.

Based on that interpretation of the Act, the State’s Program was designed and implemented with the expectation that the cannabis plant and its constituent parts, including extracted resin (hashish and other concentrates) and extract-infused edible and non-edible products would be manufactured, distributed, possessed, and used for medical purposes in Arizona. For nearly a decade, Arizona’s registered qualifying patients and all those who serve them (*i.e.*, licensed dispensaries and cardholding

dispensary agents and caregivers) have conducted their affairs in reliance on ADHS's interpretation of the Act, as manifested in its Rules, guidance, and systems. More to the point, Arizona's dispensaries have been dispensing, and Arizona's cardholders have been acquiring concentrates and infused edible products for nearly a decade with no reason whatsoever to believe that these actions fell outside the bounds of AMMA.

The Court of Appeals' Opinion of June 26, 2018, wherein two judges announced over a strong dissent that AMMA offers no protection for the possession and use of extracted resin (and by extension, anything made with that resin) effectively exposed a substantial percentage of Arizona's cardholder population and virtually all of Arizona's licensed dispensaries to felony charges, based on a construction of the Act that is flawed and dismissive of the voters' intentions. Because the Opinion presents statutory construction and due process issues of statewide importance, Director Humble supports Rodney Jones's Petition for Review.

II. INTERESTS OF AMICUS CURIAE

Will Humble served as Director of ADHS from January 2010 until March 2015, after having served for a year as its Interim Director. In that capacity, Director Humble participated in virtually every facet of ADHS's implementation of AMMA following passage of Proposition 203 in 2010, including the agency's interpretation of AMMA in collaboration with the Arizona Attorney General's Office and the formulation and

promulgation of the Rules for the Program. There is arguably no one more knowledgeable about AMMA's implementation than Director Humble.

As a key stakeholder in the development and implementation of Arizona's Program, Director Humble has substantial interest in the outcome of this case. Beyond his concern for Rodney's (and all cardholders') right to due process of law under the U.S. and State Constitutions, Director Humble is deeply concerned that the Opinion: 1) removes options that Arizona's most vulnerable patients are entitled to under the Act; 2) erodes key provisions of ADHS' well-researched and objective implementation of the Act by overturning their Administrative Code; 3) undermines the intent of Arizona voters who approved Proposition 203 by removing forms of marijuana that were clearly outlined in the Act; and 4) causes undue damage to the business models of dispensaries and their contractors that were built around the statutory and regulatory constructs of the Act and the ADHS' implementation of AMMA. Humble, ¶ 18.

Director Humble is convinced that this Court will benefit from the thorough historical account of ADHS's implementation of AMMA as presented in his accompanying declaration and summarized in this brief. Humble, ¶¶ 1-4.

III. ARGUMENT

A. AMMA is Premised Upon the Medical Use of Marijuana in All Forms, Including Extracts and Concentrates.

In November 2010, Arizona voters passed Proposition 203, creating AMMA. AMMA places broad responsibility for the development and management of Arizona's Program in the hands of ADHS. [A.R.S. § 36-2803](#) and [A.R.S. § 36-2801\(4\)](#).

During the 2010-2011 Rules-making time, ADHS performed substantial research, to better educate the Agency on how to implement Arizona's new medical marijuana program. Humble, ¶¶ 5-11; 44-51. Marijuana extracts and concentrates were specifically addressed by ADHS and found to be within the safe harbor protections of AMMA. The primary source leading to ADHS' conclusion was the language of AMMA itself, which defines "marijuana" in the broadest possible terms, i.e., "all parts of any plant of the genus cannabis whether growing or not, and the seeds of such plant." [A.R.S. § 36-2801\(8\)](#).

AMMA explicitly contemplates "mixtures and preparations," edibles, and methods of administration beyond smoking. Humble, ¶¶ 55-57. AMMA is riddled with such references. For example, [A.R.S. § 36-2803 \(B\)](#), refers to "smoking or ingesting marijuana" as an additional indication that more than smoking dried flower was permitted. Similar references to "ingesting" (versus smoking) appear at [A.R.S. § 36-2814\(A\)\(3\) and \(B\)](#). Likewise, [A.R.S. § 36-2805\(A\)\(3\)](#) reads "...that marijuana be consumed by a method other than smoking", suggesting that physicians could

recommend, and patients could choose the administration of marijuana by a variety of methods. And, [A.R.S. § 36-2802](#) expressly contemplates multiple methods of “engaging in the medical use of marijuana” including “smoking”.

Beyond scouring AMMA, ADHS looked to the full text of [Proposition 203 and the contents of the election publicity pamphlet](#), including medical studies referenced within it. Humble, ¶¶ 50-59. The publicity pamphlet text further reinforced ADHS’ conviction that the extracted resin of the plant is included and expected from AMMA, as are the mixtures and preparations of such concentrates that are infused into edible and non-edible products. Humble, ¶¶ 5-11. Naturally, this would make sense on its face, as extracts and concentrates are, by their nature in many instances, precursor ingredients to “mixtures and preparations”. For example, when you open a bottle of aspirin you find tablets and not chunks of willow trees.¹

ADHS’ conclusion that AMMA embraces extracts and concentrates finds additional support in the [Legislative Findings ensconced in Proposition 203](#), which guides the voters to a well-respected study on the efficacy of marijuana as medicine. That study, [*Marijuana and Medicine Assessing the Science Base*](#), by Janet E. Joy, Stanley J. Watson, Jr., and John A. Benson, Jr., Editors, Division of Neuroscience and Behavioral

¹ [Salicylic acid](#) is the active ingredient in aspirin, and it has been derived from Willow trees for thousands of years, prior to modern chemistry formulating it into convenient tablets.

Health, Institute of Medicine National Academy Press, Washington, D.C., includes references – historic and present day - to extracts and concentrates of marijuana as medicine. The report also acknowledges that prior to 1942, marijuana was a part of U.S. pharmacopoeia. *Id.* at 14.² And, it further acknowledges that the federal government recently approved extracted and concentrated marijuana as medicine. In 1985, the Food and Drug Administration approved the manufacture and sale of Marinol, “...as a capsule containing THC in sesame oil; it is taken orally.” *Id.* at 152.³ To ADHS, the fact that extracts and concentrates are part of the medical profile of marijuana and intended to be part of AMMA appeared incontestable.

B. The Attorney General Voiced No Concern Over Extracts and Concentrates.

ADHS did not operate in a vacuum when drafting the AMMA Rules and performing its related responsibilities. ADHS consulted frequently with the Attorney General’s Office, to assure that no Rules were drafted in such way as to be inconsistent with AMMA’s text. The issue of extracts and concentrates arose during the rule-

² A simple Google image search for “[marijuana patent medicine bottle](#)” reveals numerous photographs of late 19th and early 20th century cannabis extracts, salts, tinctures, and concentrates, manufactured and sold by drug companies that still exist today.

³ On 25 June 2018, the Food and Drug Administration gave further credence to the legitimacy and efficacy of extracted and concentrated marijuana, when it issued a [formal press release](#) announcing the approval for manufacture and sale of [Epidiolex](#), an oral solution of cannabidiol extracted and concentrated from the cannabis plant.

making period, and the Attorney General’s Office never advised ADHS against extracts or concentrates. Humble, ¶¶ 10, 19, 20, and 42.

In the approximate eight years since the Rules were enacted, the Attorney General – indeed all Arizona law enforcement agencies – have been fully aware of ADHS’ Rules. At no time during Director Humble’s tenure was any legal advice or instruction against extracts or concentrates ever given to ADHS. Humble, ¶¶ 19-26. To this day, ADHS continues to support and to [track](#)⁴ extract and concentrate manufacture and distribution throughout Arizona.

C. The Zander Welton Nexus.

Consistent with its conclusion that extracts and concentrates were part of AMMA, on 28 March 2011, ADHS published the initial Rules for AMMA and began to administer the Program, accepting patient card applications the following month. Two years later, on 01 March 2013, Rodney Jones (Rodney), an AMMA-patient, was arrested in Yavapai County for possession of a trace amount of resin in the form of [hashish](#) that he acquired from an ADHS-licensed dispensary in Maricopa County. Curiously, Rodney would not be charged for possession of that hashish until a year later⁵, and only after five-year old Zander Welton and his parents obtained relief from

⁴ See P.4, Table 7.

⁵ The Yavapai County Attorney did not pursue charges against Rodney until 09 April 2014.

the Maricopa County Superior Court. On 21 March 2014, Judge Katherine Cooper ruled that concentrates and products made from them were legally protected under AMMA's immunities and safe harbors. Humble, ¶ 36.

Zander suffered a congenital condition that triggered dozens of epileptic grand mal seizures daily. After exhausting conventional medical options, none of which made a significant difference in his condition, Zander's parents discovered that Zander responded favorably to marijuana extract. Marijuana extract reduced Zander's seizures to roughly five per day, a substantial improvement in his quality of life. Facing threat from the Maricopa County Attorney that they risked criminal charges, on 28 October 2013, Zander's parents filed an action for declaratory and injunctive relief, seeking assurance that neither they nor their five-year old son, Zander, would be prosecuted for possessing or administering marijuana extract to Zander (like Rodney, an AMMA patient).⁶ Humble, ¶¶ 33-42.

Zander fell well within the categories of patients that AMMA contemplated for administration of extracts or concentrates. *Id.* ADHS kept abreast both of Rodney's

⁶ The case was captioned as: Zander Welton, as represented by Jacob Welton and Jennifer Welton v. State of Arizona, a governmental entity; Janice Brewer, governor of the State of Arizona in her official capacity, Arizona Department of Health Services, an Arizona administrative agency; William Humble, director of Arizona Department of Health Services in his official capacity; and William Montgomery, Maricopa County Attorney in his official capacity, Maricopa County Superior Court Action No. CV 2013-014852.

criminal case, and Zander's civil lawsuit, as the outcomes could have an immediate impact on the Program.

ADHS, Director Humble, Governor Brewer, and the State of Arizona received early dismissals from Zander's lawsuit. But co-defendant Maricopa County elected to litigate against Zander and his parents, arguing that extracts and concentrates were outside the safe harbor protections of AMMA. The Superior Court rejected the County Attorney's arguments in a [ruling dated 21 March 2014](#), and Maricopa County elected not to appeal. As a result, ADHS viewed the question of extracts and concentrates that had emerged from the Jones case (at the trial court level) resolved.

Rather than challenge a compelling Superior Court decision involving an epileptic five-year old, Maricopa County evidently left it to Yavapai County to try the issue anew, by indicting an AMMA patient card-holder (Rodney) for possession of an extract. It seems unlikely the timing of Rodney Jones' 09 April 2014 indictment – the day after the appeals time expired in Zander's case – was coincidence.

D. ADHS Has and Still Supports the Manufacture and Medical Use Extracts and Concentrates.

Director Humble left his position at ADHS in March 2015, before Rodney was convicted and sentenced to prison. The Governor has since installed a new Director of ADHS. By the publicly-visible activities of ADHS in the years since Director Humble's departure, there appears no indication that the Agency has retreated from this view that AMMA covers extracts and concentrates. Humble, ¶¶ 60-69.

For example, per ADHS's [Arizona Medical Marijuana Program May 2018 Monthly Report](#), there were 437.86 pounds of marijuana converted into edibles and 403.70 pounds of marijuana converted into other products sold in May 2018, with 2018 annual sales to-date totaling 2070 pounds and 1853.98 pounds sold respectively. *Id.*, P. 4, Table 7; P. 11, Table 7a. Similarly, ADHS continues to enforce its Rules for marijuana extractions and concentrates, such as Administrative Code Sections [R9-17-316](#), [R9-17-317](#), and [R9-17-319](#). Humble, ¶ 62. Likewise, ADHS promulgated and maintains instruction manuals and handbooks for dispensary operators such as: [Recommendations for Best Practices Regarding Marijuana Extractions, Concentrates, Infusion Kitchens and Edible Food Products Containing Marijuana](#) and [Application to separately license Medical Marijuana Dispensary Infusion Kitchens](#) and ADHS published [official definition of "food,"](#) in context of marijuana infusion kitchens. Humble, ¶¶ 64-69. ADHS even contemplates the distribution of edibles and non-edibles in the 2017 edition of the [Medical Marijuana Verification System Dispensary Handbook](#), P. 11. Humble, ¶ 68.

E. The Impact of the Opinion Inadvertently Discriminates Against the Most Vulnerable Patients.

The Opinion created an artificial subclass of patients who cannot smoke (children, the elderly, lung cancer patients, asthmatics, etc.), and sanctions a form of discrimination against them by arbitrarily subjecting them to criminal prosecution based on the form of medicine they are (were) able to use. Blind to the medical purpose of AMMA, the Opinion will lead to a further and vicious widespread discrimination

against patients. This is not merely about the obvious discriminatory practice of dividing patients into arbitrary classes: those who can ingest whole flower versus those who cannot (and are resultingly prevented from participating in AMMA). It is also about demolition of the existing AMMA program, waste of tens of millions of dollars invested into Arizona's economy by the dispensaries, arbitrary punishment of Arizona's citizens via further restriction on access to medicine, and potential mass prosecutions. The Court of Appeals' ruling is at odds with AMMA and places Arizona in the unique position of being in a minority of medical marijuana States that would prohibit extracted or concentrated medicine.⁷

F. The Opinion Has Overwhelming Unintended Consequences.

If the Opinion is affirmed, one would expect ADHS to take immediate action, pursuant to [A.R.S. § 36-2815](#) and [A.R.S. § 36-2806](#), to discipline the licenses of each dispensary engaged in the acts of manufacturing or dispensing extracts or concentrates. It is also reasonable to expect ADHS to completely overhaul their Administrative Code and to impose a completely new regulatory scheme that would exclude extracts, resins, and edibles. Dispensaries and patients would no longer have access to these mixtures

⁷ See Appendix - charts breaking down the legislation of medical marijuana States and recreational marijuana States according to whether they permit extracts or concentrates. Many States (e.g., Louisiana, Minnesota, New York, Ohio, Pennsylvania, and West Virginia) express a preference for extracts and concentrates, discourage whole leaf, and/or prohibit smoking.

and preparations of the Cannabis plant, and dispensaries would be required to discard the instruments and equipment needed under the current regulatory scheme and overhaul their business models to one that focuses exclusively on marijuana flowers.

G. Conclusion.

Extracts and concentrates were always part of AMMA and its definitions, and the State has adhered to that interpretation since the start of the AMMA program nearly a decade ago. Besides being legally incorrect, the choice inadvertently created by the Opinion is cruel and heartless: forgo your medicine or risk a felony conviction and jail. No one should ever be placed in such a dilemma. AMMA is a medical program that addresses regulated access to medicine. The two-judge majority was simply wrong on the law, and their Opinion hurts Arizona's most vulnerable citizens, such as those afflicted with cancer, HIV, epileptics, and children. Rodney Jones' conviction should be overturned, and this Court should reverse the Opinion.

RESPECTFULLY SUBMITTED: 31 October 2018.

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IV. APPENDIX

This chart breaks down the legislation of hash/concentrated cannabis. It has been divided into two sections. I - States where cannabis is recreationally legal and II - States where cannabis is only medicinally legal.

I. Marijuana use legal recreationally & medicinally.

| State | Extracts Concentrates Legal | Amount | Legislation | Date Effective |
|-----------------|--------------------------------|---|---|-------------------|
| Alaska | N | N/A | https://bit.ly/2OVkL1g | 2/24/2015 |
| California | Y | up to 8g | https://bit.ly/2NA1zS1 | 1/1/2018 |
| Colorado | Y | up to 1 oz | https://bit.ly/2nBARAz | 1/1/2014 |
| Washington D.C. | N | N/A | https://bit.ly/2OIVUEg | 2/26/2015 |
| Maine | Y | up to 5g | https://bit.ly/2OjXIDb | 2017 |
| Massachusetts | Y & N* | up to 5g | https://bit.ly/2QlpH7a | 12/30/2016 |
| Nevada | Y | up to 3.5g | https://bit.ly/2ROxeme | 1/1/2017 |
| Oregon | Y | up to 16oz solid infused @ home up to 72oz liquid infused @ home up to 1oz extract @ home | https://bit.ly/2OVCp52 | 3/29/2016 |
| Vermont | Y | up to 5g | https://bit.ly/2KgYFnE | 1/22/2018 |
| Washington | Y | up to 16oz solid infused up to 72oz liquid infused up to 7oz concentrate | https://bit.ly/2pVLBsh | 12/6/2012 |

* hash illegal though up to 1oz possession decriminalized, concentrate up to 5g legal

| II. Marijuana use legal only medicinally. | | | | | |
|---|------------------------------------|--|--|----------------|---|
| State | Extracts Concentrates Legal? | Amount | Legislation | Date Effective | |
| Arizona | N | N/A | https://bit.ly/2ydxli3 | 2018 | http://bit.ly/2pQrlbn |
| Arkansas | Y | 2.5oz | https://bit.ly/2OgDdBY | 2016 | |
| Connecticut | Y | 2.5 oz | https://bit.ly/2RltfYb | 2015 | |
| Delaware | Y | 3oz | https://bit.ly/2CF3tjh | 2014 | |
| Florida | Y | 70 day supply determined by phys | https://bit.ly/2IRCd1k | 2016 | |
| Hawaii | Y | 4oz | https://bit.ly/2pMSf3F | 2000 | |
| Illinois | Y | 2.5oz | https://bit.ly/1y8DRB5 | 2014 | |
| Louisiana | Y | ?? | https://bit.ly/2OkEFU9 | 2015 | no smoking |
| Maryland | Y | 4oz | https://bit.ly/2pQp1Bb | 2014 | |
| Michigan | Y | 2.5oz | https://bit.ly/2QKztFL | 2008 | |
| Minnesota | Y | 30 day supply determined by phys | https://bit.ly/2EfhCoS | 2014 | no smoking |
| Montana | Y | 1oz | https://bit.ly/2EctkAU | 2015 | |
| New Hampshire | Y | 2oz | https://bit.ly/2ydvZVv | 2016 | |
| New Jersey | Y | 2oz. | https://bit.ly/2INZCk9 | 2011 | no edibles unless you are a minor |
| New Mexico | Y | 8oz | https://bit.ly/2IPc17z | 2007 | |
| New York | Y | 30 day supply determined by phys | https://on.ny.gov/2ycN2GX | 2017 | no smoking |
| North Dakota | Y | 2.5oz leaves/flower 2000 mg THC total - other products | https://bit.ly/2PxutEp https://bit.ly/2yewHBH | 2018 | leaf/flower not available to minors |
| Ohio | Y | 90 day supply | https://bit.ly/2C82BCC | 2017 | smoking no - vapor yes |
| Oklahoma | Y | 8oz @ home | https://bit.ly/2OgDG7c | 2018 | |
| Pennsylvania | Y | 30 day supply determined by phys | https://bit.ly/2A5uBFv | 2016 | no smoking |
| Rhode Island | Y | 2.5 oz | https://bit.ly/2Pu7JoE | 2006 | |
| West Virginia | Y | 30 day supply determined by phys | https://bit.ly/2EfGxZC | 2017 | no smoking |