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STATE OF NEW JERSEY	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff-Respondent,	:	APPELLATE DIVISION DOCKET
v.	:	NOS. A-004052-12T4 (Direct
EDWARD R. FORCHION,	:	Appeal) and A-004477-12
Defendant-Appellant.	:	(Appeal of Violation of Probation)

On Appeal From Judgments of
Conviction (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

***LETTER REPLY BRIEF ON BEHALF OF
DEFENDANT-APPELLANT EDWARD R. FORCHION***

THE DEFENDANT IS NOT CONFINED

Honorable Judges:

Kindly accept this letter reply brief in lieu of a formal
reply brief.

TABLE OF CONTENTS

	<u>Page No.</u>
COUNTER-STATEMENT OF PROCEDURAL HISTORY	1
COUNTER-STATEMENT OF FACTS	5
LEGAL ARGUMENT:	
<u>POINT I</u>	
MR. FORCHION DID ESTABLISH A BASIS FOR THE DEFENSE OF NECESSITY	6
<u>POINT II</u>	
JUDGE DELEHEY IMPROPERLY LIMITED THE SCOPE OF DEFENDANT'S EXPERT TESTIMONY	8
<u>POINT III</u>	
DEFENDANT'S ARREST IMPINGED ON HIS RIGHT TO TRAVEL, THE COMMERCE CLAUSE, THE EQUAL PROTECTION CLAUSE, THE FULL FAITH AND CREDIT CLAUSE, AND THE SEARCH WAS ILLEGAL	10
<u>POINT IV</u>	
NEW JERSEY'S CONTROLLED DANGEROUS SUBSTANCE LAWS VIOLATE THE RELIGIOUS FREEDOM RESTORATION ACT AND ARE UNCONSTITUTIONAL (THIS POINT RESPONDS TO THE STATE'S <u>POINT IV</u> WHICH ANSWERED <u>POINTS IV, V, AND</u> <u>VI</u> OF DEFENDANT'S OPENING BRIEF)	15
<u>POINT V</u>	
THE NEW JERSEY COMPASSIONATE USE MEDICAL MARIJUANA ACT HAS PREEMPTED, NULLIFIED, AND RENDERED UNCONSTITUTIONAL NEW JERSEY'S 2C MARIJUANA LAWS	17
<u>POINT VI</u>	
JUDGE DELEHEY IMPROPERLY PRECLUDED DEFENDANT FROM DISCUSSING THE COMPASSIONATE USE OF MEDICINAL MARIJUANA ACT DURING HIS TRIAL	19

CONCLUSION 20

COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State omits (as to the March 15, 2011 status conference before the Honorable Charles A. Delehey, J.S.C. (Ret./Recall) (Pb2)), that in addition to the defendant filing constitutional challenges as to the marijuana statutes, he would also seek (if the motions were denied pretrial), an interlocutory appeal. The prosecutor stated that he "would have no objection to conducting the criminal trial, whatever the result may be, if he's found not guilty the Mr. Forchion is a free man. If he's found guilty, you could hold any type of sentencing in abeyance pending the resolution of his constitutional argument." (1T53-4 to 9; emphasis supplied). Judge Delehey agreed, stating: ". . . in the event of a conviction, Mr. Forchion isn't going to have his liberty taken from him immediately, that will be stayed pending resolution of the Constitutional matter." (1T56-3 to 6).

However, both the prosecutor and judge reneged on the promise not to take the defendant's liberty away from him, as he would be incarcerated for an alleged violation of probation. Less than one month later the defendant did, in fact, file pretrial motions to dismiss (dated April 20, 2011) supported by an 82-page brief with a 107-page appendix raising numerous

constitutional challenges (including that the New Jersey Compassionate Use Medical Marijuana Act preempts criminal classification of marijuana as a Schedule I narcotic).

When Judge Delehey denied the pretrial motions ("Memorandum of Law" dated September 6, 2011 (Da¹ 4-15)), the defendant did not immediately seek an interlocutory appeal since there was the agreement (later reneged) by the State and Court that, should defendant be convicted, the sentence would be stayed.

The state acknowledges that "CUMMA was passed into law on January 18, 2010" (Pb at 3), thereby the State of New Jersey recognized on that date (cognized on January 18, 2010) that marijuana was medicine; therefore, Schedule I classification is improper, making the 2C marijuana laws null and void.

The State writes that: "Finally, the court held that defendant failed to put forth any rationale that would support his contention that the New Jersey drug laws are racist. Therefore, he [Judge Delehey] denied the motion in its entirety." (Pb5). However, a 185-page ACLU report released in June of 2013 ("The War on Marijuana In Black and White - Billions of Dollars Wasted on Racially Biased Arrests;" <http://www.aclu.org/aclu-thewaronmarijuana>) reveals the racism

¹ "Da" denotes appendix to appellate brief.

in the State of New Jersey's marijuana laws. This ACLU report was filed subsequent to the filing of defendant's pretrial motions/brief (dated April 20, 2011) and subsequent to the trial in May of 2012 and sentencing in January of 2013.

The State writes: "On August 14, 2012, Judge Delehey presided over defendant's motion to dismiss the remaining count of the indictment. [11T]. Although defendant did not appear, defense counsel argued on his behalf. [11T2-1 to 4-2]." (Pb8). Concerning the motion for judgment of acquittal argument, Mr. Forchion had previously been guaranteed by Judge Delehey that he would be able to argue this motion telephonically. However, when the defendant phoned into the Court, the woman who answered the phone placed the defendant on hold and then, after a few minutes, she advised defendant that his argument was not needed.

On sentencing day (January 16, 2013) this March 15, 2011 agreement (not to execute a sentence until defendant appealed; 1T53-4 to 9) was reneged upon by Judge Delehey's sentencing the defendant to probation (a loss of liberty). The defendant did not sign the paperwork or report to Probation as he advised everyone that he would be filing a motion for reconsideration.

The defendant also points out that the January 17, 2013 date (the day after sentencing) is the date on which Judge Delehey issued a fugitive arrest warrant for defendant's arrest,

apparently acting ex parte as neither the defendant nor his attorney Donald M. Ackerman, Esq., were present. The defendant believes that this action was due to the Honorable Glenn A. Grant, J.A.D. (Acting Administration Director Administration of the Courts in Trenton) ordering Judge Delehey to revoke probation. This alleged probation violation was not supported by any probation paperwork and the ex parte communication violates his Sixth Amendment right to self-representation.

On January 30, 2013, following the apparent ex parte actions, the defendant was arrested at the Philadelphia International Airport by the Burlington County Sheriff's Department while defendant was on his way to California for his cancer treatment. After the defendant was held in jail for 43 days (missing two cancer treatments), on March 12, 2013, the defendant appeared before Judge Delehey and Mr. Ackerman told the defendant to plead guilty and he would be allowed to go to California. The Court used the defendant's medical condition to force him to plead guilty.² The March 12, 2013 plea was a forced plea; the defendant had the choice between staying in jail on a

² Judge Covert signed the Order on March 14, 2014. (Ackerman Certification, Para. 4; Da33). While Judge Covert had recused herself from hearing the case early on, she continued to have involvement with the case, signing this Order.

bogus probation violation or pleading guilty. There was no probation violation paperwork, or any other legal document from probation. The defendant submits that he was re-sentenced to jail because Judge Grant did not like the non-custodial sentence. Since defendant was forced to plead guilty, he takes issue with the State's statement: "Defendant pled guilty to the charge. [13T3-13 to -21]." (Pb10). The choice was for the defendant to stay in jail (without his treatment placing him at great risk) or to plead guilty by coercion and go to California for this required medical treatments.³ Defendant's ill health and desire for medical treatment forced him to plead guilty.

COUNTER-STATEMENT OF FACTS

The defendant disputes Trooper Rayhon's testimony that defendant's vehicle pulled in the intersection. (7T46-10 to -16). The defendant testified that he merely lurched his vehicle into the intersection, with just the front tires of Mr. Forchion's vehicle entering the intersection. (1T34-6 to 12).

³ At the VOP sentencing on March 12, 2013, Judge Delehey read an excerpt from a letter by defendant in which defendant writes: "I'm a legitimate bone cancer patient and this unjust imprisonment is having a disastrous effect on my condition." (13T9-8 to 11). Judge Delehey unfairly answered: "Mr. Forchion has played his health with this Court as if it were a Stradivarius." (13T10-3 to 4).

POINT I

MR. FORCHION DID ESTABLISH A BASIS
FOR THE DEFENSE OF NECESSITY

The State writes:

Turning to defendant's case, Judge Delehey properly held that defendant could not avail himself of the defense of necessity. First, as in Tate, the statutory defense was not available to defendant. The Criminal Code maintains that marijuana is a Schedule I controlled dangerous substance and has not changed its classification. As a Schedule I narcotic, the statute prohibits the possession of marijuana.

Moreover, in line with the discussion in Tate, the Code now excepts possession when it is possessed for medicinal purposes in accordance with the procedures delineated in the statute. Therefore, as the code demonstrates a clear legislative purpose, possession of marijuana without a valid permit is not available as a defense.

Furthermore, the common law defense was also in applicable to defendant's case. Defendant failed to demonstrate that there were no other alternatives available to him. Accordingly, his claim of error must be denied. (Pb23-24).

The State cites State v. Tate, 102 N.J. 64 (1986) (Pb20 to 23). As explained in his opening brief, the defendant 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). The case sub judice is distinguishable from Tate for here, 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 the case at bar, at the time of the defendant'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).

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

The defendant, a medical marijuana patient (as stipulated to in court) and bicoastal traveler (obtaining medical treatment in California) submits that he has a constitutional right to right to travel (even driving by vehicle on Interstate 95 comprises Washington D.C., Connecticut, and Rhode Island). The State cannot logically argue that an individual like defendant must obtain a license in every state.

The conviction must be reversed and indictment dismissed.

POINT II

JUDGE DELEHEY IMPROPERLY LIMITED
THE SCOPE OF DEFENDANT'S EXPERT TESTIMONY

The State writes:

Defendant argues that Judge Delehey improperly curtailed defendant's ability to mount a defense when the judge precluded him from calling expert witnesses. It should be noted that no showing was ever made that the witnesses were available, had been consulted, and had furnished reports. Defendant submitted a lengthy pre-trial memorandum that detailed his proposed witnesses and included an appendix. Absent from the brief and appendices is any indication that the witnesses would have testified on defendant's behalf. Indeed, the witnesses may have been wholly unaware that they were potential witnesses in fourth-degree possession and a third-degree distribution case. (Pb26).

The State also writes: "Judge Delehey circumscribed defendant's possible defenses by precluding him from arguing that he was medically and religiously exempt. Once precluded from arguing those aspects, defendant's proposed experts were irrelevant to his trial." (Da28).

The State concludes:

Although defendant furnished a long list of potential expert witnesses, none of whom provided reports or gave any indication that they were prepared to testify on defendant's behalf, defendant's witnesses were in direct contravention to Judge Delehey's September 2011 pretrial opinion and order. Defendant was precluded from

arguing that his religion dictated that he smoke marijuana. He was also precluded from arguing that he was medically exempt from smoking marijuana. CUMMA was enacted prior to defendant's arrest, but was not in effect at the time.

Because defendant was properly prohibited from arguing these defenses, defendant's expert witnesses were irrelevant and a waste of the Office of the Public Defender's resources. Defendant's witnesses would not have been allowed to testify and defendant cannot succeed on this point. (Pb30).

The defendant submits that Dr. Fenichel had an expert report. However, the Office of the Public Defender (OPD) deprived him of properly utilizing Dr. Fenichel and his report, as well as preventing the defendant from presenting the necessary experts to defend the possession charge. The defendant wished to present an expert on the religious use; the OPD also refused to permit this to be done.

The OPD refused to even attempt to assist the defendant simply because Judge Delehey refused to permit experts. The OPD did locate an expert for the second trial (the distribution trial) but he was not used because it was a distribution case.

The OPD should have assisted Mr. Forchion with at least trying to obtain a religious expert. See United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996). For these reasons, the conviction must be reversed.

POINT III

DEFENDANT'S ARREST IMPINGED ON HIS RIGHT TO
TRAVEL, THE COMMERCE CLAUSE, THE EQUAL
PROTECTION CLAUSE, THE FULL FAITH AND
CREDIT CLAUSE, AND THE SEARCH WAS ILLEGAL

The State writes:

Defendant's argument that the New
Jersey Criminal Code violates his
constitutional rights is without merit.
Although possession of marijuana has been
legalized in two states, and medical
marijuana is now legal in New Jersey,
possession of marijuana is still a Federal
offense under the existing law. See 21
U.S.C.A. §844. (Pb31).

The State concludes: "Defendant cannot claim that something
deemed illegal by the federal government violates his rights on
the State level." (Pb32).

THE EQUAL PROTECTION CLAUSE VIOLATION

The State cites James v. City of Costa Mesa, 700 F.3d 394
(9th Cir. 2012) in which "the appellants raised an equal
protection argument similar to the one now before this Honorable
Court. (Pb33). In James, the Ninth Circuit held that doctor-
supervised marijuana use was a federally prohibited use of drugs
not covered by Title II of the Americans with Disabilities Act
(ADA) that prohibited discrimination in provision of public
services. The Court also held that medical marijuana use did
not come within the ADA exception for drug use "authorized by

other provisions of Federal Law" and the plaintiffs had not been denied equal protection. James is a Ninth Circuit case not binding on this Court; in addition, it is distinguishable factually from the case at bar. Most importantly, the State of New Jersey's entire medical marijuana program violates federal law, making the State's invocation of the James case specious.

THE FREEDOM TO TRAVEL/DUE PROCESS CLAUSE VIOLATION

Freedom to travel has long been recognized as a basic right under the United States Constitution. In addition, Article I, paragraph 7 of the New Jersey Constitution (always coterminous to the Fourth Amendment) proscribes those searches and seizures that are unreasonable. State v. Bruzzese, 94 N.J. 210 (1983).

We live in a very mobile society with very frequent interstate travel. There are twenty-two state and the District of Columbia who have medical/recreational marijuana, and those citizens must be afforded the right to travel (particularly medical marijuana, as opposed recreational marijuana, users). Freedom to travel has long been recognized as a basic right under the United States Constitution, protected by the Due Process Clause of the Fifth and Fourteenth Amendments.

THE COMMERCE CLAUSE VIOLATION

The State writes: "Similarly, the United states Supreme Court has held that the CSA does not violate the Commerce

Clause. (Pb34). However, as Professor Tribe has cautioned:
"[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." The action of the State of New Jersey creates an unreasonable state restraint of citizens (such as the defendant) engaging in interstate commerce.

THE FULL FAITH AND CREDIT CLAUSE VIOLATION

The State writes:

Finally, there is no argument to be made under the Full Faith and Credit Clause. New Jersey enacted its own criminal code, which strictly forbids the possession of marijuana, with limited, regulated exceptions. Because some possession is tolerated in California does not obligate New Jersey to abandon its own Criminal Code. (Pb35).

Defendant submits that a person who travels between states must be afforded the benefits of the Religious Freedom Restoration Act (RFRA).

The State of New Jersey's action in arresting the defendant Forchion violated the Equal Protection Clause of the Fourteenth Amendment, as he was permitted to possess the marijuana in the State of California.

THE FOURTH AMENDMENT PROHIBITION AGAINST
UNERASONABLE SEARCH AND SEIZURE VIOLATION

The State also argues (in Subpoint B) that "The Search And Seizure Of Defendant's Motor Vehicle Was Valid And Did Not Contravene The Fourth Amendment." (Pb35).

The State writes, concerning the stop:

Because it was after 10:00 p.m. on a busy roadway, the trooper approached defendant's car on the passenger side. [7T49-20 to -25]. While talking to defendant, the trooper noticed a strong smell of burnt marijuana. [7T50-5 to -7]. The trooper believed that defendant's rambling was a distraction technique; he began to survey the interior of defendant's car. [7T50-7 to -12]. On the floor behind the driver's seat, he saw a glass pipe, that he knew based on his training and experience, was the kind commonly used to ingest marijuana. [7T50-10 to -15].

Trooper Rayhon asked defendant to turn off the car and give the keys to the trooper. [7T50-18 to -22]. The trooper then asked defendant to hand him the glass pipe so that the officer could examine it and determine if that was from where the smell was emanating. [T50-17 t -22]. The trooper placed defendant under arrest. A search of defendant incident to his arrest did not reveal any more contraband, but did reveal approximately \$2,000 in United States currency. [T50-21 to -22; 7T54-2 to -8]. (Pb39 to 40).

The State concludes:

Defendant presents no arguments that undermine Judge Delehey's reasoning.

Defendant was stopped lawfully pursuant to an observed traffic violation, an odor of burnt marijuana permeated his car, a glass pipe commonly used for smoking marijuana was seen in plain view in the backseat of defendant's car, and defendant's driving privileges were suspended. The stop was proper and a valid search warrant allowed the officer to continue the search of defendant's car at the trooper's barracks. Defendant cannot succeed on this point. (Pb40 to 41).

The defendant Forchion 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 him to jail violate the United States Constitution's Fifth and Fourteenth Amendment Right to Travel, the Commerce Clause, the Due Process Clause, the Full Faith and Credit Clause, the Equal Protection Clause, and the Fourth Amendment prohibition against unreasonable search and seizures.

POINT IV

NEW JERSEY'S CONTROLLED DANGEROUS SUBSTANCE LAWS
VIOLATE THE RELIGIOUS FREEDOM RESTORATION ACT AND
ARE UNCONSTITUTIONAL (THIS POINT RESPONDS TO THE
STATE'S POINT IV WHICH ANSWERED POINTS IV, V, AND
VI OF DEFENDANT'S OPENING BRIEF)

The State writes: "First, defendant's arguments are misplaced in that defendant was convicted under N.J.S.A. 2C:35-10, not 2C:35-5." (Pb41). Defendant is aware that he was convicted under N.J.S.A. 2C:35-10 (Count Two) and he challenges this statute in this Point. Defendant was charged and indicted in Count One under N.J.J.A. 2C:35-5; therefore, he challenges the constitutionality of this statute as well.

The State cites S.D. v. M.J.R., 415 N.J. Super. 417 (App. Div. 2010) (Pb42). However, S.D. v. M.J.R. involved a husband who contended that his Muslim faith permitted him to sexually assault his wife. The case involved no marijuana and has no bearing on the case sub judice.

The State writes: "The use and possession of marijuana in conjunction with the practice of Rastafarianism as defense has been rejected by the courts." (Pb43). However, all of the cases cited by the State are from other jurisdictions and are not binding on this Court.

The State writes, concerning People of Guam v. Guerrero,

290 F.3d 1210 (9th Cir. 2002), that:

The Court stated that RFRA was not a defense for the importation of marijuana, the crime for which Guerrero was charged. Id. at 1223. The Court did not exempt marijuana possession as a whole, contrary to defendant's argument. It stated that the RFRA may be used as a defense in simple possession cases in federal courts. Id. (Pb44 to 45).

The State writes, in conclusion as to this issue:

Similarly, defendant's case is not analogous to the use of sacramental wine during prohibition. Nor does it fall within the purview of the International Religious Freedom Act, as defendant was not prohibited or arbitrarily constrained from practicing, assembling or disseminating information about his religion. Furthermore, as stated in its title, the International Religious Freedom Act concerns itself with acts of religious persecution committed in foreign countries. (Pb45).

The defendant disagrees with the State's contention that "defendant's case is not analogous to the use of sacramental wine during prohibition." (Pb45). The Rastafarian religion includes the sacramental use of cannabis—specifically, the religious use of the smoking of Ganja (marijuana).

Defendant again cites Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir.), cert. denied, 120 S.Ct. 56 (1993), where the Third Circuit upheld the plaintiff police officers' claim that the Sunni Muslim religion

required male adults to wear beards, along with Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), in which the United States Supreme Court held that the states cannot restrict religiously-mandated (Santeria) ritual slaughter of animals, regardless of the purpose of the slaughter.

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

POINT V

THE NEW JERSEY COMPASSIONATE USE MEDICAL
MARIJUANA ACT HAS PREEMPTED, NULLIFIED, AND
RENDERED UNCONSTITUTIONAL NEW JERSEY'S
2C MARIJUANA LAWS

The State writes:

Defendant argues that under the New Jersey Compassionate Use of Medical Marijuana Act ("Medical Marijuana Act") defendant's crimes were exempt from prosecution. While the Medical Marijuana Act allows for the use of medical marijuana, it does not exempt the general public from prosecution, nor does it apply by merely stating the marijuana is for medicinal purposes. Furthermore, the Medical Marijuana Act's exemption does not apply to defendant's case.

Judge Delehey's 2011 opinion clearly laid out the reasons why defendant's possessory charge did not fall under the purview of CUMMA. Defendant was arrested before the Act went into effect. Defendant was not a registered patient under the Act. (Pb47).

Defendant points to his arguments citing Church of Lukumi Bablu, supra (Santeria adherents killing chickens) and the FOP Newark, supra (Sunni Muslim officers wearing beards) for the principle that, if exemptions are made for religious reasons, then the CUMMA should also constitute an exemption to the 2C. If there are exemptions for religious reasons there should be exemptions for secular reasons, as well. The State of New Jersey's medical exemption (the CUMMA of 2010) constitutes both a secular and a religious exemption.

On Pb49, the State argues: "Moreover even accepting defendant's argument that the Legislature should amend the statute to remove marijuana from Schedule I, it would still fit the definition of a Schedule II narcotic, which would still be prohibited under N.J.S.A. 2C:35-5 and N.J.S.A. 2C:35-10 . . ."

The defendant submits that marijuana is not Schedule I; since it is not a Schedule I drug, he did not violate the statute, mandating dismissal of the indictment.

POINT VI

JUDGE DELEHEY IMPROPERLY PRECLUDED DEFENDANT
FROM DISCUSSING THE COMPASSIONATE USE OF
MEDICINAL MARIJUANA ACT DURING HIS TRIAL

The State writes:

As stated in Point V, supra, defendant was not entitled to an affirmative defense under CUMMA. The Act was not in effect at the time of defendant's arrest. Defendant obtained his marijuana from an unknown source and in excess of the amount permitted by statute. Defendant was not a registered patient under CUMMA. Defendant simply could not meet the standards detailed in the Act's affirmative defense, codified in the New Jersey Criminal Code at N.J.S.A. 2C:35-18 . . . (Pb50 to 51).

The State writes:

Defendant presented testimony from a doctor who discussed defendant's cancer. Defense and the State stipulated that defendant was registered medical marijuana user in California. Defendant was not entitled to the inference that his California medical marijuana identification card carried weight in New Jersey or that he was exempt under New Jersey's laws. Defendant was not registered in New Jersey. He possessed slightly over one pound of marijuana, 14 ounces over the amount a patient is allotted in a thirty-day period in New Jersey. He did not obtain the marijuana from a designated dispensary, as the law was not in effect and the dispensaries were not open. There was no indication that he obtained the marijuana from a treating physician. (Pb52).

The defendant is very well-versed in New Jersey marijuana laws. When CUMMA was passed, the defendant believed that he was protected by the Act. He should have been able to argue before the jury that he had a defense bringing his medical marijuana from California. The defense was left incomplete by the Judge's barring of the essence of the case—that defendant believed he would be exempt from New Jersey law due to CUMMA.

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. In addition, the defendant's medicinal marijuana should be returned to him (or he should be reimbursed for the monetary equivalent). In addition, Mr. Forchion submits that his DNA sample should be destroyed.

Respectfully submitted,

Joseph Krakora
Public Defender

By: _____
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Attorney for Defendant-
Appellant Edward R. Forchion

Dated: October 1, 2014