

**Medical Marijuana: A Survey
Of its History and Current Status**

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III. Medical Necessity Defense

Medical marijuana issues are being fought not only in the legislatures, but also in the trenches of criminal prosecutions. The "medical necessity" affirmative defense to prosecutions for possession, use, or cultivation remain the hope for citizens in states that either do not have, or the patients cannot benefit from, existing medical marijuana laws. While some defendants have successfully plead the defense, on the whole the defense fails for a variety of reasons. The primary reasons are a lack of medical testimony demonstrating the patient's need for medical marijuana, the courts' reluctance to invade legislative domain, and the defendant's failure to demonstrate no legal alternative (this relates to the existence of a state TRA).¹¹⁶ Furthermore, each state has slightly different variations on the elements of the necessity defense.

Additionally, the defense is an unsatisfactory solution for patients because it does not establish some immunity for the patient to avoid investigation and prosecution. Patients will have to assume the risks of this hardship, with little chance for exoneration, will be forced into an indefinite interruption of treatment, and the threat of prosecution may deter patients from the choice to use marijuana, thereby forcing them to choose suffering rather than treatment.¹¹⁷ The defense, like TRAs, may sound promising in the abstract, but in practice is not a satisfactory solution to proponents of, and particularly to patients who use, medical marijuana.

A. Defense Permitted

*U.S. v. Randall*¹¹⁸

Robert Randall was the first person to successfully defend against a charge of possessing marijuana by claiming medical necessity. Randall was prosecuted for possession of several plants of marijuana, in violation of the D.C. Code, which he used to alleviate symptoms associated with glaucoma. The court discussed, in depth, the common law defense of necessity and its application to the current case. The court found that the facts established the basic elements of the necessity defense, and only needed to be considered in light of the defense's limitations. Namely, the three restrictions to the defense are:

1. The circumstance was not brought about by the actor himself.
2. The same objective could not be accomplished by a less offensive alternative.
3. The evil sought to be averted was less heinous than that performed.¹¹⁹

The court found that neither the first nor the second restriction was applicable to Randall's case; he did not cause himself to contract glaucoma and he demonstrated that surgery and conventional medications did not alleviate his pain to the same degree marijuana did. Thus, the only consideration for the court was whether the defendant's use of marijuana was the lesser "evil." The court noted that this restriction required a

¹¹⁶ George Blum, Annotation, *Defense of Necessity, Duress, or Coercion in Prosecution for Violation of State Narcotics Laws*, 1 A.L.R. 5th 938, I. § 2a (1997).

¹¹⁷ Grey, Matthew W., *Medical Use of Marijuana: Legal and Ethical Conflicts in the Patient/Physician Relationship*, Allen Chair Symposium 1995: Bioethics and the Law, 30 U. RICH. L. REV. 249, 272 (January 1996).

¹¹⁸ *U.S. v. Randall*, 104 Daily Wash. L. Rep. 2249 (D.C. Super. 1976).

¹¹⁹ *Id.* at 2252.

"balancing of the interests of [Randall] against those of the government."¹²⁰ Citing numerous cases, the court found a revelation of a very far-reaching right of an individual to preserve his health and bodily integrity.¹²¹ In the instant case, Randall was in jeopardy of losing his sight from the glaucoma, and suffered tremendous pain, so clearly his interest was strong. The government's interest, while also strong in seeking to protect the public from illicit drugs, did not outweigh Randall's interests, according to the court. The court reasoned that because no direct harm would be visited upon innocent third parties,

any major ill effects from the inhalation of marijuana smoke will occur to the defendant alone. Furthermore, defendant, by growing marijuana for his own consumption, cannot be said to be contributing to the illegal trafficking in this drug, and thus injuring, however nebulously, innocent members of the public. In any event, it is unlikely that such slight, speculative and undemonstrable harm could be considered more important than defendant's right to sight.¹²²

Accordingly, the court found that Randall established the defense of necessity and was not guilty of the charged offense. The court did qualify, however, that medical necessity is difficult to demonstrate and would not be available to a sufficiently large number of those accused such that it would support wholesale use of marijuana.¹²³

*Washington v. Diana*¹²⁴

The defendant was convicted of felony possession of marijuana, which he used for relief of disabling spasticity associated with multiple sclerosis. He did not raise the necessity defense at trial, but the appellate court, in the interest of justice, remanded the matter so the trial court could fully consider the issue and let the trier of fact determine if all the elements were met. Specifically, the elements to consider were:

1. whether Diana reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis (the reasonableness of the belief must be sustained by corroborating medical testimony);
2. whether the benefits derived from its use were greater than the harm sought to be prevented by the controlled substance laws (that Diana's action was the lesser of the evils);
3. whether any other drug is as effective in minimizing the effects of the disease (no legal alternative).¹²⁵

Relying on *U.S. v. Randall*¹²⁶ and the recent enactment of a TRA by the state legislature, the court held that Diana could utilize the defense.¹²⁷ The court not only found the rationale of the Randall court convincing, but also argued that the legislature's enactment of a TRA was evidence that the legislature wanted to permit very ill patients to use marijuana for relief. The court recognized that Washington's TRA limited medical

¹²⁰ Randall, 104 Daily Wash. L. Rep. at 2253.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2254.

¹²⁴ 604 P.2d 1312 (Wash. App. 1979).

¹²⁵ *Id.*

¹²⁶ *Supra*, note 116.

¹²⁷ Diana, 604 P.2d at 1317-18.

marijuana to patients suffering from conditions associated with cancer and glaucoma, but did not comment on the impact, if any, of multiple sclerosis' exclusion from maladies listed in the TRA.

*Idaho v. Hastings*¹²⁸

The defendant was charged with felony possession of marijuana for growing marijuana in her basement, which she used to control pain caused by rheumatoid arthritis. While the court refused to create a special defense of "medical necessity," it ruled that the defendant, upon remand to the trial court, was entitled to introduce evidence related to the common-law defense of necessity.¹²⁹ The court did not comment on the evidence except to note that it should be left for consideration by the trier of fact.

*Jenks v. Florida*¹³⁰

A husband and wife, AIDS patients who contracted the disease via a blood transfusion, were convicted of cultivating marijuana and possession of drug paraphernalia in violation of Florida law.¹³¹ The appellate court reversed their conviction, stating that the defense of medical necessity was recognized in Florida. In particular, the common law defense of necessity had been adopted in Florida pursuant to Florida Statutes § 2.01. The medical necessity defense is "merely a more particular application of the necessity defense" and there had been no clearly expressed legislative rejection of such defense.¹³² The court rejected the state's assertion that the legislature intended to preclude the use of the defense, under the present circumstances, when it placed marijuana in Schedule I.¹³³

Accordingly, the court found that the defense should have been allowed at trial, and additionally, mandated the Jenks' acquittal. The court, instead of remanding to the trial court, determined that the Jenks' established the elements of necessity as laid out by *U.S. v. Randall*. Namely, the Jenks' did not cause themselves to contract AIDS, their medical expert testified that no drug or treatment was available to effectively eliminate or diminish the Jenks' nausea, and they established that their interest surmounted that of the government's because if their nausea was not controlled, their lives were in danger.¹³⁴

While these decisions look promising and offer some persuasive language for patients seeking to assert the defense, there are many problems with the application of the defense. First and foremost, the defense has only been permitted in state cases, not federal prosecutions. Thus, the defense does nothing to prevent federal prosecutions, which, as discussed in Part I, is the current threat to medical marijuana users. Second, the criteria for the defense have not been interpreted frequently enough to elucidate clear

¹²⁸ 801 P.2d 563 (Idaho 1990).

¹²⁹ *Id.* at 565.

¹³⁰ 582 So. 2d 676 (Fla. Dist. Ct. App. 1991).

¹³¹ The trial judge rejected their assertion of a medical necessity defense, but demonstrated his compassion by sentencing them to one year of unsupervised probation and ordering them to perform 500 hours of community service, to be discharged by "providing care, comfort, and concern for each other." 582 So. 2d at 678.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ This outright acquittal is very unusual for these cases; it is likely that the extreme circumstances of the Jenks' situation evoked compassion from the judges.

guidelines. For example, the first Randall criteria, that the defendant did not "bring about the circumstances of his situation," has been untested in more abstract cases and might pose problems for patients. A prosecutor could potentially argue that an AIDS patient who contracted the disease via sex or using needles, or a cancer patient who smoked for many years, did indeed "bring about the circumstances" which the actor found himself in, and was thereby precluded from the defense.

The second criteria, a lack of legal alternatives, is now often frequently relied on to reject the defense. State TRAs and the availability of Marinol is continuously cited as a "legal" alternative for the patient to pursue.¹³⁵ The third criteria, the balancing of evils, is very difficult to discern. It calls for a subjective determination about how strong the patient's interest is relative to the governments. No objective measures determine at what point the patient's pain and suffering is sufficient to override the government's interest in protecting the public with drug laws.

Finally, the defense does nothing by way of addressing the ability of a physician to assist the patient in determining amount, frequency of use, procurement, supervision, and other such logistics, and therefore ignores the physician's role as careprovider.

B. Defense Denied

Notwithstanding the aforementioned decisions, the propensity of courts is to deny the defense. Typical of such rejection is *State of New Jersey v. Tate*, where a defendant with quadriplegia asserted the defense.

*State of New Jersey v. Tate*¹³⁶

The defendant suffered spasticity that caused intense pain and disability, for which only marijuana provided relief. He was convicted of possession of over 25 grams of marijuana. The court denied the defense. First, looking at the language of the New Jersey CSA and the TRA, the court determined that the legislature had contemplated medical use of marijuana and determined appropriate exceptions to its criminal status (i.e. a "valid prescription of order from a practitioner...").¹³⁷ Given the legislature's express exception, the court concluded it was "without authority to fashion an alternative exception under the Code's 'necessity' section."¹³⁸ Therefore, the defense was precluded.

In addition, the court stated that enactment of a TRA by the New Jersey legislature was further evidence of its intention to exclude the defense in the present circumstances. Namely, it provided a legal alternative for patients and Tate had not applied to that program.¹³⁹ Moreover, the court found that even if the TRA had not been enacted, Tate could have applied to the FDA to be part of the federal IND program.

¹³⁵ Such reliance is questionable, given that the TRAs generally rely on NIDA's cooperation, which has not been forthcoming and the fact the patients do not seem to think Marinol offers comparable relief as marijuana.

¹³⁶ 505 A.2d 941 (N.J. 1986).

¹³⁷ *Id.* at 944-45.

¹³⁸ *Id.* at 945.

¹³⁹ The court made this argument, despite the fact that it noted the program was underfunded and had "never gotten off the ground in any practical sense." *Id.* at 943. The court summarily dismissed the dissenters' concerns that Tate had a total lack of a real alternative because the program had approved no

Thus, the court excluded the defense because the legislature had set forth the narrow circumstances under which a patient was permitted to use marijuana, and Tate did not fall into this exception.

Minnesota v. Hanson¹⁴⁰

The court affirmed the rejection of the necessity defense based on the existence of a TRA. The defendant had been suffering from epilepsy since 1956.¹⁴¹ Hanson's doctors had prescribed many of the anti-seizure medications, but only marijuana afforded bearable relief. The court foreclosed the defense.

The court reasoned that, through enactment of the TRA, the legislature had determined the single exception for the medical use of marijuana.¹⁴² The court specifically found that the decision in *Washington v. Diana*, which concluded that the state TRA implied *recognition* of the medical value of marijuana, was "misplaced."¹⁴³ Additionally, the court perceived a clear legislative intent to foreclose any other use of marijuana since the legislature retained marijuana in Schedule I.¹⁴⁴

Kauffman v. State¹⁴⁵

Kauffman suffered intense pain from muscle spasms and his prescribed medication was ineffective to alleviate his symptoms.¹⁴⁶ Finding that marijuana was the only remedy for his pain, he used it regularly. The trial court refused the necessity defense and convicted Kauffman of unlawful possession.

The appellate court affirmed the conviction. It noted that while the Alabama legislature had adopted the common law, and with it the defense of necessity, in this case the Alabama legislature had precluded assertions of the defense when it enacted the Controlled Substances TRA.¹⁴⁷ Quoting Minnesota precedent, the court held that the research act "'provisions demonstrate that the legislature has specifically addressed and determined the possible medical uses of marijuana."¹⁴⁸

These cases demonstrate the courts' propensity to interpret TRA's as a legislature's intent to foreclose the necessity defense, rather than a recognition of marijuana's medical value. Another case, *Commonwealth v. Hutchins*, exemplifies the subjective nature of the "lesser of two evils" component of the necessity defense.

applications, was not expected to start functioning for eight months, and Tate's illness was not even included in the eligible conditions. (Handler, J., dissenting).

¹⁴⁰ 468 N.W.2d 77 (Minn. App. 1991).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 79.

¹⁴⁴ *Id.* at 78.

¹⁴⁵ 620 So. 2d 90 (Ala. Crim. App. 1992), *cert. denied*, Ex parte Kauffman (Ala. Apr. 30, 1993).

¹⁴⁶ *Id.* at 91.

¹⁴⁷ ALA. CODE §§ 20-2-110 to 120 (1996).

¹⁴⁸ Kauffman, 620 So.2d at 92-93 (quoting *Minnesota v. Hanson*, 468 N.W.2d at 77).

*Commonwealth v. Hutchins*¹⁴⁹

The defendant suffered from scleroderma accompanied by Raynaud's phenomenon and had been using marijuana to alleviate his symptoms for years.¹⁵⁰ For purposes of its ruling, the court accepted Hutchins' offer of proof that he suffers many debilitating symptoms that physicians have been unable to control with other medications. However, the court found that before a defense of necessity could even be considered, the first question must be a "competing harms" analysis, comparing the defendant's interest against the government's.¹⁵¹ The court decided, as a matter of law, that the defense of necessity was inapplicable. It held:

...the alleviation of the defendant's medical symptoms, the importance to the defendant of which we do not underestimate, would not clearly and significantly outweigh the potential harm to the public were we to declare that the defendant's cultivation of marijuana for medical purposes may not be punishable.¹⁵²

Thus, while acknowledging that some circumstances can overcome the "competing harms" test, the court concluded Hutchins' circumstances were insufficient.¹⁵³

With few exceptions, the case opinions demonstrate the courts' predilection to refuse the necessity defense. However, the cases also evince a pattern of making medicinal marijuana available to citizens in some tangible way. When the defense is foreclosed, often the rationale is that marijuana is theoretically available to individuals via legal alternatives. Thus, while the bottom line of most cases has been disheartening to proponents, perhaps the opinions provide ammunition to argue in the legislature that TRAs need to be revamped in order to run more efficiently and more successfully to actually supply patients. Additionally, the opinions suggest to attorneys attempting the defense to ensure they have obtained pertinent affidavits and declarations from experts and percipient witnesses in support of the defense, establishing the defendant's medical need for the marijuana to ameliorate the conditions caused by his or her illness. Until such progress is made, however, the medical necessity defense remains an unlikely, last-resort alternative, for patients using medical marijuana.

IV. Marinol

The synthetic form of THC, dronabinol, is prescribable in pill form as an antiemetic, under the brand name Marinol. Pursuant to final rule, dronabinol, in gelatin capsule form, was placed in Schedule II of the CSA in 1986.¹⁵⁴ The availability of this "legal" form of marijuana has in some cases hampered, and in others has been a catalyst,

¹⁴⁹ 575 N.E.2d 741 (Mass. 1991).

¹⁵⁰ Scleroderma is a condition that results in the buildup of scar tissue throughout the body. No treatment is recognized and severe cases may result in death. Raynaud's is a problem with blood vessels causing coldness, numbing, tingling and pain in the toes and fingers.

¹⁵¹ Hutchins, 575 N.E.2d at 730.

¹⁵² Id. at 732.

¹⁵³ For a discussion of the case and an argument of the impropriety of taking the "competing harms" analysis away from the jury, see Todd H. Whilton, "Commonwealth V. Hutchins: A Defendant is Denied the Right to Present a Medical Necessity Defense," 27 New Eng. L. Rev. 1101, 1108-110 (1993).

¹⁵⁴ Rescheduling of Synthetic Dronabinol, 51 Fed. Reg. 17,476 (1986).