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Attorney for Defendant

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

STATE OF HAWAII,  
  
Plaintiff,  
vs.  
  
BRIAN MURPHY  
  
Defendant.

) CR. NO.: 10-1-0262 (3)  
)  
)  
) DEFENDANT BRIAN MURPHY'S MOTION  
) IN LIMINE FOR AN ORDER ALLOWING  
) DEFENDANT TO RAISE SPECIFIC  
) DEFENSES; DECLARATION OF  
) COUNSEL; MEMORANDUM IN SUPPORT  
) OF MOTION; EXHIBITS A-I; NOTICE  
) OF MOTION; CERTIFICATE OF  
) SERVICE  
)  
)  
) Hearing Date: June 7, 2012  
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) Hearing Time: 9:30 a.m.  
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DEFENDANT BRIAN MURPHY'S MOTION IN LIMINE FOR AN ORDER  
ALLOWING DEFENDANT TO RAISE SPECIFIC DEFENSES

COMES NOW Defendant, Brian Murphy, by and through his undersigned attorney, and hereby moves this honorable Court for an Order Dismissing the instant indictment or instructing the jury on the following specific defenses:

1. Choice of Evils - Necessity, HRS §§ 703-302;
2. Procuring Agent
3. De minimis Infraction, HRS § 702-236

And/or for any and all relief or Orders as justice warrants.

This Motion is made under Rules 12, 45 and 47, Hawaii Rules of Penal Procedure, the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sec. 5, 10 and 14 of the Hawaii State Constitution, and the attached Declaration of Counsel and Memorandum In Support Of Motion, and such further evidence as may be adduced at a hearing on the motion. Defendant reserves the right to supplement this notice based upon receipt of discoverable materials either from the State or as a result of Defendant's on-going pretrial investigation.

DATED: Wailuku, Hawaii, April 12, 2012.

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Christopher M. Dunn  
Attorney for Defendant

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I,

Plaintiff,

VS.

BRIAN MURPHY

Defendant.

CR NO.: 10-1-0262(3)

DECLARATION OF COUNSEL

**DECLARATION OF COUNSEL**

STATE OF HAWAII )

) SS.

COUNTY OF MAUI )

I, CHRISTOPHER M. DUNN, declare, depose and say that:

1. I am counsel for Petitioner in the above-entitled case;
2. Representations made in the attached motion, memorandum and exhibit are true and accurate to the best of my knowledge, understanding and belief.

I, CHRISTOPHER M. DUNN, do declare under the penalty of law that the foregoing is true and correct.

DATED: Wailuku, Maui, Hawai'i, \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER M. DUNN  
Attorney for Defendant

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I,

Plaintiff,

VS.

BRIAN MURPHY

Defendant.

CR NO.: 10-1-0262(3)

MEMORANDUM OF LAW

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BRIAN MURPHY'S  
MOTION IN LIMINE FOR AN ORDER ALLOWING DEFENDANT TO  
RAISE SPECIFIC DEFENSES

**I. ISSUES PRESENTED**

- A. Whether Defendant may raise the defense of "Choice of Evils - Necessity"?
- B. Whether Defendant may raise the defense of "Procuring Agent"?
- C. Whether the Trial Judge should dismiss the instant indictment as alleging De minimis Infractions, or in the alternative, whether the Defendant may raise the defense of De minimis Infraction?

**II. OVERVIEW**

The Hawaii Medical Marijuana Statutes allow for the use of marijuana by qualified individuals but do not

provide a safe, practical or legal means for qualified individuals to acquire marijuana. Consequently, qualified patients are forced to resort to a dangerous black-market to acquire their medical marijuana, or go without their medicine and suffer.

Mr. Murphy attempted to rectify this conundrum via the legislative process but was unsuccessful. So that qualified individuals could safely acquire medical marijuana, Mr. Murphy established Patients Without Time (PWT), a medical marijuana co-operative run by qualified individuals that served qualified individuals. Mr. Murphy's charges stem from his role at PWT.

Mr. Murphy seeks jury instructions at trial on the Defenses of "Necessity - Choice of Evils", "Procuring Agent" and "De minimis Infraction" for helping qualified patients to acquire medical marijuana rather than leaving them to do without their sanctioned medicine or resort to the dangerous black market.

### **III. MEDICAL USE OF MARIJUANA**

HRS §329-122 provides for the Medical use of Marijuana pursuant to certain conditions. HRS §329-121 defines medical use as "the acquisition, possession, cultivation, use, distribution or transportation of marijuana and/or

paraphernalia relating to the administration of marijuana to alleviate the symptoms or effects of a qualifying patient's debilitating medical condition." However, the legislature limited the term "distribution" to the transfer of marijuana and paraphernalia from the primary caregiver to the qualifying patient.

The result of the medical marijuana statutes is confusing. On the one hand, the legislature acknowledges the medical benefits of marijuana for the treatment of certain debilitating illnesses, sanctions the issuance of State permits for the medical use of marijuana, and provides an affirmative defense for the acquisition/possession/use of marijuana (plants, seeds, processed or derivatives). In contrast, the statute makes it impossible for a qualifying patient or their care-provider to acquire marijuana (plants, seeds, processed or derivatives) without participating in an illegal transaction, i.e., soliciting the distribution of marijuana from a source that is not afforded the affirmative defense.

Qualifying patients and/or their registered caregivers are forced to resort to the "black market" in order to acquire their marijuana (plants, seeds, processed or derivatives). Engaging in illicit drug-deals is dangerous

for all qualifying patients and impossible for others. See Exhibit A.

Additionally, even if a qualifying patient were able to acquire seeds from the "Black-Market", many qualifying patients are unable to cultivate marijuana due to their poor health, living situation and/or the likelihood of theft. See Exhibit B.

Finally, not only are medical marijuana patients vulnerable to victimization by criminals, they are also at the mercy of a police force that is fundamentally opposed to acknowledging the medical value of marijuana or enforcing the medical marijuana statutes. Recently, on duty police officers were observed disseminating anti-marijuana propaganda in a lobbying effort. See Exhibit C. Former Maui Police Chief Phillips has testified against medical marijuana on numerous occasions, but also concedes that medical marijuana patients are at extreme risk when cultivating/ acquiring or otherwise possessing their medicine . See Exhibit D. There are countless instances of police officers seizing and ultimately destroying medical marijuana that was possessed by qualified individuals in compliance with the Medical Marijuana Statutes. See Exhibit E.

Undoubtedly, law enforcement's opposition to medical marijuana is based in large part on financial incentives, namely the proceeds derived from marijuana related seizures and forfeitures.

Consequently, medical marijuana patients are at risk from being victimized by criminals and are afforded little to no protection by an adverse police force.

In sum, the Medical Marijuana statutes allow qualifying patients to acquire and maintain an adequate supply of marijuana, but provide no safe, practical or legal method by which to do so.

#### **IV. MR. MURPHY'S EFFORTS TO CLARIFY THE MEDICAL MARIJUANA STATUTES**

In 2004-2005, Mr. Murphy founded Maui Citizens for Democracy in Action (MCDA). MCDA was created as a political organization that sought, through the legislative process, to expand the Medical Marijuana statutes and otherwise rectify the above described conundrum facing qualified patients seeking to acquire marijuana.

For example, in 2006, MCDA proposed an ordinance to the Maui County Counsel that would have clarified and expanded the Medical Marijuana Statutes. The County



Counsel failed to respond to MCDA's numerous requests for an answer as to whether the ordinances would be considered and/or enacted. Consequently, MCDA endeavored to have the proposed ordinance placed on the November 2006 ballot in the form of an "Initiative". However, MCDA was provided mis-information by the County Counsel and Corporation Counsel, subjected to false requirements regarding the collection of the necessary signatures for the already cumbersome initiative process and ultimately hamstrung by the County in its legislative efforts.<sup>1</sup> This is another example of the institutional bias against medical marijuana patients.

#### **V. THE MISSION OF PATIENTS WITHOUT TIME**

In light of the inherent contradictions of the Medical Marijuana Statutes and MCDA's inability to clarify them through the legislative process, Mr. Murphy formed PWT. PWT was created as a qualified patient co-operative / club whereby members paid a membership fee, signed a membership agreement, collectively stored and acquired marijuana in a safe-secure-reliable place, and received guidance on the cultivation and use of medical marijuana.

***In 2009, the State of Hawaii House of Representatives***

***congratulated PWT for forming the above described co-operative and assisting medical marijuana patients in acquiring medical marijuana.*** See Exhibit F.

Like MCDA, PWT was subjected to numerous abuses. Mr. Murphy was approached by known crime figures, assaulted and extorted for "protection" money in order to continue the operation of PWT. He informed law enforcement of the extortion and was told that it was a "tax" that had to be paid. In 2007, Mr. Murphy was the victim of an armed home-invasion, where masked gunmen broke into his home, savagely beat Mr. Murphy with a firearm and stole the collective supply of PWT medical marijuana that was stored at Mr. Murphy's home on a nightly basis. Police responded to the scene, did a cursory investigation that left behind critical evidence such as pieces of the weapon used to assault Mr. Murphy and never made an arrest. Mr. Murphy photographed important evidence left behind by the police and provided the evidence to MPD. See Exhibit G

Such incidents underscore the threat of assault and theft that medical marijuana patients are subject to whenever they are attempting to acquire, cultivate or store their medical marijuana. Although Mr. Murphy was not personally safe as the operator of PWT, he provided a

safe-haven at PWT for qualified patients to acquire medical marijuana.

#### **VI. THE STATE'S CASE AGAINST MR. MURPHY**

It is alleged in Count One of the above numbered Indictment that Mr. Murphy conspired to Promote Harmful and/or Detrimental Drugs. In Counts Two through Twenty Nine of the same Indictment, it is alleged that Mr. Murphy illegally engaged in the Promotion of Marijuana and Marijuana derivatives and in Prohibited Acts Related to Marijuana Paraphernalia. In sum, the State alleges that Mr. Murphy, with several co-conspirators, possessed with the intent to distribute, or distributed, marijuana, marijuana derivatives and marijuana plants to Medical Marijuana Permit holders. See Grand Jury Transcript attached herewith as Exhibit H

Discovery provided by the State suggests that Mr. Murphy was the operator of an organization named "Patient's Without Time" (PWT). PWT occupied a storefront within a small strip-mall on Baldwin Avenue in Paia, HI. PWT was operated by medical marijuana permit holders. PWT provided marijuana (plants, seeds, processed or derivatives) to medical marijuana permit holders. The discovery provided by the State does not indicate that PWT distributed to any

individual in excess of 3 ounces of marijuana or in excess of 7 plants, the statutory limitations for processed marijuana and plants.

On December 28, 2007, a search warrant was executed at Mr. Murphy's residence uncovering 311 Marijuana clones, 17 Marijuana plants, over an eighth of an ounce of Marijuana concentrate, 2.72 pounds of processed Marijuana and \$5,340.00. On January 25, 2008, another search warrant was executed at Mr. Murphy's residence uncovering, 7 Marijuana plants, 10.64 pounds of processed Marijuana and \$8,745.00. Mr. Murphy made statements to police following the execution of the warrants.

In those interviews, Mr. Murphy explained the mission and structure of PWT. Mr. Murphy said that he stored PWT plants and processed marijuana at his home overnight. He explained that the amount of marijuana and the number of plants seized at Mr. Murphy's home was well under the legal limit that could have been collectively possessed by the 1200 members of PWT. "Murphy stated he knows that he may be in violation of State of Hawaii law for running the cooperative as a type of dispensary, but feels confident that he could win in a trial due to a **necessity defense**. Murphy stated the State of Hawaii made a medical marijuana act which allows medical marijuana patients to acquire

medical marijuana, however does not articulate how or where are to acquire their medicine, thus forcing someone like Murphy to run a cooperative like Patients Without Time, which allows patients to obtain medical marijuana." See Statement attached herewith as Exhibit I.

#### **VII. JURY INSTRUCTIONS**

It is well established as a matter of fundamental due process that a defendant has the right to present any and all defenses at trial. Therefore, the accused is "entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive or unsatisfactory the evidence may be." *State v. O'Daniel*, 62 Haw. 518, 527-528 (1980); see also *State v. Horswill*, 75 Haw. 152 (1993); *State v. Lira*, 70 Haw. 23 (1988).

Here, Defendant asserts that the Court must allow him the right to present and argue at trial that he is not guilty of the offenses charged in the indictment pursuant to a "Necessity - Choice of Evils" defense and/or a "Procuring Agent" defense.

### **A. Choice of Evils - Necessity**

The choice of evils defense under [HRS § 703-302](#) authorizes the defendant to act if the defendant reasonably believes that his or her conduct is necessary to avoid an imminent harm or evil and if the harm or evil sought to be avoided is greater than that sought to be prevented by the law being broken by the defendant's conduct. State v. Padilla, 114 Haw. 507, 515 (2007). Defense counsel can find no case in the State of Hawaii that forecloses a Necessity Defenses to individuals charged with drug distribution offenses.

In opposition to the instant motion, the State is certain to cite United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001). There, the U.S. Supreme Court held that a Medical Necessity defense was unavailable in a Federal prosecution involving a medical marijuana dispensary. However, the ruling was in the context of Federal Law which does not sanction the medical use of marijuana, except in extraordinarily limited circumstances, i.e., use by participants in a federal study.

The Oakland holding is inapplicable to the instant case in light of Hawaii's Medical Marijuana Statutes. Because there is evidence that Mr. Murphy operated PWT so that qualified patients need not suffer without their

medicine or otherwise be placed in danger, he is entitled to a "Necessity" instruction.

### **B. Procuring Agent**

Under the "Procuring Agent Defense," one who acts merely as a procuring agent for the buyer of drugs is a principal in the purchase, not the sale, and, therefore, can be held liable only to the extent that the purchaser is held liable. State v. Davalos, 113 Haw. 385 (2007). A Defendant's participation in the negotiation of a drug transaction and his touching of the drugs and money involved did not, in and of itself, foreclose a procuring agent defense, in trial for promoting a dangerous drug in the second degree; rather, the question of whether defendant was merely acting as procuring agent for the buyer of drugs, or was acting as agent for the seller, was a question for the jury, thereby warranting an instruction on the procuring agent defense. Id. The question of whether a defendant was acting on the seller's behalf or on the purchaser's behalf in a drug transaction rests on the specific facts of the case, for purposes of determining whether procuring agent defense is available in prosecution

for distribution of dangerous drugs; generally these are questions of fact for the fact finder. Id.

It is anticipated that the evidence will show that PWT, as a cooperative organization run by qualifying individuals, served as the procuring agent for other qualifying individuals so that they could safely acquire Marijuana without having direct contact with the "Black Market". Consequently, Mr. Murphy is entitled to a "Procuring Agent" instruction.

### **C. De minimis Infraction**

Defendant is moving the Court to dismiss the instant indictment upon a determination that the charge constitutes a de minimis infraction, or in the alternative, to permit Defendant to present a defense of "De minimis Infraction". HRS § 702-236 contains the relevant law:

§ 702-236. De minimis infractions.

(1) The Court may dismiss the prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:

(a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or

(b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or



(c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense.

(2) The court shall not dismiss a prosecution under subsection (1) (c) of this section without filing a written statement of its reasons.

A motion for a de minimis determination may be considered by the Court in a pretrial motion. State v. Fukagawa, 100 Hawai'i 498, 60 P.3d 899 (2002).

As discussed above, Mr. Murphy created and ran PWT as a qualified patient co-operative / club whereby members paid a membership fee, signed a membership agreement, collectively stored and acquired marijuana in a safe-secure-reliable place, and received guidance on the cultivation and use of medical marijuana. The indictment alleges that Mr. Murphy and several co-conspirators, i.e. PWT, possessed with the intent to distribute, or distributed, marijuana, marijuana derivatives and marijuana plants to Medical Marijuana Permit holders and within statutorily prescribed limits.

In the instant case, Mr. Murphy and PWT did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction. Additionally, his case presents such other

extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. In fact, the House of Representatives congratulated PWT for helping medical marijuana patients acquire their medical marijuana. See Exhibit

The Court is in the best position to step back and see that the evil sought to be prevented by the penal statute neither occurred nor was truly threatened in this case. Accordingly, it is urged that the Court declare the infractions de minimis and dismiss the instant prosecution. In the alternative, Defendant is entitled to raise a "De minimis Infraction" defense.

DATED: Wailuku, Hawaii, April 12, 2012

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Christopher M. Dunn  
Attorney for Defendant

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<sup>i</sup>MCCDA has remained politically active. In 2007, Crafted State of Hawaii House Resolution HCR-10 Presented to Hawaii State Legislature, deferred to Judiciary Committee; 2008 State Employee Drug Testing Bill; 2008 University of Hawaii FDA Research Grant Bill; 2008 Medical Marijuana Adequate Supply Bill; 2008 Medical Marijuana Reciprocity Bill; 2008 Lowest Enforceable Priority Bill; 2008 Marijuana/Alcohol Equalization; [2008 Maui County Family Farmer Regulation and Revenue Ordinance](#).

Mr. Murphy also launched the 2007~2008 MCCFDIA Voter Registration Drive with a rally in Kihei. MCCFDIA staged Voter Registration rallies at several Maui locations in partnership with various Maui non-profit advocacy groups.

Nov 27, 2007 MCCFDIA presented text and support packages to Maui County Council members and Mayor Tavares explaining the 2008 Maui County Family Farmer Regulation and Revenue Ordinance.

Jan 2008 Submitted the 2008 Maui County Family Farmer Regulation and Revenue Ordinance to the Maui County Council. Conducted meetings with individual Maui County Council Members, Hawai'i State Representatives, and Hawai'i State Senators.

Jan 22, 2008 drafted **House Bill HB2675 HD1**, designed to increase the number of marijuana plants allowed for medical use to 14 plants and to create the medical marijuana task force to discuss the value of constructing secure growing facilities for medical marijuana and study inter-island transport issues related to medical marijuana, is introduced and passes first reading.

Jan 28, 2008 HR49HD1, "requesting the Maui County mayor and county council to implement various measures regarding medical marijuana in the county of Maui" referred to HLT, JUD

Jan 31, 2008 Maui County Police Chief Thomas Phillips issues an official testimony clarifying that MPD "does not believe in supporting medical marijuana in its entirety."

Feb 15, 2008 **House Bill HB2675** passes Second Reading as amended in HD 1 and referred to the committee(s) on PSM/JUD

Feb 19, 2008 Responding to the Maui County Democratic Party's request for assistance, MCCFDIA placed Deputy Voter Registrars at eight Maui Caucus venues, producing the as-yet single most successful day in the 2008 Voter Registration Drive with over 900 voters registered.

Feb 26, 2008 Maui County Family Farmer Regulation and Revenue Ordinance Initiative Drive starts with first issue of petition forms. Estimates place mid-April as the deadline to acquire over 8,000 valid signatures.

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Feb 29, 2008 HB2675 HD1 passes committees on PSM (public safety & military affairs) with amendments to establish a medical marijuana task force.

March 4, 2008 **HB2675 HD1** passes Third Reading as amended in HD 2, transmitted to Senate, passes 1st reading (3/6/08) and referred to HTH.

March 14, 2008 The committees on HLT recommend that HR49HD1 be passed, with amendments March 17, 2008.

The committee(s) on HTH recommend(s) that HB2675 HD1 be passed, with amendments, referral to JDL (3/20/08).

March 27, 2008 The committee(s) recommends that HR49HD1 be deferred.

April 4, 2008 HB2675 HD1 Report adopted; passes 3rd reading, transmitted to House.

April 22, 2008 HB2675 HD1 House agrees to Senate amendment(s), passes Final Reading as amended in SD 1, received notice of House agreement and passage on Final Reading, transmitted to Governor.

July 8, 2008 HB2675 HD1 vetoed, returned from the Governor without approval, overridden by Senate, not by House.