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## CAPTURING CANNABIS DECRIMINALIZING POSSESSION IN TENNESSEE “PURSUANT TO A VALID PRESCRIPTION”

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### I. INTRODUCTION

Before diving into an abyss of drug history, certain key points and terms of art must be clarified. First, cannabis, marijuana, and marihuana (“cannabis” unless historical context uses otherwise) are the same substance, occurring in natural form as *Cannabis Sativa L.*<sup>2</sup> Second, cannabis is a Schedule VI controlled substance--not a narcotic drug.<sup>3</sup> While all narcotics are controlled substances,<sup>4</sup> not all controlled substances are narcotics, and it is incorrect (under Tennessee law) to categorize naturally grown cannabis (in plant form) as

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<sup>2</sup> Compare TENN. CODE ANN. § 39-17-402(16)(A) (2019) (“‘Marijuana’ means all parts of the plant cannabis”); with The Tennessee Drug Control Act of 1971, §2(n) (defining “marihuana” as “all parts of the plant CANNABIS SATIVA L.”); and 21 U.S.C.A. §802 (Westlaw 2019) (“‘marihuana’ means all parts of the plant Cannabis sativa L.”).

<sup>3</sup> TENN. CODE ANN. § 39-17-402(4) (2019) (providing, “‘Controlled substance’ means a drug, substance, or immediate precursor in Schedules I through VII of §§ 39-17-403 -- 39-17-416”).

<sup>4</sup> *Id.*

a narcotic drug.<sup>5</sup> Third, an “ultimate user” is one who may lawfully possess a controlled substance (e.g., oxycodone, amphetamine salts, or cannabis) by virtue of a valid prescription.<sup>6</sup> Forth, one-half ounce of cannabis could provide anywhere from fifty-six days of medical use to upwards of ninety days of use, depending on the patient and consumption rate.<sup>7</sup> Fifth, physicians are authorized to prescribe cannabis in Tennessee.<sup>8</sup>

## II. DISCUSSION OF LEGAL AUTHORITY

Ostensibly, due to the fact that no Tennessean has yet to be arrested for medical marijuana possession while holding a valid prescription authorizing medicinal use, no direct case law exists.<sup>9</sup> Although the current statutory framework fails to clarify inner and outer limits of key components,<sup>10</sup> a handful

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<sup>5</sup> See, e.g., TENN. CODE ANN. § 39-17-402(17) (2019) (failing to include marijuana or cannabis in definition of “narcotic drug”). See also 1980 Tenn. AG LEXIS 562 (concluding that “[i]t is apparent...marijuana is not a narcotic drug.”) (emphasis added).

<sup>6</sup> See TENN. CODE ANN. § 39-17-402(26) (2019) (“‘Ultimate user’ means a person who lawfully possesses a controlled substance for the person’s own use or for the use of a member of the person’s household...”).

<sup>7</sup> If a patient took five “hits” of marijuana each day, one-half (1/2) of an ounce would provide the patient relief for *at least fifty-six days*. See JONATHAN P. CAULKINS, *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 22 (2012) (noting that one “hit” is about 1/20<sup>th</sup> of a gram of marijuana); see also TENN. CODE ANN. § 39-17-418(b) (2019) (listing one-half ounce of marijuana as 14.175 grams). Thus, a patient would use around .25 grams of marijuana for one day of relief.

<sup>8</sup> 2003 Tenn. AG LEXIS 157 (“Read together *in pari materia*, any controlled substance listed in the enumerated statutes is included within the exception of TENN. CODE ANN. § 39-17-418(a).”).

<sup>9</sup> See, e.g., State v. Long, No. W2016-02471-CCA-R3-CD, 2018 WL 3203124, at \*15 (Tenn. Crim. App. June 29, 2018), *perm. app. denied* (Sept. 17, 2018) (affirming marijuana possession charges against appellant who had California doctor’s written “recommendation” for “marijuana as a pain medication”).

<sup>10</sup> See, e.g., TENN. CODE ANN. § 39-17-402 (2019) (failing to define “valid prescription”). See also 2003 Tenn. AG LEXIS 151 at \*11 (citing TENN. CODE ANN. § 63-10-404 as earlier code defining “prescription drug”).

of interpretations on the “‘valid prescription’ exception” exist.<sup>11</sup> Interestingly, Tennessee’s historical code versions reveal over a century of law allowing controlled substance possession by prescription for medical purposes.<sup>12</sup> To fully understand the current code, multiple sections *in parie materia* must be noted.<sup>13</sup> Unescapably, after reviewing Tennessee’s controlled substance laws (historical and current), medical cannabis possession is authorized—regardless of how a court interprets the statute.

A. SECTION 418(A) IS UNAMBIGUOUS AND THE STATUTE’S  
PLAIN MEANING AUTHORIZES MEDICAL CANNABIS  
POSSESSION WITH A VALID PRESCRIPTION.

“It is an offense for a person to knowingly *possess* [] a controlled substance...*unless* the substance was obtained directly from, *or pursuant to, a valid prescription.*”<sup>14</sup> This section is clear on its face—it authorizes lawful possession if the possessor has a valid prescription. Ultimate users may obtain a valid prescription for medical cannabis because Tennessee practitioners are authorized to write prescriptions for “any” controlled substance.<sup>15</sup> The only restraint for one seeking to utilize medical cannabis in Tennessee is the “legitimate medical purpose” and proof that the “‘valid prescription’ exception” applies. Statutory interpretation of the current code version authorizes medical cannabis possession by its plain meaning in the text.

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<sup>11</sup> See Part II, *infra*. See also 2016 Tenn. AG LEXIS 40 (denying “[a]uthority of Municipality to Decriminalize Marijuana Possession” but failing to note if medical possession is allowed via prescription).

<sup>12</sup> See generally *Hyde v. State*, 174 S.W. 1127 (Tenn. 1914). See, Public Act, 63rd Tenn. Gen. Ass. Ch. No. 91, SB 383 (Passed March 24, 1923) (providing “[a]n act to regulate the sale, bartering, *possession* and control of opium and coca leaves...”) [emphasis added].

<sup>13</sup> See *State v. Kilpatrick*, 327 S.W.3d 64, 68 (Tenn. Crim. App. 2010) (discussing “valid prescription exception” and noting additional statutory sections such as TENN. CODE ANN. § 53-11-410).

<sup>14</sup> TENN. CODE ANN. § 39-17-418(a) (2019) (emphasis added).

<sup>15</sup> 2003 Tenn. AG LEXIS 157 at \*10.

## 1. THE UNAMBIGUOUS STATUTE'S INTERPRETATION DECRIMINALIZES MEDICAL POSSESSION.

When analyzing *what types* of controlled substance were within § 418(a), the Attorney General noted, "Tennessee courts have promulgated two cardinal rules of statutory construction."<sup>16</sup> The primary rule is to "follow the plain meaning of the statute where the language is clear and unambiguous on its face."<sup>17</sup> Moreover, "where a statute is plain and explicit in its meaning, and its enactment within the legislative competency, the duty of the courts is simple and obvious, namely, to say [what the law is] and obey it."<sup>18</sup> Significantly, "it is not for the courts to question the wisdom of a legislative enactment."<sup>19</sup>

Importantly, the current code contains another "exception" provision in addition to § 418(a). It provides: "It is an exception to this part if the person lawfully possessed the controlled substance as otherwise authorized by this part and title 53, chapter 11, parts 3 and 4."<sup>20</sup> Chapter 11 ("Narcotic Drugs and Drug Control") contains two prescription possession exceptions in part III. Section 302 ("Handlers of controlled substances") embodies the historical exception allowing possession via a prescription<sup>21</sup> and § 308 ("Prescription Requirements") specifically addresses restrictions on more stringently regulated controlled substances.<sup>22</sup>

Relative to medical marijuana, § 308(d) provides: "A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medical purpose."<sup>23</sup> This is noteworthy because the prior subsections only refer to schedule I, II, III and IV.<sup>24</sup> Thus, the perplexing question

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<sup>16</sup> *Id.* at \*4; *see also* 2012 Tenn. AG LEXIS 33.

<sup>17</sup> *Jackson v. General Motors Corp.*, 60 S.W.3d 800, 804 (Tenn. 2001).

<sup>18</sup> *Miller v. Childress*, 21 Tenn. 319, 321-22 (1841).

<sup>19</sup> 2003 Tenn. AG LEXIS 157 at \*4 (citing *Hamblen Cty. Educ. Ass'n v. Hamblen Cty. Bd. of Educ.*, 892 S.W.2d 428, 431 (Tenn. Ct. App. 1994) (citing *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977))).

<sup>20</sup> TENN. CODE ANN. § 39-17-427 (2019).

<sup>21</sup> *See discussion infra* Part II (i).

<sup>22</sup> *See* TENN. CODE ANN. § 53-11-308 (2019).

<sup>23</sup> TENN. CODE ANN. § 53-11-308(d) (2019).

<sup>24</sup> TENN. CODE ANN. § 53-11-308 (2019).

immerses, why does the statute not address schedule VI (or VII) in any form? Due to the omission of any reference to Schedule VI,<sup>25</sup> it is difficult to determine if the Code provision would implicitly include or exclude cannabis; however, read *in parie materia*, the distinction is moot as a physician can prescribe “any” controlled substance.<sup>26</sup>

## 2. THE STANDARD DEFINITION OF “PRESCRIPTION”

CLEARLY DECRIMINALIZES POSSESSION BASED ON ITS  
PLAIN MEANING.

Oddly, the current Code does not define “prescription.”<sup>27</sup> If a statutory term “is not defined in the statute, nor [] defined by Tennessee Courts” then to “interpret[] the meaning of a word or phrase in a statute, the court may use dictionary definitions.”<sup>28</sup> Relative to § 418(a)’s medical context, the word prescription (in noun form as in the statute) is “a *written direction for a therapeutic or corrective agent...*”<sup>29</sup> This definition beckons to the everyday reader that the prescription establishes lawful ownership over a controlled substance, as long as it is valid. Thus, under the statute’s plain meaning, a “prescription” is a written direction for a therapeutic agent, establishing a right to possess a drug for an amount of time authorized by statute. That drug is cannabis and the amount of time is indefinite.<sup>30</sup>

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<sup>25</sup> See TENN. CODE ANN. § 39-17-427 (2019).

<sup>26</sup> 2003 Tenn. AG LEXIS 157 at \*10.

<sup>27</sup> See TENN. CODE ANN. § 39-17-402 (2019); TENN. CODE ANN. § 53-11-301 (2019); TENN. CODE ANN. § 63-6-236 (2019).

<sup>28</sup> McGarity v. Jerrolds, 429 S.W.3d 562, 578 (Tenn. Ct. App. 2013) (citing State v. Majors, 318 S.W.3d 850, 859 (Tenn. 2010)).

<sup>29</sup> PRESCRIPTION, Merriam-Webster (last visited March 4, 2019) (emphasis added).

<sup>30</sup> See TENN. CODE ANN. § 63-6-236 (2019) (failing to include “expiration date” as a required entry for a valid prescription). Thus, once a prescription meets the requirements, possession appears authorized indefinitely.

3. PHYSICIANS MAY LEGALLY PRESCRIBE CANNABIS  
BECAUSE WHEN READ *IN PARI MATERIA*, ANY  
CONTROLLED SUBSTANCE IS WITHIN § 418(A)'S  
EXCEPTION.

In reviewing Tenn. Code Ann. § 39-17-418(a), the Attorney General explained:

Tenn. Code Ann. § 39-17-402(4) defines a controlled substance as a “drug, substance, or immediate precursor in Schedules I through VI of §§ 39-17-403 - 39-17-415 inclusive.” Read together *in pari materia*, any controlled substance listed in the enumerated statutes is included within the exception of Tenn. Code Ann. § 39-17-418(a).<sup>31</sup>

Clearly, cannabis is within the scope of the physician’s authority to prescribe.

B. ALTHOUGH § 418(A) IS NOT AMBIGUOUS, IF IT WERE,  
CANNONS OF CONSTRUCTION AUTHORIZE MEDICAL  
CANNABIS POSSESSION WITH A VALID PRESCRIPTION.

If the text is considered ambiguous, interpretation favors medical cannabis in Tennessee. Mindful of Albert Einstein’s saying, “If you want to know the future, look to the past,” Tennessee’s historical drug laws aid in understanding § 418(a). Although alcohol is not a controlled substance, at one point in time it hardly differed from cannabis. During prohibition, possession of alcohol was federally banned; yet, Tennessee physicians were authorized to prescribe alcohol to patients.<sup>32</sup> If a patient had a prescription, they could obtain the substance from a “druggist” who held the substance for medical purposes.<sup>33</sup> Ironically, at one point in time, alcohol

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<sup>31</sup> 2003 Tenn. AG LEXIS 157 at \*10 (emphasis added).

<sup>32</sup> See Tennessee Code, 11 § 11219(2) (1932) (“Reception and possession by druggists, hospitals, and manufactures for certain specified purposes”).

<sup>33</sup> See *Motlow v. State*, 145 S.W. 177, 181 (Tenn. 1911) (denying relief for proprietor of Jack Daniels distillery claiming whiskey was

could not be sold in Tennessee and was imported across state lines to avoid problems from local producers selling illegally.<sup>34</sup> Undeniably, Tennessee's medical exception during federal bans on alcohol favors medical cannabis possession via a prescription--irrespective of the federal bans on cannabis.<sup>35</sup> Provided the ultimate user obtains a valid prescription, the historical analysis of Tennessee's drug laws showcase a State policy favoring lawful possession of medical cannabis.

1. TENNESSEE'S HISTORICAL CODE SHOWS A CLEAR  
POLICY OF AUTHORIZING POSSESSION OF A  
CONTROLLED SUBSTANCE WITH A VALID PRESCRIPTION.

In 1857, drug regulations concerned only opium and coca leaves (of which morphine and cocaine may be derived, respectively).<sup>36</sup> Pre-1900's regulations focused on labeling requirements, with little focus on medical possession of a controlled substance.<sup>37</sup> Importantly, the possession by prescription exception appears in the 1923 Code.<sup>38</sup> It excluded from prosecution, "any person having in his possession or under his control any of the aforesaid drugs which has or have been prescribed or dispensed by a physician, dentist, or

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manufactured for medical resale); *see also* *Slaven v. State*, 257 S.W. 90, 91 (Tenn. 1923) (citing 1917 Act containing medical exceptions for alcohol use by "bona fide patients" during prohibition).

<sup>34</sup> *Slaven*, 257 S.W. at 91.

<sup>35</sup> *See also* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1453 (2009) (discussing legal status of state medical marijuana regulations).

<sup>36</sup> *See* Tenn. Code Pt. IV, Tit. I, Ch. 7, Art. II, § 4831 (1857) (noting laudanum and morphine derived from opium as drugs subject to labeling regulation).

<sup>37</sup> Notably, opium and coca leaves were also mentioned in the 1923 code version in which the drugs could be possessed pursuant to a valid prescription; *See* Tenn. Code Pt., I Tit., 14 Ch., 21, § 6619(d) (1932).

<sup>38</sup> *See* Public Act, 63rd Tenn. Gen. Assembly Chapter No. 91, Senate Bill No. 383 (Passed March 24, 1923) (providing, "An act to regulate the sale, bartering, possession and control of opium and coca leaves...").

veterinary surgeon registered in the State of Tennessee....”<sup>39</sup> Thus, reviewing Tennessee’s historical drug regulations, two state interests are clear: (1) prohibit unauthorized use of dangerous drugs and (2) provide authorized possession of drugs for medical use.

Near the end of prohibition, Tennessee modified the law by incorporating new language relative to drug possession. With wording similar to the current law, the 1932 Code exempted from prosecution those in “possession” of drugs prescribed by a state-registered physician.<sup>40</sup> Similarly, the 1955 version also contained the possession by prescription exception.<sup>41</sup> Although cannabis was mentioned in the 1932 Code, it was not formally defined until 1955.<sup>42</sup> The 1955 definition (mirroring the current Code) defines cannabis as: “all parts of the plant *cannabis sativa* L....”<sup>43</sup> The 1955 Code is clear--cannabis is not a narcotic drug under Tennessee Law.<sup>44</sup>

2. WHEN § 418’S ORIGINAL LANGUAGE WAS CODIFIED, IT CLEARLY AUTHORIZED MEDICAL CANNABIS POSSESSION BASED ON THE LEGISLATIVE INTENT AND SCHEDULE PLACEMENT.<sup>45</sup>

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<sup>39</sup> Compare Tenn. Code 18 § 6585 (1932) (listing drugs such as “alpha or beta eucaine, chloroform, cannabis indica, and chloral hydrate”); with Tenn. Code 91 § 6619 (1932) (noting opium and coca leaves as sole drugs requiring a prescription for lawful possession); and Tenn. Code 91 § 2(d) (1923) (regulating possession of opium and coca leaves).

<sup>40</sup> See Tennessee Code, 21 § 6619(d) (1932). Accord Tennessee Code, 21 § 6619(d) (1934) (Superseded by, Uniform Narcotic Drug Law, Tenn. Code 21A § 6632.1 (1937, Ch. 255, § 24).

<sup>41</sup> See Tenn. Code 52 § 1312 (1955).

<sup>42</sup> See Uniform Narcotic Drug Law, Tenn. Code 13 § 52-1302(14) (Acts 1937, Ch. 255 § 24).

<sup>43</sup> Tenn. Code 52 § 1302(14) (1955).

<sup>44</sup> *Id.* Accord 1980 Tenn. AG LEXIS 562 (“It is apparent...marijuana is not a narcotic drug.”).

<sup>45</sup> This heading references “§ 418” for consistency and clarity. The actual codified provision with the original language is located in the Tennessee Drug Control Act of 1971 § 15(c)(3).



“Pursuant to, a valid prescription” first appeared in the Tennessee Drug Control Act of 1971.<sup>46</sup> This critical link answers many questions concerning marijuana, cannabis, or “marihuana,” and its application to our current Code.<sup>47</sup> For example, it explains why cannabis was included in Schedule VI.<sup>48</sup> The Act provides:

There is hereby established a Schedule VI for the classification of substances which the Commissioner of Mental Health upon the agreement of the Commissioner of Public Health, *upon considering the factors set forth in Section 3(a) of this Act*, decides should not be included in Schedules I through V. The controlled substances included in Schedule VI are: (1) *Marihuana*.<sup>49</sup>

Notably, marihuana is the sole drug listed in Schedule VI in the 1971 Code.<sup>50</sup> Similarly, the current Code includes only marijuana and cannabis derivatives in Schedule VI.<sup>51</sup> The factors in Section 3(a) determine a controlled substance’s appropriate placement and include:

(1) the actual or relative potential for abuse; (2) the scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the substance; (4) the history and current pattern of abuse; (5) the scope, duration, and significance of abuse; (6) the risk to the public health; (7) the potential of the substance to produce psychic or physiological dependence liability; and (8)

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<sup>46</sup> See Tennessee Drug Control Act of 1971, Ch. 163, HB 522.

<sup>47</sup>The Act created: “A comprehensive system of drug and drug abuse control for Tennessee...relative to contraband drugs; and [provides] certain penalties and for rehabilitation and treatment.”

<sup>48</sup> *Contra*, Controlled Substances Act, 21 U.S.C. § 812(c) (Westlaw 2019) (noting Schedule I placement).

<sup>49</sup> Tennessee Drug Control Act of 1971 § 15 (emphasis added).

<sup>50</sup> *Id.*

<sup>51</sup> TENN. CODE ANN. § 39-17-415 (2019) (listing marijuana and its derivatives in Schedule VI).

whether the substance is an immediate precursor of a substance already controlled under this section.<sup>52</sup>

While Section 15 places “marihuana” in Schedule VI, it fails to provide any further explanation as to *why* or *what* the commission’s actual findings were on the substance. Based on the legislative history’s text, the commissions must have determined marihuana had: (1) “low potential for abuse” relative to Schedule V substances; (2) “currently accepted medical use in treatment in the United States”; and (3) “limited physical dependence or psychological dependence relative” to Schedule V drugs--because if the commissions felt otherwise, marihuana would have been placed in Schedule V--not Schedule VI.<sup>53</sup> Thus, even if marihuana is not expressly stated as having Schedule V qualities, it implicitly must have these requirements by virtue of being in a lesser schedule placement. Schedule VI placement shows the legislature’s informed decision evidencing little concern relative to marijuana use and potential public harm.<sup>54</sup>

In addition to 1971’s schedule placement, the Tennessee Drug Control Act appears to be the first authority to establish lesser penalties for marijuana possession.<sup>55</sup> Specifically, “casual exchanges” of “marihuana, not in excess of one-half (1/2) ounce, for no remuneration...” were reduced from felony to misdemeanor.<sup>56</sup> Here, the 1971 Code embodies

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<sup>52</sup> Tennessee Drug Control Act of 1971 § 3(a).

<sup>53</sup> Compare Tennessee Drug Control Act of 1971 §5 (listing Schedule I drugs with “high potential for abuse” and “no accepted medical use”); with Tennessee Drug Control Act of 1971 §13 (listing Schedule V drugs as having “low potential for abuse...current accepted medical use...[and] limited physical dependence” relative to precursor substances); and Tennessee Drug Control Act of 1971 § 15 (failing to delineate any findings relative to marijuana and Section 3(a) factors).

<sup>54</sup> Cf., TENN. CODE ANN. § 39-17-405 (2019) (noting drugs in Schedule I have high potential for abuse).

<sup>55</sup> Tennessee Drug Control Act of 1971 § 25(a)(3).

<sup>56</sup> Tennessee Drug Control Act of 1971 § 25(b)(1). See also 2012 Tenn. AG LEXIS 33 (defining “casual exchange” as “the spontaneous passing of a small amount of an illegal drug, regardless whether money is received for the exchange of the illegal drug.”).

Tenn. Code Ann. § 39-17-418(b)'s express language regarding quantity.<sup>57</sup> Although the 1971 Code is not a verbatim recitation of the current Code, the substantive content and application to possession is hardly distinguishable, allowing offenders to be charged with a lesser misdemeanor possession charge. Notably, the possession via prescription language is verbatim to the current Code.<sup>58</sup> The only differences in the provisions appear to be omitting "intentionally" from the *mens rea* of the former statute and the addition of "causally exchange" to the *actus reus* of the latter.<sup>59</sup> Invariably, the 1971 Code yields the most practical legislative insight on the statute.

As a matter of thoroughness, it should be noted that the current Criminal Code has been modified since 1971; however, no provisions have been modified relative to: naturally grown marijuana;<sup>60</sup> the valid prescription exception; or casual exchanges.<sup>61</sup> Moreover, audio recordings from the legislative floor debates on the Tennessee Drug Control Act of 1971 do not shed any light on marijuana's placement or the valid prescription exception.<sup>62</sup> Notably, Tennessee's Criminal Code undertook a major overhaul in 1988.<sup>63</sup> Although additional enactments to the Code have occurred since the

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<sup>57</sup> Tennessee Drug Control Act of 1971 §25(b)(1).

<sup>58</sup> Compare Tennessee Drug Control Act of 1971 §25(b) (noting "unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice"); with TENN. CODE ANN. § 39-17-418(a) (2019) (same).

<sup>59</sup> See TENN. CODE ANN. § 39-17-418(a) (2019).

<sup>60</sup> Modern additions to the code regarding new forms of cannabis (e.g., "tetrahydrocannabinols" and "synthetic equivalents" derived from cannabis are omitted from discussion due to their non-organic origins. See, e.g., TENN. CODE ANN. § 39-17-455 (2019) (proscribing "manufacture [of] marijuana concentrate by a process which use[s] inherently hazardous substance" as a Class E felony).

<sup>61</sup> See TENN. CODE ANN. § 39-17-417(b) (1982); see also TENN. CODE ANN. § 39-17-418(b) (1988).

<sup>62</sup> To ensure thorough research, audio recordings discussing HB 522 were purchased from the Tennessee State Library and Archives. Although references to the simple possession statutes were made in the discussion, there was little insight relative to medical use of controlled substances obtained from the recording.

<sup>63</sup> See Tennessee Drug Control Act of 1989; TENN. CODE ANN. § 39-17-401 (1988).

primary provisions were enacted in 1971, “pursuant to a valid prescription” remains unchanged. Thus, mindful of the historical exceptions allowing possession by a valid prescription, medical use of marijuana appears fully authorized by the legislature, provided that the user obtains a valid prescription.

3. ARGUING § 418(A)’S COMMA IS “OBVIOUSLY MISPLACED” FAILS UNDER THE DOCTRINE OF LEGISLATIVE INACTION.

Justice Brock’s concurring opinion in *Sanderson* takes an interesting viewpoint on Tennessee’s statutory provision.<sup>64</sup> Although contrary to the historical policy of the Criminal Code (authorizing possession via a prescription) Justice Brock’s concurrence asserts:

The comma between the words “to” and “a” is obviously misplaced and should be placed between the words “of” and “a,” the meaning being that lawful possession of a controlled substance must be obtained either directly from a physician or from a pharmacist pursuant to a valid prescription or order of a physician.<sup>65</sup>

It is highly unlikely that the comma placement in Tennessee’s prescription exception was “obviously misplaced.” Without question, reading the statute as Justice Brock asserts might make the provision easier to apply in the legal analysis, but it is not up to the judicial department to question the acts of the legislature.<sup>66</sup> Simply put, *Sanderson* was decided forty-two years ago. If Justice Brock’s assertions were correct, why would the legislature have yet to correct the error? To ask is to answer, and considering the language remains unchanged, it is highly unlikely the comma was “obvious misplaced” when: (1) first written in 1971; (2) re-

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<sup>64</sup> See *State v. Sanderson*, 550 S.W.2d 236, 239 (Tenn. 1977).

<sup>65</sup> *Id.* at 239, n.1 (Brock, J., concurring).

<sup>66</sup> *Reynolds v. Gray Med. Inv'rs, LLC.*, No. E2017-02403-COA-R9-CV, 2018 WL 6504086, at \*2 (Tenn. Ct. App. Dec. 11, 2018) (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013)).

codified in 1982 and 1988; and (3) printed in the current Code.<sup>67</sup>

Nonetheless, the doctrine of legislative inaction applies to the “obviously misplaced” comma in the 1971 Code. In most circumstances, “inaction [of the legislative department] is generally irrelevant to the interpretation of statutes.”<sup>68</sup> There is however, a “limited exception” to this principle “when the legislature’s inaction follows judicial interpretation of a statute.”<sup>69</sup> Specifically, the doctrine:

Presumes that, had the legislature disagreed with a prior judicial construction of a statute, it would have amended the statute accordingly. It is not a rule of law; rather, it is a judicial principle that permits – but does not compel – a presumption of legislative acquiescence in a prior judicial interpretation of the statute.<sup>70</sup>

“Given this long-standing judicial application of the statute,” one “can presume that the Legislature agrees” with the statutory application as it occurred in *Sanderson*, “and there is no authority to suggest otherwise.”<sup>71</sup> The assertion that the comma is misplaced is incorrect in light of the doctrine of legislative inaction. Finally, based on the well-known principle that it is not for the courts to “alter or amend statutes or substitute [their] policy judgment for that of the

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<sup>67</sup> Compare Tennessee Drug Control Act of 1971 § 25(b) (codifying language in *Sanderson*, 550 S.W.2d at 237); with TENN. CODE ANN. § 39-6-417(b) (1982) (incorporating language and punctuation verbatim); and TENN. CODE ANN. § 39-6-417(b) (1988) (containing same); and TENN. CODE ANN. § 39-6-418(a) (2018) (same).

<sup>68</sup> *Hardy v. Tournament Players Club at Southwind*, 513 S.W.3d 427, 443 (Tenn. 2017) (citing *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 519 (Tenn. 2005)).

<sup>69</sup> *Id.* at 444.

<sup>70</sup> *Id.* See, e.g., *Goodman v. HBD Indus., Inc.*, 208 S.W.3d 373, 379 (Tenn. 2006) (noting that “the Legislature has also expressed its tacit acceptance of the decision, in that it has chosen not to overrule it by statute.”).

<sup>71</sup> *Dedmon v. Steelman*, 535 S.W.3d 431, 462 n.29 (Tenn. 2017) (citing *Hardy*, 513 S.W.3d at 444 (Tenn. 2017)).

Legislature,” the current version of the statute appears to be written consistent with the legislative department’s desires.<sup>72</sup>

C. ALTHOUGH § 418(A) AUTHORIZES MEDICAL CANNABIS POSSESSION, THE PATIENT MUST PROVE THE “‘VALID PRESCRIPTION’ EXCEPTION” APPLIES TO AVOID CRIMINAL PENALTIES.

Even though Tennessee’s current Code decriminalizes an ultimate user’s medical cannabis possession pursuant to a valid prescription, the patient (as the defendant) has the burden to show the “‘valid prescription’ exception” applies.<sup>73</sup> The patient must show that there is a legitimate medical purpose<sup>74</sup> and the prescription must be: (1) “issued by a licensed practitioner”; (2) “acting in good faith”; (3) “in accord with accepted medical standards”; and (4) “the person obtaining the prescription” must act “in good faith...free from fraud, deceit, or misrepresentation.”<sup>75</sup>

1. “INNOCENT UNTIL PROVEN GUILTY” DOES NOT APPLY TO § 418(A)’S POSSESSION EXCEPTION.

As noted in *Sanderson*, the legislature did not intend to place a “protective cloak around anyone who procures a prescription...by fraud, misrepresentation or deceit.”<sup>76</sup> Not surprisingly, one claiming to be exempt from prosecution must prove innocence to avoid guilt (and abuse of the exception).<sup>77</sup> The *Duke* court dismissed the defendant’s possession charges under the valid prescription exception after the defendant showed “by a preponderance of the

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<sup>72</sup> *Reynolds*, 2018 WL 6504086, at \*2 (Tenn. Ct. App. Dec. 11, 2018) (citing *Armbrister*, 414 S.W.3d at 704 (Tenn. 2013)).

<sup>73</sup> See TENN. CODE ANN. §53-11-410(a) (2018) (“The burden of proof of any exemption or exception is upon the person claiming it.”). See also *State v. Kilpatrick*, 327 S.W.3d 64, 68 (Tenn. Crim. App. January 21, 2010).

<sup>74</sup> *State v. Sanderson*, 550 S.W.2d 236, 237 (Tenn. 1977).

<sup>75</sup> *Id.* at 239. Accord *State v. Kilpatrick*, 327 S.W.3d 64, 68 (Tenn. Crim. App. 2010) (citing *Sanderson* in discussion of the “‘valid prescription’ exception”).

<sup>76</sup> *Sanderson*, 550 S.W.2d at 238.

<sup>77</sup> *Kilpatrick*, 327 S.W.3d at 68.

evidence” that the substance at issue “had been prescribed by a physician.”<sup>78</sup> Although the statutes fail to list what the burden of proof is to rebut the unlawful possession presumption, it appears to be the civil “more likely than not” standard according to *Duke*.<sup>79</sup> Thus, any medical cannabis patient must realize: (1) he or she can be *arrested* for possession and (2) innocence must be proven.

## 2. THERE MUST BE A LEGITIMATE MEDICAL PURPOSE FOR THE EXCEPTION TO APPLY.

The threshold requirement to establish a prescription’s validity is that the prescription be issued for a “legitimate medical purpose.”<sup>80</sup> Factors aiding the legitimacy analysis are: factual circumstances of the actual patient and medical justification for the substance based on the claimed illness.<sup>81</sup> Although these two factors are not expressly mentioned in case law, they are clearly the most significant factors in the legitimate medical purpose analysis.

The leading case on the “valid prescription” exception is *State v. Sanderson*.<sup>82</sup> The defendant in *Sanderson* was the sister of the female patient.<sup>83</sup> Acting “on behalf of her sister” the defendant procured a prescription in her sister’s name for a Schedule IV diet pill “sight unseen” asserting that, “her sister [] had a weight problem.”<sup>84</sup> Notably, diet pills were often abused as an “upper” yet the physician wrote the prescription for the defendant’s sister without confirming if any actual need for the substance existed.<sup>85</sup> While the defendant was a regular patient of the physician, the actual

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<sup>78</sup> *Duke v. State*, 366 S.W.2d 913, 914 (Tenn. 1963).

<sup>79</sup> See *id.* But see TENN. CODE ANN. §53-11-410 (2018) (failing to list burden of persuasion requirement).

<sup>80</sup> *Sanderson*, 550 S.W.2d at 237 (analyzing the “valid prescription exception” in §52-1432(b) of The Tennessee Drug Control Act of 1971).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 236.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 237.

<sup>85</sup> *Sanderson*, 550 S.W.2d at 237-38.

patient (defendant's sister) had never visited (or even met) the physician.<sup>86</sup>

Analyzing the "legitimate medical purpose" for the sister's prescription, the Court looked at the factual circumstances of the patient. The court found it most suspicious that a female patient, weighing 115lbs and being (5) five foot (8) eight inches tall, could have a legitimate need for prescription diet pills.<sup>87</sup> Consulting numerous anatomical sources, the Court concluded: "this 'fat lady' weighs a minimum of 40 pounds *less* than the average woman of her age and height...."<sup>88</sup> Unsurprisingly, there was "no legitimate use for diet pills" by the "skinny" patient and the prescription rendered was not "sound medical practice."<sup>89</sup> Additionally, the Court noted the pills were left "at a beer joint with the label removed" and clearly "never designed for any legitimate purpose."<sup>90</sup>

The claimed illness and medical justification played a strong role in *Sanderson*. While diet pills differ from cannabis--it is clear that a court will inquire into the medical justifications for any controlled substance prescription.<sup>91</sup> Damming defendant's medical justification in *Sanderson* was the physician's testimony, "I don't know anything about these drugs."<sup>92</sup> Unsurprisingly, the Court used the Physicians' Desk Reference because it was an "authoritative and standard treatise" on medical substances.<sup>93</sup> Since the drug was for weight loss, the Court stated that there was no illness justifying the patient's prescription, and accordingly, no

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<sup>86</sup> *Id.* at 236-37.

<sup>87</sup> *Id.* at 237-38.

<sup>88</sup> *Id.* at 238 (citing sources such as the World Almanac Newspaper Enterprise Association, Factbook on Man: From Birth to Death, and Book of Health--A Medical Encyclopedia for Everyone) (emphasis added).

<sup>89</sup> *Id.* at 237-38.

<sup>90</sup> *Id.* at 238.

<sup>91</sup> *See id.* at 237 (noting "good faith" requirement of physician to prescribe medicine "to relieve" ailments of the patient such as pain and suffering").

<sup>92</sup> *Id.*

<sup>93</sup> *Sanderson*, 550 S.W.2d at 237.



medical justification for the patient to use the substance.<sup>94</sup> Thus, under *Sanderson*, medical cannabis patients need: (1) an illness justifying cannabis and (2) proof that “sound medical practice” supports issuing a prescription for the illness.<sup>95</sup>

3. THE PATIENT MUST SHOW FOUR ELEMENTS TO INVOKE THE VALID PRESCRIPTION EXCEPTION.

Assuming there is a legitimate medical purpose for the prescription, a patient must show the “valid prescription” exception” applies.<sup>96</sup> As the current statutory language is verbatim to that in *Sanderson*, nothing more is required.<sup>97</sup> The *Sanderson* court clearly held:

The “valid prescription” exception [applies] when the prescription is issued by a *licensed practitioner*, acting in *good faith* and *in accord with accepted medical standards* and when the person obtaining the prescription is also acting in good faith and is *free from fraud, deceit, or misrepresentation*. A “valid prescription” presupposes ethical and prudent conduct on the part of the practitioner and honest motivation on the part of the patient.<sup>98</sup>

The first element requires issuance by a licensed practitioner<sup>99</sup> and it is met when the patient procures the prescription from a licensed Tennessee practitioner.<sup>100</sup> The

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<sup>94</sup> See *id.* at 238 (noting that the defendant failed to call the sister as a witness which would have allowed the jury to “observ[e] first-hand whether [the patient] was in need” of the substance prescribed).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 239.

<sup>97</sup> See Tennessee Drug Control Act of 1971, *supra* note 67.

<sup>98</sup> *Sanderson*, 550 S.W.2d at 239 (emphasis added).

<sup>99</sup> Cf. *State v. Long*, No. W2016-02471-CCA-R3-CD, 2018 WL 3203124 (Tenn. Crim. App. June 29, 2018) (discussing marijuana possession charges against appellant with *California doctor’s* written recommendation of medical marijuana for pain).

<sup>100</sup> Under the current code, “Practitioner” means: “A *physician*, dentist, optometrist, veterinarian, scientific investigator or other person licensed, registered or otherwise permitted to distribute,

second element of good faith (discussed at length in *Sanderson*) is specific to the *physician's conduct*--not the patient.<sup>101</sup> In *Sanderson*, the physician did not act "in good faith."<sup>102</sup> Specifically, the physician's "gross negligence" in prescribing a weight loss pill without even seeing the patient sufficiently showed a lack of good faith.<sup>103</sup> Overall, the determination of a physician's good faith is made on a case-by-case analysis.<sup>104</sup>

The third *Sanderson* element is perhaps the largest hurdle for medical cannabis patients. It requires showing medical cannabis is "in accord with accepted medical standards."<sup>105</sup> Perhaps due to the federal cannabis ban, not all known medical benefits are readily available. Plus, even if another state's legislation shows medical condition benefits from medical cannabis, it would not be binding on a Tennessee court.<sup>106</sup> Undeniably, a patient may assert accepted medical standards support cannabis by official treatise (*e.g.*, physician's desk reference).<sup>107</sup> Critically, as thirty-four states

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dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research *in this state*; or A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research *in this state*." TENN. CODE ANN. § 39-17-402(23) (2019) (emphasis added).

<sup>101</sup> *Sanderson*, 550 S.W.2d at 238.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 237.

<sup>104</sup> See *Duke v. State*, 366 S.W.2d 913 (Tenn. 1963) (failing to find or discuss any lack of good faith by physician prescribing dolophine solution to defendant who "told th[e] doctor that he was a "drug addict").

<sup>105</sup> *Sanderson*, 550 S.W.2d at 239.

<sup>106</sup> See Arkansas Medical Marijuana Amendment of 2016 § 2(13) (listing "qualifying medical conditions" such as: Cancer, glaucoma, Tourette's syndrome, Crohn's disease, ulcerative colitis, post-traumatic stress disorder, cachexia or wasting syndrome; peripheral neuropathy; seizures (including characteristic of epilepsy); or severe and persistent muscle spasms).

<sup>107</sup> See *Sanderson*, 550 S.W.2d at 237 (citing physician's desk reference); see also *Diagnostic & Statistical Manual of Mental Disorders*, American Psychiatric Association, p. 511, (5<sup>th</sup> Edition) (2013) (noting cannabis may be used to treat nausea and vomiting

now allow medical cannabis, it is likely in accordance with accepted medical standards.<sup>108</sup>

Finally, the fourth *Sanderson* element requires “the person obtaining the prescription” show “good faith” in obtaining the prescription without “fraud, deceit, or misrepresentation.”<sup>109</sup> Again, the patient must actually need medical cannabis. Additionally, the patient must use the drug in a manner evidencing good faith. Thus, the patient loading up cannabis in a “carburation mask”<sup>110</sup> for a weekend social with friends (who do not have a cannabis prescription) would not be acting in good faith.<sup>111</sup> Interestingly, the “paraphernalia exception” would however allow such use by an ultimate user with a valid prescription.<sup>112</sup>

Out of an abundance of caution, any patient seeking to invoke the valid prescription exception must ensure the prescription meets statutory requirements for validity. Although not mentioned in *Sanderson*, it is especially important for a medical cannabis prescription that the quantity not exceed one-half ounce (the amount specifically mentioned in § 418(b)). The Code authorizes prescriptions in handwritten form, but it will require the physician’s writing to be legible, signed, and dated.<sup>113</sup> Additionally, the prescription must also contain: (1) prescribing physician’s name; (2) drug prescribed; (3) drug strength; (4) drug quantity; and (5) proper drug instructions (e.g., “this substance should not be used in a manner that violates the law, such as operating a motor vehicle”).<sup>114</sup> If a patient shows these requirements, then

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caused by chemotherapy, anorexia, and weight loss in individuals with AIDS).

<sup>108</sup> State Medical Marijuana Laws, National Conference of State Legislatures, (March 3rd, 2019).

<sup>109</sup> *Sanderson*, 550 S.W.2d at 239. *Accord Kilpatrick*, 327 S.W.3d at 68.

<sup>110</sup> See TENN. CODE ANN. § 39-17-402(12)(C)(iv) (2018).

<sup>111</sup> See *Sanderson*, 550 S.W.2d at 238.

<sup>112</sup> See TENN. CODE ANN. § 39-17-425 (2018) (saying paraphernalia is unlawful “except when used or possessed...by a person authorized...to...possess a controlled substance”) [emphasis added]. If cannabis in a pipe, water-pipe, bong, etc. is possessed pursuant to a valid prescription, then the use of the corresponding paraphernalia appears exempt from criminal sanctions.

<sup>113</sup> TENN. CODE ANN. § 63-6-236 (2019).

<sup>114</sup> *Id.*

criminal sanctions for medical cannabis possession should not be imposed.

### III. CONCLUSION

Regardless of how § 418 is interpreted, the plain language contained in it authorizes possession of medical cannabis if the ultimate user possesses a valid prescription. Tennessee practitioners (including physicians) are authorized to prescribe cannabis. The prescription's validity hinges on compliance with case law and statutory provisions. Failure to meet these requirements will result in criminal penalties as the burden is on the patient to prove the valid prescription exception applies. Where a defendant/patient proves (by a preponderance of the evidence) cannabis in his/her possession is held pursuant to a valid prescription, he or she is exempt from criminal sanctions under the current statutory framework. Although one may be arrested and tried, the appropriate ruling should be acquittal. Thus, it appears that medical cannabis possession is effectively decriminalized when possession is pursuant to a valid prescription.