Wyoming Law Review

Volume 12 | Number 2 Article 7

2012

CRIMINAL LAW—A Canonical Conundrum Concerning Cannabis: How Wyoming's Supreme Court Ignored Its Own Interpretive Rules and Read a Medical Marijuana Defense Out of the Law, Burns v. State, 246 P.3d 283 (Wyo. 2011)

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CASE NOTE

CRIMINAL LAW—A Canonical Conundrum Concerning Cannabis: How Wyoming's Supreme Court Ignored Its Own Interpretive Rules and Read a Medical Marijuana Defense Out of the Law, *Burns v. State*, 246 P.3d 283 (Wyo. 2011)

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INTRODUCTION

Wyoming lies between two states that have legalized the medical use of marijuana, Montana and Colorado.[1] Reluctant to consider medical use, and concerned with the potential encroachment of marijuana users from surrounding states, in 2011 the Wyoming Legislature eliminated a statutory exception to the state's marijuana law.[2] Until eliminated, that exception potentially permitted an affirmative defense for marijuana and some other controlled substances obtained

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[1] Colorado passed Amendment 20 in 2000, establishing the state's Medical Marijuana Registry. COLO. BALLOT AMEND. 20 (2000) (codified as Medical Use of Marijuana for Persons Suffering from Debilitating Conditions, COLO. CONST. art. XVIII, § 14). The Colorado statute enforces professional conduct and provides strict penalties for medical professionals erroneously recommending marijuana use. COLO. REV. STAT. § 12-36-118(g)(I-X)(2012). Patients may possess and consume marijuana upon a Colorado physician's conclusion "that the patient might benefit from the medical use of marijuana . . . ." COLO. CONST. art. XVIII, § 14(2)(a)(II). Colorado's constitutional amendment was the subject of considerable controversy in the state, with the Governor discouraging doctors from approving marijuana under threat of federal law. Andrew J. Boyd, *Medical Marijuana and Personal Autonomy*, 37 J. MARSHALL L. REV. 1253, 1263–64 n.82 (2004); *see also* Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 431 (2011) (stating that Colorado joined a wave of states in legalizing medical use of marijuana including Maine, Nevada, and Hawaii in 1999–2000).

Montana voters approved Initiative 148 in 2004, protecting medical marijuana users from civil or criminal penalties for medical use. *See* Montana Medical Marijuana Act, MONT. CODE ANN. §§ 50-46-101 to -210 (2009); MONT. CODE ANN. § 50-46-201(1) (2007); Troy E. Grandel, *One Toke Over the Line: The Proliferation of State Medical Marijuana Laws*, 9 U. N.H. L. REV. 135, 146 (2010); Ari Lieberman & Aaron Solomon, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619, 624 (2009).

[2] *See More from the Capitol: Your Legislature at Work*, WYO. EMP'T LAW LETTER (March, 2011); *see also* Steve Elliot, *Medical Marijuana Called Unlikely in Wyoming*, TOKE OF THE TOWN (Sep. 28, 2011, 12:20 PM), http://www.tokeofthetown.com/2011/09/medical_marijuana_called_unlikely_in_wyoming.php (stating that state senators speculated Wyoming was unlikely to follow neighboring states in allowing medical marijuana use); Bob Vines, *Medical Marijuana in Wyo.? Not Likely*, WYO. TRIB.-EAGLE, Sep. 28, 2011, at A1 (stating that Wyoming is hostile to other states' relaxation of marijuana prohibitions).

pursuant to a valid prescription or order of a medical practitioner.[3] The Wyoming Legislature voted overwhelmingly to close that loophole, leaving medical marijuana users without any defense for the criminality of possession and use in Wyoming.[4]

The point may have been moot. Only weeks earlier, the Wyoming Supreme Court affirmed the conviction of Colorado resident Daniel Joseph Burns for marijuana possession, even though Burns asserted he obtained the marijuana in accordance with Colorado's medical marijuana law.[5] Arrested under section 35-7-1031 of the Wyoming Statutes,[6] Burns argued that he obtained the marijuana in his possession pursuant to the valid prescription or order of a practitioner in Colorado under that state's medical marijuana law.[7] The State of Wyoming successfully quashed that defense through a motion in limine, and Burns offered a conditional guilty plea as he appealed the denial of his affirmative defense to the Wyoming Supreme Court.[8] The court affirmed Burns's conviction the following January, holding that the Wyoming statute did not exempt a defendant from criminal liability even if the defendant obtained a legitimate medical marijuana exception under Colorado law.[9]

The decision in *Burns* and the Legislature's subsequent revocation of the statutory exception in 35-7-1031 illustrate the political challenges in jurisdictions that border medical marijuana states. Since California became the first state to do so in 1996, fifteen other states and the District of Columbia have legalized medical marijuana.[10] Despite an aggressive federal anti-narcotics policy that refuses to acknowledge any medical benefits to marijuana use,[11] federal intervention has

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[3] The old statutory exception read: "It is unlawful for any person knowingly or intentionally to possess a controlled substance 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, or except as otherwise authorized by this act." WYO. STAT. ANN. § 35-7-1031(c) (2009). The new statute adds the following clarification: "[N]otwithstanding any other provision of this act, no practitioner shall dispense or prescribe marihuana, tetrahydrocannabinol, or synthetic equivalents of marihuana or tetrahydrocannabinol and no prescription or practitioner's order for marihuana, tetrahydrocannabinol, or synthetic equivalents of marihuana or tetrahydrocannabinol shall be valid." WYO. STAT. ANN. § 35-7-1031(c) (2011).

[4] Vines, *supra* note 2, at A1.

[5] *See generally* Burns v. State, 246 P.3d 283 (Wyo. 2011).

[6] WYO. STAT. ANN. § 35-7-1031(c)(iii) (2009).

[7] *Burns*, 246 P.3d at 284.

[8] *Id.* at 285.

[9] *Id.* at 286.

[10] *See infra* note 34 and accompanying text.

[11] Jared Bayer, Comment, *Re-balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U. L. REV. 1421, 1435–37 (2004) (stating that while states liberalize marijuana laws, the federal government refuses to enact similar changes).

not slowed several states' moves toward legalization.[12] Estimates of the number of legal marijuana users range from 730,000 to 1.5 million.[13] States prohibiting marijuana will inevitably face the challenge of how to respond to visitors bringing medical marijuana across the border.[14]

This note argues that the Wyoming Supreme Court reached an erroneous holding in *Burns*. It did so by ignoring its well-defined interpretive cannons of statutory construction and by disregarding a specific exception in the Wyoming statute allowing for marijuana "obtained directly from or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice."[15] While the Wyoming Legislature jettisoned the statutory exception for medical marijuana shortly after the *Burns* decision, the Wyoming Supreme Court erred in reading the exception out of the law prior to the Legislature's actions.

By outlining the history of medical marijuana policy,[16] surveying the relevant interpretive canons of statutory construction,[17] and analyzing the language of section 35-7-1031(c)(iii) under those interpretive cannons,[18] this note will demonstrate that the court should have allowed Burns to present an affirmative

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[12] Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423 (2009) (noting that states continued to enact medical marijuana legislation post-*Raich*).

[13] Kris Lotlikar, *The First Ever Investor-Grade Analysis of the Medical Marijuana Markets*, MED. MARIJUANA MKTS. (Mar. 23, 2011), http://medicalmarijuanamarkets.com/see-change-strategy-releases-the-state-of-the-medical-marijuana-markets-2011-the-first-ever-investor-grade-analysis-of-the-medical-marijuana-markets-in-the-u-s (reporting the findings of survey responses and interviews conducted by See Change Strategy LLC, which the author identifies as "an independent financial analysis firm that specializes in new and unique markets"); Russ Belville, *America's One Million Legal Marijuana Users*, THE NORMAL STASH BLOG (Mar. 28, 2011), http://stash.norml.org/americas-one-million-legal-marijuana-users (reporting figures compiled by the author from state medical marijuana registries and patient estimates).

[14] *See, e.g.*, Kenneth Falcon, *A Lesson in Legalization: Successes and Failures of California's Proposition 19*, 9 GEO. J.L. & PUB. POL'Y 463, 484 (2011) (noting that large-scale marijuana production in California incentivizes illegal transportation into its neighboring states); Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 576 (2010) (discussing the need for "controls and incentives to prevent against negative externalities in the form of spillover effects in neighboring states"); Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 868 (2004) (speculating that marijuana may be easily purchased in a liberalizing state and carried across borders, and that the price of marijuana would fall in both states as a result); Beau Kilmer et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND CORP. (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP325.pdf (noting the likelihood of interstate transportation of marijuana if it is legalized in California).

[15] WYO. STAT. ANN. § 35-7-1031(c)(iii) (2009); *see supra* note 3 (explaining the previous statute).

[16] *See infra* notes 25–72 and accompanying text.

[17] *See infra* notes 73–142 and accompanying text.

[18] *See infra* notes 166–216 and accompanying text.

defense of legitimate marijuana possession. If the State of Wyoming had a policy interest in discouraging the transportation of medical marijuana from Colorado into Wyoming, the proper remedy was legislative—evidenced by the subsequent action by the Wyoming Legislature rescinding the statutory exception in section 35-7-1031(c)(iii).[19]

BACKGROUND

America's controlled substance policies inhabit several legal intersections, including federal and state law,[20] criminal and constitutional law,[21] and the fields of law and medicine.[22] The criminalization of marijuana in U.S. history was accompanied by an equivalent retreat from objective analysis of marijuana's medical possibilities.[23] In recent years, political forces in favor of restoring marijuana's medical uses have clashed with political forces bent on keeping the substance categorically illegal.[24]

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[19] *See infra* notes 105–06, 203–04 and accompanying text.

[20] *See* Lauryn P. Gouldin, *Controlled Substance Law: Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 523–25 (1999) (suggesting California citizens may be able to prove the completely intrastate nature of marijuana cultivation and distribution); *see generally* Gregory W. Watts, Note, Gonzales v. Raich*: How to Fix a Mess of "Economic" Proportions*, 40 AKRON L. REV. 545 (2007) (noting the conflict between federal and state orientations toward marijuana and advocating a neo-Federalist approach to the interaction of federal and state marijuana laws).

[21] *See* Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 307–08 (2011) (arguing marijuana prohibition is subject to strict scrutiny under the Fourteenth Amendment doctrine of bodily autonomy); *see generally* Andrew King, Comment, *What the Supreme Court Isn't Saying About Federalism, the Ninth Amendment, and Medical Marijuana*, 59 ARK. L. REV. 755 (2006) (subjecting the United States' arguments in *Gonzalez v. Raich* to Ninth Amendment enumerated right analysis).

[22] *See* Conant v. Walters, 309 F.3d 629, 641–43 (9th Cir. 2002) (Kozinski, J., concurring) (noting that several studies contradict the government's position that marijuana has no medical use); *see generally* Alex Kreit & Aaron Marcus, *Recent Developments in Health Care Law:* Raich*, Health Care, and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957 (2004) (describing the impact of *Raich* on several traditionally state-overseen medical practices).

[23] *See* Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1793–94 (2003) (noting that the Marihuana Tax Act of 1937 accepted medical use of marijuana but made acquisition of the drug economically difficult, while the Controlled Substances Act of 1970 finally eliminated medical use of marijuana).

[24] *See* Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 233 (2010) (describing the disconnect between federal marijuana policy and the government's own research suggesting the relative harmlessness of marijuana); Kreit, *supra* note 23, at 1796 (recounting the government's refusal to hold hearings on reclassification of marijuana from Schedule I to Schedule II despite administrative judge's conclusion that marijuana is "one of the safest therapeutically active substances known to man").

A Brief History of Medical Marijuana

People have used marijuana medicinally for thousands of years.[25] In the United States, marijuana enjoyed legal medical status until the federal criminalization of cannabis in 1937.[26] Wyoming's deference to a medical approach to the plant was evident in 1913, when the Legislature listed Indian hemp as a narcotic requiring a prescription except for small dilute amounts.[27] Criminal possession of cannabis followed in 1929, but without explicit repeal of allowances for prescription-approved use.[28] With the adoption of the federal Uniform Narcotic Drug Act in 1937, cannabis and cannabis extract were banned recreationally, but continued to be authorized in Wyoming for distribution by prescription.[29] Such prescription use remained legal until the Uniform Controlled Substances Act was adopted and the Uniform Narcotics Act was repealed in 1971.[30]

Support for the legalization of medical marijuana began in earnest in the 1990s.[31] In 1995, California voters approved Proposition 215 via referendum, codified as the California Compassionate Use Act (CCUA) in 1996.[32] The Act exempted physicians, patients, and primary caregivers who possessed or cultivated marijuana, for medical purposes, with the recommendation or approval of a physician, from criminal prosecution.[33] Since the passage of the CCUA, fifteen other states, and the District of Columbia, have passed laws allowing medical marijuana.[34]

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[25] *See* LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE 32–35 (rev. ed. 1997).

[26] *See* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES 92–117 (1999).

[27] 1913 Wyo. Sess. Laws 101.

[28] 1929 Wyo. Sess. Laws 67.

[29] 1937 Wyo. Sess. Laws 208.

[30] 1971 Wyo. Sess. Laws 477.

[31] *See* Gouldin, *supra* note 20, at 471–72, 481–82.

[32] *See* Watts, *supra* note 20, at 558 n.87 (citing CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (c-d)).

[33] *Id.* at 558.

[34] Those states, in addition to California, are Alaska, Arizona, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *See* ALASKA STAT. § 17.37.040 (2011); ARIZ. REV. STAT. ANN. § 36-2801 (2011) (Arizona Medical Marijuana Act); COLO. REV. STAT. § 12-43.3-101 (2011) (Colorado Medical Marijuana Code); DEL. CODE ANN. tit. 16 § 4901A (2011) (The Delaware Medical Marijuana Act); HAW. REV. STAT. § 329-121 (2011); ME. REV. STAT. tit. 22 § 2383-B (2011); MICH. COMP. LAWS § 333.26422 (2011) (Michigan Medical Marihuana Act); MONT. CODE ANN. § 50-46-101 (2011); NEV. REV. STAT. § 453A.250 (2011); N.J. STAT. ANN. § 24:6I-1 (2011) (New Jersey Compassionate Use Marijuana Act); N.M. STAT. ANN. § 26-2B-3 (2011) (Lynn and Erin Compassionate Use Act); Oregon Medical Marijuana Act, OR. REV. STAT. § 475.309 (2009); R.I. GEN. LAWS § 21-28.6-1 (2011) (The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act); VT. STAT. ANN.

The federal government did not concede that the wave of state-level legalization represented a rejoinder to its unwavering opposition to medical marijuana use.[35] Justice Departments under Presidents Bill Clinton and George W. Bush applied political pressure against states that had approved medical marijuana measures, and conducted several raids on dispensaries and individual users, particularly in California.[36] The constitutionality of these actions was upheld in 2001 in *United States v. Oakland Cannabis Buyers' Cooperative*[37] and in 2006 by *Gonzales v. Raich*.[38] In *Raich*, the United States Supreme Court overturned an injunction granted by the United States Court of Appeals for the Ninth Circuit preventing the federal government from interfering with the use of marijuana by two California residents.[39] The Court ruled that under the Commerce Clause of the United States Constitution, Congress may criminalize the production and use of home-grown marijuana even where states approve its use for medicinal purposes.[40]

Whatever the rhetorical force of *Raich*, it was clear that the federal government had neither the resources nor the will to destroy every medical marijuana operation in California, let alone in other medical marijuana states.[41] *Raich* did nothing to slow the movement of states toward legalizing medical marijuana.[42] The states' disregard of the federal mandate has led scholars to speculate that marijuana's days as a Schedule I controlled substance might be numbered.[43] Although the

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tit. 18 § 4472 (2011); WASH. REV. CODE § 69.51A.040 (2011). The District of Columbia legalized medical marijuana in 2010. *See* Legalization of Marijuana for Medical Treatment Initiative of 1999 (Act), D.C. CODE § 7-1671.01 (2011).

[35] *See* Berkey, *supra* note 1, at 429–30 (stating that the Departments of Justice and Health and Human Services responded with immediate hostility to passages of Proposition 200 in Arizona and 215 in California).

[36] *See* Pete Brady, *California Under Siege*, CANNABIS CULTURE (May 14, 2002), http://www.cannabisculture.com/articles/2305.html.

[37] 532 U.S. 483 (2001).

[38] 545 U.S. 1 (2005).

[39] *Id.* at 10.

[40] *Id.* at 27.

[41] *See* Memorandum from the U.S. Dep't of Justice Deputy Attorney Gen. to Selected U.S. Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf (stating that "prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources").

[42] *See* Berkey, *supra* note 1, at 435; Mikos, *supra* note 12, at 1423.

[43] *See* Carcieri, *supra* note 21, at 308 (predicting that, if reelected in 2012, President Obama will encourage Congress to end federal marijuana prohibition and allow states to develop their own laws within federal guidelines); Kreit, *supra* note 14, at 565–66 (predicting increased medical legalization and eventually recreational legalization at the state level); Mikos, *supra* note 12, at 1423. Schedule I drugs under the Controlled Substances Act are drugs found to have a high potential for

federal government has disputed the medical benefits of marijuana,[44] in 2009, the U.S. Attorney General directed federal prosecutors to back away from medical marijuana patients in states where medical use was legal.[45] However, in October of 2011, federal prosecutors began targeting medical marijuana dispensary owners in California, warning owners of buildings housing dispensaries that they were violating federal laws and could be subject to property seizures.[46] Medical marijuana advocates responded by filing lawsuits in California's four federal judicial districts, requesting court orders to halt U.S. attorneys from closing dispensaries.[47]

Medical Marijuana in Wyoming

Wyoming's controlled substances statute paralleled the federal statute enacted in 1971.[48] Wyoming vigorously prosecuted the recreational use of, and trafficking in, marijuana.[49] However, Wyoming seemed willing to entertain an exception for the medical use of otherwise illicit drugs. Prior to 2011, subsection (c) of section 35-7-1031 of the Wyoming Statutes contained an affirmative defense applying only to possession charges, covering possession of a controlled substance "obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice."[50] The first opportunity for the Wyoming Supreme Court to examine this exception occurred in *Pool v. State*, decided in 2001.[51] In *Pool*, the defendant argued that the trial court improperly denied his motion for acquittal based on the State's failure to prove he did not

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abuse, no currently accepted medical use in treatment, and a lack of accepted safety use for the drug under medical supervision. 21 U.S.C. § 812 (2011). Except as specifically authorized, it is illegal for any person to distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance, of a Schedule I drug. *Id.* The extensive list of Schedule I substances includes opiates, opiate derivatives, psychedelic substances, depressants, stimulants, and other listings. *Id.*

[44] *See* Gardiner Harris, *F.D.A. Dismisses Medical Benefit from Marijuana*, N.Y. TIMES (Apr. 21, 2006), http://www.nytimes.com/2006/04/21/health/21marijuana.html.

[45] *See* M. Alex Johnson, *DEA to Halt Medical Marijuana Raids*, MSNBC.COM (Feb. 27, 2009, 5:42 PM), http://www.msnbc.msn.com/id/29433708/ns/health-health_care/t/dea-halt-medical-marijuana-raids/.

[46] *See* Tim Fernholz, *Deciphering the White House Jihad Against Pot*, CBSNEWS.COM (Nov. 9, 2011, 9:07 AM), http://www.cbsnews.com/8301-215_162-57321294/deciphering-the-white-house-jihad-against-pot/.

[47] *See* John Hoeffel, *Medical Marijuana Advocates Sue to Halt Dispensary Closings*, L.A. TIMES (Nov. 8, 2011), http://articles.latimes.com/2011/nov/08/local/la-me-pot-suits-20111108.

[48] 1971 Wyo. Sess. Laws 477.

[49] *See generally* Jon Gettman, *Marijuana in Wyoming: Arrests, Usage, and Related Data*, BULLETIN OF CANNABIS REFORM (Oct. 19, 2009), http://www.drugscience.org/States/WY/WY.pdf (tracking arrest and usage statistics for marijuana in Wyoming).

[50] WYO. STAT. ANN. § 35-7-1031(c) (2009).

[51] 17 P.3d 1285 (2001).

have a valid prescription for methamphetamine.[52] The court held that the State did not have to prove a negative; the defendant's lack of a prescription was not an element of the possession charge to be positively established.[53] Rather, the statutory exception was an affirmative defense.[54]

Between *Pool* and the principal case, *Burns*, the Wyoming Supreme Court did not hear any criminal cases related to medical marijuana. However, in *Tarraferro v. State ex rel. Wyoming Medical Commission*, the court arguably established a precedent of deference to physicians concerning marijuana-related substances.[55] In *Tarraferro*, the court heard the appeal of a claimant who had used Marinol, a pharmaceutical drug whose active ingredient is also found in marijuana, as a pain medication for an inguinal hernia.[56] The Wyoming Workers Safety and Compensation Division denied payment for the medication, and the Wyoming Medical Commission affirmed that denial, ruling that Marinol was experimental and unnecessary.[57] The court reversed the Commission's ruling, deferring to the treating physician's testimony that the use of Marinol was reasonable, necessary, and non-experimental.[58] The court noted the physician's expertise in pain management and his pharmacological knowledge,[59] concluding that although use of Marinol was "novel," it was not experimental.[60] The court contrasted the physician's testimony with the cursory research done by the Commission,[61] finding "[t]hat Marinol was a reasonable and necessary, non-experimental treatment for Tarraferro's pain."[62]

Burns presented the next opportunity for the Wyoming court to address the affirmative defense.[63] Shortly after the decision in *Burns*, the Wyoming Legislature amended section 35-7-1031(c) to explicitly exclude physician-prescribed medical

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[52] *Id.* at 1287.

[53] *Id.* at 1288.

[54] *Id.*

[55] 123 P.3d 912 (Wyo. 2005).

[56] *Id.* at 913.

[57] *Id.* at 914.

[58] *Id.* at 919.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 918.

[62] *Id.* at 920.

[63] The case and the subsequent legislative elimination of section 35-7-1021(c)(iii) of the Wyoming Statutes created a small ripple of national publicity, raising questions about the state's compassion for medical users, as well as its respect for the laws of a neighboring state. *See Wyoming Bill Wouldn't Recognize Medical Pot Cards*, BILLINGS GAZETTE (Feb. 17, 2011, 9:15 AM), http://billingsgazette.com/news/state-and-regional/wyoming/article_444944b0-3ab1-11e0-9826-001cc4c03286.html.

marijuana.[64] Then, in *Bruyette v. State*, decided a few months after *Burns*, the Wyoming Supreme Court affirmed the trial court's decision to exclude evidence relating to the defendant's possession of a California medical marijuana card.[65] The defendant informed the police at the time of his arrest for marijuana possession that he had obtained the marijuana in California with a medical prescription card.[66] The District Court, as in *Burns*, granted the State's motion in limine to exclude evidence relating to a medical marijuana defense, and even took the additional step of instructing the jury that medical use of marijuana was not a defense.[67] In his appeal, Bruyette argued that his constitutional right under Article 1 Section 10 of the Wyoming Constitution to present a defense had been denied by the district court's ruling.[68] The court noted that the right to present a defense is limited to the presentation of "relevant" evidence.[69] The court referenced its earlier decision in *Burns*, where it had pointed out that, since possession of marijuana is illegal, it would be illegal under Wyoming law for a physician to prescribe, or a patient to possess, marijuana. This meant that the possession of a medical marijuana card from a California physician was irrelevant.[70] The trifecta of *Burns*, *Bruyette*, and the legislative elimination of the statutory exception in section 35-7-1031(c) amounted to a decisive stance in the State of Wyoming against medical-based defenses of marijuana charges.

What makes *Burns* unique, however, is that Burns's defense raised the statutory exception specifically, and it was the sole basis of his appeal.[71] The court had to interpret the language of the statute to determine whether the recommendation of a Colorado physician constituted a valid order or prescription as contemplated by the exception.[72]

Statutory Interpretation: Plain Meaning vs. Term-of-Art

When interpreting statutory language, courts normally first look to the plain meaning of the words in a statute.[73] If statutory language is clear, courts need not look outside the statute (e.g., to its legislative history) to determine the statute's

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[64] *See supra* note 3 (describing differences between the old statutory exception and the new statutory language).

[65] 253 P.3d 512 (Wyo. 2011).

[66] *Id.* at 513.

[67] *Id.* at 512.

[68] *Id.* at 514.

[69] *Id.*

[70] *Id.* at 515.

[71] *See* Burns v. State, 246 P.3d 283, 284 (Wyo. 2011).

[72] *Id.*

[73] *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

meaning.[74] Courts will thus look to the dictionary definition of statutory terms to discern their plain meaning, since dictionaries presumably provide the most common, universal definitions of words.[75]

Sometimes words in statutes are meant to denote usage in specialized fields or professions, such as medicine, law, or other industries. In such instances, courts may find it more reasonable to discern the meanings of those terms relative to their context in the fields they are meant to represent.[76] Courts in those instances examine whether the surrounding words are similarly technical, and whether the legislature intended the statute to employ the meanings found in those particular fields.[77] The guiding principle in term-of-art interpretation is that words or phrases that have acquired, or are intended for, technical or particular meanings, should be assigned those meanings when used in appropriate contexts.[78]

The United States Supreme Court's treatment of ordinary and special meaning is instructive. In *Williams v. Taylor*, the Court explained that, absent an indication Congress intended differently, statutory language lends itself to ordinary and common meaning.[79] Congress's inclusion of other technical terms, or the indication of an obviously contextual setting, indicates intent to define terms technically.[80] When a phrase has acquired the status of a term-of-art, it has a narrower, more limited meaning than the same phrase would have under a plain language interpretation.[81] The Court will not assume that Congress intended

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[74] *See* FDIC v. Meyer, 510 U.S. 471, 476 (1994); YULE KIM, STATUTORY INTERPRETATIONS: GENERAL PRINCIPLES AND RECENT TRENDS 2–3 (1998).

[75] *See* Renishaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1251 (Fed. Cir. 1998) (turning to the dictionary after noting that "[n]either party forwards a technical meaning for 'when' in the applicable industry"); James R. Barney, *In Search of "Ordinary Meaning*," 85 J. PAT. & TRADEMARK OFF. SOC'Y 101, 124 (2003) (arguing that dictionary definitions are "entitled to a 'heavy presumption' of correctness").

[76] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing that statutory terms ought to be interpreted contextually rather than "on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress").

[77] *Id.*

[78] UNIF. STAT. AND RULE CONSTR. ACT § 2 (1995) (stating that "[a] word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context"); NORMAN J. SINGER ET AL., STATUTES AND STATUTORY CONSTRUCTION 474 (7th ed. 2007) ("In the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning.") (citations omitted).

[79] 529 U.S. 420, 431 (2000).

[80] *Id.*

[81] *See* Circuit City Stores v. Adams, 532 U.S. 105, 118 (2000) (finding that "engaged in commerce" had acquired a narrower meaning based on its statutory context and particular purpose).

such specialized meaning absent evidence in either the surrounding language of the statute or legislative intent.[82]

The Wyoming Supreme Court makes the same distinction between plain and specialized meaning as the United States Supreme Court.[83] The court reads a statute as clear and unambiguous if reasonable persons are able to agree on its meaning.[84] Conversely, technical terms, or terms-of-art, are to be assigned their technical, context-informed meaning unless the Legislature intended differently.[85] Wyoming courts have deferred to context to determine the particular meaning of a term-of-art.[86] Additionally, Wyoming courts have followed the United States Supreme Court in recognizing that legal terms are especially to be contextually defined.[87]

The Rule of Lenity

According to the interpretive canon of lenity, in criminal cases where two reasonable interpretations of a statute exist, one inculpating and the other exculpating a defendant, a court should employ the exculpatory interpretation.[88] One legal scholar has called the rule of lenity "[t]he traditional rule for construing criminal statutes."[89] Justice Holmes declared that it is the principle of fair warning

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[82] *See* W. Va. Univ. Hosp. v. Casey, 499 U.S. 83, 91 n.5 (1991) (finding that because "attorneys' fees" were not part of the contextual language of the Handicapped Children's Protection Act, the term should not be construed to be a subset of reasonable expenses).

[83] *See* Weber v. State, 261 P.3d 225, 226 (Wyo. 2011); Wesaw v. Quality Maint., 19 P.3d 500, 506 (Wyo. 2001) (citing *In re* Claim of Prasad, 11 P.3d 344, 347 (Wyo. 2000)); Pierson v. State, 956 P.2d 1119, 1125 (Wyo. 1998) (citing Amrein v. State, 836 P.2d 862, 864–65 (Wyo. 1992)).

[84] *See* Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n, 845 P.2d 1040, 1043 (Wyo. 1993).

[85] *See* Williams Prod. RMT Co. v. State Dep't of Revenue, 107 P.3d 179, 185–86 (Wyo. 2005); Amoco Prod. Co. v. State, 751 P.2d 379, 382 (Wyo. 1988); *supra* note 78 and accompanying text.

[86] *See* Dale v. S & S Builders, LLC, 188 P.3d 554, 561 (2008) (stating that the words "arbitrary" and "capricious" must be understood in context as terms-of-art under administrative review statute).

[87] *See* Morris v. CMS Oil & Gas Co., 227 P.3d 325, 339 (2010) (citing Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001) (stating that words that have acquired a specialized meaning in the legal context must be accorded their legal meaning)).

[88] *See* United States v. Santos, 553 U.S. 507, 514 (2008) (stating that a "tie must go to the defendant" when interpreting ambiguous criminal statutes). "The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation[,]" dating back at least to the Sixteenth Century. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010).

[89] Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998).

that motivates the lenity rule.[90] The United States Supreme Court has stated that "where text, structure, and history fail to establish that the Government's position is unambiguously correct," a court should "apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."[91] Lenity is "based on concern about one provision in the Constitution: the Fifth (and Fourteenth) Amendment's guarantee of procedural due process, specifically the right to notice."[92]

Congress fulfills its legislative role by defining crimes by statute, whereas judges lack the power to expand a statute's reach by interpreting it to include activity not clearly covered in the statute under examination.[93] As the United States Supreme Court phrased the canon's philosophy in *McNally v. United States*, "[i]f Congress desires to go further, it must speak more clearly than it has."[94]

Courts recognizing lenity place limitations on its application, making clear that the canon is not to be interpreted as a "get out of jail free card" to criminals simply because a statute has more than one possible interpretation.[95] Both interpretations must be fair and reasonable.[96] Many courts only apply the rule after the court has sought every other possible guideline for meaning.[97] Moreover, a mere lack of meticulous drafting does not justify lenity; the United States Supreme Court has said that the "grammatical possibility" of a defendant's interpretation does not command a resort to the rule of lenity if the interpretation proffered by the defendant reflects "an implausible reading of the congressional purpose."[98] Courts are also required to exhaust other interpretive tools before applying lenity, so that the mere existence of some statutory ambiguity is insufficient to warrant its application in favor of a defendant. Before lenity is applied, a court must

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[90] McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

[91] United States v. Granderson, 511 U.S. 39, 54 (1994).

[92] LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 237 (2008).

[93] *Id.* at 238; *see* United States v. Bass, 404 U.S. 336, 347–48 (1971) (finding a burden on Congress to make statutory language more precise in criminal codes).

[94] 483 U.S. 350, 360 (1987).

[95] United States v. Block, 452 F. Supp. 907, 911 (M.D. Fla. 1978) (citing Scarborough v. United States, 431 U.S. 563, 577 (1977); Barrett v. United States, 423 U.S. 212, 217 (1976); Huddleston v. United States, 415 U.S. 814, 832 (1974); *Bass*, 404 U.S. at 350–51; United States v. Campos-Serrano, 404 U.S. 293, 298 (1971); United States v. Cook, 384 U.S. 257, 262–63 (1966); United States v. Standard Oil, 384 U.S. 224, 225 (1966); United States v. Healy, 376 U.S. 75, 82 (1964); United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977)).

[96] JELLUM, *supra* note 92, at 238.

[97] Reno v. Koray, 515 U.S. 50, 65 (1995).

[98] Caron v. United States, 524 U.S. 308, 316 (1998).

determine that it can do no more than guess at legislative intent.[99] A court will ideally attempt to discern that meaning from the words used, and from applicable legislative materials.[100]

It is true that the Supreme Court has occasionally subordinated lenity, at times raising the bar for ambiguity to heights unattainable by most defendants. In *Muscarello v. United States*, for example, the Court defined the lenity threshold as the "*grievous* ambiguity or uncertainty" of a statute.[101] When traditional guidelines fail, however, and after having appealed to ordinary or technical meaning and any discernible legislative intent,[102] the Court will apply the canon. In *United States v. Santos*, Justice Scalia outlined two principles reflected in the lenity canon: "that no citizen should be . . . [punished] for violati[ng] . . . a statute whose commands are uncertain," and that courts should not "mak[e] criminal law in Congress's stead."[103] When properly applied, lenity not only provides fair notice to defendants, but also "reinforce[s] the notion that only the legislature has the power to define what conduct is criminal and what conduct is not."[104]

Although some state legislatures, frustrated with the effects of narrow interpretations of criminal statutes,[105] have eliminated the rule of lenity,[106] Wyoming's has not. As recently as July 2011, in *State v. Juarez*, the Wyoming Supreme Court affirmed the district court's suppression of evidence based on the ambiguity of section 31-5-217.[107] The defendant's traffic stop for failure to signal when merging from an entrance ramp onto the interstate and the "subsequent search of . . . [the] vehicle yielded nine pounds of marijuana."[108] The defendant moved to suppress the evidence, and the district court granted the motion.[109] The Supreme Court of Wyoming upheld the decision, applying the rule of lenity, and concluded that the statute did not clearly require motorists to signal when merging

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[99] Muscarello v. United States, 524 U.S. 125, 138 (1998).

[100] *See* Daniel A. Per-Lee, Annotation, *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes*, 62 L. Ed. 2d 827, 828–37 (1981) (discussing and listing comprehensive authority on the canon of lenity).

[101] *Muscarello*, 524 U.S. at 138 (citations omitted) (emphasis added).

[102] *See* United States v. Shabani, 513 U.S. 10, 17 (1994) (stating the rule of lenity applies when other canons fail to resolve ambiguity and that the Court is unwilling to apply lenity under the "mere possibility" of alternative construction).

[103] 553 U.S. 507, 513 (2008).

[104] Solan, *supra* note 89, at 58.

[105] *See id.*

[106] Laws in Oregon, California, and New York prohibit the application of lenity in criminal cases. OR. REV. STAT. § 161.025(2) (2009); CAL. PENAL CODE § 4 (West 1988); N.Y. PENAL LAW § 5 (McKinney 1998).

[107] 256 P.3d 517, 520 (Wyo. 2011).

[108] *Id.* at 518.

[109] *Id.*

onto an interstate roadway.[110] The court relied on well-established precedent that, to be enforceable, "statutes are required to provide *good* notice of the conduct that is required."[111] The court reasoned that it could not discern the intent of the Legislature on the question of whether merging constituted turning, and "[h]ad the Legislature intended to require a signal . . . it would have stated its intent more clearly."[112] In so finding, the court applied the rule of lenity and held that the statute did not require motorists to signal while merging onto an interstate highway. The court cited the district court's reasoning, which implied that there must be a *positive* "reason to believe the Wyoming Legislature necessarily intended the use of a turn signal."[113] The decision in *Juarez* was consistent with the Wyoming Supreme Court's reasoning that proper statutory language "provides notice to citizens of what conduct is prohibited"[114] and that a statute is unconstitutionally vague if people of common intelligence must necessarily guess at its meaning and differ as to its application.[115]

Like other jurisdictions, Wyoming will not automatically apply the lenity canon and allow defendants to suggest alternative meanings to statutory language without a finding of genuine ambiguity.[116] In *Jones v. State*, the court found that the term "after" in section 6-2-501(f)(ii) of the Wyoming Statutes, specifying a maximum five-year prison term and $2000 fine for a second or subsequent battery offense against a household member subsequent to a conviction for a similar offense during the previous ten years, was not ambiguous. And the rule of lenity therefore had no role to play.[117] However, when finding ambiguity after exercising other interpretive tools, the Wyoming Supreme Court has taken a strong position that such ambiguity should not merely be weighed in favor of defendants, but that it should be *resolved* in favor of defendants, and that defendants should "*receive the benefit* of any ambiguity."[118]

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[110] *Id.* at 521.

[111] *Id.* at 520 (emphasis added).

[112] *Id.*

[113] *Id.* at 519.

[114] Dougherty v. State, 239 P.3d 1176, 1181 (Wyo. 2010) (citation omitted).

[115] *See* Smith v. State, 964 P.2d 421, 422 (Wyo. 1998) (citing Hobbes v. State, 757 P.2d 1008, 1011 (Wyo. 1988)); *see also* Shafer v. State, 197 P.3d 1247, 1251 (Wyo. 2008) (determining the inclusion of "attempt" in one statute and the omission of "attempt" in another implies legislative intent to cover "attempt" in one instance and not the other).

[116] *See* Crain v. State, 218 P.3d 934, 940 (Wyo. 2009) (citing Fraternal Order of Eagles Sheridan v. State, 126 P.3d 847, 855–56 (Wyo. 2006)) ("[W]here the statute under consideration is unambiguous, the rule of lenity has no role to play."); Nowack v. State, 774 P.2d 561, 564 (Wyo. 1989) (citing Albernaz v. United States, 450 U.S. 333, 342 (1981) ("Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one.")).

[117] 256 P.3d 536, 541–42 (Wyo. 2011).

[118] *Schafer*, 197 P.3d at 1251 (emphasis added).

Thus, in *Schafer v. State*, the court reversed a conviction of aggravated battery and assault because, in merging a general attempt charge with a specific assault and battery charge, the State had contravened the intent of the Legislature.[119] After finding that the Legislature did not intend the general attempt statute to apply to the aggravated assault and battery statute,[120] the court reasoned that, at the very least, the language dealing with the concept of attempt in the aggravated assault and battery statute is ambiguous. That ambiguity necessitated applying the rule of lenity.[121]

The interpretive canon of lenity is designed to give defendants the benefit of the doubt when, after deploying other tools and methods of interpretation, a court is unable to discern the clear definition of statutory language to the exclusion of another equally sound interpretation. Motivated by the Fifth Amendment's requirement of notice, the canon assumes defendants should not have to guess at the meaning of a law before they discern that they are obeying or violating it. Although limited to instances where statutory meaning is indeed vague after all available methods of interpretation are exhausted, both the United States Supreme Court and the Wyoming Supreme Court use the canon of lenity to avoid expanding statutes' meanings beyond that intended by the legislative branch.

Surplusage

Based on the presumption that a legislative body would not waste words when writing laws,[122] the canonical rule against surplusage, or "superfluity," discourages interpretations of a statute that render some words in the statute meaningless.[123] Courts consider a rule against superfluous language important when two similar but nonidentical terms are found in a statute. Courts assume that legislative bodies use different terms in statutes because they intended each of the terms to have particular, nonsuperfluous meanings.[124] The United States Supreme Court has noted that, because of the need for precision in convictions and sentencing, surplusage should especially be avoided when interpreting criminal statutes.[125]

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[119] *Id.* at 1250.

[120] *Id.* at 1251.

[121] *Id.*

[122] *See* Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 122 (2010) (stating that the "'superfluity canon' . . . presume[s] the legislat[ors] to [not] waste words when enacting laws").

[123] *See* Duncan v. Walker, 533 U.S. 167, 174, (2001) ("We are 'reluctan[t] to treat statutory terms as surplusage[,]' in any setting."); Reiter v. Sonotone Corp., 442 U.S. 330, 338–39 (1979) (stating that interpretation ignoring disjunctive "or" and robbing term "property" of independent meaning would violate the necessity to "give effect . . . to every word Congress used").

[124] Bailey v. United States, 516 U.S. 137, 146 (1995); Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

[125] Ratzlaf v. United States, 510 U.S. 135, 140–41 (1995).

As an example, Wyoming's bribery statute provides that a public servant commits bribery if he or she "solicits, accepts, or agrees to accept any pecuniary benefit" in exchange for a vote or other action favorable to the person offering the bribe.[126] A defendant's claim that a bilateral agreement is necessary to convict a public official of bribery would arguably render the word "solicits" in the statute superfluous, since unilateral action is implicit in the definition of "solicit."[127] Thus, when faced with two reasonable interpretations of a bribery statute, a court is likely to prefer the interpretation that allows "solicits" to have some unique meaning, rather than the interpretation that renders that word superfluous.[128]

The surplusage canon is not absolute, and there are reasons to exercise caution before applying it. Legislatures do not always draft statutes with care;[129] a legislative body may not have deliberated over the drafting of a statute sufficiently to assume that each word has a distinct meaning, or that redundant words have been removed before the final draft of the legislation is adopted into law.[130] Additionally, the rule against surplusage is typically subordinated to other rules if there is a chance that the rule against surplusage could contradict the intent of the legislation. This is particularly true if the additional words are considered "minor" in the face of the ordinary meaning of rest of the statute.[131] Courts will avoid the canon if its application requires adding meaning to a statute that is not warranted by legislative history or intent.[132] As a general rule, the Supreme Court adheres to the surplusage canon when there is no overriding reason to reject the canon, and expresses "a deep reluctance to interpret a statutory provision so as to render

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[126] WYO. STAT. ANN. § 6-5-102(a)(ii) (2011).

[127] *See* Blakeman v. State, 100 P.3d 1229, 1234–35 (Wyo. 2004) (finding that the plain meaning of "solicit" was to ask for the purpose of receiving and noting that other jurisdictions also interpret the term unilaterally).

[128] *See Ratzlaf*, 510 U.S. at 140 (stating that judges should not assume a word's inclusion in a statute to be of no consequence).

[129] *See* John F. Manning, Exchange, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 98 (2006) ("Nor can one maintain that all of the canons of construction readily invoked by textualists . . . reflect legislators' actual knowledge of the contents of legislation.").

[130] *See* Jack L. Landau, *Oregon as a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 570 (2011) (arguing that legislators sometimes intend to be redundant).

[131] *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) (arguing that statutes, like judicial opinions and academic articles, often contain surplusage as a result of harmless oversight in drafting and "the strains of the negotiating process"); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You*, 45 VAND. L. REV. 561, 572 (1992) (suggesting that the surplusage canon is often contrary to real life experience).

[132] Begay v. United States, 553 U.S. 137, 153 (2008) (Scalia, J., concurring) (observing that "the canon against surplusage merely helps decide between competing permissible interpretations of an ambiguous statute" and does not justify adding requirements not contemplated by Congress).

superfluous other provisions in the same enactment."[133] This reluctance becomes especially determinative when the term in question is "pivotal" to interpreting the statute.[134]

The Wyoming Supreme Court has used the surplusage canon, noting, for example, in *Deloges v. State* that "every word, clause, and sentence must be construed so that no part is inoperative or superfluous."[135] In that case, an appellant challenged his denial of additional benefits subsequent to an award of permanent total disability benefits.[136] The court rejected a reading of the State's disability statute that would have required compensation greater than one hundred percent of disability, because such a reading would have rendered the statutory language absurd (insofar as it is absurd to believe a disability statute is designed to compensate the disabled for more than one hundred percent of his disability).[137] In *State Bd. of Equalization v. Cheyenne Newspapers*, the court was asked to address whether supplies used in the production of newspapers were exempt from taxation.[138] Wyoming's 1957 Use Tax Act exempted particular property from taxation, including "'[t]angible personal property . . . which directly enters into or becomes an ingredient or component part of any manufactured article or substance or commodity . . . .'"[139] The Wyoming Department of Revenue and Taxation had assessed a tax against Cheyenne Newspapers on the cost of photographic equipment used to produce printed newspapers, claiming that, since the newspapers only consisted of ink and paper, the photographic equipment was not part of the papers' finished product.[140] The majority on the court reasoned that such an interpretation would render the phrase "which directly enters into" as mere surplusage, implying that the Legislature intended that phrase to have the same meaning as "becomes an ingredient or component part of."[141] Since the surplusage canon assumes legislatures intend two separate clauses to imply two separate concepts, the court concluded that such an interpretation was unreasonable.[142]

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[133] Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990).

[134] *See* Duncan v. Walker, 533 U.S. 167, 174–76 (2001) (observing that the Court has a duty to give effect to every word of a statute and avoid treating statutory terms as surplusage).

[135] 750 P.2d 1329, 1331 (Wyo. 1988).

[136] *Id.* at 1330.

[137] *Id.* at 1332.

[138] 611 P.2d 805, 815 (Wyo. 1980).

[139] *Id.* at 807.

[140] *Id.* at 806.

[141] *Id.* at 812–13.

[142] *Id.* at 810.

PRINCIPAL CASE

On March 12, 2009, a Wyoming State Trooper stopped Colorado resident Daniel Joseph Burns for speeding in Laramie County.[143] Burns was found to be in possession of more than three ounces of marijuana, and arrested for violating Wyoming Statute section 35-7-1031(c)(iii).[144] Prior to trial, Burns made known his intention to argue, as a defense, that the marijuana was obtained pursuant to the prescription or order of a practitioner in Colorado under that state's medical marijuana law.[145] The prosecution responded by filing a motion in limine to exclude Burns's proposed jury instruction, which set forth that defense theory, and for which Burns had offered his marijuana registry card and physician certification. After a hearing, the district court of Laramie County granted the prosecution's motion, prohibiting Burns from presenting at trial any evidence and defense theories to the effect that he lawfully obtained his marijuana pursuant to a valid prescription or order of a practitioner in Colorado.[146] The prohibited evidence included Burns's "debilitating medical condition," his status on the medical marijuana registry maintained by the Colorado Department of Public Health and Environment, and the medical efficacy of marijuana in general.[147] Burns argued, in response to the motion, that the Colorado registry card and physician's certification constituted a valid prescription or order as contemplated by section 35-7-1031(c) and thus should be considered a statutorily recognized defense against the possession charge that he was entitled to present at trial.[148] The parties then entered into an agreement for a conditional guilty plea, preserving Burns's right to appeal the exclusion of his affirmative defense.[149]

Burns appealed his suspended prison sentence to the Wyoming Supreme Court, which, on January 19, 2011, affirmed his conviction, holding that the Wyoming statute did not exempt a defendant from criminal liability even if the defendant obtained a legitimate medical marijuana exception under Colorado law. The issue before the court was whether the fact that a defendant obtained a Schedule I controlled substance pursuant to a valid order of a practitioner in another state constituted a defense under section 35-7-1031(c).[150] The court answered that a defendant's possession of a valid order of a practitioner did not

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[143] Burns v. State, 246 P.3d 283, 284 (Wyo. 2011).

[144] WYO. STAT. ANN. § 35-7-1031(c)(iii) (2009).

[145] *Burns*, 246 P.3d at 284.

[146] *Id.*

[147] *Id.* at 284–85.

[148] *Id.* at 285. Burns was referring to the statutory exception that existed prior to the Wyoming Legislature's removal of the exception in 2011. *See* WYO. STAT. ANN. § 35-7-1031(c) (2009); *supra* note 3 (explaining the old statutory exception).

[149] *Burns*, 246 P.3d at 285.

[150] *Id.* at 284.

constitute a defense under the statute, since marijuana possession for any reason remained illegal in the State of Wyoming.[151] Such a decision required that the court disregard the exception contained, at the time, in section 35-7-1031(c)(iii) allowing for the possession of marijuana "obtained directly from or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice."[152]

Writing for a unanimous court, Justice Golden first noted that Burns's appellate brief did not sufficiently analyze the meaning of section 35-7-1031(c).[153] The court nevertheless committed to perform that analysis. The court noted that considerable deference is afforded the trial court in evidentiary decisions such as the granting of in limine motions.[154] The burden of proof for abuse of discretion is on the side losing the motion.[155]

The district court had determined the exception in section 35-7-1031(c) did not apply to Burns's Colorado medical registry card and physician's certification, because they were not the equivalent of a "prescription or order" as intended under the statute.[156] At this point, however, rather than analyzing the definitions of "prescription" and "order" in the statute and evaluating the district court's reasoning, the court abruptly declared that such analysis was not necessary, since "[t]he possession of marijuana, even for medical purposes, remains illegal" in Wyoming and under federal law.[157] Therefore, the court reasoned, "it would be illegal for a physician to prescribe or order, in any sense, the possession of marijuana."[158]

The court resolved the seeming inconsistency of the illegality of a physician prescribing or ordering marijuana with the fact that some Colorado residents legally possess and use the drug, by pointing out that Colorado law merely requires a physician's "certification" that a patient might benefit from the use of marijuana.[159] The court added that the State of Colorado, rather than a physician, actually qualifies patients for marijuana use.[160] Since the action of the physician does not directly determine the potential possession of marijuana by the patient

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[151] *Id.*

[152] WYO. STAT. ANN. § 35-7-1031(c) (2009).

[153] *Burns*, 246 P.3d at 285.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 286.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

(a point punctuated by the language of the physician's certification, stating that it is not a prescription), the court reasoned the exception provided in section 35-7-1031(c) did not apply.[161]

The court's reasoning consisted of a logical, almost syllogistic progression of thought based on its implicit understanding of the language of section 35-7-1031(c), its interpretation of the meaning of "prescription or order" in the statute, and its understanding of the process of legitimate acquisition of marijuana in Colorado.[162] The Wyoming exception required the prescription or order of a physician.[163] Colorado law does not permit a physician to prescribe or order the possession of marijuana.[164] Therefore, the court concluded, Burns did not have a prescription or order for marijuana, and the Wyoming exception did not apply.[165]

ANALYSIS

In *Burns*, the Wyoming Supreme Court inappropriately defined the word "order," rendered language in the statutory exception of section 35-7-1031(c) meaningless, and ignored recognized medical terminology. In so doing, the court made an inferential leap in closing a loophole that only the Wyoming Legislature could close. The statutory exception did not explicitly require that a person possessing medical marijuana receive that marijuana from a physician in Wyoming,[166] but the court's decision appealed to the categorical illegality of a Wyoming physician prescribing or ordering that a patient use marijuana.[167] Substantial difference of opinion exists as to what "order" means in a medical context,[168] and although Burns may not have acquired his marijuana in the same way one might acquire an antibiotic or other prescribed medication, he clearly acquired it pursuant to the recommendation of a physician, without whose approval he would not have possessed it.[169]

Had Burns been allowed to offer his defense, a jury could have decided whether Burns had merely intended to travel through Wyoming with his medical supplies on his person like any other patient traveling through the state,

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[161] *Id.*

[162] *Id.* at 285–86.

[163] WYO. STAT. ANN. § 35-7-1031(c) (2009), *supra* note 3 (explaining the former statute).

[164] *Burns*, 246 P.3d at 286.

[165] *Id.* at 285–86.

[166] *See* WYO. STAT. ANN. § 35-7-1031(c) (2009), *supra* note 3 (explaining the previous statute).

[167] *Burns*, 246 P.3d at 286.

[168] *See infra*, notes 177–83, 207–15 and accompanying text.

[169] Brief of Appellant at 18, *Burns*, 246 P.3d 283 (No. S-10-0053), 2010 WL 1783749. Colorado only approves a medical marijuana license based upon the recommendation of a medical practitioner. *See* COLO. CONST. art. XVIII, § 14(3)(b)(I).

assuming in good faith that he had done everything legally necessary to acquire his medicine; or whether he had intended to bring illegal narcotics into the state for more nefarious purposes.[170] Instead, the court attributed a narrow, inculpatory meaning to the language in the statutory exception, rendering the word "order" indistinguishable from the word "prescription,"[171] precluding those legally allowed to possess marijuana in Colorado from bringing a practitioner-recommended medication into Wyoming.

This note argues that the Wyoming Supreme Court had good reason to, and should have, interpreted the word "order" in the statutory exception as a medical term-of-art.[172] Such a reading would have indicated that a Colorado physician's approval or recommendation of medical marijuana satisfied the requirement in the statutory exception. The court also had good reasons to apply the rule of lenity[173] to the statutory exception, acknowledging the language of the exception was vague concerning whether a Colorado resident who obtained marijuana pursuant to the order of a physician could legally possess marijuana in Wyoming.[174] Lastly, the court ought to have applied the surplusage canon[175] to distinguish the words "prescription" and "order" in the statute, a distinction sufficient to interpret the Colorado practitioner's recommendation as an "order."[176]

The Court Should Have Interpreted "Order" as a Term-of-Art

The Wyoming Statutes recognize the distinction between plain meaning and terms-of-art, and the Wyoming Supreme Court has applied that distinction in its interpretation of statutory language.[177] In section 35-7-1031(c), the words "order" and "prescription" refer to the directives of a medical practitioner. Wyoming's Standards of Practice statutes for medical ethics include, in section 33-23-101(d), the language: "It is unlawful for any person to dispense, replace or duplicate ophthalmic lenses or any contact lenses without a prescription or order from a

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[170] Brief of Appellant, *supra* note 169, at 11 ("Only if possessor attempts or intends to distribute the substance does he lose the defense of an authorized prescription.").

[171] *See infra* notes 207–15 and accompanying text.

[172] *See infra* notes 177–84 and accompanying text.

[173] *See infra* notes 185–203 and accompanying text.

[174] *See infra* notes 195–204 and accompanying text.

[175] Durden, *supra* note 122, at 122.

[176] *See infra* notes 204–14 and accompanying text.

[177] WYO. STAT. ANN. § 8-1-103(a)(i) (2012) ("Words and phrases shall be taken in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."); *see* Williams Prod. RMT. Co. v. State Dep't of Revenue, 107 P.3d 179,185–86 (Wyo. 2005) ("In addition, when construing technical terms contained within statutes, we look to the meaning ascribed to those terms in the applicable field."); Blackmore v. Davis Oil Co., 671 P.2d 334, 339–41 (Wyo. 1983) (Rooney, C.J., dissenting).

physician or optometrist."[178] Section 33-43-102(a)(iii) speaks of "services . . . in accordance with the prescription or verbal order of a physician or other authorized health care professional."[179] Section 35-22-205 reads: "A cardiopulmonary resuscitation directive for any person who is admitted to a health care facility shall be implemented as a physician's order concerning resuscitation as directed by the person in the cardiopulmonary resuscitation directive, pending further physicians' orders."[180] These statutes suggest that an "order" is the gesture of a medical professional.

Inexplicably, however, the *Burns* court accepted without comment the plain meaning, dictionary definition of "order" offered by the State, defining "order" as "command."[181] Whether a physician's order is as unambiguously pronounced as a physician's prescription (a question explored in the section on surplusage below), medical directives, instructions, or authorizations are not simply "commands," but instructions and guidelines contingent on particular medical situations. The Wyoming Supreme Court has previously determined that whether a term has a technical or plain meaning is a question to be resolved by the finder of fact.[182] Since Burns's initial defense (based on his acquisition of the marijuana pursuant to a physician's order) was rejected by the district court prior to trial, Burns did not have the opportunity to present evidence to a jury that the term "order" was included in the statutory exception with a medical context in mind.[183] Because Burns was not allowed to demonstrate this context at trial, the Wyoming Supreme Court's deferral to the plain meaning interpretation imposed a general definition on the term where a contextual, term-of-art definition would have been a more appropriate reflection of the statutory language.[184] This failure to apply the term-of-art canon of construction, moreover, played a pivotal role in the ultimate holding in the case.

Ambiguity in the Statutory Exception Justified Lenity

The rule of lenity, a canon of statutory construction holding that ambiguities in criminal statutes should be resolved in favor of defendants, exists to protect defendants from the possibility that they might hear, but not understand, the

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[178] WYO. STAT. ANN. § 35-23-101(d) (2009).

[179] WYO. STAT. ANN. § 33-43-102(a)(iii) (2009).

[180] WYO. STAT. ANN. § 35-22-205 (2009).

[181] Burns v. State, 246 P.3d 283, 286 (Wyo. 2011) ("Generally, our first step would be to analyze the definitions of 'prescription' and 'order' as used in the statute. However, in this case there is no need to engage in that analysis.").

[182] Powder River Coal Co. v. Wyo. Dep't of Revenue, 145 P.3d 442, 448 (Wyo. 2006) ("Whether a term has such a technical meaning is a question of fact to be proved.").

[183] *Burns*, 246 P.3d at 285.

[184] *See* Williams Prod. RMT Co. v. State Dep't of Revenue, 107 P.3d 179, 185 (Wyo. 2005) ("[W]hen construing technical terms contained within statutes, we look to the meaning ascribed to those terms in the applicable field.").

law.[185] The rule is applied when a court is unable to derive an unambiguous interpretation of statutory language after exploring the language using other standard interpretive tools.[186] A plain meaning or term-of-art exploration of the statutory exception in section 35-7-1031(c) would not have resolved the question of whether the "practitioner" in the provision had to be in Wyoming, or could have been based in another state. Wyoming's Controlled Substances Statute does not define "physician," "practitioner," or other terms associated with the medical profession.[187] A reasonable person living in a state allowing medical marijuana, upon reading Wyoming's statutory exception, could well have assumed that the authorization of a physician from a neighboring state was a sufficient guard against prosecution for possession of medical marijuana, particularly when that marijuana was not being smoked, sold, transferred, or openly displayed within the state of Wyoming.[188]

The statutory exception specified that the excepted substance must be obtained pursuant to the prescription or order of a practitioner.[189] The court in *Burns*, however, used Wyoming's categorical prohibition of marijuana to conclude that there could be no conceivable circumstances where a Wyoming physician could prescribe marijuana.[190] In doing so, the court seemed to suggest there were no conceivable circumstances where the exception could apply, rendering questions as to whether the law applied to Schedule I substances obtained pursuant to the authoritative pronouncement of a physician outside of Wyoming obsolete.

Prior to the Wyoming Legislature's elimination of the statutory exception, the law read, "[i]t is unlawful for any person knowingly or intentionally to possess a controlled substance 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, or except as otherwise authorized by this act."[191] The language of the exception did not clarify whether the "practitioner" must practice in Wyoming, or whether the patient must acquire the controlled substance in Wyoming.[192] It did not provide for the possibility of acquiring a prescription or

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[185] JELLUM, *supra* note 92, at 237.

[186] Reno v. Koray, 515 U.S. 50, 65 (1995).

[187] WYO. STAT. ANN. §§ 35-7-1001 to -1057 (2009).

[188] *See* Brief of Appellant, *Burns*, *supra* note 169, at 11 (noting that neither federal nor Wyoming law prohibits interstate filling of prescriptions, and that residents of other states regularly drive through Wyoming carrying their prescriptions with them).

[189] *See* WYO. STAT. ANN. § 35-7-1031(c) (2009); *supra* note 3 (discussing the former statutory exception).

[190] *See Burns*, 246 P.3d at 286.

[191] WYO. STAT. ANN. § 35-7-1031(c) (2009); *see supra* note 3 (discussing the former statutory exception).

[192] *See* WYO. STAT. ANN. § 35-7-1031(c) (2009).

order for a medication in another state, something that is not uncommon in rural areas or in border communities.[193] Because of this ambiguity, lenity would have been an appropriate interpretive tool for the court.[194]

The Wyoming Supreme Court has established criteria for the application of lenity to a vague statute.[195] A statute is vague if people of common intelligence must necessarily guess at its meaning and differ as to its application.[196] Given these criteria, it was unreasonable for the court to limit the affirmative defense to substances only acquired in Wyoming, obtained pursuant to an order in Wyoming.[197] Wyomingites face unique challenges related to rural health care access.[198] Moreover, out-of-state residents bring their drugs into the state when visiting or traveling through. Since residents sometimes obtain medical services, including prescription drugs, from neighboring states, and since the statutory exception does not specify that the practitioner or the drug must originate in Wyoming, it is reasonable to suppose that two people of common intelligence might, upon reading section 35-7-1031(c)(iii) prior to its elimination by the Legislature, have drawn divergent conclusions concerning whether the substance in question must be obtained from a physician in Wyoming.

Additionally, if the purpose of lenity is to avoid holding a defendant "accountable for a violation of a statute whose commands are uncertain,"[199] or to provide fair warning to citizens that they might be breaking a law (or be uncovered

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[193] *See infra* note 198 and accompanying text.

[194] *See* United States v. Santos, 553 U.S. 507, 515 (2008) ("When interpreting a criminal statute, we do not play the part of a mindreader.").

[195] *See* Schafer v. State, 197 P.3d 1247, 1251 (Wyo. 2008) ("Under the rule of lenity, criminal defendants receive the benefit of any ambiguity.").

[196] *See* Britt v. State, 752 P.2d 426, 428 (Wyo. 1988) ("The constitutional standard for vagueness of a criminal statute has been defined by this court. 'An ordinance or statute is void for vagueness if it fails to give a person of ordinary sensibility fair notice that the contemplated conduct is forbidden. . . .' While there is a strong presumption of constitutionality, . . . 'a statute is unconstitutionally vague when 'men of common intelligence must necessarily guess at its meaning and differ as to its application.' . . . The underlying principle is that no man shall be held criminally liable for conduct which he could not reasonably understand to be proscribed.'") (citations omitted); Hobbes v. State, 757 P.2d 1008, 1011 (Wyo. 1988).

[197] *See* Burns v. State, 246 P.3d 283, 286 (Wyo. 2011). The court reasoned that the illegality of possession within a jurisdiction means "it would be illegal for a physician to prescribe or order, in any sense, the possession of marijuana." *Id.*; *see infra* text accompanying notes 198–203 (demonstrating that because the statutory language was ambiguous, the court should have applied the rule of lenity, erred on the side of the defendant, and left it up to the Legislature to clarify the language of the statutory exception if it desired to do so).

[198] *See Rural and Frontier Health*, WYO. DEP'T OF HEALTH, http://www.health.wyo.gov/rfhd/index.html (last visited Apr. 9, 2012) (providing information on the challenges of rural health care including lack of primary services, long drives to care providers, and sustainability of facilities in small communities).

[199] *Santos*, 553 U.S. at 515.

by an exception), then the totality of the language in section 35-7-1031(c) was insufficient to guarantee that warning or certainty. One may "obtain directly" a substance from a practitioner anywhere, and there are no other Wyoming laws prohibiting a Wyoming citizen from obtaining medical services, including prescription drugs, from other states.[200] Burns should not have had to consult a Wyoming attorney before driving through the state with his legally obtained substance on his person.[201]

In *Juarez,* the Wyoming Supreme Court held that section 31-5-217 was sufficient to warrant lenity because there was no positive "basis in the statute at issue to conclude that a motorist is absolutely required to signal" when merging onto an interstate highway.[202] Similarly, there was no positive reason to believe the Wyoming Legislature intended section 35-7-1031(c) to apply only to in-state physicians prescribing controlled substances.[203] Because these two statutes are equally ambiguous, the court should have applied the rule of lenity, erred on the side of the defendant, and left it up to the Legislature to clarify the language of the statutory exception if it desired to do so.

The Court's Interpretation Rendered "Order" Superfluous

The canonical rule against surplusage (surplusage canon) is based on the notion that, if a legislative body puts two words alongside one another in a statute, each word has its own unique meaning.[204] Absent an indication that legislators intended some terms in a statute to be restatements or clarifications of other words, courts ought to defer to interpretations that do not render certain terms in a statute inoperative or superfluous. [205]

Prior to its legislative elimination in 2011, the exception in section 35-7-1031 (c) listed two actions by a physician that could serve as the basis for the affirmative defense: The substance may be acquired pursuant to either a "prescription" or an "order." The State's appellate brief defined "order" using *Webster's Dictionary*,

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[200] *See* Brief of Appellant, *Burns*, *supra* note 169, at 11.

[201] *See* Dougherty v. State, 239 P.3d 1176, 1181 (Wyo. 2010) (indicating the importance of providing notice of prohibited conduct); Griego v. State, 761 P.2d 973, 976 (Wyo. 1988) (discussing the importance of notice in alerting the public to conduct regarded as illegal under state law); *supra* text accompanying note 103.

[202] State v. Juarez, 256 P.3d 517, 521 (Wyo. 2011).

[203] *See* Brief of Appellant, *Burns*, *supra* note 169, at 11.

[204] Durden, *supra* note 122, at 115.

[205] United States v. Atl. Research Corp., 551 U.S. 128, 137 (2007).

assuming the plain language canon was sufficient.[206] That definition, which is stripped of any context, medical or otherwise, was "specific rule, regulation, or authoritative direction: COMMAND."[207]

Interpreting "order" to be a "command" or "regulation" makes it indistinguishable from "prescription," which *Webster's* defines as "a prescribing or dictating," and in a more specifically medical context, "a written direction for the preparation and use of a medicine."[208] The similarity in language to the State's definition of "order" is impressive: prescribing, dictating, authoritatively directing. A reader of the two definitions would be hard pressed to articulate a meaningful difference between them, but the surplusage canon directs courts to assume that the Legislature intended the two terms to have different meanings.[209]

Moreover, the two terms mean quite different things. In a medical context, it is accepted terminology that the "order" of a physician or other medical professional is similar to an "authorization."[210] Thus, in a handbook on restraining elderly patients, "doctor's order" is used interchangeably with "physician's authorization."[211] Similarly, in a reference manual for Los Angeles County's Emergency Medical Services, paramedics are instructed to interpret "Federal Law restricts this device to sale by or the order of a physician" to mean the requirement of "specific physician authorization."[212] More salient to the legal usage of the terms, the United States District Court for the Southern District of Texas's decision in *Wallace v. Methodist Hospital Systems* repeatedly uses "order" and "authorization" interchangeably to describe the hospital's assertion that a nurse violated hospital rules by undertaking procedures "without a doctor's authorization" in failing "to obtain a physician's order for the insertion or removal of a nasogastric feeding

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[206] Brief of Appellee at 10, *Burns*, 246 P.3d 283 (No. S-10-0053), 2010 WL 2395612.

[207] *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 808 (3d ed. 1977)).

[208] WEBSTER'S NEW INTERNATIONAL DICTIONARY 1954 (2d ed. 1956).

[209] United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute . . . .'"); *see* State Bd. of Equalization v. Cheyenne Newspapers, Inc., 611 P.2d 805, 810 (Wyo. 1980) ("It cannot be reasonably expected that the legislature intended [two words in the same statute] to have identical meanings."); *supra* notes 122–42 and accompanying text.

[210] Medicaid SSI Benefits and Services, ICARE, http://www.icare-wi.org/members/ssibenefits.aspx (last visited Apr. 9, 2012) ("Some services may require a doctor's order or a prior authorization.").

[211] Jan L. Warner & Jan Collins, *Restraining Elderly Residents Presents Very Special Concerns*, NEXTSTEPS, http://www.lifemanagement.com/nsa4.8.2078/ (last visited Apr. 9, 2012).

[212] *Supply and Resupply of Designated EMS Provider Units, Reference No. 701*, LOS ANGELES CNTY. DEP'T OF HEALTH SERVS. (Feb. 15, 2010), http://ems.lacounty.gov/policies/ref700/701.pdf.

tube" and other infractions.[213] These examples suggest, at the very least, that a physician's "order" might reasonably be interpreted to be of a different category of meaning than the more forceful and authoritative physician's "prescription." Either that difference was specifically contemplated by the Wyoming Legislature when it drafted section 35-7-1031(c), in which case the surplusage canon would preclude conflation of "prescription" and "order," or the meaning of "order" is ambiguous, in which case the court ought to have applied the doctrine of lenity.[214]

Unfortunately, the court only pointed out that Burns could not have had a prescription, an obvious point since the physician's certification explicitly stated it was not a prescription.[215] It is difficult, however, to understand how that same certification did not functionally entail a physician's authorization. Because "order" is commonly and plainly used in medical terminology to mean authorization, and because Burns clearly received such an authorization as far as the Colorado law was concerned,[216] the court should have assumed "order" had a meaning distinct from "prescription."

CONCLUSION

Interpretive canons and principles purport to provide clarity in applying criminal statutes. With an increasing number of states legalizing the medical use of marijuana, other jurisdictions are faced with choices concerning how to apply ambiguous statutes, and whether to respect neighboring jurisdictions' laws. Policy concerns about marijuana may tempt courts to do the work of legislators in an effort to prevent encroachment by medical marijuana users into drug-free states. Such judicial decisions may fail to apply canons such as lenity and surplusage, and the interpretive norms of terms-of-art, where courts might otherwise do so.

The Wyoming Supreme Court in *Burns* did not adequately consider the ambiguous language of the statutory exception, the duplicative meaning of its two key terms, or the legitimacy of the process by which Daniel Joseph Burns acquired his medical marijuana.[217] In this case, Burns should have had the opportunity to demonstrate to the jury, given his compliance with what he understood to be the applicable law, that he had acquired his marijuana through legitimate channels, that he intended to use it legally, and that he could not have

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[213] Wallace v. Methodist Hosp. Sys., 85 F. Supp. 2d 699, 705, 719 (S.D. Tex. 2000) (finding that using "doctor's authorization" and "doctor's order" in successive sentences meant the same authorization for work to be performed).

[214] *See* United States v. Santos, 553 U.S. 507, 514 (2008); *supra* notes 122–42, 209 and accompanying text.

[215] Burns v. State, 246 P.3d 283, 286 n.5 (Wyo. 2011) ("The Physician's Certification clearly states that it is not a prescription for marijuana."); Brief of Appellee, *Burns*, *supra* note 206, at 10.

[216] Brief of Appellant, *Burns*, *supra* note 169, at 18.

[217] *See supra* notes 163–215 and accompanying text.

foreseen that the seemingly clear exception under Wyoming law would not apply to him.[218] In denying Burns that opportunity, the Wyoming Supreme Court sidestepped the question of the Legislature's failure to either clarify its statutory exception, or amend it. Significantly, the Wyoming Legislature took the second route immediately after *Burns* was decided, amending the statute to close the "prescription or order" loophole as it applied to marijuana.[219] The Legislature's decision raises suspicion that the *Burns* court was more concerned with protecting the state from medical marijuana than with statutory interpretation.

[218] *See supra* note 167 and accompanying text.

[219] *See* WYO. STAT. ANN. § 35-7-1031(c) (2011), *supra* note 3 (explaining the differences between the former statute and the amended statute).