Supreme Court No. 89928-2
Court of Appeals No. 31280-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DANIEL KENNETH ELLIS,
Defendant/Petitioner.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Salvatore F. Cozza, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Daniel Kenneth Ellis, the defendant/appellant below, asks this Court to accept review of the following Court of Appeals' decision terminating review.

II. COURT OF APPEALS DECISION.

Mr. Ellis seeks review of the published opinion of the Court of Appeals, Division Three, filed January 9, 2014, which affirmed the denial of his suppression motion and conviction for an unrelated crime. A copy of the opinion is attached hereto as **Appendix A**. This petition for review is timely.

III. ISSUE PRESENTED FOR REVIEW.

Whether an affidavit supporting a search warrant for evidence of a marijuana-based crime must show probable cause that the criteria of the 2011 MUCA amendments establishing an exception of decriminalized behavior have not been met, and whether State v. Fry is applicable in this context.

IV. STATEMENT OF THE CASE.

In March 2012 Spokane County Sheriff's Deputy Mark Benner visited Mr. Ellis' residence to arrest a third party on local warrants. He smelled a marijuana odor with increasing potency as he approached the

house. Because two unfriendly dogs prevented him from accessing the front door, he began looking for another way to contact the residents. Near the garage he again smelled a marijuana odor. He saw a bright light emitting from the edge of windows mostly covered by black plastic and saw walling and insulation encompassing about a quarter of the interior space. Based on his training and experience, he believed Mr. Ellis was growing marijuana in the garage.

Deputy Benner authored and obtained a search warrant for the premises. CP 53, 62–64. The Affidavit for Search Warrant generally alleged the facts set forth above. CP 56–61. While executing the search warrant, police found one active and two empty marijuana grow rooms, two valid MUCA growing permits, and a loaded shotgun. Mr. Ellis had a prior felony. CP 8, 53–54.

The State charged Mr. Ellis with second degree unlawful possession of a firearm. CP 3, 54. He moved to suppress the shotgun under the exclusionary rule, arguing the search warrant lacked probable cause to believe his marijuana growing operation was criminal. CP 6–20, 28–34. The trial court denied the motion and entered written findings of fact and conclusions of law, stating:

FINDINGS OF FACT

1. Courts have been struggling with the medical marijuana issues for over a decade.

2. The state legislature has attempted to fix those issues over time.

3. There is no realistic way for law enforcement to determine if someone is a medical marijuana user.

4. An authorized medical marijuana user must still comply with state law.

5. Law enforcement did not know if the defendant was in compliance with the medical marijuana statute.

CONCLUSIONS OF LAW

1. Under the medical marijuana laws, there are limits.

2. It is still a violation of the law to have excess marijuana.

3. HIPAA privacy laws prevent asking doctors about medical marijuana patients.

4. That invasion has to be justified by either a warrant or exigent circumstances.

5. Law enforcement has the authority to determine a defendant's compliance with state statutes regarding medical marijuana.

6. Based on the state of the law, as it currently exists, the search warrant was valid.

7. Law enforcement was lawfully allowed to search the home and gather evidence.

8. The Defendant's motion for suppression of evidence is denied.

CP 35–36; 9/20/12 RP 9–11. The court found Mr. Ellis guilty following a stipulated facts trial. 11/5/12 RP 13–18; CP 52–53. He appealed. CP 68–69.

On appeal, Division Three acknowledged the 2011 amendments to the Medical Use of Cannibis Act ("MUCA") decriminalized growing marijuana under certain circumstances and the "MUCA created a potential medical use exception to the [Uniform]C[ontrolled]S[ubstances]A[ct]'s ("CSA") general rule criminalizing marijuana manufacturing." *Slip Opinion* at 4–5; chapter 69.50 RCW. Div. Three concluded the MUCA exception merely functions "about the same as the old medical use affirmative defense" provided in pre–2011 amendment of the statute. Relying on State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010) (where a plurality of this Court held the medical use affirmative defense did not alter the probable cause necessary under the CSA to support a search warrant), Div. Three held an affidavit supporting a search warrant need not show the MUCA exception's inapplicability. *Slip Opinion* at 5–6.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review should be granted so this Court may determine whether an affidavit supporting a search warrant for evidence of a marijuana-based crime must show probable cause that the criteria of the 2011 MUCA amendments establishing an exception of decriminalized behavior have not been met, and whether State v. Fry is applicable in this context. RAP 13.4(b)(3) and RAP 13.4(b)(4).

2. The search warrant was not supported by probable cause that a crime was being committed when possession and manufacture of marijuana is not a crime under some circumstances and the supporting affidavit alleged only that police officers smelled marijuana upon arriving at a residence and saw a bright light emitting from a small area sectioned out of a garage that had most of its windows covered with black plastic.

The March 2012 search warrant affidavit established that the police officers suspected there was growing marijuana at the residence. CP 56–61. But they did not know how many plants were being grown or the status of the residents. They therefore did not know whether the grow operation was permitted under MUCA. The State thus fails to establish probable cause to believe a crime was being committed.

a. A court may not issue a warrant absent facts indicating a crime is "probably" being committed.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Washington Constitution article I, section 7, provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Generally, warrants provide the authority of law required by the constitution. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citing State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)).

To justify the issuance of a warrant, the supporting affidavit must show probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause requires the State to set forth facts establishing a reasonable inference that an accused is "probably" involved in criminal activity and that evidence of the crime can be found at the location to be searched. State v. Shupe, 172 Wn. App. 341, 289 P.3d 741 (2012) (quoting State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)), *rev. denied*, 177 Wn.2d 1010 (2013). The trial court's assessment of probable cause is a legal conclusion that this Court reviews de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

b. Following 2011 MUCA amendments, the search warrant affidavit did not establish probable cause to believe a crime was being committed.

In State v. Fry, the Washington Supreme Court determined that authorization to possess medical marijuana under MUMA does not negate a finding of probable cause to search for marijuana. 168 Wn.2d 1, 6, 228 P.3d 1 (2010). There, the trial court denied a motion to suppress evidence obtained in a search of Fry's residence even though he presented officers a medical marijuana authorization card before they sought the warrant. Id. at 4.

The Court concluded that probable cause existed despite the authorization card because MUCA did not decriminalize the use and possession of marijuana. The Court analogized the statutory affirmative defense to a claim of self-defense, which a police officer would not be required to evaluate before deciding to arrest an individual for assault. Rather than negating an element of the crime, MUCA established an affirmative defense to excuse the criminal act. Id. at 7-8 (outlining rationale of four-justice lead opinion).[1]

[1] In Fry—unlike in this case—there was no contention that the facts, including the information and smell of marijuana, did not support a finding of probable cause to search the Fry's residence. Instead, Fry contended the probable cause was negated once he produced the medical marijuana authorization. The court rejected this argument. Fry, 168 Wn. 2d at 6, 10.

The version of the statute considered by the Fry Court provided that

> [i]f charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, *will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter.*

Former RCW 69.51A.040(2) (2007) (emphasis added). Thus, the officers had probable cause to search based on a reasonable inference that criminal activity was taking place. Id. at 8.

In 2011, a year after the Supreme Court's decision in Fry, the Legislature made substantial changes to MUCA. The 2011 amendments alter the protections afforded to patients, providers, and physicians. While the former statute categorized the protections as an affirmative defense, the new statute provides that "medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime." RCW 69.51A.040 (emphasis added); Laws of 2011 ch. 181 § 401 (eff. July 22, 2011).

Moreover, under RCW 69.51A.025,

> Nothing in this chapter or in the rules adopted to implement it precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use as authorized under RCW 69.51A.040.

Laws of 2011, ch. 181, § 413.

The amended statute now provides an exception to the general prohibition on possession of controlled substances. To obtain a warrant, officers thus must show the exception does apply. Without such a showing, the officer's observations do not establish probable cause to believe a crime has been committed.

Although there is no decision directly on point, the Supreme Court's decision in Neth is instructive. There, the Court determined plastic baggies often associated with drug distribution, a large sum of money, and Neth's criminal history were insufficient to support a warrant to search his vehicle. Neth, 165 Wn.2d at 183-84. As the Court explained, evidence that is equally consistent with lawful and unlawful drug-related conduct does not provide probable cause to search. Id. at 185.

Here, the affidavit does not, for example, show that the residence contained more than the permitted number of plants under MUCA or mention whether the police attempted to ascertain whether a resident was an authorized provider or patient. *See* RCW 69.51A.040 (a qualifying patient or provider may possess no more than 15 plants or, if the person is both a qualifying patient and a provider for another patient, no more than

twice that amount); *see also* RCW 69.51A.085 ("collective garden" may contain up to 45 plants).

The officer's observations are therefore analogous to the evidence deemed too ambiguous to support probable cause in Neth. The smell of growing marijuana may have indicated a crime was being committed. On the other hand, following the 2011 amendments, it may be been consistent with legally permissible activity. Under the rationale of Neth, the evidence should have been suppressed.

c. The decriminalization language retains its force in light of the governor's veto of the registry/licensing provisions in conflict with federal law, as well as provisions describing an affirmative defense.

Division III nonetheless reasons that the activity of RCW 69.51A.040 purports to decriminalize remains criminal, albeit subject to an affirmative defense, in light of the Governor's veto of certain sections of the bill involving registry and licensing of patients, providers, and producers of cannabis. *Slip Opinion* at 6; *Slip Opinion* at 2–3 (Fearing, J., concurring). This reasoning should be rejected.

This Court reviews issues of statutory interpretation de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Of paramount importance in such analysis is the Legislature's intent in adopting the

statute. Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

In analyzing a statute, this Court looks first to its plain language. Armendariz, 160 Wn.2d at 110. Under the "plain meaning rule," this Court examines the language of the statute, other provisions of the same act, and related statutes. City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). This Court examines the statute as a whole. In re Detention of Williams, 147 Wn.2d 476, 490, 55 P.3d 597 (2002). If the plain language of the statute is unambiguous, this Court's inquiry ends, and the statute is enforced "in accordance with its plain meaning." Armendariz, 160 Wn.2d at 110.

If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous. State v. Slattum, 173 Wn. App. 640, 649, 295 P.3d 788 (2013). In that case, this Court may resort to construction aids, including legislative history. State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004). "The spirit and intent of the statute should prevail over the literal letter of the law." Morris v. Blaker, 118 Wn.2d 133, 143, 821 P.2d 482 (1992). But the rule of lenity requires that, absent clear legislative intent to the contrary, a statute must be construed in the light most favorable to

an accused. Slattum, 173 Wn. App. at 657-58. Finally, this Court attempts to interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The operative language in Mr. Ellis' case is this: "The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime." RCW 69.51A.040. In addition, RCW 69.51A.025 provides that "[n]othing in this chapter . . . precludes a qualifying patient or designated provider from engaging in the private, unlicensed, noncommercial production, possession, transportation, delivery, or administration of cannabis for medical use ... ." The earlier versions of the statute contained no such language. Laws of 2007, ch. 371 § 5; Laws of 1999, ch. 2 § 5 (Initiative Measure No. 692, approved November 3, 1998). In enacting the amendments, the Legislature expressed its intent to decriminalize the medical use and provision of cannabis. RCW 69.51A.005(2) ("Purpose and Intent"); Laws of 2011, ch. 181 § 102.

RCW 69.51A.025 and .040 plainly indicate the Legislature's intention to decriminalize the use, delivery, and production of marijuana for medical use under certain circumstances. This language is consistent

with the Legislature's intent in adopting the amendments. RCW 69.51A.005(2). Although Division Three would read this language out of MUCA, it is not affected by the Governor's veto of other portions of the statute.

The opinion below seeks to delete the operative language of RCW 69.51A.025 and .040 and negate the Legislature's express intent based on the Governor's veto of other sections of the legislation. This position conflicts with the rule that all portions of a statute should be given meaning. J.P., 149 Wn.2d at 450. As Division Three acknowledges, the Governor's veto was based on concerns that registration– and licensing–related activities could place state employees at risk of federal prosecution. *Slip Opinion* at 2–3 (Fearing, J., concurring). The Governor also took care to veto other provisions she believed were "associated with or dependent upon these licensing sections." *See, e.g.,* Laws of 2011, ch. 181 § 101 (legislative declaration and intent section, mentioning registry); § 201 (definition section including registry–related definitions); § 410 (provision limiting refusal of and eviction from housing based on cannabis use, vetoed based on potential conflict with federal law); §§ 601–11 (provisions relating to licensing of producers and processors); §§ 701–05 (provisions relating to licensing of dispensers); §§ 801–08 (miscellaneous

provisions applying to producers, processors and dispensers, including prohibition on advertising and establishment of civil penalties); § 901 (requiring state departments of health and agriculture to create registration system); § 1104 (provision requiring legislative review of statutes if medical marijuana authorized by federal statute vetowed based on connection to licensing provision); § 1201 (licensing of and affirmative defense for preexisting dispensaries). The Governor also vetoed § 407, creating an affirmative defense for non-residents authorized under another state's scheme, because that section "would not require these other state or territorial laws to meet the same standards for health care professional authorization as required by Washington law." *See* Veto Message on Engrossed Second Substitute S.B. 5073, *reprinted in* Laws of 2011, at 1374–76.

As the above summaries indicate, the Governor did not veto the language decriminalizing the medical use of marijuana. As such, provisions relating to such decriminalization were passed into law. The Governor's "explanation of partial veto" reiterates her support of the original initiative and 2007 amendments expanding the availability of medical marijuana. The Governor's statement further reassures that "[q]ualifying patients or their designated providers may grow cannabis for

the patient's use or participate in a collective garden *without fear of state criminal prosecutions."* (Emphasis added.) Id. The Governor's veto of the registration requirements does not support Division Three's position.

Chapter 69.51A RCW does retain two affirmative defenses. The second, RCW 69.51A.045, is of little relevance here, as it involves a necessity defense, that the qualifying patient requires more than the amount permitted by statute. The first, RCW 69.51A.043, provides that an unregistered patient or provider may raise an affirmative defense at trial. However, this section does not address whether there is, at the outset, probable cause to believe a crime is being committed. As set forth above, under Neth an affidavit that does not establish, for example, that the marijuana is beyond the legally permissible amount, does not establish probable cause to believe a crime is being committed.

RCW 69.51A.043 does not conflict with the decriminalization aspects of RCW 69.51A.040 and .025. Construed consistently with those provisions, it may be viewed as a second means of protection for authorized patients and providers. J.P., 149 Wn.2d at 450.

Should this Court find, however, that the veto of the registry provision renders MUCA's decriminalization language ambiguous, the language must be interpreted against the State. *See* RCW 69.51A.005(2)

(statement of legislative intent in adopting the amendments); *see also* Slattum, 173 Wn. App. at 657–58 (because the word "imprisonment" in statute providing for state-funded post-conviction DNA testing is ambiguous, the rule of lenity required the reviewing Court to construe this statute strictly against the State).

Finally, the removal of the registry requirements made it harder, although not impossible, for law enforcement to do its job. But this Court cannot rewrite statutes based on public policy concerns. This situation, moreover, is not a novel one. Certain substances may be possessed only with a prescription. But an officer observing an individual consume a knew controlled substance would not have probable cause to arrest that individual even if the individual was not displaying that prescription. More is required. *Cf.* State v. Gonzales, 46 Wn. App. 388, 400–01, 731 P.2d 1101 (1986) (police had probable cause to believe that capsules and a pill found in a clear vial were controlled substances because they observed drug paraphernalia and a marijuana pipe in defendant's residence.

Under the 2011 amendments to MUCA, observations suggesting some amount of marijuana is being grown are insufficient to support that a crime is "probably" being committed. As in the above example, more evidence is required.

VI. CONCLUSION.

Here, the affidavit fails to provide any facts or circumstances from which the issuing judge could make a determination that there was a fair probability that the possession and/or manufacturing of marijuana observed by Deputy Benner was not in compliance with Washington's medical marijuana laws. Thus, the affidavit fails to establish probable cause for a violation of law, i.e., that a crime was likely being committed.[2]

For all the reasons stated, the conviction should be reversed.

Respectfully submitted on February 10, 2014.

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[2] State officers cannot obtain a valid state search warrant where there is not probable cause of a state crime. *See, e.g.*, United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, 948 (9th Cir. 2010) (finding that because the evidence supporting the grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed).

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 10, 2014, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Mr. Ellis' petition for review and Appendix A:

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January 9, 2014

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CASE # 312801
State of Washington v. Daniel Kenneth Ellis
SPOKANE COUNTY SUPERIOR COURT No. 121007641

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

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FILED
JAN 09, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DANIEL K. ELLIS, Appellant.	)	No. 31280-1-III PUBLISHED OPINION

BROWN, J.—Daniel K. Ellis appeals his conviction for second degree unlawful firearm possession, contending the trial court erred in denying his suppression motion. He contends the search warrant lacked probable cause to believe his marijuana growing operation was criminal, considering tensions between the Uniform Controlled Substances Act (CSA), chapter 69.50 RCW, and the Washington State Medical Use of Cannabis Act (MUCA), chapter 69.51A RCW. We disagree with him and affirm.

FACTS

The facts are undisputed. In March 2012, Spokane County Sheriff's Deputy Mark Benner visited Mr. Ellis's residence to arrest a third party on local warrants. He smelled a marijuana odor with increasing potency as he approached the house. Because two unfriendly dogs prevented him from accessing the front door, he began

looking for another way to contact the residents. Near the garage, he again smelled a marijuana odor and saw a very bright light emitting from the edges of windows mostly covered by black plastic. Peering inside, he saw walling and insulation encompassing about a quarter of the interior space. Based on his training and experience, he believed Mr. Ellis was growing marijuana at his residence.

Deputy Benner submitted an affidavit and obtained a warrant to search the residence for evidence of marijuana manufacturing in violation of the CSA. While executing the search warrant, law enforcement found one active and two inactive marijuana growing rooms, two valid MUCA growing permits, and a loaded shotgun. Mr. Ellis is a convicted felon.

The State charged Mr. Ellis with second degree unlawful firearm possession. He moved to suppress the shotgun under the exclusionary rule, arguing the search warrant lacked probable cause to believe his marijuana growing operation was criminal. The trial court denied the motion in written factual findings and legal conclusions stating:

1. Courts have been struggling with the medical marijuana issues for over a decade.
2. The state legislature has attempted to fix those issues over time.
3. There is no realistic way for law enforcement to determine if someone is a medical marijuana user.
4. An authorized medical marijuana user must still comply with state law.
5. Law enforcement did not know if the defendant was in compliance with the medical marijuana statute.

. . . .

1. Under the medical marijuana laws, there are limits.
2. It is still a violation of the law to have excess marijuana.
3. HIPAA[1] privacy laws prevent asking doctors about medical marijuana patients.

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[1] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in titles 18, 26, 29, and 42 U.S.C.).

4. That invasion has to be justified by either a warrant or exigent circumstances.
5. Law enforcement has the authority to determine a defendant's compliance with state statutes regarding medical marijuana.
6. Based on the state of the law, as it currently exists, the search warrant was valid.
7. Law enforcement was lawfully allowed to search the home and gather evidence.

Clerk's Papers at 35-36. The court found Mr. Ellis guilty following a stipulated facts trial. He appealed.

ANALYSIS

The issue is whether the trial court erred in denying Mr. Ellis's suppression motion. He challenges the court's legal conclusion that probable cause supported the search warrant. Specifically, he argues while the affidavit may have presented probable cause to believe he was growing marijuana, it did not, considering the activities decriminalized by MUCA, present probable cause to believe he was violating the CSA in doing so. We review legal conclusions regarding evidence suppression de novo.[2] *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). And, we review de novo whether qualifying sworn information as a whole

[2] The factual findings regarding evidence suppression are verities on appeal because Mr. Ellis does not challenge them. *See State v. Christian*, 95 Wn.2d 655, 656, 628 P.2d 806 (1981); RAP 10.3(g). But we still consider them in determining whether they support the legal conclusions. *See State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

presents probable cause supporting a search warrant.[3] *In re Det. of Peterson*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002).

A judicial officer may not issue a search warrant unless he or she determines probable cause supports it. U.S. CONST. amend. IV; CONST. art. I, § 7; CrR 2.3(c). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)); *see State v. Patterson*, 83 Wn.2d 49, 58, 515 P.2d 496 (1973). "Accordingly, 'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). While the affidavit need not make a prima facie showing of criminal activity, it must show criminal activity is at least probable. *See State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

The CSA generally criminalizes growing marijuana: "Except as authorized by this chapter, it is unlawful for any person to manufacture . . . a controlled substance,"

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[3] Further, we interpret a statute de novo. *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 582 n.15, 790 P.2d 124 (1990). When doing so, we "discern and implement" our legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *see State ex rel. Great N. Ry. v. R.R. Comm'n of Wash.*, 52 Wash. 33, 36, 100 P. 184 (1909). If the statute's meaning is plain, we effectuate it as an expression of our legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *Walker v. City of Spokane*, 62 Wash. 312, 318, 113 P. 775 (1911).

including marijuana.[4] RCW 69.50.401(1); *see* RCW 69.50.401(2)(c), .204(c)(22). But MUCA decriminalizes growing marijuana if a person meets certain requirements:

> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions . . . for . . . manufacture . . . of . . . cannabis under state law . . . .

RCW 69.51A.040. Still, this provision's reach is narrow: "Nothing in this chapter shall be construed to supersede Washington state law prohibiting the . . . manufacture . . . of cannabis for nonmedical purposes." RCW 69.51A.020.

Interpreting these statutes together, we conclude MUCA created a potential medical use exception to the CSA's general rule criminalizing marijuana manufacturing. At least for purposes of probable cause, this new exception functions about the same as the old medical use affirmative defense provided in former RCW 69.51A.040(1) (1999). *See generally* Vitaliy Mkrtchyan, Note, *Initiative 692, Now and Then: The Past, Present, and Future of Medical Marijuana in Washington State*, 47 GONZ. L. REV. 839, 863-64 (2012) (discussing the medical use exception's possible limitations). In *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010), a plurality of our Supreme Court held the medical use affirmative defense did not vitiate probable cause supporting a search warrant. The lead opinion affirmed this division's analysis on this issue while the concurring opinion expressed no view on this issue. *Id.* at 10 (J.M. Johnson, J., lead opinion), *aff'g State v. Fry*, 142 Wn. App. 456, 460-61, 174 P.3d 1258 (2008); *id.* at 20 (Chambers, J.,

[4] Because law enforcement obtained and executed the warrant in March 2012, we do not consider the November 2012 amendments made by Initiative 502, Laws of 2013, ch. 3 (codified in chapters 46.04, 46.20, 46.61, and 69.50 RCW).

concurring). Because MUCA did not per se legalize marijuana or alter the established elements of a CSA violation, the thrust of *Fry* survived Laws of 2011, ch. 181, § 401 (codified at RCW 69.51A.040).

Our conclusion is consistent with legislative history. While our legislature initially sought to prohibit searches for evidence of marijuana-based crimes unless supported by probable cause of some MUCA noncompliance, those provisions were eventually removed or vetoed. *Compare* S.B. 5073, §§ 401, 901, 904, 62d Leg., Reg. Sess. (Wash. 2011), *and* ENGROSSED SECOND SUBSTITUTE S.B. 5073, §§ 401, 901-902, 62d Leg., Reg. Sess. (Wash. 2011), *with* LAWS OF 2011, ch. 181, §§ 401, 901, *and* Veto Message on Engrossed Second Substitute S.B. 5073, from Governor Christine Gregoire to the President and Members of the Senate (Apr. 29, 2011), *reprinted in* LAWS OF 2011, at 1374-76. Consequently, the MUCA exception applies to marijuana-based arrests, prosecutions, and criminal sanctions, but not searches. *See* RCW 69.51A.040; S.B. REP. on Engrossed Second Substitute S.B. 5073 as Amended by the House on Apr. 11, 2011, at 7, 62d Leg., Reg. Sess. (Wash. 2011); Veto Message on Engrossed Second Substitute S.B. 5073, *supra*.

Considering all, we hold an affidavit supporting a search warrant presents probable cause to believe a suspect committed a CSA violation where, as here, it sets forth enough details to reasonably infer the suspect is growing marijuana on his or her property. The affidavit need not also show the MUCA exception's inapplicability. In so holding, we respectfully disagree with *United States v. Kynaston*, No. CR-12-0016-WFN, slip op. at 2 (E.D. Wash. May 31, 2012) (granting a suppression motion and

concluding that under Washington law, an affidavit supporting a search warrant for evidence of a marijuana-based crime "must show probable cause that the criteria of the medical marijuana exception have not been met"), *rev'd*, No. 12-30208 (9th Cir. July 24, 2013). Here, the trial court did not err in denying Mr. Ellis's suppression motion.

Affirmed.

Brown, J.

I CONCUR:

Siddoway, A.C.J.

FEARING, J. (concurring) – I agree with the dissenting opinion in *State v. Fry*, 168 Wn.2d 1, 20, 228 P.3d 1 (2010)(Sanders, J., dissenting). One's growing of marijuana should not support probable cause to search one's property when one possesses authorization to grow the plant for medicinal purposes.

RCW 69.51A.040 now reads, "The medical use of cannabis . . . does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions . . . ." Nor may the medicinal user or provider have his or her "real or personal property seized or forfeited[,]" provided the user or provider complies with all other provisions of the medical marijuana law. RCW 69.51A.040. Here, when Deputy Mark Benner approached Daniel Ellis' home, Ellis was absent and could not present Deputy Benner authorization papers. But the deputy, before seeking a warrant, could have investigated the legality of Ellis' growing marijuana. Benner could have returned to the home later and asked Ellis to show his authorization to grow.

In 1998, the voters of Washington approved Initiative 692, the Washington State Medical Use of Marijuana Act (MUMA), chapter 69.51A RCW. The people found that "humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual

decision, based upon their physician's professional medical judgment and discretion." MUMA, LAWS OF 1999, ch. 2, §§ 1-2 (now codified as amended at RCW 69.51A.005). For patients to smoke marijuana, someone must grow the plant.

Washington medicinal marijuana law reflects the unamerican principle that the innocent user or grower carries the burden of establishing his or her guiltlessness. In *Fry*, a plurality of the court recognized that authorization to grow marijuana is "[a]n affirmative defense [that] admits the defendant committed a criminal act but pleads an excuse for doing so." 168 Wn.2d at 7 (J.M. Johnson, J., lead opinion). The accused may present authorization as a defense only after being "charged with a violation." *Id.* at 9. Because authorization to grow medicinal marijuana does not negate probable cause, law enforcement may treat a medical marijuana grower or user as a criminal suspect through searches of his or her property, despite the grower or user not being guilty of a crime. *Id.* at 6. Thus, under the current state of the law, law enforcement could search a medicinal grower's property every day and impose upon the grower the burden of proving his or her innocence to avoid arrest, prosecution, or other criminal sanctions. Humanitarian compassion takes a back seat.

MUMA has not changed to the benefit of Daniel Ellis since the *Fry* decision. In 2011, the State legislature adopted a comprehensive amendment to the law that, among other things, provided for licensing of marijuana producers with the Department of Agriculture and required a law enforcement officer to ascertain whether the person or

location under investigation was registered with the Department before obtaining a search warrant. S.B. 5073, § 902(1), 62d Leg., Reg. Sess. (Wash. 2011). But Governor Christine Gregoire vetoed section 902 of the bill, based upon a justifiable concern that state employees might be prosecuted under federal law for aiding in the production of a controlled substance. Veto Message on Engrossed Second Substitute S.B. 5073, from Governor Gregoire to the President and Members of the Senate (Apr. 29, 2011), *reprinted in* LAWS OF 2011, at 1374-76. Washington Initiative 502, LAWS OF 2013, ch. 3 (codified in chapters 46.04, 46.20, 46.61, and 69.50 RCW), may temper, but it will not erase the discordant provisions of the State's medical marijuana law. MUMA will continue to exist aside the limited legalization of marijuana, because MUMA's provisions target exclusively medicinal, not recreational, users. *See* Vitaliy Mkrtchyan, Note, *Initiative 692, Now and Then: The Past, Present, and Future of Medical Marijuana in Washington State*, 47 GONZ. L. REV. 839, 873 (2012).

As a member of the Court of Appeals, I defer to the decisions of the state Supreme Court. Although I disagree with the lead opinion in *Fry*, it provides the answer to the question of whether the warrant to search Daniel Ellis' home was based upon probable

cause and answers the question in the affirmative. Therefore, I must concur in our majority's affirmation of Daniel Ellis' conviction for an unrelated crime.

Fearing, J.

I CONCUR:

Siddoway, A.C.J.