No. 90731-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ADRIANE CONSTANTINE,

Respondent.

ON STATE'S PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION III, 31313-1-III

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Jack Burchard

BRIEF IN RESPONSE TO STATE'S PETITION FOR REVIEW AND OBJECTION TO ENLARGING TIME TO PETITION FOR REVIEW

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A. SUMMARY OF ARGUMENT

The Court of Appeals' decision was not timely petitioned for review and does not merit review under RAP 13.4(b). The Court followed existing precedent by holding that live medical testimony from a patient's physician is unnecessary to submit a "designated provider" defense to a jury. The writings that designated the defendant as a provider of medical marijuana to a particular patient, along with the physician's written statement that he believed the benefits of marijuana use for the patient outweighed the risks, met the affirmative defense requirements. The remaining criteria of the defense were either uncontested or properly labeled by Division Three as factual decisions for the jury.

If this Court does accept review, Ms. Constantine asks this Court to also review Division Three's analysis of the designated provider defense insofar as the Court suggested that the defendant must prove she was treating a "qualifying patient" based on records from the patient's health care custodian. (Majority Ruling pgs. 15-17, FN3 and FN4) Ms. Constantine also asks this Court, if review is granted, to address the excessive jury fee of $2,343.48 that was imposed.

B. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should deny review because the State's petition was untimely.

Issue 2: Whether this Court should deny review because the Court of Appeals' decision remains consistent with settled law allowing a designated provider defense to go to a jury for its factual determinations, even absent live medical testimony on the patient's medical conditions.

Issue 3: Whether, if review is granted, this Court should also review Division Three's analysis suggesting that the designated provider must prove her patient is a "qualifying patient," and that medical records of such should be offered through the patient's health care records custodian.

Issue 4: Whether, in the event that review is granted, this Court should also direct that any jury fee be capped at $250.

C. RE-STATEMENT OF THE CASE

On June 30, 2010, drug task force agents flew over a property in rural Okanogan County that belonged to Morgan Davis and saw marijuana plants in a greenhouse. (RP 28, 31, 39-41, 404, 406, 407, 421, 487) The following week, officers seized over 121 marijuana plants and other paraphernalia from the home and outbuildings; Mr. Davis and his wife, Adrianne Constantine, were arrested for manufacturing marijuana. (RP 46, 72, 124, 130, 140, 126, 408, 410-15, 420, 426-27, 440, 446-49, 453-54, 467-69, 482; CP 150-52)

At trial, Ms. Constantine sought to offer an affirmative designated provider defense to the jury. She indicated that 15 of the plants were segregated from the others for her to provide medical marijuana to patient Tristan Gilbert, and that the rest belonged to her husband. (RP 345-46) She also offered proof that she was over 18 years old (CP 71), that Mr.

Gilbert gave her written designation to serve as his designated provider (CP 67), that certain plants were grown for Mr. Gilbert's sole use (RP 286-88), and that the patient had this written medical authorization:

> I, Thomas Orvald, am a physician licensed in the State of Washington. I am treating the above named patient [Tristan Gilbert] for a terminal illness or a debilitating condition as defined in RCW 69.51A.010._ I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that the potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient.

(CP 66, 69) Ms. Constantine, her husband and Mr. Gilbert were all prepared to testify to this same information. (RP 507-08, 514-15)

The trial court refused to allow the "designated provider" defense without live medical testimony about Mr. Gilbert's particular medical condition to prove he was a "qualifying patient." (CP 51-52) Division Three reversed this decision and remanded for a new trial. (Div. 3, Ruling on 7/31/2014, hereafter "Majority Ruling") The State's petition for review was officially filed one day after it was due.

D. ARGUMENT

Issue 1: Whether this Court should deny review because the State's petition was untimely.

The State's petition for review was filed after the Court's 4:30 p.m. filing deadline on the date it was due, which made the official date of

filing one day late. After prompting from this Court, the State moved to extend the date for filing by one day. The entire basis for the request was:

> "The attorney for Petitioner was in court until late in the day on the last date to file the Petition and was not able to file the Petition until returning from court."

(Petitioner's Motion for Extension of Time to File Petition for Review)

The State's petition for review was due within 30 days of the Court of Appeal's decision. RAP 13.4(a). Division Three warned by letter that any petition for discretionary review must be timely "received (not mailed) on or before the dates they are due." (See Appendix A)

The time to file a petition for review should only be extended "in extraordinary circumstances and to prevent a gross miscarriage of justice..." RAP 18.8(a). "The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section." RAP 18.8(b). Courts have found extraordinary circumstances where the filing "despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 765-66, 764 P.2d 653 (1988).

The State offered no extraordinary circumstance for its late filing or any explanation as to how an extension was necessary to prevent a gross miscarriage of justice. Instead, the State simply indicated that the

petition was not filed on time because the prosecutor returned late from court to perform the filing. This statement does not show reasonable diligence by the State to meet the filing deadline, excusable error or circumstances beyond the party's control. Instead, the prosecutor's statement implies that the petition for review was already drafted and all that remained was for the prosecutor to return from court and e-file the document from his computer. The State offered no extraordinary reason as to why the petition was not filed before the prosecutor went to court or why it could not have been filed by another office staff member.

There is no showing of reasonable diligence, excusable error or circumstances beyond the State's control. The State has offered no legal basis to justify the late filing, let alone suggested any miscarriage of justice would occur if this Court rejects the petition as untimely. The State's motion to extend does not meet RAP 18.8(b) and should be denied.

Conversely, enlarging the time to appeal in this case would constitute a miscarriage of justice to the appellate system in general and to the Respondent specifically. If filing deadlines were of no importance, and missing filing deadlines of no consequence, this Court would likely not have asked for the State to justify its late filing in writing or invited this response. Granting an extension on the basis offered by the prosecutor in this case invites abuse of the system. Furthermore, Ms.

Constantine is entitled to an end to her day in court, which had presumptively been achieved when the time for filing the petition for review lapsed. *See Reichelt*, 52 Wn. App. at 766n.2 ("[T]he prejudice of granting such motions would be to the appellate system and to litigants generally, who are entitled to an end to their day in court.")

The State's petition was untimely, and no extension is warranted.

Issue 2: Whether this Court should deny review because the Court of Appeals' decision remains consistent with settled law allowing a designated provider defense to go to a jury for its factual determinations, even absent live medical testimony on the patient's medical conditions.

If this Court enlarges the State's time for petitioning for review, the petition for review should be denied on its merits.

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

The State's petition does not identify under which of the above criterion it seeks review. The State alleges that the Court of Appeal's decision "undermines statutory requirements" and conflicts with cases generally pertaining to proof of affirmative defenses. (See State's Petition

for Discretionary Review, hereafter PDR, pg. 7, *passim*) However, none of these assertions allege or establish that the Court of Appeals' decision actually merits review under the standards set forth in RAP 13.4(b)(1)-(4).

The Court of Appeals' ruling is consistent with case law, the Medical Marijuana Act, and legislative intent in that a designated provider need not prove a qualifying patient's particular terminal or debilitating condition in order to raise the designated provider affirmative defense before the jury. The Court of Appeals aptly wrote:

> The legislature chose to allow designated providers to rely upon a signed medical authorization without also requiring such providers to suffer criminal penalties if their reliance was misplaced... Whether the [qualifying patient's] diagnosis is correct or true is not relevant. Because the correctness or the truth of the diagnosis is not relevant, the court erred in requiring Dr. Orvald to testify.

(Majority Ruling pg. 15-16)

A defendant provider need not prove her patient's health condition for her own "designated provider" defense. Designated providers and qualifying patients have distinct burdens for proving their respective defenses. These distinct burdens are for good reason: while a qualifying patient may be required to prove his particular medical condition, designated providers are neither required to do the same nor in a position to offer such proof due to patient confidentiality laws. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009) (disclosure of the patient's

specific medical condition to the designated provider "...may conflict with one or more purposes of the patient-physician confidentiality statute.")

> [T]he people of the state of Washington intend that:
>
> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their health care professionals, may benefit from the medical use of marijuana shall not be found guilty of a crime under state law for their possession and limited use of marijuana.
>
> Persons who act as designated providers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana.

Former RCW 69.51A.005 (2010) (emphasis added).[1]

To establish an affirmative marijuana defense, a "qualifying patient" or "designated provider" must meet "the requirements appropriate to his or her status under this chapter..." RCW 69.51A.040(2) (2007) (emphasis added). The qualifying patient or designated provider shall:

> (a) Meet all criteria for status as a qualifying patient **or** designated provider;
>
> (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

[1] The parties and courts below appear to have inadvertently referenced only the 2007 version of the Medical Marijuana Act. But amendments were made to some parts of this Act, effective one month before Ms. Constantine's arrest. *See* Laws 2010, ch. 284, § 1 (eff. 6/10/2010); Substitute S.B. 5798, 61st Leg. , Reg. Sess. (WA 2010). The 2010 changes do not effect this appeal, as the 2010 amendments did not alter the "designated provider" definition in RCW 69.51A.040 (2007), the issue before this Court. The amendments changed the term "physician" to "health care professional" and added or amended definitions for "health care professional," "tamper resistant paper," and "valid documentation." See RCW 69.51A.005, .030, .060 (2010) and RCW 69.51A.010(2), (5), (7) (2010).

(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.

RCW 69.51A.040(3) (2007) (emphasis added).

The Court of Appeals correctly held that subsection (b) above should not have prevented Ms. Constantine's affirmative "designated provider" defense from going before a jury. As to subsection (b) – whether the amount of marijuana exceeded a proper 60-day supply – Division III correctly ruled that this is an issue of fact for the jury to decide. (Majority Ruling, pg. 17-18) Ms. Constantine asserted that she was responsible for 15 of the plants that were segregated from the rest of the 121 plants that belonged to her husband. Division Three followed existing precedent[2] and held that only a jury could decide if the defendant had too many plants to maintain her designated provider defense.

Similarly, although Division Three did not address subsection (c) of RCW 69.51A.040(3)– whether Ms. Constantine presented valid documentation to any law enforcement official who questioned the

[2] *See Otis*, 151 Wn. App. at 582 (whether 75 plants was too many to prevail on the affirmative defense was a factual issue that would be decided by the jury); *State v. Adams*, 148 Wn. App. 231, 198 P.3d 1057 (2009) (40 plants did not prevent the affirmative defense from going to the jury); *State v. Ginn*, 128 Wn. App. 872, 117 P.3d 1155 (2005) (23 marijuana plants confiscated and defense still permitted); *State v. Hanson*, 138 Wn. App. 322, 157 P.3d 438 (2007) (defense allowed even though 34 plants had been seized;) *State v. Brown*, 166 Wn. App. 99, 104, 269 P.3d 359 (2012) ("[T]rial courts may not weigh conflicting issues of fact to deny a defendant the opportunity to present a medical marijuana defense..."); *State v. Fry*, 168 Wn.2d 1, 11, 228 P.3d 1 (2010) (viewing evidence in favor of defendant, he must only make prima facie showing [of the affirmative defense] in order to submit the defense to jury).

provider regarding her use of marijuana – this too was an issue of fact for the jury to decide. Ultimately, there were no facts to suggest that Ms. Constantine was ever asked to present valid documentation as a designated provider to any law enforcement officer. Therefore, her obligation to provide such documentation under RCW 69.51A.040(3)(c) never arose. *See Hanson*, 138 Wn. App. at 324; *Adams*, 148 Wn. App. at 236.

Having satisfied subsections (b) and (c) of RCW 69.51A.040(3), all that remained for Ms. Constantine's prima facie showing of her medical marijuana defense was for her to meet subsection (a) – i.e., "meet all criteria for status as a qualifying patient **or** designated provider." RCW 69.51A.040(2)(a) (emphasis added). The criteria for status as a "designated provider" is set forth in RCW 69.51A.010(1) (2007) (2010 version is the same). A "designated provider" means a person who:

> (a) Is eighteen years of age or older;
>
> (b) Has been designated in writing by a patient to serve as a designated provider under this chapter;
>
> (c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and
>
> (d) Is the designated provider to only one patient at any one time.

RCW 69.51A.010(1) (2010).[3]

[3] C.f. RCW 69.51A.010(4) (2010) (setting forth the distinct criteria for meeting criteria for status as a "qualifying patient," including that the person "(a) Is a patient of a health

The only "designated provider" criterion that would seemingly be at issue in this case is subsection (b) above. Subsections (a), (c), and (d) were not contested below or on appeal; moreover, Ms. Constantine offered evidence that she was over 18 years of age, 15 of the marijuana plants were segregated for Mr. Gilbert's medical use, and Ms. Constantine only offered herself as a designated provider to this single patient. The remaining criterion for asserting a designated provider defense is whether Ms. Constantine was "designated in writing by a patient to serve as a designated provider under this chapter." RCW 69.51A.010(1)(b).

Ms. Constantine met this final criterion of RCW 69.51A.010(1)(b) and should have been able to present her designated provider defense to the jury. Ms. Constantine offered a written designation provided to her by Mr. Gilbert, designating her as his provider for medical marijuana. (CP 67) She also offered a copy of Mr. Gilbert's written authorization form, signed by Dr. Orvald, for Mr. Gilbert's medical use of marijuana. (CP 66, 69) The medical authorization form indicated that Dr. Orvald was treating patient Tristan Gilbert for a terminal illness or a debilitating condition as

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care professional; (b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition; (c) Is a resident of the state of Washington at the time of such diagnosis; (d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana."

defined by RCW 69.51A.010 and that he had discussed the risks and benefits of such with the patient.

This evidence was sufficient to satisfy RCW 69.51A.010(1)(b). Ms. Constantine provided a "writing" whereby a "patient" designated her to provide his medical marijuana, along with "valid documentation" from Mr. Gilbert's physician that the patient "may benefit from the medical use of marijuana." *Otis*, 151 Wn. App. at 582 (documentation requirement satisfied by "a written statement that generally convey[ed] a physician's professional opinion that the benefits of the medical use of marijuana outweigh the risks for a particular patient.."); *Accord*, RCW 69.51A.010(7) (2010). All of the criteria for submitting the designated provider defense to the jury were met in this case. The Court of Appeals' decision to remand for a retrial so that Ms. Constantine may present her "designated provider" defense to the jury does not require review.

Division Three's decision aligns with existing precedent insofar as it held that proof of Mr. Gilbert's particular medical condition with testimony from the diagnosing physician was not required for Ms. Constantine's designated provider defense. (Majority Ruling, pg. 15-16) Indeed, no known appellate cases have ever required a designated provider to call his or her patient's health care professional to testify to that patient's specific medical condition. As properly acknowledged by

Division Three, the designated provider is permitted to rely on the writing from the patient without independently investigating the medical bases for the health care professional's diagnosis. (Majority Ruling, pg. 15-16) *Accord Brown*, 166 Wn. App. at 105-06 (prima facie showing met for designated provider defense, including the writing requirement, where, like here, defendant provided written documentation of medical marijuana "prescriptions" and signed designated provider form).

Division Three's decision to not require live medical testimony from the patient's physician regarding the patient's medical condition is consistent with other cases. In *State v. Otis*, live medical testimony was not required; the defendant could present a designated provider defense to the jury with a letter from the patient's doctor that he was treating the patient, had discussed use of medical marijuana with the patient, and believed the benefits of medical marijuana use outweighed the risks. 151 Wn. App. at 575. The patient there, like here, was also prepared to submit evidence of his particular medical conditions if necessary. *Id.*

Similarly, in *State v. Ginn*, the State argued that live medical testimony was necessary to support a "qualifying patient"[4] affirmative defense. 128 Wn. App. at 882-83. Even there, where the patient would have had the ability to waive physician-patient confidentiality for his own

[4] Note: the "qualifying patient" and "designated provider" defenses are distinct.

defense, the Court still did not require live medical testimony. The Court allowed the defense even without medical testimony; the defendant could rely on statements in the medical marijuana authorization forms to satisfy a "qualifying patient" affirmative defense criteria. *Id.*

In sum, live testimony by the patient's health care professional has not been required for either "qualifying patient" or "designated provider" defenses; Division Three's decision is consistent with the law and does not merit review under RAP 13.4(b)(1), (2) or (3).

Review is also not warranted under RAP 13.4(b)(4) as a matter of substantial public interest. This case involves a highly particularized set of facts. The Medical Marijuana Act has been amended several times, including since Ms. Constantine's alleged criminal act. The particular statute addressing "qualifying patients" and "designated providers" defenses has been significantly amended. *C.f.* RCW 69.51A.040 (2007) with RCW 69.51A.040 (2011). To utilize the affirmative defense, designated providers must meet the definition for a designated provider, which has not changed since 2007 (RCW 69.51A.010(1)) and now further satisfy the new requirements of RCW 69.51A.040 (2011), including special registry requirements. Given that the designated provider laws have changed so significantly, further guidance from this Court based on

this relatively outdated case is not needed as a matter of substantial public interest. Review is, thus, also not warranted under RAP 13.4(b)(4).

Issue 3: Whether, in the event review is granted, this Court should also review Division Three's analysis where it suggested that the designated provider must prove her patient is a "qualifying patient" with medical records offered through the patient's health care records custodian.

The Court of Appeals and trial court assumed, apparently relying on a pattern jury instruction,[5] that Ms. Constantine had to prove she was providing marijuana to a "qualifying patient"[6] rather than just prove she had been "designated in writing by a patient[7] to serve as a designated provider" as set forth in RCW 69.51A.010(b). (Majority Ruling pgs. 8, 15) To support this assumption, Division Three relied on RCW 69.51A.040(3), but this statute simply indicates that the defendant had to prove she was a "qualifying patient" or a "designated provider," not that she is a designated provider to a qualifying patient. Division Three also cited *State v. Ginn*, 128 Wn. App. at 879 (Majority Ruling pg. 15) for its opinion that the defendant had to prove Mr. Gilbert was a "qualifying patient," but *Ginn, supra*, is distinguishable. That case involved a

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[5] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 52.11, at 1014 (3d ed. 2008) (designated provider defense, 2008 version same as current WPIC 52.11).
[6] "Qualifying patient" is defined in RCW 69.51A.010(4) (2010), as set forth in FN3.
[7] C.f. RCW 69.51A.040(3) (requires proof of defense as "qualifying patient" or "designated provider"); RCW 69.51A.010(1)(b) ("designated provider" definition references "patient," not "qualifying patient" like does its interpreting counterpart in WPIC 52.11).

defendant asserting a "qualifying patient" defense for his own marijuana use, not a defendant asserting a "designated provider" defense.

It is not clear from either RCW 69.51A.040(3) or *State v. Ginn, supra*, that "[o]ne asserting the designated provider affirmative defense must make a prima facie showing that he or she was assisting a 'qualifying patient.'" (Majority Ruling, pg. 15) On the other hand, there are no known cases addressing whether "qualifying patient" is a term of art or means the same thing as "patient" under the Medical Marijuana Act.

If review is granted, Ms. Constantine would argue that a designated provider is not required to prove that her patient was a "qualifying patient." *State v. Slattum*, 173 Wn. App. 640, 649, 295 P.3d 788 (2013) ("Statutory interpretation begins with the statute's plain meaning.") Instead, Ms. Constantine was only required to prove that she was "designated in writing by a patient to serve as a designated provider..." (RCW 69.51A.010(b) (emphasis added). Ms. Constantine's defense was supported by the written designation from Mr. Gilbert and his medical authorization form as a "patient" of Dr. Orvald. The plain meaning of the statute did not require the designated provider to prove the term of art "qualifying patient" as defined in RCW 69.51A.010(4).

If Division Three did correctly interpret the designated provider statute so that "patient" means "qualifying patient," the Court then

correctly limited its holding to not require proof of the patient's underlying medical condition in order to qualify as a designated provider. Requiring proof of the underlying medical condition would have exceeded the scope of the statute and legislative intent and run afoul of patient confidentiality rules. See *Otis*, 151 Wn. App. at 578.

Not requiring evidence from the health care professional regarding the medical condition is also consistent with other sections of the Medical Marijuana Act, such as RCW 69.51A.040(3)(c) (2007) and RCW 69.51A.010(5) and (7) (2010).[8] These statutes imply that the designated provider can rely on an untampered medical authorization form without verifying the veracity of its contents (or later obtaining testimony of the same) from the health care professional.

Designated providers may rely on written designations from patients and authorization forms from health care professionals without investigating the confidential medical issues a patient may face. Indeed, the term "primary caregiver" was replaced with "designated provider" in the Medical Marijuana Act in 2007 in order to make it clear that the "'designated providers' are not expressly responsible for the house, health,

[8] RCW 69.51A.040(3)(c) (2007) and RCW 69.51A.010(5) and (7) address the "valid documentation" that must be provided by a designated provider when asked by law enforcement, valid documentation meaning a "statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana.")

or care of a patient." Sub. H.B. Report on E.S.S.B. 6032, 60th Leg. Reg. Sess. (Wash. 2007).[9] The Legislature maintained that the designated provider would still need to possess a written designation from the patient to rely on their defense, which Ms. Constantine did here. *See* Sub. H.B. Report, *supra*, pg. 2; Final Bill Report on E.S.S.B. 6032, at pg. 1.

Assuming Ms. Constantine had to prove Mr. Gilbert was a "qualifying patient" under RCW 69.51A.010(4) (2010), Division Three correctly found the medical authorization from Dr. Orvald was sufficient. That signed form met each criteria of the qualifying patient definition by showing that Mr. Gilbert was Dr. Orvald's patient, the doctor was treating him for a terminal illness or debilitating condition as defined in RCW 69.51A.010, the doctor had advised about the risks and benefits of medical use of marijuana, and the doctor advised Mr. Gilbert that he may benefit from the medical use of marijuana. (CP 66, 69) The very language of RCW 69.51A.010 did not require Ms. Constantine to prove a particular medical condition, but that Mr. Gilbert had been diagnosed as having such condition, which Dr. Orvold's medical authorization form satisfied. *Accord Fry*, 168 Wn.2d at 18, 23.

[9] E.S.S.B. 6032, 60th Leg., Reg. Sess. (Wash. 2007), Reports and Public Hearings available at: http://apps.leg.wa.gov/billinfo/summary.aspx?year=2007&bill=6032 (last visited 10/23/2014)

On the other hand, contrary to Division Three's suggestion in its footnotes (Majority Ruling pgs. 16-17, FN 3 and FN4), the testimony of a medical records custodian was no more required than live testimony from the health care professional himself on the above issues. By the plain words of the statute, a designated provider simply needs a writing from the patient, not a writing directly from the health care provider or records custodian. The issue is not whether the content of the authorization form is correct, which could raise hearsay concerns but for the records custodian testifying. Instead, the issue is whether the designated provider was provided that same writing by the patient (which does not raise hearsay concerns since the truth of the contents are not at issue). Division Three correctly recognized that a designated provider can rely on the patient's written form, even if misplaced. (Majority Ruling pg. 16) But it then improperly suggested that the designated provider needed to call a medical records custodian to introduce the authorization form, which oversteps the intent of the Legislature and patient confidentiality rights.

Ultimately, Division Three's decision does not meet the criteria for review under RAP 13.4(b), since it properly held that testimony is not required from the patient's health care professional to submit a designated provider defense. But if review is granted, Ms. Constantine asks that this Court address what could be termed dicta in the Court's footnotes 3 and 4

where the majority responded to the dissenting judge's arguments pertaining to medical records custodians.

Issue 4: Whether, in the event that review is granted, this Court should also direct that any jury fee be capped at $250.

If review is granted, Ms. Constantine asks that this Court address the excessive jury fee of $2,343.48 that was imposed, directing that any jury fee be capped at the legal maximum of $250. *See* RCW 10.01.160(2); RCW 10.46.190; RCW 36.18.016; 13B Wash. Prac. §3612; *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812, *review denied*, 177 Wn.2d 1021 (2013); (State's Response Brief conceding error, pg. 31). Division Three reversed Ms. Constantine's conviction and did not reach the issue.

E. CONCLUSION

Based on the foregoing, Ms. Constantine requests that this Court deny the State's petition for review as untimely or not meeting the requirements of RAP 13.4(b). Or, if review is granted, Ms. Constantine asks that this Court address the additional issues set forth herein.

Dated this 28th day of Oct., 2014.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918
Attorney for Respondent

APPENDIX
(COURT'S LETTER ACCOMPANYING RULING)

Renee S. Townsley
Clerk/Administrator

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July 31, 2014

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CASE # 313131
State of Washington v. Adriane Constantine
OKANOGAN COUNTY SUPERIOR COURT No. 101001521

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

RST:
Enc.

c: **E-mail** Hon. Jack Burchard
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FILED
JULY 31, 2014
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,	)	No. 31313-1-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED
	)	IN PART
ADRIANE CONSTANTINE,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — During a helicopter flyover of property located on Reevas Basin Road near Tonasket, Washington, law enforcement observed at least 20 marijuana plants growing in a partially uncovered greenhouse. The property belonged to Morgan Davis, husband of Adriane Constantine. An Okanogan deputy sheriff obtained a warrant to search two greenhouses, a house, and a shed on the property. The search uncovered numerous marijuana plants in the greenhouses. In the home, the officers found processed marijuana and distribution paraphernalia. Ms. Constantine was charged with and found guilty of manufacture of marijuana. Ms. Constantine appeals, contending the officers lacked probable cause to search the house because officers failed to establish a nexus between the marijuana in the greenhouses and the house. She also contends that

the court erred by requiring the testimony of Dr. Thomas Orvald before it would instruct the jury on her medical marijuana affirmative defenses.

We conclude that there was a sufficient nexus between the greenhouses and the house to support probable cause to search the house. We determine that Ms. Constantine raised only the designated provider medical marijuana affirmative defense, and conclude that the trial court erred by requiring Dr. Orvald to testify as a prerequisite to allowing Ms. Constantine to raise this defense. Specifically, the medical marijuana laws do not require Ms. Constantine to prove that the patient to whom she is a provider have a specific terminal or debilitating medical condition; rather, the laws require that she prove that such patient *was diagnosed* by a physician as having a terminal or debilitating medical condition. Because the testimony of the diagnosing physician is not necessary to establish this, we reverse Ms. Constantine's conviction.

FACTS

On June 30, 2010, Detective Jan Lewis of the North Central Washington Narcotics Task Force and Deputy Terry Shrable of the Okanogan County Sheriff's Office flew in a helicopter over property located near Tonasket, Washington. The officers observed two greenhouses. One greenhouse was partially uncovered, revealing approximately 20 large growing marijuana plants. The officers noted other buildings on the property, including a

small stick built house located just east of the greenhouses and a small stick built shed west of the greenhouses. Officers confirmed that the address of the property was 44 Reevas Basin Road and that it was owned by Mr. Davis.

Detective Lewis flew over the property again on July 6. The tops of the greenhouses were covered with plastic, but the detective saw dark green coloring through the plastic. Detective Lewis believed the green color to be growing marijuana plants.

The next day, Detective Lewis obtained a warrant to search the two greenhouses, the house, and the shed on Reevas Basin Road. The search warrant authorized searching for evidence of manufacturing marijuana, including books, records, receipts, ownership of the residence, and identifying information. In addition to a narrative of events by Detective Lewis, the warrant included an aerial photograph of the property taken during the July 6 flyover. The affidavit stated, "In this photo you can clearly see the green houses to the left of the house. The larger of the two green houses was half opened when the initial flight was done. This is the one that I could see growing marijuana plants in. Everything in the photo including the outbuildings is on the same parcel of property. There are no other driveways or houses except for the one in the photo that have access to these marijuana plants." Clerk's Papers (CP) at 167.

On July 8, officers executed the search warrant. Upon arrival at the property, officers made contact with Ms. Constantine outside of the residence. Officer Steve Brown told Ms. Constantine that the officers were executing a search warrant on the home and informed her of the purpose of the search. Both before and after execution of the warrant, Ms. Constantine told the officers that she knew the law, had a marijuana card, and wanted a lawyer. Ms. Constantine asked Officer Brown to retrieve her medical marijuana card from inside the house. The officer declined and advised her of her *Miranda*[1] rights. Officer Brown told Ms. Constantine that the medical marijuana card would not make a difference because there were too many plants. The officer did not further question Ms. Constantine, but she continued to make statements without being questioned. Ms. Constantine's medical marijuana card was found in her purse during the search of the house.

Officers located approximately 121 growing marijuana plants. The plants were primarily found in the greenhouses, with the exception of a few plants found growing outside. Inside the residence, officers found various quantities of processed marijuana, packaged marijuana, marijuana seeds, paperwork, receipts, cash, an electronic scale, and packaging material. In the small shed, officers found several dried marijuana plants.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Ms. Constantine was arrested and charged with one count of manufacture of marijuana under RCW 69.50.401(1). She moved to suppress the evidence found in the house and the shed. She argued that the officers lacked probable cause to search the house and shed because there was no nexus between the greenhouses and the house and shed.

The trial court denied the motion. The court concluded that a clear legal nexus existed between the house, greenhouses, outbuildings, and immediate surrounding areas. In support of this conclusion, the court found that the photograph and the testimony showed the land, house, greenhouses, garden area, and outbuildings all within a clearly defined living compound. Additionally, the residence was approximately 50 to 70 feet from the greenhouses and there were no other houses nearby. The buildings were well separated from other structures or homes; the nearest other structure to the property was over 700 yards away. Also, only one access road approached the property and ended on the property.

Months prior to trial, the State filed a motion in limine. One aspect of the motion in limine sought to suppress any reference to a medical marijuana defense for Ms. Constantine, either as a designated provider or as a qualifying patient. Ms. Constantine asserted a designated provider defense, but not a qualifying patient defense. To support

the designated provider defense, Ms. Constantine presented only three documents: (1) A medical marijuana authorization for Tristan Gilbert, signed by Dr. Thomas Orvald; (2) A document signed by Mr. Gilbert naming Ms. Constantine as his designated provider for supplying his medical marijuana; and (3) A verification from the Washington State Department of Health confirming that Dr. Orvald was a licensed physician in the state of Washington during the relevant time period.

The medical marijuana authorization, signed by Dr. Orvald, stated that Mr. Gilbert was his patient, that he had diagnosed Mr. Gilbert with a terminal illness or debilitating condition as defined by RCW 69.51A.010, that he had advised Mr. Gilbert of the potential risks and benefits of the medical use of marijuana, and that in his opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks. Ms. Constantine did not submit any medical records that identified the nature of Mr. Gilbert's illness or condition. Moreover, the medical marijuana authorization signed by Dr. Orvald did not specify the nature of Mr. Gilbert's illness or condition, nor did it identify what if any medical records were reviewed by Dr. Orvald prior to him signing the medical authorization. The designation of provider authorization included a limit of 15 plants and was in effect at the time of the search of Mr. Davis's property.

Even though Ms. Constantine stated in her motion that she was not asserting an affirmative defense based on her individual status as a qualifying patient, she nevertheless presented two authorization documents to establish her qualifying use. Both authorizations stated that Ms. Constantine was being treated for a terminal illness or debilitating condition. The first authorization was signed by Dr. Orvald and was effective from March 2, 2009 to March 2, 2010. The second authorization was signed by Dr. Jason Ling and was effective from August 23, 2010 to August 23, 2011. Neither document was in effect at the time of the July 8, 2010 search. Also, neither document listed Ms. Constantine's illness nor her condition.

During the motion in limine argument, defense counsel addressed the discrepancy between the 121 marijuana plants found and the 15 plants that the defendant was permitted to grow for Mr. Gilbert:

> Basically with regard to the designated provider defense, my client would . . . offer, by way of proffer, that [she] . . . was responsible for growing the 15 plants [for] Mr. Gilbert—they never went to fruition . . . . But that's—the 15 plants were hers and the other plants were [her husband's].
>
> . . . .
>
> . . . I think there was a distinction . . . in the way they were lined up out there.

RP at 345-46.

The court found that the Washington Pattern Jury Instructions Criminal 52.11 set out the six elements of the designated provider defense.[2] The court noted that Ms. Constantine was required to prove that Mr. Gilbert was a qualifying patient, which in turn required proof that he had been diagnosed by a physician as having a terminal or debilitating medical condition. *See* RCW 69.51A.010(4).

The court ruled that Ms. Constantine presented questions of fact for most of the six elements, but that the three documents submitted in response to the State's motion in limine were insufficient to prove that Mr. Gilbert was a qualifying patient. The court reasoned:

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[2] It is a defense to a charge of manufacture of [manufacture] of marijuana that:

(1) the defendant is eighteen years of age or older; and
(2) the defendant was designated as a designated provider to a *qualifying patient* prior to assisting the patient with the medical use of marijuana; and
(3) the defendant possessed no more marijuana than necessary for the qualifying patient's personal, medical use for a sixty-day period; and
(4) the defendant presented a copy of the qualifying patient's valid documentation to any law enforcement official who requested such information; and
(5) the defendant did not consume any of the marijuana obtained for the personal, medical use of the qualifying patient for whom the defendant is acting as designated provider; and
(6) the defendant was the designated provider to only one qualifying patient at any one time.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL

> The question is whether medical testimony from the authorizing physician is required to establish [certain] elements of the defense. The medical documents do not speak for themselves. In order to obtain instructions on designated provider, the defendant must provide evidence that Mr. Gilbert was [a] qualifying patient. . . . Mr. Gilbert's testimony and documentation is not sufficient. Medical testimony is required from the prescribing provider. . . . Testimony about the underlying condition and it being a qualifying condition to make Mr. Gilbert a qualifying patient is necessary.
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> . . . .
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> The jury must find the existence of the debilitating or terminal condition. The medical marijuana statute does not overrule the rules of evidence. Separate from the paperwork, there must be proof of the terminal or debilitating condition.
>
> Based on the information provided to the court [in the motion in limine], the court will not instruct on [the] medical marijuana designated provider defense without medical testimony that Mr. Gilbert is a qualifying patient.

CP at 51-52.

Ms. Constantine did not or could not obtain Dr. Orvald's testimony at trial. Rather, Ms. Constantine sought to submit her qualifying patient medical marijuana authorization and designated provider authorization from Mr. Gilbert to Ms. Constantine. The State moved to suppress this evidence. The State contended that the evidence was not needed because there was no ability for Ms. Constantine to get a qualifying patient affirmative defense instruction. Ms. Constantine argued that the evidence explained the story of the search, including Ms. Constantine's words to officers in execution of the

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52.11, at 1014 (3d ed. 2008) (emphasis added).

warrant. The State contended that this effort was a back door approach to raise the affirmative defense without a jury instruction, and that Ms. Constantine had not offered the proof to assert either affirmative defense.

The court granted the motion to exclude the evidence. The court found that Ms. Constantine was not entitled to a qualifying patient affirmative defense because her authorization for her personal use was expired at the time of the search and therefore not valid. For the designated provider defense, the court relied on its earlier ruling on the matter. Even so, the court allowed Ms. Constantine to explain her statements to officers that she wanted to get the card. A jury found Ms. Constantine guilty of manufacture of marijuana.

Ms. Constantine appealed. She first challenges the denial of her motion to suppress the evidence found in the search of the house. She contends that officers lacked probable cause to search the house and shed because there was no nexus between these buildings and the suspected criminal activity observed in the greenhouses. She next challenges the trial court's refusal to give the qualifying patient and designated provider affirmative defense jury instructions. She contends that the evidence was sufficient to submit the affirmative defense instructions to the jury.

ANALYSIS

Probable Cause to Search the House. Review of a probable cause determination has a historical fact component and a legal component. *State v. Emery*, 161 Wn. App. 172, 201-02, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). On matters of historical fact finding, we apply an abuse of discretion standard when reviewing a magistrate's decision on whether information provided in the warrant is reliable and credible. *Id.* at 202. Then, for the legal component, we apply de novo review to determine whether the qualifying information as a whole amounts to probable cause. *Id.* We consider only the information that was available to the issuing magistrate. *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994). "'It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.'" *Emery*, 161 Wn. App. at 202 (alteration in original) (quoting *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004)).

A search warrant may only be issued upon a determination of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists where there are facts sufficient to establish a reasonable inference that the defendant is involved

in criminal activity and that evidence of the criminal activity can be found at the place searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

A warrant is overbroad and violates the particularity requirement if the warrant authorizes police to search persons or seize things for which there is no probable cause. *State v. Maddox*, 116 Wn. App. 796, 806, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d at 499. Probable cause requires not only a nexus between criminal activity and the item to be seized but 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)). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id.* at 147.

Facts that individually would not support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). The application for a search warrant must be judged in the light of common sense, resolving all doubts in favor of the warrant. *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). "Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings

under the defendant's control." *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997).

Here, the nexus requirement is met. The warrant contains information that Mr. Davis, Ms. Constantine's husband, owns and controls the property on which the buildings stand and that the type of evidence sought could be found in the greenhouses, the house, and the shed. The relevant facts are that officers observed at least 20 marijuana plants growing in a greenhouse on Mr. Davis's property. Located close to the greenhouses were a home and a shed. These buildings were on a clearly defined living compound owned by Mr. Davis. Only one road driveway accessed both the greenhouses and the house, and dead ended on the property.

The illegal activity identified in the affidavit is the manufacture of a controlled substance, with intent to deliver marijuana. The affidavit requested a warrant to search the greenhouses, house, and shed for books, records, receipts, notes, ledgers and other papers related to the manufacture and processing of marijuana; for names and addresses of others that may be involved in the illegal possessing and trafficking of marijuana; ownership of the residence; any and all records and receipts showing dominion and control over the house at 44 Reevas Basin Road; and any or all other material evidence in violation of RCW 69.50.401, to include but not limited to drug paraphernalia for

packaging, weighing, distributing, and using marijuana. It is reasonable to believe that items to be seized would be found in the house located adjacent to the greenhouses. It is also reasonable to believe that the house would be used by the persons tending the marijuana in the two greenhouses and would also be used to package and weigh the large amount of marijuana that is grown in the greenhouses.

Despite Ms. Constantine's contention, *Thein* does not control the outcome of her appeal. *Thein* establishes that general statements regarding the common habits of drug dealers are not sufficient to establish probable cause when considered alone. *Thein*, 138 Wn.2d at 150-51. But here, probable cause was supported by more than an implied assumption of where evidence may be kept. It was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on Mr. Davis's ownership and control of the property where both the observed criminal activity and the house were located, the proximity of the home to the criminal activity, and the type of evidence sought in the warrant. We affirm the trial court's determination that the magistrate properly issued the search warrant.

Affirmative Defenses. We note that Ms. Constantine did not assert to the trial court that she was a qualifying patient. She, therefore, waived this affirmative defense. We also note that the trial court did not bar Ms. Constantine from asserting a designated

provider affirmative defense. Rather, it held that the rules of evidence required Ms. Constantine to call Dr. Orvald as a trial witness to establish whether Mr. Gilbert suffered from a terminal or debilitating medical condition.

One asserting the designated provider affirmative defense must make a prima facie showing that he or she was assisting a "qualifying patient." Former RCW 69.51A.040(3) (2007); *State v. Ginn*, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005). A "qualifying patient" means a person who (a) is a patient of a health care professional; (b) *has been diagnosed* by that health care professional as having a terminal or debilitating medical condition; (c) is a resident of the state of Washington at the time of such diagnosis; (d) has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and (e) has been advised by that health care professional that they may benefit from the medical use of marijuana. RCW 69.51A.010(4).

Here, the trial court interpreted RCW 69.51A.010(4) as requiring a defendant to prove that the patient actually have a terminal or debilitating medical condition. However, that subsection does not require this; rather, it requires a defendant to prove that the patient "has been diagnosed" as having a terminal or debilitating medical condition. The legislature, within constitutional limitations, may proscribe what proof is needed for an affirmative criminal defense. The legislature chose to allow designated

providers to rely upon a signed medical authorization without also requiring such providers to suffer criminal penalties if their reliance was misplaced. Here, it is uncontested that Dr. Orvald diagnosed Mr. Gilbert as having a terminal or debilitating medical condition. This diagnosis is sufficient. Whether the diagnosis is correct or true is not relevant. Because the correctness or the truth of the diagnosis is not relevant, the court erred in requiring Dr. Orvald to testify.[3]

The State argues that *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010) requires Ms. Constantine to prove that she had a specific medical condition that qualified under the statute. We disagree. In *Fry*, Mr. Fry was diagnosed by his doctor with various conditions, none of which met that statutory definition. *Id.* at 11-13. The majority opinion did not decide whether a conclusory statement signed by a physician that his patient had a terminal or debilitating medical condition would be sufficient. However, the concurring opinion of Justice Chambers, signed by three other justices, notes that a conclusory statement signed by a physician should be sufficient. *Id.* at 18. This portion of Justice Chambers's concurring opinion was expressly approved by Justice Sanders in

[3] By so holding, we are not inferring that the medical authorization is self-authenticating. The medical authorization is a business record and, unless the prosecutor agrees otherwise, the defendant will be required to have the medical authorization admitted through a custodian of the record. *State v. DeVries*, 149 Wn.2d 842, 846-48, 72 P.3d 748 (2003).

his dissent. *Id.* at 23. Thus, there were five justices who held that a conclusory statement signed by a physician that his patient has a terminal or a debilitating condition should be sufficient.[4]

The State urges us to affirm on the alternative basis that Ms. Constantine possessed much more than 15 marijuana plants, the number permitted under Mr. Gilbert's authorization. We decline to affirm on this alternative basis. Although a defendant must show by a preponderance of the evidence that she or he is entitled to the medical use of marijuana act's defense, when deciding whether to permit an issue to go to the jury, "the trial court must interpret the evidence most strongly in favor of the defendant." *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). Here, during the motion in limine argument, Ms. Constantine asserted that she was responsible for growing only the 15 plants allowed in accordance with Mr. Gilbert's authorization, and that the remaining plants belonged to her husband and were segregated. Because we must interpret the

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[4] The dissent disagrees with this holding. However, as a lower appellate court, we are required to adhere to precedent. Precedent includes a majority of justices, even a majority that is comprised of concurring and dissenting opinions.

The dissent also faults Ms. Constantine for not offering medical records to support her affirmative defense. The dissent's point would be well taken had the trial court permitted such records to establish the nature of the qualifying condition. However, the trial court did not permit this. Rather, it required Ms. Constantine to present medical *testimony* to establish a qualifying condition before it would instruct the jury on the designated provider affirmative defense.

evidence most strongly in favor of Ms. Constantine, given this record, we hold that the number of plants possessed by her is an issue of fact for the jury.

In conclusion, we hold that the trial court erred by requiring Dr. Orvald to testify in support of Ms. Constantine's affirmative defense. We therefore reverse Ms. Constantine's conviction, and remand this case for a new trial.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

Statement of Additional Grounds for Review. Ms. Constantine also filed a pro se statement of additional grounds. Primarily, she challenges the credibility of law enforcement testimony and offers an alternate version of events. These issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence are matters for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d

821, 874-75, 83 P.3d 970 (2004). Ms. Constantine's remaining single statement allegations are either too vague or contain matters outside the record of this case. They do not merit review and will not be addressed.

Lawrence-Berrey, J.

I CONCUR:

Fearing, J.

No. 31313-1-III

KORSMO, J. (dissenting) — The trial court correctly recognized that there needed to be proof of the "terminal or debilitating medical condition." There was no proof, but only the conclusory statement that one existed. There also is no basis for granting a new trial on theories that were not pursued at the first trial. Adriane Constantine was free to offer the doctor's business records at trial through a proper custodian of the record, but she made no effort to do so. Having refused to pursue this approach at trial, she does not get a second trial to attempt to pursue a new defense theory for which she also has not provided a factual basis. In other words, the defendant failed to offer adequate evidence or provide a witness who could offer it. For both reasons, I dissent.

Initially, I take issue with the ruling that the defendant did not have to prove that the "qualifying patient" had been diagnosed with one of the statutory conditions that constitute a "terminal or debilitating medical condition." RCW 69.51A.010(6). The majority focuses on the word "diagnosed" in RCW 69.51A.010(4)(b)[1] while ignoring the remainder of the subsection—what the diagnosis must concern. Whether or not the diagnosed condition is a "terminal or debilitating" one is a question of fact for the jury to

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[1] In pertinent part, RCW 69.51A.010 reads:

(4) "Qualifying patient" means a person who:

. . . .

(b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition.

decide. It is just as much a factual component, subject to jury proof, as the other elements of the defense. The majority correctly concludes that the statute does not require proof that the patient actually has the disease in question, but that conclusion misses the point of the argument. The defendant does not have to show that the diagnosis was accurate, but she does have to show that it involved one of the conditions listed in RCW 69.51A.010(6).[2]

There is no such proof in this case. The salient portion of the medical authorization states: "I am treating the above named patient for a terminal illness or a debilitating condition as defined in RCW 69.51A.010." Clerk's Papers (CP) at 66. Although perhaps the jury could permissibly infer from the word "treating" that a physician must have first "diagnosed" the patient, nothing in this statement conveys what the diagnosis was. Instead, the form simply states the medical professional's (improper) legal conclusion about the unstated diagnosis. No information is provided for the jury to determine whether the condition is one recognized by statute as a basis for medical marijuana use.

In a properly presented case, the defense would offer medical evidence that the patient was diagnosed with a particular condition. The jury would receive an instruction

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[2] The trial judge wisely recognized: "So, the statement that the underlying condition doesn't have to be provided in the valid documentation does not mean that it doesn't have to be shown at trial. It does have to be shown at trial." Report of Proceedings (RP) at 364.

based on RCW 69.51A.010(6), determine that the condition was legally recognized, and find the patient was a "qualifying patient." That did not happen here. Instead, the defense wanted the jury to speculate, based on the doctor's legal conclusion, that the patient had a qualifying condition. The trial judge, accordingly, properly rejected this offer of proof and told the defense how to cure it—present the medical evidence, which presumably would have meant the doctor's testimony since the records appeared to lack the necessary information.

Whether the diagnosis was of one of the legally recognized conditions is no less a factual question for the jury to determine than whether or not the doctor even made a diagnosis. The defense needed to establish both of those facts for the jury. Why the majority allows the doctor to make the jury's determination is unclear to me. The jury has to find the fact that the doctor "diagnosed" the patient. The fact that the patient's condition was a "terminal or debilitating" one under the statute is also a jury question. Presumably, if the doctor thought that acne or schizophrenia constituted a debilitating condition, the doctor would not be permitted to opine that the patient had a legally recognized basis for using marijuana. Why the doctor is permitted to opine that some unknown diagnosis does qualify is unclear.

The trial judge properly concluded that the authorization form was inadequate to establish that there was a "qualifying patient."

Secondly, the trial court correctly concluded that there was no foundation for admitting the evidence. The majority overlooks several aspects of the ruling on the motion in limine even while recognizing that the defense could present the evidence through a proper records custodian. Here, the defense simply did not have the appropriate person to present the records and made no attempt to obtain that person even after the judge told the defense what was necessary.

The prosecutor sought to exclude the patient, Tristan Gilbert, from testifying that the doctor had diagnosed him with a "terminal or debilitating medical condition" that made him a "qualifying patient." RCW 69.51A.010(4). The trial court agreed that it would be hearsay for the patient to set forth the doctor's diagnosis. The majority apparently agrees. The trial judge also ruled that Mr. Gilbert was not a proper custodian to admit the records. Once again, the majority agrees. *See* slip opinion at 16 n.3. The trial court noted that the medical marijuana statute did not overrule the Evidence Rules, nor did it set up an alternative evidentiary basis for admitting evidence, but simply left those matters to the court system. RP at 361. Accordingly, the judge told the defense that it would need to find "medical testimony" to establish the defense. CP at 52; RP at 365. These rulings were all correct, and they provide the second reason why the medical marijuana defense was properly rejected—there was no records custodian.

Instead of seeking a records custodian to admit the records, the defense offered, both at pretrial and again at trial, to put on only Mr. Gilbert to admit the records. RP at 365, 507. Medical records are appropriately admitted at trial under The Uniform Business Records as Evidence Act, chapter 5.45 RCW. *See State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79 (1990). RCW 5.45.020 provides that such a record is "competent evidence if the custodian or other qualified witness testifies" to the method of preparation in "the regular course of business."

The authorization form is undoubtedly the doctor's business record. Mr. Gilbert is not a medical professional and did not work for the doctor. He could not testify that it was the doctor's record. He was not a records custodian for purposes of RCW 5.45.020. For this reason, also, the trial court correctly ruled that the defense did not have a basis for presenting the authorization form at trial.

The defense attempted to offer inadequate documentation through a person who was not a custodian of the deficient records. The trial judge rejected the proffer for both reasons. As both reasons were correct, we should be affirming the defendant's conviction. Since the majority reaches a contrary conclusion, I respectfully dissent.

Korsmo, J.

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Petitioner	)	Supreme Court No. 90731-5
vs.	)	
	)	COA No. 31313-1-III
ADRIANE CONSTANTINE	)	PROOF OF SERVICE
Respondent	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 28, 2014, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Ms. Constantine's response to the State's petition for review to:

Adriane Constantine
44 REEVES BASIN RD
TONASKET WA 98855

Having obtained prior permission, I also served Karl Sloan at ksloan@co.okanogan.wa.us, syu@co.okanogan.wa.us, and shinger@co.okanogan.wa.us by e-mail using the electronic service feature while e-filing.

Dated this 28th day of October, 2014.

/s/ Kristina M. Nichols
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