Supreme Court No. 92726-0

(Court of Appeals No. 32282-3-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

JUSTIN ROBERT ROSE,
Defendant/Respondent

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests review of the Court of Appeals published decision at *State v. Rose*, No. 32282-3, slip. op. (Wash. Ct. App. Div. III, December 17, 2015).

II. COURT OF APPEALS DECISION

The State of Washington requests this Court to review the Court of Appeal's decision reversing the Kittitas County Superior Court's upholding of Justin Robert Rose's conviction of marijuana possession following Mr. Rose's stipulation at the District Court that he had not fulfilled the conditions required of him in his October 30, 2012, Stipulated Order of Continuance with the State. Copies of the Court of Appeals opinion (Appendix A) and the Stipulated Order of Continuance ("Order for Stay of Proceedings" Appendix B) are attached.

III. ISSUES PRESENTED FOR REVIEW

1. Whether Initiative 502 (I-502), approved by voters in November 2012, and as codified within RCW 69.50, conveys sufficient legislative intent to bar the State from prosecuting marijuana possession cases

charged prior to I-502's effective date when (1) the state saving clause presumes to *save* all prior criminal proceedings prior to an amended act's effective date unless the amended law contains an *express* declaration of legislative intent to the contrary; and (2) RCW 69.50 as amended provides less than vague allusions as to the people's intention with regard to whether the amended statute ought to have retroactive application.

2. Whether the court of appeals interpretation of I-502's intent language, as having retroactive application on criminal prosecutions prior to I-502's effective date, is harmonious with the law as codified when RCW 69.50 by its plain language preserves prosecutions and prohibits non-retroactive treatment for a class of persons under the age of 21 years.

IV. STATEMENT OF CASE

On June 26th, 2012, Justin Robert Rose was charged with violating RCW 64.50.401, possession of marijuana less than 40 grams, and former RCW 69.50.412(1), use of drug paraphernalia. On October 30, 2012, Mr. Rose entered into a Stipulated Order of Continuance (SOC) with the State whereby, if Mr. Rose fulfilled certain conditions of the agreement, the charges against Mr. Rose would be dismissed following a one-year stay of prosecution. Mr. Rose further agreed that, should he not fulfill the

conditions of the SOC within the one year period, the State reserved the right to revoke the agreement and proceed to a bench trial.

On November 6, 2012, during the pendency of the stay, voters passed I-502 with an effective date of December 6, 2012. I-502 decriminalized possession of less than one ounce of marijuana by persons over 21 years of age and further removed marijuana paraphernalia from its previous designation within the unlawful categories of paraphernalia possession.

On January 7, 2013, the probation office of Kittitas County filed a Motion and Certification for Review of the SOC alleging that Mr. Rose had violated the conditions of his agreement with the State. At a February 28, 2013 hearing in the Lower Kittitas County District Court, Mr. Rose stipulated that he had not satisfied the conditions of the SOC. The prosecution moved to revoke the stay, and the District Court terminated the agreement and found Mr. Rose guilty of both charges. Two months later and prior to sentencing, Mr. Rose moved to dismiss the charges based on the passage I-502. The District Court denied that motion, concluding that I-502 does not convey an express intent that I-502 voters had meant the amended law to be applied retroactively to proceedings predating the passage of the new law.

Mr. Rose appealed to the Kittitas County Superior Court which affirmed the lower court decision. Mr. Rose thereafter sought discretionary review by the Court of Appeals. On December 17, 2015, the Court of Appeals, in reversing the decision of the Kittitas County Superior Court, held that the saving clause does not apply because RCW 69.50, when read together with I-502, conveys an intent that runs contrary to, and defeats, the presumption afforded by the saving clause that pending prosecutions are otherwise preserved.

In a related case, the Court of Appeals Division II held that I-502 expressed intent to dismiss all pending prosecutions. *State v. Gradt*, No. 45507-2 (Wash. Ct. App. Div. III, December 17, 2015) (finding that the intent language of I-502 is ambiguous, but the saving clause must be narrowly construed).

V. REASONS REVIEW SHOULD BE GRANTED AND ARGUMENT

A substantial public interest issue is present which necessitates review because the question of retroactivity continues to affect ongoing criminal prosecutions and creates uncertainty for criminal defendants and prosecutors alike. This Court may grant review where an issue is presented of substantial public interest. RAP 13.4(b)(4).

Strong policy reasons necessitate review of this case in the context of the effect of I-502 upon the criminal justice system, particularly among: (1) defendants charged with marijuana possession who entered into agreed Stipulated Orders of Continuance prior to I-502's effective date; (2) defendants charged with marijuana possession who remain on warrant status to face termination of Stipulated Orders of Continuance agreements; and (3) probationers convicted of marijuana possession and on warrant status. A significant number of criminal cases, in which defendants were charged with marijuana possession prior to I-502's effective date, were stayed under agreed Stipulated Orders of Continuance (SOC) with the State prior to I-502's effective date. No bright-line statewide rule exists as to the duration for which these proceedings may be stayed—the allowable longevity of SOC periods varies by local rules and practice. In addition, defendants in unknown numbers are on warrant status and have yet to appear in court to face hearings in which the State may move to terminate such SOC agreements. Lastly, some defendants on warrant status remain under the probationary jurisdiction of Washington District Courts following convictions of marijuana possession predating I-502's effective date. A court's probationary jurisdiction tolls due to a defendant's warrant status causing these probationers to remain under the purview of our courts whereby sentences otherwise suspended may be fully or partially

reinstated upon adjudication of alleged probation violations. *See City of Spokane v. Marquette*, 146 Wn.2d 124, 134, 43 P.3d 502 (2002) (holding that a court's probationary period is tolled while a probationer is on warrant status).

Thus, whether the State of Washington should give effect to the criminal saving clause upon a defendant's non-fulfillment of probationary conditions or conditions of SOC agreements, thereby causing the reinstatement of criminal proceedings against defendants for either marijuana possession or probationary violations, or whether such proceedings are barred by the intent of I-502, is an issue substantially affecting the public interest. Not only does this issue pose far reaching implications on the efficiency of prosecutors statewide in the administration of our criminal justice system, it also touches on the expectations of the citizenry when faced with criminal prosecution by virtue of being charged with marijuana possession prior to the effective date and codification of the new law.

A. RCW 69.50 when read together with Initiative 502 does not fairly convey sufficient intent so as to defeat the presumption of the criminal saving clause.

In preserving criminal offenses already committed from the effects of a law's amendment or repeal, the criminal saving clause creates a presumption that such newly amended or repealed laws shall have no

retroactive application upon criminal proceedings occurring prior the law's effective date, unless the presumption is defeated by a "strong expression of intention" to the contrary. *State v. Grant*, 89 Wn.2d 678, 684, 575 P.2d 210 (1978) (citing *State v Walker*, 7 Wn. App. 878, 503 P.2d 128 (1972), *rev'd on other grounds*, 82 Wn.2d 851, 514 P.2d 919 (1973). *See also* RCW 10.01.040. The plain language of our state's saving clause reflects that such an intention must be expressly stated in the amended act; providing in pertinent part that:

> No offense committed . . . previous to the time when any statutory provision shall be repealed . . . shall be affected by such repeal, *unless a contrary intention is expressly declared in the repealing act*, and no prosecution for any offense . . . pending at the time any statutory provision shall be repealed . . . shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, *unless a contrary intention is expressly declared in the repealing act*. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contract intention is expressly declared therein.
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> RCW 10.01.040 (emphasis added).

In 2010, this Court reaffirmed the prospective effect of the afore cited clause when it opined that "our courts have long held that under the saving clause, amendments to criminal statutes (which include reclassification of crimes) do not apply retroactively to offenses committed before the effective dates of those amendments." *Rivard v. State*, 168 Wn.2d 775, 781, 231 P.3d 186 (2010) (holding the saving clause precluded retroactive application of statute reclassifying vehicular homicide where no indication existed that the legislature intended retroactive application). *See, e.g., State v. Ross*, 152 Wn.2d 220, 237-39, 95 P.3d 1225 (2004); *State v. McCarthy*, 112 Wn. App. 231, 236-37, 48 P.3d 1014 (2002); *State v. Kane*, 101 Wn. App. 607, 610-12, 5 P.3d 741 (2000). The thrust of the saving clause presumption against the non-retroactive application of amended criminal statutes is rooted in jurisprudential considerations concerning the manner in which the state ought to treat offenders who chose to commit crimes, notwithstanding a crime's subsequent legality; it is rooted in the notion that "there is nothing fundamentally unfair in sentencing offenders in accordance with the law they presumably were aware of at the time they committed their offenses." *Kane*, 101 Wn. App at 618. To that extent, "the saving statute creates an easily administered, bright-line rule" and "is not subject to alteration by delays that can occur between trial and sentencing." *Id.*

As the majority below noted, this Court has interpreted the saving clause so as not to require that an amended or repealed law state an intention of retroactivity in "express terms," but rather as providing "that the intent must be 'expressed' in the statute" so as to "construe the statute as authorizing the expression . . . in words that *fairly convey* that intention." *State v. Zornes*, 78 Wn.2d 9, 18, 475 P.2d 109 (1970) (emphasis added).

However, the two decisions upon which the appeals court majority relied, in which courts found that a newly amended or enacted statute expressly declared retroactive intent, concerned statutes in issue with declaratory language that *fairly conveyed* a significantly greater intent toward those statute's retroactive application than the language present in I-502 and as codified in RCW 69.50, which states:

> The people intend to stop treating adult marijuana use as a crime and try a new approach that:
> (1) Allows law enforcement resources to be focused on violent and property crimes;
> (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
> (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state licensed system similar to that for controlling hard alcohol.
>
> Section 1 of I-502, "Intent."

Grant put in issue to this Court the retroactive application of The Uniform Alcoholism and Intoxication Treatment Act which came into effect after defendants were convicted of public intoxication at a justice court trial, but before their appealed trial *de novo* in superior court. *Grant*, 89 Wn.2d at 681-682. Defendants moved to dismiss asserting, *inter alia*, that the new law provided that no person could be subjected to criminal prosecution subsequent to the statute's January 1, 1975 effective date. *Id* at 681. The new statute provided that "it is the policy of this state that alcoholics and intoxicated persons *may not be subject to criminal prosecution* solely because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment." *Id* at 682 (emphasis added). The Court held that the "may not be subject to criminal prosecution" language was an express declaration of intention of retroactive application; implicit in the idea that there is to be *no criminal prosecution* is the notion "that no person shall go to trial on such a charge after the effective date." *Id* at 684.

The absolute prohibitionary language on criminal prosecution vis-à-vis public intoxication charges in *Grant* is a far cry from the language of I-502 which merely sets out that, *arguendo* beginning upon I-502's effective date, voters wished to "try a new approach" and to "stop treating adult marijuana use as a crime." It does not follow from the intent language in I-502 that because voters wished to "stop treating" marijuana

use as a crime, they also fairly conveyed a *strong expression of intention* to bar all criminal prosecutions relating to possession charges prior to I-502's effective date. *See Grant*, Wn.2d at 684 (citing *Walker*, 7 Wn. App. 878). As the Honorable James Hurson at trial noted, "a 'new approach' does not express an intent for retroactive application" nor, as the dissent in *Rose* succinctly put, does the phrase *stop treating* allude to what I-502 voters intended to be done to pending cases. *Rose*, slip. op. at 4.

The second case upon which the majority of the appeals court relied, *Zornes*, is equally distinguishable. *See Zornes,* 78 Wn.2d 9, 475 P.2d 109 (1970). In that case, defendants appealed their conviction of marijuana possession under the Uniform Narcotic Drug Act (NDA). *Zornes*, 78 Wn.2d at 10. During the pendency of defendants' appeal, the legislature amended the NDA to provide that cannabis (marijuana) was no longer a designated "narcotic drug" for the purposes of RCW 69.33. *Id* at 11. Section 7(13) conveyed that the intent of that statute was that certain newly enacted provisions "*shall not ever* be applicable to any form cannabis." *Id* at 13. The expression of the words "not ever" were critical in in the Court's interpretation and ultimate finding that the amended NDA carried a *strong impression of intention* upon its enactment that was meant to carry both prospective and retrospective application. *Id* at 13-14.

Neither statement in the instant case fairly conveys similar intent language presupposing, as was the case in *Grant* and in *Zornes,* an absolute bar on all prior criminal proceedings prior to I-502's effective date. As discussed above, neither the language indicating I-502 voters were desirous to take a "new approach" with respect to marijuana possession, nor that they wished to "stop treating marijuana use as a crime," offers similar backward looking language present in the statutes in issue in *Grant* and *Zornes*. Thus, absent in I-502 is sufficient intent language so as to fairly convey that the people meant to give the new decriminalization law retroactive application on criminal prosecutions predating its December 6, 2012 effective date.

Moreover, the recent decisions of the appeals courts in *Rose* and *Gradt* represent a departure from *Rivard* where this Court reaffirmed the strong presumption that the saving clause creates against non-retroactive application in recognizing "our courts have long held that under the saving clause, amendments to criminal statutes . . . do not apply retroactively to offenses committed before the effective dates of those amendments. *Rivard,* Wn. 2d at 781.

The opinion of the court of appeals in this matter stretches the *fairly convey* language of *Zornes* so far as to erode the wish of the legislature when it envisioned a saving clause for our state. The

presumption against retroactive application is said to only be overcome by a *strong* presumption of intention. *Grant*, Wn.2d at 684 (citing *Walker*, 7 Wn. App. 878). The presumption was created by the legislature under sound reasoning that there is nothing unfair about holding criminal defendants accountable for transgressing laws that they are presumed to have known. *Kane*, 101 Wn. App at 618.

This presumption has been weakened by analysis that stretches whether a law has fairly conveyed a particular *strong* intention of retroactive application to the point of absurdity—so much so as to interpret a new law's intent in a manner that conflicts with the operational provisions of the new law itself.

B. A reading of RCW 69.50 and Initiative 502 as expressing voter intent to bar criminal prosecutions prior to the new law's effective date makes the statute internally inconsistent.

Because I-502 did not completely eliminate the crime of marijuana possession, as it preserved in RCW 69.50 the unlawfulness of possession for classes of persons under the age of 21, the intent clause must not be construed so as to provide retroactive application barring *all* prior criminal prosecutions. Such a reading would be untenable and wholly inconsistent with the express prohibition that "no person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana..." RCW 69.50.4013(3)(a). And indeed, I-502 did not even alter RCW 69.50's

landscape with regard to marijuana possession's illegality because "except as otherwise authorized by [RCW 69.50], any person found guilty of possession of forty grams or less of marijuana [remains] guilty of misdeameanor." RCW 69.50.4014. Instead, I-502 carved out decriminalization of possession of less than 28 grams, for certain classes of persons, specifically those at least 21 years of age, while preserving both prospective and retroactive criminal prosecutions for a class of person under the age of 21. *Id.* Therefore, it cannot be said that voters intended retroactive application when the new law sets out by its plain language that certain classes of persons are not to be afforded retroactive application of the new law. Such an interpretation would create a conflict between the voter's intent as codified in the intent clause provision of RCW 69.50 and the provision that "no person under twenty-one years of age may possess . . . marijuana." *Id. See also Scheib v. Crosby*, 160 Wn. App. 345, 350, 249 P.3d 184, (2011) ("a principle of statutory construction is to avoid interpreting statutes so as to create conflicts between different provisions, so as to achieve a harmonious statutory scheme"), *citing, e.g., Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008). Thus, in preserving certain kinds of possessions charges for certain classes of individuals, the statute clearly does not afford total retroactive application.

Yet, a reading of the intent clause as expressing a bifurcated intent, whereby the statute does not apply retrospectively or prospectively to persons under 21, yet does apply retrospectively to persons at least 21, is equally untenable because it stretches the language of intention far beyond the words "to stop treating" and "a new approach." Hence, the only tenable and harmonious reading requires the amended statute to be construed as not fairly conveying retroactive intent on prosecutions prior the statute's effective date because, as discussed above: (1) interpreting voter intention as having full retroactive application conflicts with the plain language of the statute preserving prosecutions for persons under 21; and (2) the intent clause has absolutely no language that can construed so as to fairly convey a bifurcated intent whereby retroactive application exists for persons over the age of 21 years of age, but not for those under 21 years of age.

Likewise, while the lower court probed the intent clause phrase "to stop treating adult marijuana use as a crime," in attempt to find some conveyance of retroactivity, the reality is that the intent clause is flawed from the onset because the new law does not even do what the clause purports; the law as written does not "stop treating adult marijuana use as a crime." The new law did *not* decriminalize all adult marijuana

possession because it preserved misdemeanor illegality for marijuana possession between 29 grams (over one ounce) and 40 grams. RCW 69.50.4013(3)(a); RCW 69.50.360(3); RCW 69.50.4014.

I-502's drafters most certainly could have imbued within the law broad sweeping marijuana decriminalization, but they did not. Instead, the new law preserved existing criminality while carving out a very narrow exception for marijuana use in instances where marijuana is: consumed in a private home, RCW 69.50.445; possessed at no more than 28 grams (1 ounce), RCW 69.50.4013(3)(a) and RCW 69.50.360(3); produced by a license producer, RCW 69.50.325; processed by a licensed processor, *Id*; and sold by a licensed retailer to persons 21 years of age or older. *Id*; RCW 69.50.4013(3)(a).

It simply does not follow from the creation of this narrow exception that voters also simultaneously intended retroactive application on all preexisting marijuana possession cases. And, as stated above, nothing in the intent clause can even be remotely construed as expressing varying degrees of retroactive intention. The intent clause does not say that voters wished to give retroactive treatment to persons previously charged with possession up to 28 grams but no more. Nor does it say that they wished to bar prosecutions against those over 21 but not under. Thus, the narrow design of I-502 itself, in carving out a narrow exception to

broad marijuana illegality, undermines any reading that it was the intent of the voters to give the law broad retroactive application. To read I-509 and RCW 69.50 otherwise would fly in the face of the plain language of the new law.

VI. CONCLUSION

I-502 was presented to voters in a spirit of caution. By its design, it was not aiming to throw open the doors of marijuana use as much as to carve aside small amounts of allowable usage and possession, amongst people of suitable adult age, in private circumstances, and only for those who purchase marijuana from a state licensed retailer. For the aforementioned reasons, the Court of Appeals decision should be reviewed as an issue of substantial public interest is involved requiring direction and clarity of law by this Court.

DATED this 19th day of January, 2016.

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APPENDIX A

FILED
DECEMBER 17, 2015
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,	)	No. 32282-3-III
v.	)	
JUSTIN ROSE, Appellant.	)	PUBLISHED OPINION

SIDDOWAY, C.J. — Washington's general criminal prosecution saving statute, RCW 10.01.040, presumptively "saves" offenses already committed and penalties or forfeitures already incurred from being affected by the amendment or repeal of a criminal statute. As a result, offenses are prosecuted under the law in effect at the time they were committed "unless," the statute provides, "a contrary intention is expressly declared in the amendatory or repealing act." *Id.* In the more than one hundred years since the saving statute was enacted, courts have only infrequently found an express legislative intent that the amendment or repeal of a criminal statute applies to pending prosecutions, penalties, or forfeitures for earlier committed crimes.

At issue in this case is whether Initiative 502, which was approved by voters in November 2012 and became effective on December 6, 2012, fairly conveys a legislative intent—in this case, the *voters*' intent—that its decriminalization of possession by

persons age 21 and older of marijuana related drug paraphernalia and small amounts of marijuana applies to pending prosecutions. We hold that this is one of the rare cases where such an intent is fairly conveyed. We reverse the post-December 6, 2012 judgment and sentence entered against Justin Rose.

FACTS AND PROCEDURAL BACKGROUND

On June 26, 2012, Justin Rose was fishing on the Yakima River below the Roza Dam when he and his companions were approached by a Washington Fish and Wildlife agent interested in checking for their fishing licenses. The Fish and Wildlife agent noticed that Mr. Rose was smoking; based on the agent's training and experience, he believed Mr. Rose was smoking marijuana from drug paraphernalia: a bong. When the agent told Mr. Rose what he had seen, Mr. Rose admitted he had been smoking marijuana and handed over the bong, which contained some marijuana, to the agent. Mr. Rose was over age 21 at the time. He was charged with one violation of RCW 69.50.4014 (possession of less than 40 grams of marijuana) and one violation of former RCW 69.50.412(1) (2002) (use of drug paraphernalia).

In October 2012, Mr. Rose entered into a deferral agreement with the State, staying the prosecution. The State agreed that if Mr. Rose complied with the conditions identified in the agreement for one year, it would move to dismiss both charges. Mr. Rose agreed that if he did not comply with the conditions, then on the request of the State the court would revoke the stay and proceed to a bench trial at which, he stipulated, the

police reports and State's evidence would be sufficient to convict him of the charged crimes. The conditions imposed on Mr. Rose included performing community service, paying a fee and costs, obtaining an alcohol and drug evaluation, and fully complying with any recommendation of alcohol or drug treatment or other services resulting from the evaluation.

Initiative 502 (I-502), "AN ACT Relating to marijuana," was approved by 55.7 percent of Washington voters on November 6, 2012. LAWS OF 2013, ch. 3.[1] Under the Washington Constitution, the law became effective 30 days later, on December 6, 2012. Const. art. II, § 1(d). The initiative did not immediately decriminalize the production, processing and retail sale of marijuana, all of which could be conducted legally only after regulations were adopted and licensing could take place. *See, e.g.*, Section 4 of I-502, LAWS OF 2013, ch. 3, § 4; *cf. State v. Reis*, 183 Wn.2d 197, 201, 351 P.3d 127 (2015) (under 2011 amendments to the Washington State Medical Use of Cannabis Act, RCW 69.51A.040, decriminalizing medical use "in accordance with the terms and conditions of this chapter," legal use must await the creation of the statutorily required registry). But Sections 20(3) and 22(1) of I-502 did unconditionally decriminalize possession of less than one ounce of marijuana by persons 21 and over, and did remove marijuana

[1] *See* http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana_ByCounty.html (last visited on Dec. 10, 2015).

paraphernalia from the unlawful categories of paraphernalia. LAWS OF 2013, ch. 3, §§ 20(3), 22(1).[2]

In or before January 2013, Mr. Rose violated the conditions of his deferral agreement by failing to enter into an intensive outpatient treatment program. The State moved in January for a review and revocation of the stay of the proceedings. At a hearing before the Lower Kittitas County District Court, Mr. Rose conceded that he had not fulfilled all of the conditions agreed in the stipulation. The district court revoked the stay order, proceeded to a bench trial, and found Mr. Rose guilty of both counts.

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[2] The relevant changes, now codified at former RCW 69.50.4013 (2013) and RCW 69.50.412(1), provided as follows:

> RCW 69.50.4013(3):
>
> The possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in section 15(3) of this act is not a violation of this section, this chapter, or any other provision of Washington state law.

LAWS OF 2013, ch. 3, § 20(3). The amounts of useable marijuana set forth in subsection 15(3) of I-502 were "(a) One ounce of useable marijuana; (b) Sixteen ounces of marijuana-infused product in solid form; or (c) Seventy-two ounces of marijuana-infused product in liquid form." *Id.* § 15(3).

> RCW 69.50.412(1):
>
> It is unlawful for any person to use drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.

LAWS OF 2013, ch. 3, § 22(1).

Before sentencing, Mr. Rose moved to dismiss the charges based on the decriminalization of his offenses by I-502. The district court denied Mr. Rose's motion. It recognized that RCW 10.01.040, which provides that offenders are presumptively prosecuted under the laws in effect at the time of their offenses, does not apply if intervening legislation conveys a contrary intent. But the district court concluded that I-502 did not convey a contrary intent. It sentenced Mr. Rose to 90 days confinement on each count, to run consecutively.

Mr. Rose appealed to the Kittitas County Superior Court, which affirmed the district court. Mr. Rose sought discretionary review of the superior court's order, which a commissioner of this court granted, finding that the decision involves an issue of public interest that should be determined by an appellate court. No. 32282-3-III, Comm'r's Ruling (June 26, 2014); RAP 2.3(d)(3).

ANALYSIS

The common law provides that pending cases be decided "according to the law in effect 'at the time of the decision.'" *State v. Brewster*, 152 Wn. App. 856, 859, 218 P.3d 249 (2009) (quoting *State v. Zornes*, 78 Wn.2d 9, 12, 475 P.2d 109 (1970)[3]) (noting that the "well-defined rule at common law" was to treat a repealed statute "as if it had never existed, except as to matters and transactions past and closed"). Yet in 1901, the

[3] Overruled by implication on other grounds in *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

Washington legislature adopted a criminal prosecution saving statute, now codified at RCW 10.01.040, whose saving clause "presumptively 'save[s]' all offenses already committed and all penalties or forfeitures already incurred from the effects of amendment or repeal," requiring that they be prosecuted under the law in effect at the time they were committed "unless," as the statute provides, "a contrary intention is expressly declared in the amendatory or repealing act." LAWS OF 1901, Ex. Sess., ch. 6, § 1; *Brewster*, 152 Wn. App. at 859.[4]

"Th[e] statute, being in derogation of the common law, must be strictly construed." *Zornes*, 78 Wn.2d at 13 (citing *Marble v. Clein*, 55 Wn.2d 315, 347 P.2d 830 (1959)). "Since the statute does not require that an intent to affect pending litigation be stated in express terms, but merely provides that the intent must be 'expressed' in the statute," our Supreme Court "construe[s] the statute as authorizing the expression of such an intent in words that fairly convey that intention." *Id.* This means that "[t]he saving force of the statute is applied narrowly and its exception—'unless a contrary intention is

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[4] RCW 10.01.040 provides:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

expressly declared in the amendatory or repealing act'—is interpreted broadly." *State v. Kane*, 101 Wn. App. 607, 612, 5 P.3d 741 (2000).

A legislative intent that the repeal or amendment of a criminal statute applies retroactively to earlier-committed offenses has been found in only a few cases. It was found in *Zornes*, in which the defendants, husband and wife, were convicted of violations of the Uniform Narcotic Drug Act after police officers raided their home, conducted a "thorough search," and recovered some marijuana cigarette ends in garbage cans and a few bits of marijuana in a match box. 78 Wn.2d at 10. Although neither defendant had a criminal history, the husband received a minimum sentence of five years and a maximum sentence of 20 years in the state penitentiary, while the wife's sentence was deferred but she was ordered to spend one year in county jail. *Id.* In 1969, while the appeal of their convictions was pending, the legislature enacted legislation taking cannabis out of the Narcotic Drug Act, RCW 69.33.220, and specifically including it in the dangerous drug act, RCW 69.40.060. *Id.* at 12. New provisions of the dangerous drug act provided, in part, that a first offender whose violation solely involved cannabis, "shall be guilty of a misdemeanor, and punishable by a fine not exceeding five hundred dollars or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment." *Id.* at 11 (quoting LAWS OF 1969, ch. 256, § 10).

Although acknowledging that the 1969 legislation "does not contain the words, 'This act shall apply to pending cases,'" the court held in *Zornes* that it did contain

language "from which the intent that it shall apply to such cases can be reasonably inferred." *Id.* at 13. It cited to language in the act which stated, "the provisions of this chapter shall not ever be applicable to any form of cannabis," and observed that the words "not ever" would be unnecessary if the legislature intended the act to have only prospective effect. *Id.* (quoting LAWS OF 1969, ch. 256, § 7(13)). The court concluded "the legislature added these words for a purpose," that it thereby expressed an intention that the amendment applied to pending actions, and that the charges could not stand. *Id.*

In *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978), the defendant was a passenger in a car en route from Seattle to Exposition '74 in Spokane when the driver, her husband, was stopped in Adams County for suspicion of driving under the influence. Following the stop, the defendant became "upset" and "quite vocal." *Id.* at 680. She was charged in 1974 and was convicted in Adams County Justice Court of the offense of being intoxicated on a public highway, a violation of RCW 9.68.040, which had been repealed by Laws of 1972, ch. 122, § 26, although the repeal was not effective until January 1, 1975. *Id.* at 681. The defendant appealed her conviction to the superior court.

By the time her appeal was heard in May 1975, the repeal of RCW 9.68.040 had become effective, as had a new act, which stated in relevant part:

> It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

Grant, 89 Wn.2d at 682 (quoting RCW 70.96A.010). As in *Zornes*, the legislation did not contain the words, "This act shall apply to pending cases." And as the State argued to the court, it also did not include the words "not ever be applicable" that were found sufficient in *Zornes*, or language having a similar meaning. The Supreme Court held in *Grant* that neither expression was required, although it "would require a similarly strong expression of intention . . . to overcome the presumption included in RCW 10.01.040." 89 Wn.2d at 684.

It found such an expression of intention in the legislation's statement of policy that alcoholics and "intoxicated persons may not be subjected to criminal prosecution" solely because of their consumption of alcoholic beverages. It read that language as an "express declaration of a legislative intention that no person shall go to trial on such a charge after the effective day of the act." *Id.*

In reported cases finding *no* "fairly conveyed" legislative intent to apply a substantive change to pending prosecutions, courts have often found not only the absence of express language supporting such an intent but language negating any such intent.

In *State v. McCarthy*, 112 Wn. App. 231, 233, 48 P.3d 1014 (2002), the defendant pleaded guilty to delivery of heroin. The parties had several disputes about the number of points to be counted toward the defendant's offender score for his prior conviction for solicitation to deliver heroin. One dispute involved an amendment to former RCW 9.94A.525(12) that was enacted in 2002, while McCarthy's challenge to his sentence was

on appeal. The court observed that "[n]othing in the amendment suggests that the Legislature intended the statute to apply retroactively" and, moreover, the amendment "expressly states that it 'appl[ies] to crimes committed on or after July 1, 2002.'" 112 Wn. App. at 237 (alteration in original) (quoting Second Substitute H.B. 2338 § 29, 57th Leg., Reg. Sess. (Wash. 2002)). When our Supreme Court was presented with the same argument in *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004), it agreed with *McCarthy*. While stating that "[t]o avoid application of the savings clause, we have not required that the legislature *explicitly* state its intent that amendments repealing portions of criminal and penal statutes apply retroactively[,]" it held that in enacting the 2002 amendments at issue in both cases, the legislature "failed to express any intent that [they] apply retroactively to pending prosecutions" and in fact expressed the opposite intent. *Id.* at 238-39.

In this case, we are dealing with an initiative to the legislature. While standard rules of statutory construction apply, our concern is with the intent of the voters. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008).[5] The

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[5] As summarized by our Supreme Court:

> "[I]n determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. Where the language of an initiative enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation." "In construing the

issue is whether an intent by the voters to apply its decriminalization provisions to stop pending prosecutions is fairly conveyed by the initiative.

The first matter addressed by authors of I-502 in Part I of the initiative is expressed by the part's title, "Intent." It begins, "The people intend to stop treating adult marijuana use as a crime and try a new approach." It then proceeds to highlight aspects of "the new approach." The first aspect of the "new approach" identified is to "[a]llow[] law enforcement resources to be focused on violent and property crimes."

The transitive verb "treat" is defined as having the following relevant meanings:

> **3 a:** to deal with or bear oneself toward in some specified way **:** behave or act towards **:** assume an attitude or form of behavior to **:** USE . . . **b :** to regard (as something or in a particular way) and act toward or deal with accordingly — usu. used with *as*.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2434 (1993). The State "treat[s] adult marijuana use as a crime" not only when it arrests and charges individuals, but also when it takes them to trial and imposes and enforces penalties. "Law enforcement

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> meaning of an initiative, the language of the enactment is to be read as the average informed lay voter would read it."
>
> . . . Only if the language is ambiguous may the court examine extrinsic sources such as a voter's pamphlet.

Id. at 585-86 (first alteration in original) (citations omitted) (internal quotation marks omitted) (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 608 (2000); *State v. Brown*, 139 Wn.2d 20, 28, 983 P.3d 608 (1999). "[We] will not substitute [our] judgment for that of the electorate unless the initiative contravenes state or federal constitutional provisions." *Id.* at 586. No state or federal constitutional concern is implicated here.

resources" that the initiative proposed to "focus[] on violent and property crimes" include prosecutors and criminal courts as well as arresting officers. I-502, Part 1, Sec. 1.

To say that "the people intend to stop treating adult marijuana use as a crime" and "[a]llow[] law enforcement resources to be focused on violent and property crimes", *id.*, is as strong a statement as is the statement at issue in *Grant* that "it is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." 89 Wn.2d at 682. Both are equally characterizable as express declarations of a legislative intention that no person shall go to trial on such a charge after the effective day of the act. It is also relevant that we look at the language of I-502 from the perspective of the average informed lay voter rather than from the perspective of the legislature. Lay voters presented with an initiative that they are told will "stop treating adult marijuana use as a crime" are more likely to make the common law assumption that prosecution will be "stopped" on the effective date than that prosecutions will be "saved" by a contrary state law.

This language on "Intent" must be read in the context of I-502 as a whole, and as pointed out earlier, it is clear from provisions of the initiative dealing with the production, processing, and retail sale of marijuana that those activities could not be conducted legally until regulations were in place under which persons could be validly licensed. But the activities for which Mr. Rose was prosecuted were decriminalized on the December 6, 2012 effective date of I-502. As to those activities, there is nothing in the

remaining provisions of the initiative that negates the disapproval of continued prosecution conveyed by Part I.

Were we not satisfied that I-502 is clear on its face, we would turn next to the official State of Washington Voters' Pamphlet. "Analysis of legislative intent regarding retroactivity is not ordinarily restricted to the statute's express language, and may be gleaned from other sources, including legislative history." *Kane*, 101 Wn. App. at 614 (citing *In re F.D. Processing*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992)).[6]

The argument in support of approval of I-502 in the Voter's Pamphlet stated in part:

> **Argument For**
> **Initiative Measure 502**
>
> Our current marijuana laws have failed. It's time for a new approach.
>
> **Initiative 502 frees law enforcement resources to focus on violent crime.**

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[6] In *Kane*, the State challenged the trial court's decision to sentence the defendant under a drug offender sentencing alternative (DOSA) for which Kane, a convicted felon, had been ineligible at the time of his crime. Before Kane was sentenced, the legislature broadened eligibility for the DOSA to include defendants whose prior felony convictions were not for violent or sex offenses, making Kane eligible if the new statute applied to him. *Id.* at 613-14. Kane could point to legislative materials from which he argued an intent to apply the change to defendants in his situation could "be reasonably inferred." *Id.* at 614. But as the court observed, the legislation "contains no language that even remotely suggests an intention to make the amended eligibility criteria available in cases arising before the effective date." *Id.* "[L]egislative history materials cannot make up for the lack of words that fairly convey that intention in the . . . amendatory statute itself." *Id.*

> Treating adult marijuana use as a crime costs Washington State millions in tax dollars and ties up police, courts, and jail space. We should focus our scarce public safety dollars on real public safety threats.

State of Washington Voters' Pamphlet, General Election 30 (Nov. 6, 2012).[7] This argument, accepted by the majority of Washington voters, fairly conveys disapproval of continued prosecution of the offenses committed by Mr. Rose.

The State argues that the criminal prosecution saving statute "'creates an easily administered, bright-line rule,'" on which the Legislature is entitled to rely when it makes changes to criminal and penal statutes. Br. of Resp't at 5 (quoting *Kane*, 101 Wn. App. at 618). We agree, but the point is not inconsistent with our decision. As history demonstrates, when the legislature amends substantive criminal law it almost always limits itself to identifying the change, without using language that conveys disapproval or concern about pending prosecutions. There is no reason to believe this will change in the future. We expect that the saving statute will usually apply.

In the rare case, as here, where legislation includes additional language that fairly conveys disapproval or concern about continued prosecution, we are required by RCW 10.01.040 to respect that expression of a contrary intention.

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[7] https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/Documents/11-%20Spokane.pdf.

Mr. Rose's convictions under RCW 69.50.4014 and former RCW 69.50.412(1) are reversed.

Siddoway, C.J.

I CONCUR:

Lawrence-Berrey, J.

KORSMO, J. (dissenting) — Although the voters' intent to eliminate in most cases the crime of possession of marijuana was clearly expressed, there was no clear intent to apply the amended statute to cases in progress. Accordingly, the savings statute applies and Mr. Rose's conviction for marijuana possession after violating the terms of his deferral agreement should be affirmed.

The savings statute could hardly be clearer: "Whenever any criminal or penal statute shall be amended or repealed, all offenses committed . . . while it was in force shall be punished or enforced as if it were in force . . . *unless a contrary intention is expressly declared* in the amendatory or repealing act, and every such . . . statute *shall be so construed as to save* all criminal and penal proceedings . . . pending at the time of its enactment." RCW 10.01.040 (emphasis added). On its face the statute requires that an express contrary intention must be stated in the amending/repealing act in order to overcome the savings statute; otherwise all amending or repealing acts shall be construed to save the statute. In other words, the benefit of any doubt should go to maintaining the repealed statute. Or put still another way, the saving statute creates a "presumption" that can only be overcome by a "strong expression of intention." *State v. Grant*, 89 Wn.2d 678, 684, 575 P.2d 210 (1978) (citing *State v. Walker*, 7 Wn. App. 878, 503 P.2d 128 (1972), *rev'd on other grounds*, 82 Wn.2d 851, 514 P.2d 919 (1973)).

The majority relies on two decisions that found an express declaration in the words of the newly amended/enacted statute at issue, the plurality opinion in *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), *overruled on other grounds by United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), and *Grant*. The language at issue in those cases was significantly more directory than anything that can be found here.

Zornes involved prosecutions for possession of cannabis under the Uniform Narcotic Drug Act. 78 Wn.2d at 10. While the appeals were pending in the Washington Supreme Court, the legislature added a proviso to the Narcotic Drug Act stating that "narcotic drugs shall not include cannabis and the provisions of this chapter shall not ever be applicable to any form of cannabis." *Id.* at 11. The amendment also directed the board of pharmacy to reclassify the drug as a dangerous drug and provided that cannabis "shall not be considered a narcotic drug and accordingly not subject to the provisions of chapter 69.33 RCW as now law or hereafter amended." *Id.* The plurality[1] opinion (four justices) concluded that the words "not ever" were critical and required reading the amendment as applying to pending cases. *Id.* at 13-14. The concurring opinion of Justice Hale (two justices) concluded that "the imprecise phraseology of the proviso" indicated

[1] Two justices concurred only in the result; eight justice ruled on the case.

the intent to reduce the penalty retroactively; that opinion would have remanded for a new trial under the dangerous drug act. *Id.* at 33.

The decision in *Grant* is a bit closer procedurally to what occurred in this case. There two passengers in a vehicle were charged with being drunk in public on August 31, 1974, four months before the repeal of that statute took effect. 89 Wn.2d at 680, 682. The case was tried in the justice court in 1974 and both passengers were convicted. They appealed to superior court and their trial de novo was conducted in May 1975, several months after the statute's repeal. The Uniform Alcoholism and Intoxication Treatment Act, ch. 70.96A RCW, took effect in between the two trials. *Id.* at 682. The new statute provided that "It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment." *Id.* One of the two defendants was convicted of public intoxication in superior court and appealed to this court, which certified the case to the Washington Supreme Court. *Id.* at 680-81. That body concluded that the "may not be subjected to criminal prosecution" language was "an express declaration of a legislative intention" that "no person shall go to trial on such a charge after the effective date of the act." *Id.* at 684. The court also noted that the remedial nature of the new legislation required liberal construction in order to effectuate its purpose. *Id.* at 685.

While both of those statutes contained clear language negating continued prosecutions ("not ever" and "may not be subjected to criminal prosecution"), Initiative 502 (I-502) had no similar language. As the trial judge, the Honorable James Hurson, aptly noted, "a 'new approach' does not express an intent for retroactive application." Clerk's Papers at 13. The majority focuses on the "stop treating adult marijuana use as a crime" language, although that is no more persuasive. While "stop treating" suggests an end to the old approach in favor of a new one, it does not speak to what is to be done with pending cases.

I agree with the majority that the "intent" section of the initiative must be read in context with the whole of I-502.[2] The language as a whole suggests the initiative is not retroactive. As the majority notes, I-502 did not eliminate the crime of possession of marijuana. Instead, it exempted from the reach of the statute possession by adults over the age of 21 who controlled less than an ounce of the substance. LAWS OF 2013, ch. 3, §§ 15, 20. In other words, those under age 21 still cannot possess marijuana and those

[2] Curiously, the majority also cites to the voter's pamphlet in support of its argument. While a voter pamphlet can show voter intent as an aid in construing legislation, it has no play in this circumstance. RCW 10.01.040 requires that an expression of intent be found in the amendatory/repealing statute itself, not in associated legislative history materials. If the intent is not expressed in the statute, the history materials cannot provide it. *Compare, Wash. Citizens Action v. State*, 162 Wn.2d 142, 155, 171 P.3d 486 (2007) (voter's pamphlet materials could not cure initiative's textual violation of constitution). Nonetheless, since the cited voting pamphlet material is just a recitation of the intent section of the initiative, it adds nothing that is not already in the legislation.

over age 21 can possess only up to one ounce without running afoul of the law. While this is a different approach for the law in the case of those over 21, it is not a repeal of the statute nor even a change of law for those under 21 years of age or those over 21 who possess large quantities. It is a very far cry from "not ever" prosecuting cannabis under the Narcotic Drug Act or stating that intoxicated persons "may not be subject to criminal prosecution" under RCW 70.96A.

The language of the initiative provides that some people may not be prosecuted if they obey the law. That simply is nowhere near strong enough language to overcome the "presumption" of the savings clause. Instead, the savings statute applies to preserve this pending prosecution, as that statute has long done. *E.g.*, *State v. Ames*, 47 Wash. 328, 332, 92 P. 137 (1907) (piloting without license prosecution still valid despite repeal of crime during appeal); *State v. Walker*, 7 Wn. App. 878, 881-882, 503 P.2d 128 (1972), *rev'd in part on other grounds*, 82 Wn.2d 851, 514 P.2d 919 (1973) (repeal of drug statute five days after crime and one month before charges filed did not prevent prosecution).[3] If the repeal of a statute is insufficient evidence of intent to overcome the savings statute, most certainly a mere amendment preserving the offense but limiting its application also is not sufficient evidence to overcome the savings statute.

[3] This aspect of the Court of Appeals decision in *Walker* was cited with approval in *Grant*, 89 Wn.2d at 684.

I-502 did not repeal the marijuana possession statute even while it restricted its application to those over age 21. There is no stated intent to apply those restrictions to pending cases. Accordingly, the savings statute applies and this prosecution was not impeded. Mr. Rose agrees that he violated the terms of his deferral and that it was proper to revoke it. His conviction, therefore should be affirmed.

I respectfully dissent.

Korsmo, J.

APPENDIX B

LOWER KITTITAS DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. **JUSTIN ROBERT ROSE,** Defendant.	Case No. 2Z0468797 DLWOR LOWER KITTITAS COUNTY DISTRICT COURT OCT 30 2012 FILED **Stipulation for and Order for Stay of Proceedings** Charges - Marijuana Poss. Less/Equal 40Grams Use of Drug Paraphernalia

COMES NOW, Jodi Hammond, Deputy Prosecuting Attorney for Kittitas County, and Justen Rose, defendant, and hereby stipulate and agree to a stay of proceedings in this matter for a period of 12 months, on the following terms and conditions:

1. The defendant shall maintain good and lawful behavior: During the term of the stay the defendant shall commit no new criminal offenses that eventually lead to conviction, a stay of proceedings or similar disposition, or a deferred prosecution. This requirement applies even in the event that the defendant is charged with a crime during the term of the stay of proceedings, but which is not resolved until after the end of the term of the stay. In addition:
   - [✓] The defendant shall complete 36 hours of approved community service and provide proof of completion to Kittitas County Probation Services within ~~90~~ 120 days.
   - [ ] The defendant shall complete __days of Department of Corrections work crew and provide proof of completion to Probation Services within ___ days.
   - [ ] The defendant shall attend a DUI victim's panel and provide proof to Probation Services within ___ days. The panel shall be: [ ] in Ellensburg [ ] in a county of the defendant's choosing with a $50.00 contribution to the Kittitas County Panel.
   - [ ] Complete Alcohol Drug Information School (ADIS) within 90 days.
   - [✓] The defendant shall obtain the following evaluation(s) and provide proof of such evaluation(s) to Probation Services **within 30 days**:
     [✓] Alcohol/Drug [ ] Domestic Violence [ ]Anger Management
     In the event the evaluating agency recommends that the defendant obtain treatment or other services, the defendant shall fully comply with the agency's recommendations, provide proof to Probation Services of compliance and begin/complete any recommended classes or treatment **within 45 days (90 days to complete ADIS).** In the event that extended treatment is recommended, the defendant shall direct the treating agency to provide compliance reports to Probation Services on a monthly basis.
   - [ ] The defendant shall abstain from the consumption of alcohol and/or drugs.
   - [ ] The defendant shall not possess any weapons. Any weapons that have been confiscated by Law Enforcement may be returned to the registered owner upon the successful completion of the Stay of Proceedings.
   - [ ] The defendant shall have no contact with _____. The Defendant consents and stipulates to a motion brought by the State for a NCO with the before mentioned person(s) at any time during this stay. Further the Defendant will not move for a termination of any Court Order limiting contact with that person(s) without the written consent of the Kittitas County Prosecutor's Office.
   - [✓] ~~Other: $100 to Drug Fund~~

2. Probation Services shall monitor the defendant's compliance with the conditions of the stay of proceedings. Probation Services shall: [✓] Actively monitor the defendant. Probation may be reduced to records-check if the probation department finds it appropriate. [ ] Complete ___ record checks.
   [ ] The defendant shall immediately report to Probation Services and continue to report as directed.

GREGORY L. ZEMPEL
KITTITAS COUNTY PROSECUTOR
KITTITAS COUNTY COURTHOUSE
ELLENSBURG, WA 98926

3. The defendant shall pay the following assessment:
   [✓] Probation record check fees of $ 40
   [ ] Probation monitoring fees of $ ___ per month
   [ ] Court appointed attorney fees of $_____
   [✓] Court costs: $ 152
   [ ] Restitution in the amount of $ _____
   [ ] A Time payment agreement is authorized

4. If the defendant complies with all of the above listed conditions, the prosecuting authority agrees to :
   [✓] Move the court for a dismissal of the charge(s) of: POM UUP filed under the above cause number(s).
   [ ] Move the court to amend the charge of _____ to the charge of _____ to which the defendant shall: [ ] plead guilty [ ] Bail forfeit $_____
   [ ] In the event the defendant pleads guilty, the parties agree to make the following sentencing recommendation to the court: _____

5. In the event the court finds, after a hearing, that the defendant has failed to comply with any of the above listed conditions, or for a positive test for the use of any illegal drug, the court shall, upon the request of the prosecuting authority, revoke the stay of proceedings and proceed to bench trial.

6. As a condition of entering this stay of proceedings, the defendant agrees to waive the following rights:
   A. The right to a jury trial
   B. The right to a trial within 90 days of arraignment.
   C. The right at trial to hear and question witnesses called by the prosecuting authority.
   D. The right to testify at trial and call defense witnesses
   E. All defenses, including statutory and affirmative, to the charge.

7. In the event the court finds cause to revoke the stay of proceedings, the defendant stipulates and agrees:
   A. to the admissibility of the police reports, which are incorporated by reference, (including any statements made by the defendant contained in the reports),
   B. that items seized by police which are alleged to be alcohol or controlled substances are in fact alcohol or controlled substances, and
   C. that facts from the reports are sufficient to convict the defendant of the charged crime(s).

8. The parties agree that in the event the defendant fails to make payments as listed above and is delinquent by fifteen (15) days or more, the plaintiff and/or court have the authority to send such delinquent amounts to a collection agency for collection of said sums. Both parties agree that this authority exists whether or not the plaintiff chooses to have the matter set for review and bench trial. The defendant specifically waives any objection to such collection action by the plaintiff or the court, regardless of whether or not the defendant is found guilty after a trial. The defendant agrees that this document, along with any time payment agreement signed by the defendant, constitutes a judgment on the amounts stated paragraph 3 above.

9. The defendant understands and agrees that this document constitutes an agreement between the plaintiff and the defendant pertaining to the resolution of a criminal charge(s). The defendant further understands that he/she is obligated to fully and strictly comply with all conditions set forth in this agreement. The defendant further understands that in the event the defendant fails to fully comply with the conditions of this agreement, the prosecuting authority may request a hearing to revoke the stay of proceedings.

10. The parties jointly request that the court allow the above-described stay of proceeding and further request that the court enter the attached order.

DATED this 9th day of October, 2012.

Defendant

Brian W. Bottoms, WSBA # 36263
Deputy Prosecuting Attorney

Attorney for Defendant, WSBA # 31937

ORDER

Based on the parties' request for a stay of proceedings, and the above stipulation between the parties, the court hereby orders that this cause is stayed for a period of 12 mos from the date of this order, under the terms and conditions contained in the attached stipulation.

Dated 10/30/12

Judge/Commissioner

GREGORY L. ZEMPEL
KITTITAS COUNTY PROSECUTOR
KITTITAS COUNTY COURTHOUSE
ELLENSBURG, WA 98926

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent.	)	No. 322823 DECLARATION OF SERVICE
vs JUSTIN ROSE, Defendant/Appellant.	)	

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 19th day of January, 2016, the undersigned delivered by email, per agreement, to:

Kraig Gardner
kraiggardner@yahoo.com

That on the 19th day of January, 2016, the undersigned delivered by US Postal Service, to:
Justin R. Rose
7002 Gregory Pl.
Yakima WA 98908-5728

copies of the following documents:

(1) Motion for Discretionary Review
(2) Declaration of Service

Ramona Fritz

OFFICE RECEPTIONIST, CLERK

To: Ramona Fritz
Subject: RE: Rose, Justin Motion for Discretionary Review

Received on 01-19-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ramona Fritz [mailto:ramona.fritz@co.kittitas.wa.us]
Sent: Tuesday, January 19, 2016 4:10 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Rose, Justin Motion for Discretionary Review

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message id: 38eb45916c6dcbdac24bb8719d004a14