COURT OF APPEALS
STATE OF WASHINGTON
2013 JUN 13 PM 3:

No. 69911-3-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent.

v.

WILLIAM MICHAEL REIS, Petitioner.

PETITIONER'S OPENING BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred in denying the defendant's motion to suppress evidence by order entered on February 6, 2013.

Issues Pertaining to Assignments of Error

1. In 2011, the Washington State Legislature amended the state's medical cannabis laws, and accordingly, the plain language of RCW 69.51A.040 states that the possession of cannabis in accordance with the terms and conditions of Chapter 69.51A RCW "does not constitute a crime." Does this provision legalize the possession of medical cannabis under certain circumstances, or does it merely allow patients' to assert an affirmative defense? (Assignment of Error 1)

2. Mr. Reis' home was searched with regard to a suspected cannabis grow. In the affidavit for search warrant, law enforcement failed to provide any evidence Mr. Reis's small grow was in violation of the state's medical cannabis laws. Assuming RCW 69.51A.040 legalizes the possession of cannabis in certain circumstances, did the search of Mr. Reis' home violate his rights under article I, section 7 of the Washington State Constitution? (Assignment of Error 1.)

B. Statement of the Case

Procedural History

Defendant, Mr. Reis, and codefendant, Rachel Lynn Reis, are charged with a violation of the controlled substances act, manufacturing of marijuana[1], during a period of time intervening between April 29, 2012 through May 21, 2012. CP 1. The evidence supporting this charge was obtained from a search of Mr. Reis' home at 12225 Shorewood Dr. SW,

[1] The terms "marijuana" and "cannabis" are synonymous with each other. That said, Chapter 69.51A RCW refers only to the term "cannabis," whereas Chapter 69.50 RCW generally refers to the term "marijuana."

Burien, WA 98146 ("Shorewood Drive Property" or "Mr. Reis' home"). Rachel Lynn Reis is Mr. Reis' daughter. She also resides at the Shorewood Drive Property, with her father. Rachel Lynn Reis is not a party to this petition for review.

The search of Mr. Reis' home was executed pursuant to a search warrant issued on May 15, 2012. CP 50-51. Probable cause to support the search warrant was based on the affidavit of Officer Thomas Calabrese. CP 21-27.

Mr. Reis moved to suppress the evidence obtained from the search of his home. CP 9-20. On February 6, 2013, the trial court denied Mr. Reis' motion. CP 88-93. Mr. Reis filed a Notice for Discretionary Review on February 12, 2013, and an emergency motion for discretionary review on February 27, 2013. CP 95. On February 25, 2013, the trial court certified, under RAP 2.3(b)(4), that its order denying Mr. Reis' motion to suppress involves a controlling question of law as to which there is substantial ground for a difference of opinion, and that immediate review of the order may materially advance the ultimate termination of the litigation. CP 110. The state filed its opposition to the motion for discretionary review on March 8, 2013. On March 11, 2013, this Court granted discretionary review.

Statement of Facts

The District Court for King County executed a search warrant to search Mr. Reis's home based on an affidavit provided by Officer Thomas Calabrese. CP 27, 50-51. Based on Officer Calabrese's statement, the court determined there was probable cause to believe that the crime of violating the Uniform Controlled Substances Act, RCW 69.50, had been committed. CP 50. Officer Calabrese's affidavit can be summarized as follows.

At an undisclosed date and time, an anonymous informant contacted Officer Calabrese and said merely that a "William" was growing marijuana in the Shorewood area of Burien. CP 23. No additional information was provided—no last name, no address, no physical description, etc. *Id.*

Sometime thereafter, Officer Calabrese was driving in the Shorewood area and noticed an undisclosed number of teenage cannabis plants sitting on the back deck of Mr. Reis' home. *Id.* Upon further inspection, Officer Calabrese saw a man who looked similar to Mr. Reis transferring the plants from smaller pots to larger ones. *Id.*

Officer Calabrese parked his vehicle and entered a neighbor's property. CP 23. From the neighboring property, the officer claimed to hear "the distinct sound of humming coming from . . . the Northwest side

of the home" and observed that "one of the daylight basement windows was covered on the inside with black plastic." *Id.* Officer Calabrese also noticed that "there was a small amount of condensation on the interior of this window." *Id.* This evidence is generally indicative of an indoor cananbis garden. CP 23-24.

After this observation, Officer Calabrese attempted to contact neighbors to inquire on unusual short traffic stays or similar circumstances at the Shorewood Drive Property that would indicate a drug dealing operation. CP 26. In general, the neighbors refused to speak to Officer Calabrese, other than to state that they were fearful of Mr. Reis. *Id.*

Officer Calabrese's affidavit also includes a summary of Mr. Reis' prior criminal history, which included a 2005 arrest and VUCSA and VUFA charge for growing cannabis in the basement of his home, and a pending charge related to a 2011 arrest for possession of 1.3 grams of cannabis. CP 26.

In addition, Officer Calabrese cites to a written record from another investigation. CP 25-26. In that record, an Officer Klokow states generally that he learned through the Sheriff's Office of Mendocino County, California, that a marijuana grow was discovered in 2006 on property Officer Klokow claims Mr. Reis owned. CP 26. Individuals

unrelated to the case admitted responsibility for the grow. *Id.* No charges were filed against Mr. Reis. *Id.*

Officer Calabrese's affidavit fails to mention or address Washington State's medical cannabis laws (Chapter 69.51A RCW). Accordingly, Officer Calabrese made no effort in his investigation to determine whether or not Mr. Reis' activity complied with the terms and conditions of Chapter 69.51A RCW. For example, Officer Calabrese's affidavit fails to indicate the number of cannabis plants he witnessed Mr. Reis attending to on his back deck, and whether the number of plants exceeded the fifteen plant limit under RCW 69.51A.040(1).

Based on the forgoing information, Officer Calabrese sought and obtained a search warrant for Mr. Reis' home. Upon executing the warrant, officers discovered and seized 6 cannabis plants located on Mr. Reis' back deck, and from inside the home, officers seized 31 juvenile plants and roughly 13 pounds of cannabis. CP 5-6. It is unclear, from the Certification for Determination of Probable Cause, whether those 13 pounds included leaf, trim, or other non-useable plant matter. *Id.* Officers also found a scale and a bill of sale to Chronic LLC. CP 4-5. Under the state's medical cannabis laws, patients may collectively grow up to 45 plants and possess 24 ounces (4 pounds, 8 ounces) of useable cannabis. RCW 69.51A.085.

C. Summary of Argument

In 2011, the Washington State Legislature amended the state's medical cannabis laws, as provided in Chapter 69.51A RCW. Accordingly, the possession of cannabis, in compliance with the terms and conditions of Chapter 69.51A RCW, "does not constitute a crime." RCW 69.51A.040 (emphasis added). Pursuant to this change in the law, qualified patients, under certain circumstances, may legally possess, manufacture, and distribute cannabis.

Because an individual may legally possess, manufacture, and distribute cannabis under certain circumstances, this activity, in and of itself, is not evidence of a crime, and law enforcement may not arrest individuals or search their home based solely on such activity. Something more is required; specifically, probable cause that the individual is in violation of the terms and conditions of Chapter 69.51A RCW.

In its order denying defendant's motion to suppress, however, the trial court concluded RCW 69.51A.040 provides only an affirmative defense and does not decriminalize the possession, manufacturing, and distribution of cannabis in certain circumstances. Accordingly, an affirmative defense does not legalize an activity, nor negate probable cause that a crime has been committed. *See State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

The trial court's interpretation of RCW 69.51A.040 is in error. The court relied upon legislative history, specifically, the governor's partial veto of E2SSB 5073 (2011), to frustrate the plain and unambiguous language of the statute. *See* CP 53-81 for a copy of E2SSB 5073, subject to the governor's partial veto.

Even assuming, in the alternative, the plain language of the statute is ambiguous. The trial court's interpretation is contrary to rules of statutory interpretation and legislative intent.

The people and the legislature have spoken on this issue, law enforcement cannot arrest and search patients simply because they are in possession of cannabis. There must also be evidence such individuals are in violation of the state's medical cannabis laws.

Here, law enforcement failed to introduce any evidence of such a violation. Therefore, Mr. Reis respectfully requests this Court to reverse the trial court's order to deny the defendant's motion to suppress evidence and remand for dismissal of the related charge.

D. Argument

The trial court's Order Denying Defendant's Motion to Suppress concerns the statutory interpretation of RCW 69.51A.040. The meaning of a statute is a question of law this Court reviews de novo. *State v. Gray*,

174 Wn.2d 920, 926, 280 P.3d 1110 (2012); *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).

A search is a governmental intrusion into a person's reasonable and justifiable expectation of privacy. *State v. Patterson*, 83 Wn.2d 49, 515 P.2d 496 (1973). For a search warrant to be valid, it must be supported by probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). In determining the validity of a search warrant, the court is limited to the information and circumstances contained within the four corners of the underlying affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658, (2008). A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *Neth*, 165 Wn. 2d at 182; *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *Cole*, 128 Wn.2d at 286).

State officers cannot obtain a valid search warrant when there is no probable cause of a state crime, even if there is probable cause that the defendant is involved in federal criminal activity. *See United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 948 (9th Cir. 2010) (because evidence supporting a marijuana grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed.)

1. **<u>RCW 69.51A.040 Legalizes the Possession of Cannabis in Certain Circumstances.</u>**

In November 1998, the citizens of Washington enacted Initiative 692, the Medical Use of Marijuana Act. The Act is codified in Chapter 69.51A RCW. The Act provides patients and caregivers who meet the Act's requirements with an affirmative defense when charged by the state with possession or manufacturing medical cannabis. Courts interpreted the Act not to prohibit the arrest of those found with medical cannabis, but to provide for their eventual exoneration through court proceedings. *See State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

In an effort to correct this issue, which led to arrest without prosecution of countless of medical cannabis patients, the legislature, effective July 2011, amended the Act, converting what had been an affirmative defense to an exception to the general controlled substances statute. The applicable statutory provision now reads:

> RCW 69.51A.040 Compliance with chapter – Qualifying patients and designated providers not subject to penalties – Law enforcement not subject to liability.
>
> The medical use of cannabis in accordance with the terms and conditions of this chapter <u>does not constitute a crime</u> and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter <u>may not be arrested, prosecuted, or subject to other criminal sanctions</u> or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have

> real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law . . . .

(Emphasis added).

The Washington legislature also codified their intent to legalize medical cannabis, stating in RCW 69.51A.005:

> [T]he legislature intends that:
>
> (a) Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis . . .
>
> (b) Persons who act as designated providers shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law, notwithstanding any other provision of the law, based solely on their assisting with the medical use of cannabis . . .

(Emphasis added).

Thus, Washington's medical cannabis laws legalize the growing and possession of cannabis so long as pursuant to the terms and conditisn of Chapter 69.51A RCW. RCW 69.51A.040.

For a medical patient, who is not participating in a collective garden pursuant to RCW 69.51A.085, these conditions include generally that the patient is diagnosed with a terminal or debilitating medical

condition (RCW 69.51A.010(4); the patient obtained a valid authorization to use cannabis for medical purposes (RCW 69.51A.010(7); the patient does not possess more than 15 cannabis plants (RCW 69.51A.040(1)); and law enforcement does not possess evidence that the patient converted cannabis for his or her medical use to a personal, nonmedical use or benefit (RCW 69.51A.040(4)(b)).

It is the state's position, however, that patients must also comply with a condition of Chapter 69.51A RCW that was vetoed by the governor. As noted above, the legislature significantly amended the state's medical cannabis laws in 2011. E2SSB 5073, 2011 Wash. Laws ch. 181; CP 53-81. This legislation was subject to a partial governor veto. The governor's partial veto left intact the language cited above, but vetoed sections of the law which involved the Department of Health and the Department of Agriculture overseeing a state licensed medical cannabis industry.

Relevant to this matter, such vetoed sections included Section 901, which required the Department of Health to develop a secure, state-wide registration system for all individuals authorized to use medical cananbis. *See* CP 74-76 (vetoed copy of Section 901). As a result of the Governor's veto, no such registry exists.

Even though no such registry exists, RCW 69.51A.040 still references Section 901. *See generally*, RCW 69.51A.040(3) ("The qualifying patient or designated provider [must] keep[] a copy of his or her proof of registration with the registry established in *section 901 of this act . . . posted prominently next to any cannabis plants.") At the bottom of the statute, however, the Code Reviser clarifies that Section 901 was vetoed by the governor. *See* RCW 69.51A.040 ("Reviser's note: Section 901 of this act was vetoed by the governor.")

Despite the veto, the trial court held that "in the absence of a state-wide registry, compliance with the terms and provisions of the medical marijuana law remains an affirmative defense to prosecution for the possession, manufacture, or sale of marijuana." CP 101. This conclusion is in error because it disregards the plain and unambiguous language of RCW 69.51A.040. In addition, even if such language is ambiguous, the law must be construed strictly against the state and in favor of Mr. Reis and the patients the law was intended to protect.

a. <u>The plain and unambiguous language of RCW 69.51A.040 legalizes the possession of cannabis in certain circumstances, any discussion of legislative history is inappropriate.</u>

The language of RCW 69.51A.040 is plain and unambiguous—the possession of cannabis, under certain circumstances, "does not constitute a

crime." Accordingly, the governor's veto and related legislative history is irrelevant. "Where a statute is unambiguous, we will determine the Legislature's intent from the language of the statute alone." *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). The "court looks first to its plain language. If the plain language of the statute is unambiguous, then this court's inquiry is at an end." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201, (2007) (internal citations omitted). The language could not have been clearer, possession of cannabis under the terms and conditions of Chapter 69.51A RCW, "does not constitute a crime." RCW 69.51A.040.

Judge Nielson from the Federal District Court for the Eastern District of Washington agreed and upheld this plain reading of the statute. *See United States of America v. Jerad Kynaston et al*, No. CR-12-0016-WFN (E.D. Wa filed Feb. 7, 2012) (appealed to the Ninth Circuit, No. 12-30208, Jun. 18, 2012); CP 28-31. The court in *Kynaston* held that to "obtain a warrant, officers must show probable cause that the criteria of the medical marijuana exception have not been met." CP 29.

Furthermore, the governor's veto of the state-wide registry, in Section 901 of E2SSB 5073 (2011), may not defeat the plain and unambiguous language. Any reference to Section 901 within RCW

69.51A.040 was effectively removed by the partial veto. Accordingly, Chapter 69.51A RCW must be read as though Section 901 and the state-wide registry was never considered by the legislature.

"The Governor's veto of a portion of a measure, if the veto is not overridden, removes the vetoed material from the legislation as effectively as though it had never been considered by the legislature." *Hallin v. Trent*, 94 Wn.2d 671, 677, 619 P.2d 357 (1980) (emphasis added). "In exercising the veto power, the governor acts as a part of the legislative bodies, and the act is to be considered now just as it would have been if the vetoed provisions had never been written into the bill at any stage of the proceedings." *Id.* at 678; *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 506, 104 P.2d 478 (1940).

Pursuant to the *Hallin* and *Shelton Hotel*, quoted above, RCW 69.51A.040 plainly reads as follows:

> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, . . . if:
>
> (1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:
> (i) No more than twenty-four ounces of useable cannabis;

(ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
(iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.
(b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;

~~(2) The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis~~;

~~(3) The qualifying patient or designated provider keeps a copy of his or her proof of registration with the registry established in *section 901 of this act~~ and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence;

(4) The investigating peace officer does not possess evidence that:
(a) The designated provider has converted cannabis produced or obtained for the qualifying patient for his or her own personal use or benefit; or
(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

(5) The investigating peace officer does not possess evidence that the designated provider has served as a designated provider to more than one qualifying patient within a fifteen-day period; and

~~(6) The investigating peace officer has not observed evidence of any of the circumstances identified in *section 901(4) of this act.~~

*Reviser's note: Section 901 of this act was vetoed by the governor.

RCW 69.51A.040 (emphasis added).

No meaning should be taken from the fact that the partial veto did not actually strike out the language relating to the state registry, as was done in the above quoted language. Pursuant to the state Constitution, article III, section 12, the governor may only veto entire sections of nonappropriation bills, not portions of sections. Const. art. 3, § 12 (amend. 62); *see generally*, *Washington State Grange v. Locke*, 153 Wn.2d 475, 486-89, 105 P.3d 9 (2005) (history of the governor's veto power both before and after the 62nd Amendment).

As a result, any remaining references to Section 901 are "incidentally vetoed" and "manifestly obsolete." *Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984).

To put another way, it is irrational to interpret the law to require compliance with the terms and conditions that are <u>nonexistent</u>. Logically, if a term and condition of the law was vetoed, the law can no longer require compliance, for the simple reason that there is no term and

condition to comply with. The Court's holding in *Hallin* and *Shelton Hotel* support this logical reading of Chapter 69.51A RCW.

Hence, the plain and unambiguous language of RCW 69.51A.040 legalizes the possession of cannabis under certain circumstances, and such circumstances do not include registering with the Department of Health pursuant to Section 901. References to Section 901 are incidentally vetoed, and Chapter 69.51A RCW must be considered now as if Section 901 was never written into the bill or considered by the legislature. The court is not permitted to "speculate as to what the legislature intended, had it foreseen the veto . . . courts may not engage in such conjecture." *Shelton Hotel*, 4 Wn.2d at 500.

Because the language of RCW 69.51A.040 is plain and unambiguous, any discussion of legislative history is inappropriate. "The rule is universal that when the language of a statute is plain and free from ambiguity, it must be held to mean exactly what it says. In such a situation there is neither room nor occasion for the application of any rules of construction." *Shelton Hotel*, 4 Wn.2d at 507. Resort to other tools of statutory construction, including consideration of legislative history, is improper. *Cherry v. Muni. of Metro. Seattle*, 116 Wash.2d 794, 799, 808 P.2d 746 (1991).

b. Assuming there is an ambiguity, under the rules of statutory interpretation, this court should construe Chapter 69.51A RCW to legalize cannabis in certain circumstances, despite the governor's veto of Section 901 of E2SSB 5073.

In the alternative, assuming there is an ambiguity, under the rules of statutory construction, Chapter 69.51A RCW decriminalizes cannabis in certain circumstances, despite the governor's veto of Section 901.

The state has argued that Chapter 69.51A RCW presents an ambiguity because a separate statutory provision, RCW 69.51A.043, authorizes patients to assert an affirmative defense should they fail to register with the Department of Health, pursuant to Section 901. Thus, the state argues, because registry is impossible, the law only allows for an affirmative defense.

Assuming RCW 69.51A.043 creates an ambiguity, pursuant to the rules of statutory construction, the existence of this provision is not controlling. The fact that the law may be construed to provide qualified patients and designated providers both arrest protection (RCW 69.51A.040) and an affirmative defense (RCW 69.51A.043) is not reason to simply do away with the former. Especially in light of the rules discussed below.

i. Under the rule of lenity, the court must construe the statute strictly against the state and in favor of the accused.

Assuming there is ambiguity, the rule of lenity requires Chapter 69.51A RCW to be construed in favor of Mr. Reis. "Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused." *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

For example, Division II of this Court recently applied the rule of lenity in construing a separate provision of Chapter 69.51A RCW. *State v. Shupe*, ___ Wn. App. ___, 289 P.3d 741 (2012). In *Shupe*, the court interpreted the definition of a designated provider. This definition limits a provider to "only one patient at any one time." *Id.* at 748 Based, in part on the rule of lenity, the court interpreted this provision to mean "one transaction after another," as opposed to one, long-term relationship. *Id.*

The policy underlying the rule of lenity is to "place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." *State v. Jackson*, 61 Wn.App. 86, 93, 809 P.2d 221 (1991) (citing *State v. Knowles*, 46 Wn.App. 426, 432, 730 P.2d 738 (1986).

A decriminalization statute, that in effect, only provides an affirmative defense, does not "clearly and unequivocally warn people of

the actions that expose them to liability." *Jackson*, 61 Wash.App. at 93. A qualified patient, reading Chapter 69.51A RCW—specifically, the legislature's intent that "[q]ualifying patients . . . shall not be arrested, prosecuted, or subject to other criminal sanctions"—would logically conclude that the legislature intended to actually provide arrest protection.

It goes without question, here, there is no state-wide registry. Consequently, the state cannot construe the law to require such registration.

Likewise, the terms and conditions of Chapter 69.51A RCW do not include registration, when no such registry exists. Any other reading of RCW 69.51A.040, and the remaining provisions of the Chapter, violates the rule of lenity.

ii. As a remedial statute, RCW 69.51A.040 must be construed in favor of the patients it was enacted to protect, necessitating decriminalization of cannabis, not an affirmative defense.

RCW 69.51A.040 is a remedial statute, and accordingly, is construed liberally in favor of the patients it was enacted to protect. The legislature's statement of intent under RCW 69.51A.005 finds that patients benefit from the medical use of cannabis, and "humanitarian compassion necessitates" that the decision to use cannabis is personal and based on professional medical judgment. Based on this finding, the legislature intends that qualifying patients "shall not be arrested, prosecuted, or

subject to other criminal sanctions or civil consequences . . . based solely on their medical use of cannabis." RCW 69.51A.005(2)(a).

Thus, Chapter 69.51A.RCW is remedial, meant to grant protection and relief to patients and their providers. As remedial legislation, it is construed liberally in favor of the individuals it is meant to protect. "This court construes remedial statutes liberally in order to effect the remedial purpose for which the Legislature enacted the statute." *Matter of Myers*, 105 Wn.2d 257, 267, 714 P.2d 303 (1986) (citing *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978)). "It is a well-accepted rule that remedial statutes, seeking the correction of recognized errors and abuses in introducing some new regulation for the advancement of the public welfare, should be construed with regard to the former law and the defects or evils sought to be cured and the remedy provided." *Peet v. Mills*, 76 Wn. 437, 439, 136 P. 685 (1913). "[I]n so construing such statutes they should be interpreted liberally . . . courts will look to the old law, the mischief sought to be abolished, and the remedy proposed." *Id.*

The legislature clearly enacted RCW 69.51A.040 to remedy the prior statutory scheme, which resulted in the arrest without prosecution of countless patients. Accordingly, "[t]his court should construe the provision liberally to advance the overall legislative purpose." *Matter of Myers*, 105

Wn.2d at 267-68. (citing *Grant*, 89 Wn.2d at 685; *State v. Bishop*, 94 Wn.2d 116, 118, 614 P.2d 655 (1980)).

iii. The governor's veto message is not conclusive of legislative intent, and moreover, it is ambiguous with regard to such intent.

The governor's veto message is not controlling when analyzing the legislative history of Chapter 69.51A RCW; moreover, the governor's comments are contradictory and ambiguous with regard to legislative intent.

To begin, the governor's veto message states that signed sections of E2SSB 5073 "provide additional state law protections." Governor's veto message on E2SSB 5073 (April 29, 2011) (emphasis added); Appendix 32. And accordingly, "[q]ualifying patients or their designated providers may grow cannabis for the patient's use or participate in a collective garden without fear of state law criminal prosecution." *Id.*

This language implies that the governor interprets Chapter 69.51A RCW to <u>legalize</u> possession of cannabis in some instances, since an affirmative defense is only triggered upon arrest and prosecution.

Similarly, the governor goes on to state that the legislature "may remove state criminal and civil penalties . . . . While such activities may violate the federal Controlled Substances Act, states are not required to

enforce federal law or prosecute people for engaging in activities prohibited by federal law." *Id.*

In contradiction to these statements, however, the governor subsequently implies that in vetoing Section 901, patients may only assert an affirmative defense pursuant to RCW 69.51A.043.

> I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed.

Id.; Appendix 34. Thus, the governor's veto message is ambiguous with regard to legislative intent.

Moreover, these statements are not controlling. The governor, in vetoing legislation, acts in a legislative capacity. *See Locke*, 153 Wn.2d 475. Accordingly, the governor's veto message is merely an expression of personal opinion as to the interpretation of the law. *Id.* at 490.

As an opinion, the remarks of a single legislator are not conclusive authority with regard to legislative intent. "The intent of legislative sponsors of a measure is noteworthy, but not conclusive as to our interpretation of the plain language of a measure. 'The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.'" *Washington State Legislator v. Lowry*, 131 Wn.2d 309, 326-27,

931 P.2d 885 (1997) (internal citations omitted; quoting *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 154-55, 839 P.2d 324 (1992); *see also, State v. Ramirez*, 140 Wn.App. 278, n. 7, 165 P.3d 61 (2007) (citing *In re Bankruptcy of F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992)) (Statements in a Final Bill Report are not "conclusive authority" with regard to legislative intent. "On the contrary, generally, we will not turn to the comments of a single legislator to establish legislative history.")

Thus, the governor's statements are ambiguous at best, and moreover, even if they did provide a clear message, they are merely the comments of a legislator, and not controlling to establish legislative intent.

iv. The 2011 legislative amendments to Chapter 69.51A RCW resulted in material changes in wording, evidencing an intent to change the law.

The legislature, in 2011, significantly amended the state's medical cannabis laws. What used to clearly provide for an affirmative defense was removed and replaced by language stating that the same activity "does not constitute a crime." RCW 69.51A.040.

"When a material change is made in the wording of a statute, a change in legislative purpose must be presumed. *WR Enterprises, Inc. v. Department of Labor and Industries*, 147 Wn.2d 213, 53 P.3d 504 (2002) (citing *Graffell v. Honeysuckle*, 30 Wn.2d 390, 399, 191 P.2d 858 (1948)).

"It is a well recognized rule of statutory construction that, where a law is amended and a material change is made in the wording, it is presumed that the legislature intended a change in the law." *Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3, 459 P.2d 389 (1969) (citing *Alexander v. Highfill*, 18 Wn.2d 733, 140 P.2d 277 (1943)).

The prior version of RCW 69.51A.040 (2010) stated:

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

CP 60-61 (emphasis added). The legislature materially changed this wording to state:

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

RCW 69.51A.040 (emphasis added).

Thus, what was once clearly identified as an affirmative defense was changed to no longer "constitute a crime." Similarly, the legislature amended its purpose and intent. The prior version of RCW 69.51A.005(2)(a) (2010) stated:

> [T]he people of the state of Washington intend that:
>
> (a) Qualifying patients with terminal or debilitating illnesses who, in the judgment of their health care professionals, may benefit from the medical use of marijuana, <u>shall not be found guilty of a crime</u> under state law for their possession and limited use of marijuana.

CP 54 (emphasis added). This language was significantly amended, and now states:

> [T]he legislature intends that:
>
> (a) Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, <u>shall not be arrested, prosecuted, or subject to other criminal sanctions</u> . . .

RCW 69.51A.050(2)(a) (emphasis added).

These amendments represent a material change; it is therefore presumed that the legislature intended to change the law. Construing RCW 69.51A.040 to only provide an affirmative defense does not change in law, and therefore, is in error.

Lastly, a short discussion of the subsequent developments in this area of law is worth mentioning (albeit, counsel for Mr. Reis appreciates that such developments are not controlling with regard to the specific question at issue here). In November 2012, the people of the state of Washington passed Initiative 502. Accordingly, all individuals, not just patients, over the age of 21 may legally possess certain quantities of

marijuana. RCW 69.50.360. Likewise, the law created a commercial recreational marijuana industry, licensed by the Liquor Control Board.

Under our state constitution, "[a]ll political power is inherent in the people." *Washington State Motorcycle Dealer Association v. State*, 111 Wn.2d 667, 675, 763 P.2d 442 (1998) (quoting Const. art. 1, § 1). The people have spoken time and again on the decriminalization of cannabis. It is perplexing to think that the legislature only intended to grant patients an affirmative defense, when a year later, the people made the unprecedented decision to legalize the possession of cannabis for everyone, patients and recreational users alike.

Notwithstanding recent developments in the law, the state's *Catch-22* interpretation of our state's medical cannabis laws is illogical. It contradicts the plain and unambiguous language of RCW 69.51A.040; it defies the rule of lenity and fundamental concepts of fairness; and moreover, it continues to harm the very individuals the law was enacted to protect. Thus, Chapter 69.51A RCW legalizes the possession of cannabis in certain circumstances, and accordingly, the search of Mr. Reis' home was unlawful.

2. **The Search of Mr. Reis' Home was Unlawful Because the Affidavit Failed to Address Whether Mr. Reis' Activity Violated Chapter 69.51A RCW.**

Pursuant to the Fourth Amendment, a search warrant may only be issued if the application shows probable cause that the defendant is involved in criminal activity and that the evidence of the criminal activity will be found in the place to be searched. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Here, state law says that certain activity "does not constitute a crime," and such individuals in compliance with the law "may not be arrested, prosecuted, or subject to other criminal sanctions." RCW 69.51A.040. Hence, where certain activity may be legal, there is no probable cause to search.

Although Officer Calabrese's affidavit includes evidence of an alleged cannabis grow, there is no assertion in the affidavit that the grow violated what is expressly permitted by Washington's medical cannabis laws. This omission is fatal to the search warrant, as the warrant then does not show probable cause of a state crime.

Here, there was no evidence that the grow operation exceeded the fifteen plant limit under RCW 69.51A.040(1). Nor was there evidence that Mr. Reis was not a qualified patient or designated provider under RCW 69.51A.010(1), (4). Furthermore, there was no evidence that Mr. Reis converted the cannabis produced for his own personal use or benefit.

RCW 69.51A.040(4). In addition, there was no evidence Mr. Reis was a designated provider to more than one qualifying patient within a fifteen-day period. RCW 69.51A.040(5). Likewise, there was no evidence of unlawful buying or selling activity from the property. Similarly, the officers failed to garner power records, which may have indicated the size and scope of the garden.

Absent Officer Calabrese's observations of Mr. Reis tending to cannabis plants on his back deck, the facts and circumstances to support probable cause largely consisted of Mr. Reis's criminal history. "[H]istory of the same or similar crimes . . . without other evidence . . . falls short of probable cause to search." *Neth*, 165 Wn.2d at 185-86 (citing *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); *State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429 (1980)). "Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches." *Neth*, 165 Wn.2d at 186; *see also Hobart*, 94 Wn.2d at 446-47 ("If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed.")

Based on well-established law, Mr. Reis's prior VUCSA and VUFA charge, and pending possession charge, are insufficient to establish

probable cause. Moreover, the alleged grow in California is irrelevant. Mr. Reis was not charged as a result of this investigation, and other individuals admitted responsibility.

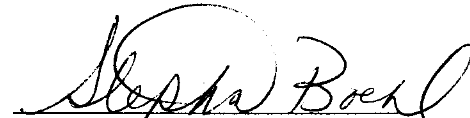
Pursuant to Washington's medical cannabis laws, law enforcement is required to show probable cause that an individual in possession of cannabis is also in violation of the terms and conditions of Chapter 69.51A RCW. That was not done here. Absent this showing, Mr. Reis' activity—tending to a small number of cannabis plants on his back deck—did not establish probable cause that a crime was being committed. The warrant was therefore unlawful.

E. Conclusion

In conclusion, Mr. Reis respectfully requests that this court reverse the trial court's order denying Mr. Reis' motion to suppress evidence, and remand the matter for dismissal.

Respectfully submitted this 13th day of June, 2013

Law Office of Kurt E. Boehl, PLLC,



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APPENDIX

Governor's veto message on E2SSB 5073 (April 29, 2011)

VETO MESSAGE ON E2SSB 5073

April 29, 2011

To the Honorable President and Members,
The Senate of the State of Washington

Ladies and Gentlemen:

I am returning herewith, without my approval as to Sections 101, 201, 407, 410, 411, 412, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806, 807, 901, 902, 1104, 1201, 1202, 1203 and 1206, Engrossed Second Substitute Senate Bill 5073 entitled:

"AN ACT Relating to medical use of cannabis."

In 1998, Washington voters made the compassionate choice to remove the fear of state criminal prosecution for patients who use medical marijuana for debilitating or terminal conditions. The voters also provided patients' physicians and caregivers with defenses to state law prosecutions.

I fully support the purpose of Initiative 692, and in 2007, I signed legislation that expanded the ability of a patient to receive assistance from a designated provider in the medical use of marijuana, and added conditions and diseases for which medical marijuana could be used.

Today, I have signed sections of Engrossed Second Substitute Senate Bill 5073 that retain the provisions of Initiative 692 and provide additional state law protections. Qualifying patients or their designated providers may grow cannabis for the patient's use or participate in a collective garden without fear of state law criminal prosecutions. Qualifying patients or their designated providers are also protected from certain state civil law consequences.

Our state legislature may remove state criminal and civil penalties for activities that assist persons suffering from debilitating or terminal conditions. While such activities may violate the federal Controlled Substances Act, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. However, absent congressional action, state laws will not protect an individual from legal action by the federal government.

Qualifying patients and designated providers can evaluate the risk of federal prosecution and make choices for themselves on whether to use or assist another in using medical marijuana. The United States Department of Justice has made the wise decision not to use federal resources to prosecute seriously ill patients who use medical marijuana.

However, the sections in Part VI, Part VII, and Part VIII of Engrossed Second Substitute Senate Bill 5073 would direct employees of the state departments of Health and Agriculture to authorize and license commercial businesses that produce, process or dispense cannabis. These sections would open public employees to federal prosecution, and the United States Attorneys have made it clear that state law would not provide these individuals safe harbor from federal prosecution. No state employee should be required to violate federal criminal law in order to fulfill duties under state law. For these reasons, I have vetoed Sections 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806 and 807 of Engrossed Second Substitute Senate Bill 5073.

In addition, there are a number of sections of Engrossed Second Substitute Senate Bill 5073 that are associated with or dependent upon these licensing sections. Section 201 sets forth definitions of terms. Section 412 adds protections for licensed producers, processors and dispensers. Section 901 requires the Department of Health to develop a secure registration system for licensed producers, processors and dispensers. Section 1104 would require a review of the necessity of the cannabis production and dispensing system if the federal government were to authorize the use of cannabis for medical purposes. Section 1201 applies to dispensaries in current operation in the interim before licensure, and Section 1202 exempts documents filed under Section 1201 from disclosure. Section 1203 requires the department of health to report certain information related to implementation of the vetoed sections. Because I have vetoed the licensing provisions, I have also vetoed Sections 201, 412, 901, 1104, 1201, 1202 and 1203 of Engrossed Second Substitute Senate Bill 5073.

Section 410 would require owners of housing to allow the use of medical cannabis on their property, putting them in potential conflict with federal law. For this reason, I have vetoed Section 410 of Engrossed Second Substitute Senate Bill 5073.

Section 407 would permit a nonresident to engage in the medical use of cannabis using documentation or authorization issued under other state or territorial laws. This section would not require these other state or territorial laws to meet the same standards for health care professional authorization as required by Washington law. For this reason, I have vetoed Section 407 of Engrossed Second Substitute Senate Bill 5073.

Section 411 would provide that a court may permit the medical use of cannabis by an offender, and exclude it as a ground for

finding that the offender has violated the conditions or requirements of the sentence, deferred prosecution, stipulated order of continuance, deferred disposition or dispositional order. The correction agency or department responsible for the person's supervision is in the best position to evaluate an individual's circumstances and medical use of cannabis. For this reason, I have vetoed Section 411 of Engrossed Second Substitute Senate Bill 5073.

I am approving Section 1002, which authorizes studies and medical guidelines on the appropriate administration and use of cannabis. Section 1206 would make Section 1002 effective January 1, 2013. I have vetoed Section 1206 to provide the discretion to begin efforts at an earlier date.

Section 1102 sets forth local governments' authority pertaining to the production, processing or dispensing of cannabis or cannabis products within their jurisdictions. The provisions in Section 1102 that local governments' zoning requirements cannot "preclude the possibility of siting licensed dispensers within the jurisdiction" are without meaning in light of the vetoes of sections providing for such licensed dispensers. It is with this understanding that I approve Section 1102.

I have been open, and remain open, to legislation to exempt qualifying patients and their designated providers from state criminal penalties when they join in nonprofit cooperative organizations to share responsibility for producing, processing and dispensing cannabis for medical use. Such exemption from state criminal penalties should be conditioned on compliance with local government location and health and safety specifications.

I am also open to legislation that establishes a secure and confidential registration system to provide arrest and seizure protections under state law to qualifying patients and those who assist them. Unfortunately, the provisions of Section 901 that would provide a registry for qualifying patients and designated providers beginning in January 2013 are intertwined with requirements for registration of licensed commercial producers, processors and dispensers of cannabis. Consequently, I have vetoed section 901 as noted above. Section 101 sets forth the purpose of the registry, and Section 902 is contingent on the registry. Without a registry, these sections are not meaningful. For this reason, I have vetoed Sections 101 and 902 of Engrossed Second Substitute Senate Bill 5073. I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed.

With the exception of Sections 101, 201, 407, 410, 411, 412, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 701, 702, 703, 704, 705, 801, 802, 803, 804, 805, 806, 807, 901, 902, 1104, 1201, 1202, 1203 and 1206, Engrossed Second Substitute Senate Bill 5073 is approved.

Respectfully submitted,
Christine Gregoire
Governor

CERTIFICATE OF SERVICE

I certify that on June 13, 2013, I served via U.S. certified mail a copy of the foregoing Petitioner's Opening Brief, in *State of Washington v. Reis*, Court of Appeals, Division I, No. 69911-3-I, to the following:

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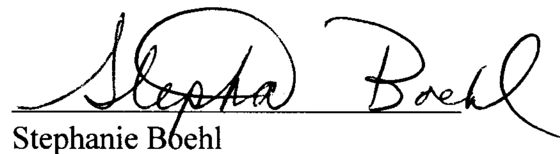

Stephanie Boehl