

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

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STATE OF WASHINGTON,  
Plaintiff-Appellee,  
v.

MICHAEL GRADT  
Defendant-Appellant.

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

The Honorable Michael Sullivan , Judge

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PETITIONER'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The RALJ Court erred in finding that Washington's general statutory savings clause applied to Initiative 502, an enactment by "the people."
2. Even if RCW 10.01.040 has application to a repeal enacted by initiative, Initiative 502 expresses an intent to dismiss all pending adult prosecutions for small amounts of marijuana.

**II.**  
**ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where a criminal statute is repealed by an initiative by the people and where that initiative has no savings clause, may Gradt be found guilty after the initiative has become effective?
2. Even if RCW 10.01.040, Washington's general savings statute, has application to the statutory repeal enacted by initiative, does Initiative 502 express an intent to dismiss all pending actions?

**III.**  
**STATEMENT OF THE CASE**

On September 15, 2012, Gradt was arrested for possessing 10.7 grams of marijuana. At the time, he was 61 years old. Had Gradt been stopped just 90 days later, the law would have prohibited his arrest and conviction.

On November 6, 2012, the voters of this state passed Initiative 502, decriminalizing the possession of small amounts of marijuana. On December 6, 2012, the Initiative became law.

Gradt then moved to dismiss the pending prosecution against him. CP 27-33. The district court judge refused to do so. Gradt was convicted of possession of less than 40 grams of marijuana. Gradt filed a RALJ appeal. The Superior Court judge affirmed the conviction. CP 1-26. He stated that: “Washington State Initiative 502 does not have the legal effect of applying I 502 retroactively.” CP 48-49.

Gradt filed a timely notice of discretionary review and this Court granted his motion for discretionary review.

#### **IV. ARGUMENT**

1. WHERE THE POSSESSION OF LESS THAN 40 GRAMS OF MARIJUANA WAS DECRIMINALIZED BY AN INITIATIVE AND THAT INITIATIVE HAS NO SPECIFIC SAVINGS CLAUSE, WASHINGTON’S GENERAL SAVING CLAUSE, RCW 10.01.040, HAS NO EFFECT.

At common law the outright repeal of a criminal statute without a savings clause bars prosecution for violations of the statute committed before its repeal. See 22 C.J.S. Criminal Law s 27, p. 89. But many states, including Washington adopted statutes in derogation of the common law. Washington’s general savings statute is found at RCW 10.01.040. The

savings statute preserves a potential or pending prosecution from being abated, perhaps inadvertently, by the Legislature's later act of repealing or amending the substantive law defining the offense or fixing its penalty. *State v. Kane*, 101 Wn. App. 607, 611, 5 P.3d 741, 743 (2000).

But the decriminalization of possession of less than 40 grams of marijuana was accomplished by Initiative 502, not by the Legislature. That makes this case analogous to *United States v. Chambers*, 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763 (1934). In that case the defendant was indicted for a violation of the National Prohibition Act, and for possessing and transporting intoxicating liquor in early 1933. On December 5, 1933, the ratification of the Twenty-First Amendment became effective, making the possession of alcohol once again legal in the United States. *Id.* at 222. Chambers moved to dismiss the charges against him and the trial court granted the motion. The government appealed and invoked the federal general saving statute. But the Supreme Court held that the statute had no effect upon a non-Congressional repeal, such as the enactment of a constitutional amendment by the people of the United States.

The same should be true in this case. The legislature was simply not involved. As in the case of the Twenty First Amendment, it was the people of the State of Washington who affected the repeal. Thus, as in *Chambers*, the savings statute simply does not apply. There was no

chance of inadvertent legislative action here. If the people had intended to preserve all pending prosecutions, the Initiative should have contained a specific savings clause.

2. EVEN IF RCW 10.01.040 HAS APPLICATION TO A REPEAL ENACTED BY INITIATIVE, INITIATIVE 502 EXPRESSES AND INTENT TO DISMISS ALL PENDING ACTIONS

Washington's statute states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, 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 contrary intention is expressly declared therein.**

RCW 10.01.040 (emphasis added).

Because RCW 10.01.040 is in derogation of the common law, it is strictly construed. The saving force of the statute is applied narrowly and

its exception—“unless a contrary intention is expressly declared in the amendatory or repealing act”—is interpreted broadly. Thus, our Supreme Court has not insisted that a legislative intent to affect pending litigation be declared in express terms in a new statute. Rather, such intent need only be expressed in “words that fairly convey that intention.” *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970); *State v. Grant*, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

Initiative 502 expresses the intention to repeal all pending criminal prosecutions for the possession of small quantities of marijuana. It 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. This measure authorizes the state liquor control board to regulate and tax marijuana for persons twenty-one years of age and older, and add a new threshold for driving under the influence of marijuana.

2013 Wash. Legis. Serv. Ch. 3 (I.M. 502).

The Washington State Supreme Court has twice allowed new legislation to control pending criminal cases in situations quite similar to the one presented here. In *State v. Zornes*, the court reversed and dismissed the defendants’ convictions under the Narcotic Drug Act for

possession of marijuana. While the appeals were pending, an amendment to the Act became effective stating that “the provisions of this chapter shall not ever be applicable to any form of cannabis.” *Zornes*, 78 Wn.2d at 11 (italics in original). From the words “not ever” preceding the words “be applicable”, the Court found it could be reasonably inferred that the Legislature intended the amendment to apply to pending cases as well as those arising in the future. *Zornes*, 78 Wn.2d at 13-14, 26. In *State v. Grant*, a new act provided that “intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages.” *Grant*, 89 Wn.2d at 682. Finding this language to be a fair expression of legislative intent so as to avoid the default rule of the saving statute, the Supreme Court dismissed a charge of being intoxicated upon a public highway in a case that was pending before the new statute became effective. *Grant*, 89 Wn.2d at 684.

Prior to Gradt’s trial, the people stated that they intended for the Government to “stop treating adult marijuana use as a crime.” This language is exceedingly similar to the language that the courts in *Grant* and *Zornes* found to express the intent to repeal pending prosecutions. Moreover, the savings statute applied is narrowly and its exception is interpreted broadly. The “new approach” language cited by the State does not overcome these rules of construction in light of the contravening

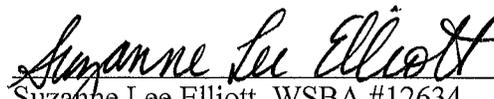
statement that “the people intend to stop treating adult marijuana use as a crime.” Given that statement, Gradt’s prosecution should have been dismissed.

**V.  
CONCLUSION**

For the reasons stated above, this Court should reverse the RALJ decision of the Pacific County Superior Court and vacate Gradt’s conviction.

DATED this 13<sup>th</sup> day of January 2015.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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**Transmittal Letter**

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