

No. 298850

STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE

DEC 19 2011

COURT REPORTER
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

Respondent,

v.

SCOTT SHUPE

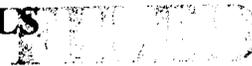
Appellant

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The United States Constitution provides only the minimum protections afforded Washington citizens against unreasonable searches and seizures by the government, whereas the Washington State Constitution offers far greater rights and guarantees against unlawful intrusion of the government into an individual's home and private affairs. *See generally, State v. Stroud*, 106 Wn.2d 144,148, 720 P.2d 436 (1986). In this regard, the Washington State Supreme Court has on numerous occasions over the past two decades, relied upon Article I, section 7, of the Washington State Constitution, in determining the propriety and lawfulness of police action, rather than simply resorting to the Federal Constitution. This has especially been the case when the United States Supreme Court has decided, for whatever reason, to limit "federal guarantees in a matter inconsistent with prior announcements" of the Washington State Supreme Court regarding constitutional guarantees afforded the citizens of this state. *State v. Jackson*, 102 Wn.2d 432, 439, 688 P.2d 999 (1980).

Traditionally, far greater emphasis has been placed on the sanctity of the home and private affairs of our state citizens under the guarantees afforded by the Washington State Constitution. Clearly, this mandate

must serve as a touchstone for resolving issues raised by the Defendant, Scott Shupe concerning the validity of the subject search warrant.

Constitutional protections are specifically intended as a bulwark against over-zealous law enforcement. Consequently, the simple fact that contraband and other related evidence are discovered and seized by police during the execution of an improvidently issued warrant cannot serve to overcome any deficiencies in the underlying affidavit in terms of establishing probable cause for the issuance of a search warrant. *Jackson*, at 445 (quoting *State v. Sieler*), 95 Wn. 2d 43, 48-49, 621 P.2d 1272 (1980).

II. STATEMENT OF ISSUES

A. Do the innocuous factors of Mr. Shupe's habitual carrying of a gym bag, a neighbor's belief that at one time a marijuana plant was in the back yard of a home that Mr. Shupe regularly visited, Mr. Shupe's involvement in a "dispensary," unspecified individuals stating they purchased marijuana from said "dispensary," and the frequenting of Mr. Shupe to another location occupied at one time by Mr. Shupe, rise to the probable cause necessary for the issuance of a search warrant for the addresses of:

1. 1514 W. Northwest Boulevard, Spokane, WA? YES.

2. 726 W. Mansfield, Spokane, WA? NO.
 3. 904 E. 11th, Spokane, WA? NO.
- B. Did Mr. Shupe’s involvement in a “dispensary” provide probable cause to search 904 E. 11th Ave, Spokane, Washington? NO.
- C. Did the state prove beyond a reasonable doubt that Mr. Shupe was guilty of manufacturing a controlled substance? NO.
- D. Did the state meet its burden of proof in the charge of possession of a controlled substance? NO.
- E. Did the State meet its burden of proof in the in the charge of delivery of a controlled substance? NO.
- F. Should RCW 69.51A.010(1)(d) be found void for vagueness? YES.
- G. Did the Court err when it gave jury instruction No. 23, with regard to RCW 69.51A.010(1), referencing “one patient at any one time,” without explanation of the phrase? YES.

III. FACTS

1. In September of 2009, Detective Kevin Langford applied for a Search Warrant, to search the following addresses: 904 E. 11th, Spokane, WA, 726 W. Mansfield, Spokane, WA, and 1514 W. Northwest Boulevard, Spokane, WA. *See Clerks Papers (CP) 44, 58.*

2. Detective Langford's affidavit stated, in part,

a. In May of 2009, [Detective] Tafoya [of the Spokane Police Department] became aware of a business selling Marijuana to qualifying patients, under RCW 69.51A, who could legally possess the drug. [Detective] Tafoya got the information from a [news] story on the internet. The news story advised that Scott Shupe dispenses Marijuana and that he grows, possesses and sells marijuana...The news article stated the business was in Spokane but would not provide a location.

CP 45.

b. On May 12th, 2009, Detective Langford, also of the Spokane Police Department, requested the business license of the business operated by Scott Shupe from the City of Spokane, which forwarded the license to him. *See* CP 46. The license indicated that the business name was "Change," with the location of the business at 1514 W. Northwest Boulevard, and that Scott Shupe was CEO, Noe Zarate and Chris Stevens were vice presidents. *Id.* Detective Langford also saw an ad in a local newspaper for a Medical Marijuana dispensary with the name of "Change," and provided a phone number. *Id.* Detective Langford stated that "it was believed that the business

currently operating at 1514 W. Northwest Blvd is the Medical Marijuana Dispensary.” CP 46.

- c. Detective Langford and other members of the Spokane Police Department began surveillance of “Change”, and the detectives state that Scott Shupe was seen carrying a duffle bag. *See* CP 46. Mr. Shupe was followed from “Change” to 726 W. Mansfield, the location that the affidavit states is Mr. Shupe’s residence. *Id.* Three other men, Chaz Shupe, Christopher Stevens, and Noe Zarate, were all seen at “Change.” *See* CP 46-47.
- d. On various unknown dates, Mr. Shupe was seen entering or exiting 1514 W. Northwest Blvd. carrying a blue duffle bag. *See* CP 46. Mr. Shupe was once seen driving a red Oldsmobile. *Id.* Mr. Shupe was followed from “Change” to 726 W. Mansfield, the address listed on the registration of the vehicle. *Id.* Detective Langford states in his affidavit that “Scott Shupe is believed to be transporting Marijuana in the duffel bag that he carries into the business.” CP 46.
- e. “Change” was placed under video surveillance on May 21st, 2009. *See* CP 47. Detective Langford stated that Officer

Douglas advised him that, after viewing many days of recorded footage, “he [had] seen in excess of 25 different customers each day.” CP 47. Other individuals, besides Mr. Shupe, were also observed at the business. *See* CP 46. One of these persons was “often seen carrying a black or dark blue duffle bag” to “Change.” CP 47.

- f. At the end of May, while in the 1500 block of Northwest Boulevard, Officer Grant “made contact with several individuals inside 1514 W. Northwest Boulevard, and smelled an overwhelming odor of marijuana.” CP 47. Officer Grant advised that there did not appear to be any items for sale. *See* CP 47. Officer Collins then entered the business to confirm the strong odor of marijuana, which he did. *Id.*
- g. On July 2nd, 2009, [Officer] T. Douglas stopped a vehicle...for an expired vehicle license violation...She could smell marijuana while at the drivers’ door of the vehicle. [The driver] advised there was medical marijuana in the vehicle and it had recently been purchased at the ‘Change’ store on Northwest Blvd. [The driver] also showed [Officer] T. Douglas a card authorizing his possession of medical marijuana...[and] showed [Officer] T. Douglas the marijuana he had just purchased. [Officer] T. Douglas, based on

her training and experience, recognized the substance to be marijuana. [The driver] also showed [Officer] Douglas the receipt for his purchase. He had purchased 14 grams of 'Blueberry' for \$200.

CP 48.

The above traffic stop and two other traffic stops "were terry stops to investigate the Delivery of Marijuana from the 'Change' store at 1514 W. Northwest Blvd...No sample of marijuana was taken from these subjects." *Id.*

- h. On [August 3rd, 2009, Spokane Police Department] received a complaint from a neighbor in the area of 700 W. Mansfield. This neighbor was contacted by [Detective] Vandenburg. This neighbor advised that at 726 W. Mansfield there [was] a marijuana plant growing in the backyard of the residence. The neighbor advised the plant [was] approximately 4 feet tall and two feet wide...This neighbor also said that [Mr. Shupe] may not still live at the residence. The neighbor did say that [Mr. Shupe appeared] to sell marijuana after the female homeowner leaves for work. The neighbor advised that the female owns an antique store. The Spokane County assessor shows the residence to be owned by Beverly Nevin...Local utilities [showed] that 904 E. 11th Ave. (lower unit) was recently rented by Scott Shupe.

CP 49-50.

- i. At some point in time, law enforcement determined that the 726 W. Mansfield address was owned by a female named Beverly Nevin, who also owned an antique shop. *See* CP 50. Detective Langford discovered local utilities showing “that 904 E. 11th Ave. (lower unit) was recently rented by Scott Shupe.” CP 50.
- j. On August 19th, 2009, Scott Shupe was observed leaving “Change” and was followed to 726 W. Mansfield. *See* CP 50. Mr. Shupe retrieved a blue duffle bag from the rear of a vehicle and was observed walking into the residence carrying the bag. *Id.*
- k. On [August 25th, 2009, Detective Langford] was contacted by the Portland Police [Department]. [Officer] Tsukimura advised that Scott Shupe had been arrested by the Oregon State Patrol. [Mr. Shupe] had been in possession of 4 pounds of marijuana and \$18,900. [Officer] Tsukimura was advising the Spokane Police Department because [Mr. Shupe] had stated that the marijuana he possessed was medical marijuana to [be] sold at the ‘Change’ dispensary. [Mr. Shupe’s] arrest was [ran] by the Spokesman Review on [August 26th, 2009].

CP 51.
- l. On September 2nd, 2009, Mr. Shupe “did not appear to be at the residence of 726 W. Mansfield.” CP 51-52.

- m. On September 4th, 2009, two people came and went from 726 W. Mansfield, and “these contacts were approximately 20 minutes in length.” CP 53. Sometime thereafter, Mr. Shupe drove a vehicle to 1514 W. Northwest Blvd., and “carried a bag into the shop.” *Id.* After a short time, he returned to 726 W. Mansfield. *See* CP 53.
- n. On September 7th, 2009, no activity at 904 E. 11th was observed, although a “red Oldsmobile” was parked at the residence and appeared to be broken down. *See* CP 10.
- o. On September 8th, 2009, Mr. Scott Shupe was seen as a passenger in a vehicle Chaz Shupe was driving. *See* CP 53. The vehicle left 904 E. 11th, and arrived at “Change” shortly thereafter. *Id.* “Both went into the business. Both exited the business a short time later and got back into the vehicle. The vehicle was followed to 726 W. Mansfield.” CP 53. The vehicle was followed from Mansfield to a coffee shop downtown, then to 904 E. 11th Ave. Scott Shupe was seen exiting the vehicle and walking into the lower unit. Chaz Shupe retrieved a light blue duffle bag from the rear of the vehicle and was seen walking into the lower apartment. CP 53.

Detective Langford stated “this was the same duffel bag that Scott Shupe carries in and out of the shop when it’s open for business. *Id.*

p. “On September 9th, 2009, [Mr. Shupe] was seen getting into [a] yellow pickup at 726 W. Mansfield. He was followed to the ‘Change’ shop. He carried a duffel bag into the business.” CP 53.

3. On September 10th, 2009, the addresses of 1514 W. Northwest Blvd., 726 W. Mansfield, and 904 E. 11th, were all searched pursuant to warrant. *See Report of Proceedings (RP) 301, March 15, 2011. Mr. Scott Shupe was arrested. Id. at 303.*
4. On September 11th, 2009, Mr. Shupe had his first appearance. *See RP 1, Sept. 11, 2009. Mr. Shupe’s counsel objects to the affidavit by Detective Langford as vague in dates, times, and specifics about the charges against Mr. Shupe of delivery of controlled substances. Id. at 3-5. Counsel states the affidavit makes no mention of Mr. Shupe delivering anything to an individual. Id. at 3-4. The Court stated there was probable cause for the charge of possession, but agreed with Counsel that there was a question as to the probable cause as to delivery or intent to deliver. Id. at 5. The Court set bond for Mr. Shupe at \$10,000.00. Id. at 6.*

5. On January 11th, 2010, Mr. Shupe came before the Court for initial arraignment. *See* RP 1, Jan. 11, 2010. Mr. Shupe plead not guilty to the charges of delivery of a controlled substance, possession of a controlled substance with intent to deliver, and manufacture of a controlled substance. *Id.* at 3.
6. On February 23rd, 2011, Mr. Shupe had his arraignment. *See* RP 1, Feb. 23, 2010. Counsel reiterated that there was no probable cause for the charge. *Id.* at 4. The Court stated that the objection would be a standing objection. *Id.* Mr. Shupe plead not guilty for the charges of delivery of controlled substance on or about September 9th, 2009, possession of a controlled substance with intent to deliver on or about September 10, 2009, and manufacture of a controlled substance on or about September 10, 2009. *Id.* at 5-6.
7. On March 4th, 2011, Mr. Shupe went before the Court for pretrial. *See* RP 8, March 4, 2011.
8. On March 10th, 2011, Mr. Shupe petitioned the Court for an Order Suppressing Evidence obtained by the September, 2009, search warrant. *See* RP 11, March 10, 2011. Counsel conceded that the search of “Change” appeared to have probable cause but notes that he had continuously objected to the smell of marijuana being an indication that something illegal is occurring. *Id.* at 12. Counsel

proceeds to argue the basis for the warrant does not pass the *Aguilar-Spinelli* test. *Id.* at 13-14. The Court denied the motion. *Id.* at 26.

9. On March 14, 2011, jury selection began and was completed. *See* RP, vol. 1, 49-148, March 14, 2011.
10. On March 15th, 2011, preliminary instructions to the jury were given, and both the State and counsel for Mr. Shupe delivered their opening statements, and the State's case in chief began. *See* RP, vol. II, 149-328, March 15, 2011.
11. On March 16th, 2011, the State rested its case, and the defense brought a motion to dismiss all charges on grounds that the State did not satisfy their burden. *See* RP, vol. III, 428, 435, March 16, 2011. The Court denied defenses motion to dismiss all charges, stating that there was "certainly sufficient testimony to get past this first bump, which is the prima facia showing." RP, vol. III, 446-447, March 16, 2011.

The defense then presented their case in chief, rested, and the Judge read the jury instructions. *See* RP, vol. III 449-513, March 16, 2011.

12. On March 17th, 2011, jury instructions were read, and the State and counsel for defense gave their closing arguments. *See* RP, vol. IV,

516-567, March 17th, 2011. Mr. Shupe was found guilty in all charges. *Id.* at 568.

13. On April 12th, 2011, Mr. Shupe motioned the Court for a judgment notwithstanding the verdict, which the Court denied. *See* RP, vol. IV, 573-574, April 12, 2011. Mr. Shupe was sentenced to six months and one day with five days credit for time served, with 30 days converted to 240 hours of community service. *Id.* at 585. Bond and appeal bond was set for Mr. Shupe at the amount of \$5000.00, with \$500.00 victim assessment, \$200.00 in court costs, \$100.00 DNA and \$110.00 lab fees. *Id.* at 587.

IV. ARGUMENT

A. The innocuous factors of Mr. Shupe’s habitual carrying of a gym bag, a neighbor’s belief that at one time a marijuana plant was in the back yard of a home that Mr. Shupe regularly visited, Mr. Shupe’s involvement in a “dispensary,” unspecified individuals stating they purchased marijuana from said “dispensary,” and the frequenting of Mr. Shupe to another location occupied at one time by Mr. Shupe,

In *State v. Jackson*, the Washington State Supreme Court reaffirmed the existing rule in this state that the sufficiency of an

informant's tip to establish probable cause for the issuance of a warrant is to be derived from *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 723, 84 S.Ct. 1509 (1964).

This *Aguilar-Spinelli* test, adopted by the Washington Supreme Court, states an informant's tip must be supported by underlying circumstances from which the informant drew his conclusion that criminal activity is occurring, and the affidavit of the officer must set forth the underlying facts from which the officer concluded that the informant was credible and his information reliable. *Jackson*, at 435; *see also, State v. Barnes*, 85 Wn.App. 638, 659-60, 932 P.2d 669 (1997); *State v. Johnson*, 75 Wn.App. 692, 710, 879 P.2d 984 (1994); *State v. Creelman*, 75 Wn.App. 490, 494-98, 879 P.2d 300 (1994); *State v. Sterling*, 43 Wn.App. 846, 849-50, 719 P.2d 1357 (1984); *State v. McPherson*, 40 Wn.App. 298, 300-01, 698 P.2d 563 (1985).

In *Spinelli*, the defendant was convicted at the trial court because of evidence gathered as a result of faulty probable cause.

In essence, the affidavit... contained the following allegations:

1. The FBI had kept track of Spinelli's movements on five days during the month of August, 1965. On four of these occasions, Spinelli was seen crossing one of two bridges leading from Illinois into St. Louis, Missouri, between 11 a.m. and 12:15 p.m. On four of the five days, Spinelli was

also seen parking his car in a lot used by residents of an apartment house at 1108 Indian Circle Drive in St. Louis, between 3:30 p.m. and 4:45 p.m.

On one day, Spinelli was followed further and seen to enter a particular apartment in the building.

2. An FBI check with the telephone company revealed that this apartment contained two telephones listed under the name of Grace P. Hagen, and carrying the numbers WYdown 4-0029 and WYdown 4-0136.

3. The application stated that "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

4. Finally, it was stated that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

Spinelli at 412-414.

The Court, after viewing each section of the affidavit, explained that the first two allegations "reflect only innocent-seeming activity and data." *Spinelli* at 414. The third allegation was "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Id.* The fourth allegation, made by a "confidential reliable informant," was required to be scrutinized because the statement was "a necessary element in a finding of probable cause." *Id.* at 415.

Mr. Shupe's case is remarkably similar to Mr. Spinelli's. In this instance, surveillance occurs over the course of five months, during which

Mr. Shupe is viewed frequenting his place of business (mostly around ten o'clock in the morning and six o'clock in the evening¹), business partner's home, Mr. Shupe's mother's home, and 904 E. 11th. *See generally*, CP 44-58. During these visits, he often drives his own vehicle and carries a blue gym bag with him. *Id.* Mr. Shupe's travels to and from those locations could hardly be taken as bespeaking illegal activity; and there is certainly nothing unusual about an individual regularly carrying a gym bag with him or in his vehicle. To use the Court's language in *Spinelli*, the fact, from news articles, online blogs, and a local newspaper, Mr. Shupe was known to local law enforcement as someone who was associated with marijuana, and "Change", "is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Spinelli* at 414.

Also, the three individuals pulled over by police in a ruse, detailed in both the affidavit and testimony from various state witnesses, never identify Mr. Shupe as the individual who sold them marijuana, and no marijuana was ever seized from them to test the veracity of their statement of purchase. Their statement was simply that they purchased marijuana from "Change," a licensed, incorporated business owned by three

¹ On page 190 of the RP, March 15th, 2011, Officer Langford indicated the surveillance of "Change" was usually conducted either at the closing or the opening of the store.

individuals, and they had the necessary documentation to validate their possession. *See* CP 48-49.

- 1. The innocuous factors DID rise to the probable cause necessary for the issuance of a search warrant for 1514 W. Northwest Boulevard, Spokane, WA.*

Mr. Shupe conceded that there was probable cause for the search of “Change”, located at 1514 W. Northwest Boulevard, Spokane, WA, based on the officer’s detection of the smell of marijuana. *See* RP 12.

- 2. The innocuous factors DID NOT rise to the probable cause necessary for the issuance of a search warrant for 726 W. Mansfield, Spokane, WA.*
- 3. The innocuous factors DID NOT rise to the probable cause necessary for the issuance of a search warrant for 904 E. 11th Ave., Spokane, WA.*

However, the innocuous facts and hearsay statements outlined above are not enough to amount to probable cause for a search warrant for the locations of 726 W. Mansfield and 904 E. 11th.

The reliance of the officer on the statement of a neighbor of Mr. Shupe’s mother (Beverly Nevin), and the weight he gives to the statement in order to substantiate his affidavit, is improper. The statement of the

neighbor, who remains unnamed, needs to be evaluated under *Aguilar-Spinelli*.

In *Spinelli*, the Court explains that “[a] magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer’s tip which - - even when partially corroborated - - is not as reliable as one which passes *Aguilar’s* requirements when standing alone.” *Spinelli* at 415-416. The statement of the neighbor of Ms. Nevin does not pass the *Aguilar-Spinelli* test, required by *State v. Jackson*.

The neighbor’s complaint was there was a marijuana plant in the backyard of 726 W. Mansfield, and that, while she has seen Mr. Shupe frequent 726 W. Mansfield, she did not know if Mr. Shupe actually resides there. *See* CP 49. The neighbor further stated that “Mr. Shupe *appears* to sell marijuana after the female homeowner leaves for work.” CP 49-50, *emphasis added*. The alleged “marijuana plant” in the backyard was never seen nor verified by law enforcement. The neighbor was not questioned about her knowledge of what marijuana is, or if she has ever seen marijuana. The affidavit itself purports the *appearance, not the occurrence*, of the sale of marijuana. Never in the affidavit does it state that the neighbor watches, sees, hears, or is present at, a sale of marijuana by Mr. Shupe, or even Mr. Shupe handling marijuana. In *Spinelli*, the Court disqualifies the informant’s statement by stating that:

...It is not alleged that the informant personally observed Spinelli at work, or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable...

Spinelli at 416

In this instance, it is not alleged that the neighbor personally observed Mr. Shupe at work, or that the neighbor had ever purchased marijuana from him. If the neighbor *did* come to the information indirectly, it would likely be through the news reports or online articles, which the officers themselves relied on to begin their investigation. It is well established, however, that those stories or articles cannot be held to be reliable. If, as the Court was previously quoted above as stating, an officer's bald and unilluminating suspicion is entitled no weight, it should follow that a bald and unilluminating suspicion of a neighbor is also weightless in the eyes of a magistrate.

Although Mr. Shupe concedes that the warrant and search of "Change" was legitimate, at 904 E. 11th and 726 W. Mansfield, no officer, at any time, smelled marijuana. No marijuana plants were ever confirmed by a trained eye prior to a search of the premises. *See* RP 14, March 10, 2011; CP 49, 54. No purchases of marijuana were ever overheard, much less seen at either location, by anybody. *Id.* All the officers have to base their warrant for 904 E. 11th and 726 W. Mansfield on is that Mr. Shupe

carries a blue gym bag to and from to these locations. Carrying a gym bag is not enough to rise to the burden of probable cause. *See* RP 14-15, March 10, 2011.

B. Mr. Shupe's involvement in a "dispensary" DID NOT provide probable cause for a warrant to search 904 E. 11th Ave, Spokane, Washington.

There is no nexus, as required by *State v. Thein*, 138 Wn. 2d 133, 977 P.2d 582 (1999), between any crime activity and 904 E. 11th. In *Thein*, the State presented an argument that

...a nexus is established between the items to be seized and the place to be searched where there is sufficient evidence to believe a suspect is probably involved in drug dealing and the suspect resides at the place to be searched. According to the State, 'a search warrant is properly issued at a drug trafficker's residence even absent proof of criminal activity at the residence...' Essentially, the State urges us to adopt a per se rule that if the magistrate determines a person is probably a drug dealer, then a finding of probable cause to search that person's residence automatically follows.

Id. at 141, 585

The Court disagreed with this logic, which was primarily drawn from *State v. O'Neil*, 74 Wn. App. 820, 879 P.2d 950 (1994), and reiterated that "[p]robable cause to believe that a man has committed a

crime . . . does not necessarily give rise to probable cause to search his home." *Thein* at 148, quoting *State v. Dalton*, 73 Wn. App. at 140.

In Mr. Shupe's case, the affidavit by the officer outlined the "tips" from informants regarding 726 W. Mansfield and 3928, but none regarding 904 E. 11th. The *only* reason the officers cite 904 E. 11th as being a place of interest is because his son, not him, carried a blue gym bag into the apartment, and Mr. Shupe lived there. *See* CP 53.

The officer's belief that the gym bag continuously contained marijuana is a baseless hunch. The officer at no time testified that Mr. Shupe was under 24 hour surveillance.

What if Mr. Shupe had been going to a gym during the time he was not under surveillance? Did Mr. Shupe carry the bag into a grocery store? His son's house? A mall? A movie theatre? Neither the affidavit nor the testimony of the officers details other activities of Mr. Shupe and it cannot be substantiated that Mr. Shupe *only* carried the gym bag to and from the locations on 11th, Mansfield, and Northwest Boulevard.

Even if Mr. Shupe *did* only carry the gym bag, to and from the locations on 11th, Mansfield, and Northwest Boulevard, what about the gym bag caused suspicion? If Mr. Shupe had been carrying a messenger bag, or a purse, or a "fanny pack," would the officer's suspicion have been the same? It is likely not. It is likely the officer had already made an

unfounded judgment that the bag *must* contain marijuana simply because of size. Woe to those who would be held under suspicion for carrying a large bag. If there was no judgment based on the size of the bag, the officer must have simply been grasping at straws to connect 904 E. 11th to “Change” in order to obtain a warrant for that location.

The officer made an egregious judgment by claiming that the blue gym bag Mr. Chaz Shupe carried into the apartment on 11th was the same that Mr. Shupe carried with him to “Change”. The officer never validated that statement. *See* CP 53.

Further, unlike other locations listed in the affidavit, 904 E. 11th presumably showed no unusual power usage increases. If it did, it is assumed that the officer would have relished the opportunity to place that information in the affidavit. The officer pulled local utility information to find the location of 904 E. 11th, and there was no mention of an increase in utility usage. *See generally*, CP 44-58.

C. The state DID NOT meet its burden of proof in the charge of manufacturing of a controlled substance.

RCW. 69.50.401 states it is unlawful for any person to manufacture a controlled substance. In order for Mr. Shupe to be found guilty of manufacturing a controlled substance, the State has to prove that,

...on or about September 10, 2009...manufactured a controlled substance...that the [Mr. Shupe] knew that the substance manufactured was a controlled substance...and...that this act occurred in the state of Washington...Manufacture means the direct or indirect production, preparation, propagation, or processing of any controlled substance. Manufacture also means the packaging or repackaging of any controlled substance. A person acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact circumstance or result is defined by law as being unlawful or an element of a crime.

RP, vol. IV, 526-527, March 17th, 2011.

There was no indication by any individual that *Mr. Shupe* was manufacturing marijuana on or about September 10th, 2009. The only individual that testified for the State who gave an indication that Mr. Shupe *had ever* manufactured marijuana, and at 904 E. 11th Avenue, was Mr. Stevens, Mr. Shupe's business partner, and his testimony was speculative at best.

The following is a portion of Mr. Stevens' testimony in regard to the possibility that Mr. Shupe was manufacturing marijuana:

Q (By Ms. Border) All right. Was there marijuana grown by Mr. Shupe?

A He's a patient. I would assume - - I would always assume so, because patients - -

Mr. Cikutovich: Objection, Your Honor.

The Court: Overruled. Go Ahead.

A I would assume so because he's a patient, and a lot of patients are growing a lot. And...

RP, vol. III, 388, March 16th, 2011.

Prosecuting attorney Ms. Border later continues her questioning about a possible marijuana grow at 904 E. 11th by Mr. Shupe:

Q Did you personally ever see a marijuana grow of Mr. Shupe's?

A Personally see a marijuana grow of Mr. Shupe? When I first met him, yes, he had a small little one.

Q Okay. And what address was that at?

A That was at 11th. That was split between him and his wife at the time.

Q It was at the 11th Street?

A Yes

Q Thank you.

RP, vol. III, 393, March 16th, 2011.

After the State rested their case, Mr. Shupe's counsel moved the Court for a dismissal of the charge of manufacturing of a controlled substance based on the State's inability to meet their *prima facie* case, which, it is argued, the Court improperly denied. *See* RP, vol. III, 435-448, March 16, 2011.

The State, at no time, provided evidence that Mr. Scott Shupe lived at the main floor of 904 E. 11th on or around September 10th, 2009. All the State provided was that the mailbox said "Scott Shupe," and Chaz Shupe, Mr. Shupe's son, gave an officer a key for entry into the apartment. *See* RP, vol. III, 439, March 16th, 2011. Any implication that Mr. Shupe lived and was growing marijuana at 904 E. 11th, was opinion from various

officers. The State did not meet their *prima facie* burden to preclude dismissal of the charge of manufacture of a controlled substance against Mr. Shupe.

There is no evidence presented that there was a marijuana grow by Mr. Shupe at any time which was not done in a manner authorized by law. There was not enough evidence to convince a reasonable juror beyond a reasonable doubt that Mr. Shupe was guilty of manufacturing a controlled substance in a manner not prescribed by law. The Court instructed the jury that,

It is a defense to a charge of manufacture of marijuana that...the defendant is a qualifying patient...[and] the defendant possessed no more marijuana than necessary for the defendant's personal medical use for a 60-day period...and...the defendant presented valid documentation to any law enforcement official who questioned the defendant regarding his or her medical use of marijuana.

RP, vol. IV, 529, March 17th, 2011.

Mr. Stevens stated that he first met Mr. Shupe in December of 2008 for multiple reasons, one of which was that both he and Mr. Shupe were medical marijuana patients. *See* RP, vol. III, 335-336, March 16th, 2011. From the information contained in the above questions and answers, around the time when Mr. Stevens first met Mr. Shupe in December of 2008, he had a "small little" marijuana grow for his, and possibly his wife's, medical use. The State attempts to imply that, because

Mr. Stevens has seen a marijuana grow at Mr. Shupe's in the past, that Mr. Shupe was growing at 904 E. 11th at the time of his arrest, years later.

Mr. Stevens' testimony indicated that the only time he saw a grow of Mr. Shupe's was at the time of their meeting, when both he and Mr. Shupe were medical marijuana patients. RP, vol. III, 388, 393, March 16th, 2011.

The State fails to establish that Mr. Shupe was the only person living at that location or that he was the only medical marijuana patient living at that location. *Even if there was a marijuana grow at 904 E. 11th by Mr. Shupe at the time of his arrest, Mr. Shupe was a medical marijuana patient allowed to possess enough marijuana necessary for his medical use for a 60-day period, and there was no testimony throughout the trial that there was more than a 60 day supply found at the location of 904 E. 11th on the date of the arrest. See RP, vol. III, 465, March 16, 2011; vol. IV, 528, March 17, 2011.*

A reasonable jury could not conclude, even if Mr. Shupe was manufacturing a controlled substance, that the manufacturing of that substance resulted in him having more marijuana than allowed for a 60 day supply.

D. The state DID NOT meet their burden of proof in the charge of possession of a controlled substance with intent to deliver.

RCW. 69.50.401 states it is unlawful for any person to possess a controlled substance with intent to deliver. In order for Mr. Shupe to be found guilty of possession of a controlled substance, the State had to prove that;

“It is a crime for any person to possess with intent to deliver a controlled substance except as authorized by law...To convict the defendant of the crime of possession with intent to deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt; One, that on or about September 9th, 2009, the defendant possessed a controlled substance; Two, that the defendant possessed the substance with the intent to deliver a controlled substance; and, Three, that this act occurred in the state [sic] of Washington...Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession, but there is dominion and control over the substance. Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control may not be exclusive to support a finding of constructive possession. In deciding whether the defendant had dominion and control.”

RP, vol. III, 523-524, March 16th, 2011.

The State did not prove Mr. Shupe possessed marijuana on or about September 9th, 2009 with intention to deliver said substance. It is not denied that Mr. Shupe was in a house where marijuana was located at

the time of the arrest, or that he was at “Change” on the 9th of September, 2009, but there is no evidence showing that Mr. Shupe had any marijuana on his person or within his dominion and control on or about September 9th or 10th, 2011. Without evidence of Mr. Shupe possessing marijuana on or about September 9th, 2009, there cannot be intent to deliver marijuana.

The bulk of marijuana found was at 726 W. Mansfield, and, when Mr. Shupe was arrested, there was more than one other individual in the house as well. *See* RP, vol. II, 296-297, 305, March 15, 2011. The marijuana seized at 726 W. Mansfield could have belonged to any other individuals present that day, but the officers made a decision to single out Mr. Shupe.

E. The State DID NOT meet their burden of proof in the charge of delivery of a controlled substance.

RCW. 69.50.401 states it is unlawful for any person to possess with intent to deliver a controlled substance except as authorized by law. In order for Mr. Shupe to be found guilty of the charge of delivery of a controlled substance,

“One, that on or about September 9th, 2009, the defendant delivered a controlled substance; Two, that the defendant knew that the substance delivered was a controlled substance; Three, that the act occurred in the State of Washington. If you find from the evidence that

each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Deliver or delivery means the actual or constructive or attempted transfer of a controlled substance from one person to another.”

RP, vol. IV, 522-523, March 17th, 2011.

In *State v. Hernandez*, 85 Wn. App. 672; 935 P.2d 623 (1997), the Court upheld that defendants Gill’s, Hernandez’, and Soto’s and Davila’s, convictions for the delivery of controlled substances and conspiracy to deliver a controlled substance, even though, in no instance, no delivered drugs or the buyers were recovered. Multiple cases were consolidated, and the Court thoroughly dissects each defendant’s case and position. *See Hernandez* at 672, 624.

Mr. Shupe’s situation is different from *Hernandez*. While no controlled substances supposedly sold were ever recovered, and no buyer was ever specifically questioned about who the seller was or what, exactly, they purchased, no sale of marijuana by Mr. Shupe was ever observed or recorded.

Officers had many occasions over the five months of surveillance to stage a buy, but made the decision to not. To the contrary, those that bought were not ever asked who sold them marijuana, and the marijuana was never requested from those

detained. The State has no evidence but for some handwritten receipts that a sale of marijuana took place. In no instance was the State able to prove beyond a reasonable doubt that it was Mr. Shupe who made the sale, as opposed to him simply filling out the receipt to assist another.

Mr. Shupe argues that there must be surveillance, product, or buyer, to prove a sale of a controlled substance. Without any of these three facts, any designated provider or receptionist at a dispensary, at any time, could be convicted for a sale of a controlled substance. It could not be the legislative intent to allow for conviction of an individual where no elements of a crime can be proven, and with no person identified as receiving marijuana from Mr. Shupe, no follow up interview or investigation into whether a transaction ever occurred, is possible.

F. RCW 69.51A.010(1)(d) should be found void for vagueness.

In Washington State, “Statutory interpretation is a question of law that [the Court] reviews de novo.” *State v. Mandanas*, 228 P.3d 13 (2010) (citing *State v. Williams*, 158 Wash.2d 904, 908, 148 P.3d 993 (2006) (see also, *Am. Cont'l Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004)).

In *Mandanas*, the Washington State Supreme Court, *en banc*, concisely stated the Court's obligation to a defendant in a criminal matter when a defendant challenges a statute for vagueness, and the weight that legislative intent is given when evaluating the statute:

In order to determine legislative intent, we begin with the statute's plain language and ordinary meaning. If the plain language of a statute is subject to only one interpretation, then our inquiry ends. If a statute is subject to more than one reasonable interpretation, it is ambiguous. The rule of lenity requires us to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary.

Mandanas at 14. [citations omitted]

In 2007, the Legislature made its intent in regard to the purpose and intent of RCW 69.51A.005 clear:

The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution. This act is also intended to provide clarification to law enforcement and to all participants in the judicial system.

RCW 69.51A.005, 2007 c 371 § 1.

However, the purpose and intent of the legislature was not adequately reflected in the wording of RCW 69.51A.010 (1)(d), because it did not provide clarity for patients, providers, the judicial system, or law

enforcement. In fact, the legislature asked for clarification, which culminated in new legislation in 2011.

What does “One person at any one time,” in RCW 69.51A.010(1)(d), mean? Does it mean one person per hour? Day? Month? Year? How are the judicial system or police officers, much less a patient or provider, supposed to know?

Throughout Mr. Shupe’s testimony, he expressed time and time again that he only served one medical marijuana patient at any time. *See* RP, vol. III, 476, March 16th, 2011. He never delivered marijuana to an individual who did not have valid documentation, and, in fact, “Change” took copies of all patients’ medical marijuana patient documentation to keep for their records. *See* RP, vol. III, 477, March 16, 2011. “Change” was so careful in following their reasonable interpretation of RCW 69.51A.010, that on receipts there were times, to the minute, written down for when the patient was served by them. *See* RP, vol. III, 354, 478, March 16, 2011.

Detective Langford, one of the lead detectives on the case, and who also authored the search warrant, had never been on a case involving a dispensary. *See* RP, vol. II, 209, March 15, 2011. Detective Langford further stated that Mr. Shupe’s case was the first in Spokane involving a dispensary, and that he had no specific training on how to investigate a

dispensary. *Id.* In cross examination, counsel for defense confirmed with Detective Langford, who had been a detective for twelve years, that most drug dealers don't advertise in newspapers, open a business with a sign out front, or are public with their activities. *Id.* But even though "Change's" activities were different, Detective Langford treated this case no different than an average street drug dealer. How does that practice allow providers to assist patients without fear of state criminal prosecution?

During sentencing, Mr. Shupe stated that he didn't know he was breaking the law, that he carefully read the RCW many times, and that his intent was to provide open and reliable marijuana for Spokane medical marijuana patients. *See generally* RP, vol. III, 461-483. Judge Eitzen believed him, stating the following:

I believe that you didn't have any intent to break the law. That was apparent to me during the trial. I also agree with you and your counsel that the law is unclear. And this is the first case of this nature that I've had where I've had a situation where I think the law is unclear, the defendant didn't mean to break the law, and it's particularly disturbing because I think in a free society, the rule of law that we should all be clear about what the law means and is so we can be clear about who intends to break the law and who doesn't...[In] this case, it's clear, I think, that you didn't intend to break the law... You meant to do it the best you could. And the law is in a state of flux right now as we speak. If the sentencing were two weeks later, we might have some clarity.

RP, vol. IV, 583-584, April 12th, 2011.

If the Trial Court states on the record that the law is unclear, how can a defendant, who is at the mercy of the Trial Court, be given a fair trial and just treatment? They cannot.

Mandanas requires that “an ambiguous criminal statute” must be interpreted “in favor of the defendant absent legislative intent to the contrary.” 228 P.3d 13 at 14 *citing State v. Jacobs*, 154 Wash.2d 596, 601, 115 P.3d 281 (2005) *see also Charles*, 135 Wash.2d at 249, 955 P.2d 798; *State v. Roberts*, 117 Wash.2d 576, 585, 817 P.2d 855 (1991). The statute is unclear. The legislative intent is not contrary to Mr. Shupe’s interpretation of the statute. The interpretation, then, must be decided in favor of Mr. Shupe.

G. The Court erred when it gave jury instruction No. 23, with regard to RCW 69.51A.010(1), referencing “one patient at any one time,” without explanation of the phrase.

As explained above, the State and Mr. Shupe have very differing ideas of what RCW 69.51A.010 (1)(d) means, and the trial court admitted the vagueness of the law and concern over the fairness of it. Mr. Shupe contends, however, that the trial court’s concern should have precluded the Court from sending the question of whether Mr. Shupe was a provider to

the jury, and thereby innocent by way of affirmative defense. If the Trial Court has concern over what the statute means, it is unfair for a defendant to be convicted by a jury under that statute without instruction from the Court on the vagueness of the law.

This vague statement is the crux of the case against Mr. Shupe. He interpreted the statute as “one patient at any *one* time.” RP, vol. III, 476, March 16, 2011. He took great pains to strictly adhere to this and be compliant with the letter of the law.

The State has taken the position that “dispensaries” are not allowed under RCW 69.51A. The State’s “belief” that dispensaries are not allowed is not supported by law, but it is an antiquated, unrealistic, paternalistic, view.

Washington State’s Initiative 692 was labeled Compassionate Use for a reason. The intent was to allow patients that required marijuana as medicine to have access to it.

To think a cancer or HIV patient with a terminal diagnosis must now manufacture his or her own medicine or search the streets for a care provider who will provide them medicine, exclusively, is unrealistic. “Change” had over 1000 documented patients – none of which the State claimed forged or falsified documentation. “Change” was one of dozens of operating dispensaries in Spokane, which shows the overwhelming

need for a supply of medicine to needy and dying patients. If the statute is interpreted to mean thousands of patients must each find their own exclusive care provider, this was clearly not the intent of the legislature.

V. CONCLUSION

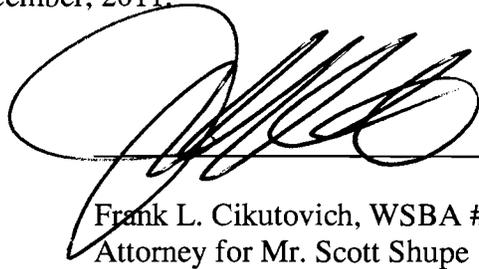
Washington State values the rights and guarantees against unlawful intrusion of the government into an individual's home and private affairs, and what happened to Mr. Shupe is exactly what the Washington State Constitution is to prevent.

The innocuous facts did not amount to probable cause for the search of 904 E. 11th Ave. or 726 W. Mansfield. There was no nexus between 904 E. 11th and a crime occurring. The State did not satisfy their burden of proving Mr. Shupe was guilty of the crimes charged against him. RCW 69.51A.010(1)(d) is void for vagueness. The Court erred in giving jury instruction No. 23 jury, because the question of whether Mr. Shupe was providing medical marijuana for one patient at one time was a legal question, not a question of fact or material.

Based upon the above mentioned points and authorities, the defendant, Scott Shupe, respectfully requests that, pursuant to Art. I Section 7 of the Washington State Constitution and the 4th Amendment of the United States Constitution, that his conviction be reversed, RCW

69.51A.010 be void for vagueness, and that the charges against him be dismissed with prejudice.

Submitted this 19th day of December, 2011.



Frank L. Cikutovich, WSBA #25243
Attorney for Mr. Scott Shupe

APPENDICES



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[RCWs](#) · [Title 69](#) · [Chapter 69.50](#) · [Section 69.50.401](#)

[69.50.320](#) << 69.50.401 >> [69.50.4011](#)

RCW 69.50.401

Prohibited acts: A — Penalties.

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter [9A.20](#) RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter [9A.20](#) RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter [9A.20](#) RCW.

[2005 c 218 § 1; 2003 c 53 § 331. Prior: 1998 c 290 § 1; 1998 c 82 § 2; 1997 c 71 § 2; 1996 c 205 § 2; 1989 c 271 § 104; 1987 c 458 § 4; 1979 c 67 § 1; 1973 2nd exs. c 2 § 1; 1971 exs. c 308 §[69.50.401](#) .]

Notes:

Intent – Effective date – 2003 c 53: See notes following RCW [2.48.180](#).

Application – 1998 c 290: "This act applies to crimes committed on or after July 1, 1998." [1998 c 290 § 9.]

Effective date – 1998 c 290: "This act takes effect July 1, 1998." [1998 c 290 § 10.]

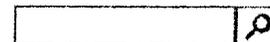
Severability – 1998 c 290: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1998 c 290 § 11.]

Application – 1989 c 271 §§ 101-111: See note following RCW 9.94A.510.

Severability – 1989 c 271: See note following RCW 9.94A.510.

Severability – 1987 c 458: See note following RCW 48.21.160.

Serious drug offenders, notice of release or escape: RCW 72.09.710.



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[RCWs](#) > [Title 69](#) > [Chapter 69.51A](#) > [Section 69.51A.005](#)

Beginning of Chapter << [69.51A.005](#) >> [69.51A.010](#)

RCW 69.51A.005

Purpose and intent.

(1) The legislature finds that:

(a) There is medical evidence that some patients with terminal or debilitating medical conditions may, under their health care professional's care, benefit from the medical use of cannabis. Some of the conditions for which cannabis appears to be beneficial include, but are not limited to:

(i) Nausea, vomiting, and cachexia associated with cancer, HIV-positive status, AIDS, hepatitis C, anorexia, and their treatments;

(ii) Severe muscle spasms associated with multiple sclerosis, epilepsy, and other seizure and spasticity disorders;

(iii) Acute or chronic glaucoma;

(iv) Crohn's disease; and

(v) Some forms of intractable pain.

(b) Humanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion.

(2) Therefore, the 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, notwithstanding any other provision of law;

(b) Persons who act as designated providers to such patients shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law, notwithstanding any other provision of law, based solely on their assisting with the medical use of cannabis; and

(c) Health care professionals shall also not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law for the proper authorization of medical use of cannabis by qualifying patients for whom, in the health care professional's professional judgment, the medical use of cannabis may prove beneficial.

(3) Nothing in this chapter establishes the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in [RCW 69.51A.010](#).

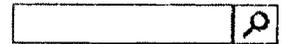
(4) Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for determining when the use of cannabis would impact community safety or the effective supervision of those

on active supervision for a criminal conviction, nor does it create the right to any accommodation of any medical use of cannabis in any correctional facility or jail.

[2011 c 181 § 102; 2010 c 284 § 1; 2007 c 371 § 2; 1999 c 2 § 2 (Initiative Measure No. 692, approved November 3, 1998).]

Notes:

Intent – 2007 c 371: "The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution. This act is also intended to provide clarification to law enforcement and to all participants in the judicial system." [2007 c 371 § 1.]



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[69.51A.005](#) << [69.51A.010](#) >> [69.51A.020](#)

RCW 69.51A.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Designated provider" means a person who:

(a) Is eighteen years of age or older;

(b) Has been designated in writing by a patient to serve as a designated provider under this chapter;

(c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and

(d) Is the designated provider to only one patient at any one time.

(2) "Health care professional," for purposes of this chapter only, means a physician licensed under chapter [18.71](#) RCW, a physician assistant licensed under chapter [18.71A](#) RCW, an osteopathic physician licensed under chapter [18.57](#) RCW, an osteopathic physicians' assistant licensed under chapter [18.57A](#) RCW, a naturopath licensed under chapter [18.36A](#) RCW, or an advanced registered nurse practitioner licensed under chapter [18.79](#) RCW.

(3) "Medical use of marijuana" means the production, possession, or administration of marijuana, as defined in RCW [69.50.101\(q\)](#), for the exclusive benefit of a qualifying patient in the treatment of his or her terminal or debilitating illness.

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

(a) Is a patient of a health care professional;

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

(c) Is a resident of the state of Washington at the time of such diagnosis;

(d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and

(e) Has been advised by that health care professional that they may benefit from the medical use of marijuana.

(5) "Tamper-resistant paper" means paper that meets one or more of the following industry-recognized features:

(a) One or more features designed to prevent copying of the paper;

(b) One or more features designed to prevent the erasure or modification of information on

the paper; or

(c) One or more features designed to prevent the use of counterfeit valid documentation.

(6) "Terminal or debilitating medical condition" means:

(a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or

(b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or

(c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to mean increased intraocular pressure unrelieved by standard treatments and medications; or

(d) Crohn's disease with debilitating symptoms unrelieved by standard treatments or medications; or

(e) Hepatitis C with debilitating nausea or intractable pain unrelieved by standard treatments or medications; or

(f) Diseases, including anorexia, which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications; or

(g) Any other medical condition duly approved by the Washington state medical quality assurance commission in consultation with the board of osteopathic medicine and surgery as directed in this chapter.

(7) "Valid documentation" means:

(a) A statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana; and

(b) Proof of identity such as a Washington state driver's license or identocard, as defined in [RCW 46.20.035](#).

[2010 c 284 § 2; 2007 c 371 § 3; 1999 c 2 § 6 (Initiative Measure No. 692, approved November 3, 1998).]

Notes:

Intent – 2007 c 371: See note following [RCW 69.51A.005](#).



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11 WAPRAC WPIC 52.11**WPIC 52.11 Medical Marijuana—Designated Provider—Defense**

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 52.11 (3d Ed)

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Part VIII. Drugs and Controlled Substances
WPIC CHAPTER 52. Special Defenses—Uniform Controlled Substances Act

WPIC 52.11 Medical Marijuana—Designated Provider—Defense

It is a defense to a charge of *[possession]* *[delivery]* *[or]* *[manufacture]* of marijuana that:

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

The defendant has the burden of proving this defense by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty *[as to this charge]*.

NOTE ON USE

If this statutory defense is in issue, use this instruction with WPIC 50.02 (Possession of a Controlled Substance—Elements), WPIC 50.11 (Manufacture of a Controlled Substance—Elements), or WPIC 50.06 (Delivery of a Controlled Substance).

The Legislature created this defense in 2007, replacing the former defense for primary caregivers. See the Comment below. For cases in which the former defense for primary caregivers applies instead of the new defense for designated providers, practitioners should use WPIC 52.11.01, Medical Marijuana—Primary Caregiver—Defense, instead of this instruction.

When the presumptive definition of sixty-day supply from WAC 246-75-010 is to be used, then this instruction needs to be supplemented with WPI 52.15, Medical Marijuana—Sixty-Day Supply—Definition.

With this instruction, use WPIC 52.13 (Medical Marijuana—Qualifying Patient—Definition), WPIC 52.14 (Medical Marijuana—Terminal or Debilitating Medical Condition—Definition), WPIC 52.16 (Medical Marijuana—Valid Documentation—Definition), and WPIC 52.12 (Medical Use of Marijuana—Definition).

COMMENT

RCW 69.51A.040(3); RCW 69.51A.010(1).

In Laws of 2007, Chapter 371, §§ 3 and 5 (effective July 22, 2007), the Legislature replaced the prior affirmative defense of "primary caregiver" with the new affirmative defense of "designated provider."

Because of the statutory change, case law interpreting the former statute may no longer be applicable. See, e.g., State v. Ginn, 128 Wn.App. 872, 883-85, 117 P.3d 1155 (Div. 2 2005) (interpreting the former affirmative defense for primary caregivers), review denied, 157 Wn.2d 1010 (2006).

The defense for a designated provider applies only to the person who is named as the designated provider; the defense cannot be expanded to include a person who shares the same residence as the designated provider. State v. McCarty, 152 Wn.App. 351, 215 P.3d 1036 (Div. 2 2009) (interpreting the similar language of the former version of RCW 69.51A.040, which related to "primary caregivers"). A person sharing the residence with a designated provider, however, has a separate affirmative defense for being merely in the presence or vicinity of medical marijuana. See State v. McCarty, supra; RCW 69.51A.050(2).

For a discussion of the amount of marijuana that constitutes a sixty day supply, see the Comment to WPIC 52.15.

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