

FILED

FEB 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 311562

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE**

STATE OF WASHINGTON

Respondent,

v.

PAUL D. BROWNE

Appellant

APPELLANT'S OPENING BRIEF

**Frank Cikutovich
Stiley and Cikutovich, PLLC
1403 W. Broadway
Spokane, WA 99201
(509) 323-9000
Fax: (509) 324-9029**

FILED

FEB 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 311562

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE**

STATE OF WASHINGTON

Respondent,

v.

PAUL D. BROWNE

Appellant

APPELLANT'S OPENING BRIEF

**Frank Cikutovich
Stiley and Cikutovich, PLLC
1403 W. Broadway
Spokane, WA 99201
(509) 323-9000
Fax: (509) 324-9029**

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. ISSUES PERTAINING.....	2
IV. STATEMENT OF THE CASE.....	3
V. ARGUMENT.....	10
Issue A.	10
Issue B.	19
Issue C.	23
Issue D.	25
Issue E.	27
VI. CONCLUSION.....	28
VII. APPENDICES.....	30

TABLE OF AUTHORITIES

CASES:

Aguilar v. Texas, 378 U.S. 108, 12 L.Ed. 723, 84 S.Ct. 1509
(1964).....13, 28

Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194
(1963).....2, 19

California v. Trombetta, 467 U.S. 479 (1984).....22

Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674
(1978).....7, 8, 23

Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038 (2001).....18

Spinelli v. United State, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584
(1969).....13, 28

State v. Cord, 103 Wn. 2d 361, 693 P.2d 81 (1985).....12, 13, 15, 23

State v. Jackson, 102 Wn.2d 432, 439, 688 P.2d 999 (1980).....1, 28

State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004).....12

State v. Remboldt, 64 Wn. App. 505, 827 P.2d 282 (1992).....12

State v. Stroud, 106 Wn.2d 144,148, 720 P.2d 436 (1986).....12

State v. Wittenbarger, 124 Wn. 467 (1994).....19, 22

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).....12

United States v. Martin, 615 F.2d 318 (5th Cir. 1980).....23

United States v. Park, 531 F.2d 754, 5th Cir. 1976).....23

CONSTITUTIONAL PROVISIONS:

The United States Constitution, Fourth Amendment.....11, 19, 28
Washington State Constitution Article I, § 7.....12, 19, 28

COURT RULES

CrR 3.3.....2, 19

WASHINGTON STATUTES AND ADMINISTRATIVE CODE

RCW 69.50.401.....6
RCW 69.50.201.....6
69.50.204.....6
RCW 69.51A.....8
WAC 246-75-010 – Medical Marijuana.....2, 3, 21, 25, 26, 27, 28

EXHIBIT ATTACHMENTS

Department of Health - Significant Analysis for Rule Concerning Medical
 Marijuana – Definition of 60 Day Supply WAC 246-75-
 010.....Exhibit A
RCW 69.51A.005 - Medical Marijuana – Purpose and Intent.....Exhibit B
WAC 246-75-010 – Medical Marijuana.....Exhibit C

I. INTRODUCTION

Paul Desmonde Browne is a sixty year old citizen of England who cares for his adult son, Daniel, now 30 years old, who suffers from cyclical vomiting syndrome. In order to prevent and ease Daniel's continued wasting disease, Mr. Browne became his son's designated care provider, and began to grow medical marijuana for his son under RCW 69.51A. It was his full intent to, and he contends that he did, follow Washington State Law. However, a series of events instigated by law enforcement deprived Mr. Browne of his due process rights under the Washington State Constitution and the Fourth Amendment of the United States of America, to defend against the accusation that he was illegally, and without defense, manufacturing medicinal marijuana. It is this series of events that brings Mr. Browne to this Court to request that in due justice and fairness, the charges against him be dismissed with prejudice.

II. ASSIGNMENTS OF ERROR

1. The Magistrate erred in granting a search warrant to Douglas County Sheriff's office.
2. The Trial Court erred in denying Mr. Browne's Motion to Dismiss for destruction of evidence.
3. The Trial Court erred in denying Mr. Browne's Motion for *Franks* Hearing and Motion to Dismiss for Government Misconduct.

4. The Trial Court erred in ordering that the presumption in WAC 246-75-010 in regard to the number of Medical Cannabis plants cannot be overcome with evidence of medical need, thus ordering Mr. Browne could not assert his defense.
5. The Trial Court erred in denying testimony of Gary Ackerson to overcome the presumptive medical need identified in WAC WAC 246-75-010, in the Court's Order on State's Motion *In Limine*.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. The Affidavit for Search Warrant lacked probable cause; the flyover and aerial photographs by a certified marijuana spotter constituted a warrantless search.
- B. The purported marijuana plants were destroyed one day after they were removed from the property located at 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd., and before charges were filed, eliminating Mr. Browne's ability to examine, identify, or count, the evidence for defense, and constituting a violation of CrR 3.3, *Brady v. Maryland*, subsequent case law, and constitutional protections.
- C. Failing to divulge in the affidavit for a search warrant that police had previously been to 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd. and left marijuana plants at that location as part of a

medical marijuana grow, constitutes a reckless material omission by the officer affiant.

- D. The rebuttable presumption in WAC 246-75-010(3)(c) applies to the entire section of WAC 246-75-010(3), and thereby applies to the presumption of fifteen marijuana plants.
- E. The Trial Court erred in denying testimony of Gary Ackerson to overcome the presumptive medical need in WAC 246-75-010, as he had adequate education and training in the growing and processing of marijuana, and could have provided testimony in regard to plant yields and growing efficacy.

IV. STATEMENT OF THE CASE

1. On October 10th, 2008, law enforcement officers obtained a warrant to search property located at 71 Chelan Hills Rd., in Douglas County, for marijuana. *Clerk's Papers* (CP) 114-116.
 - a. "After reviewing [Daniel DeHart's] documentation and inspecting his medical marijuana plants, the officers unhandcuffed Mr. DeHart, and allowed him to choose [six] marijuana plants to keep, along with the plants that were drying. The officers left the residence, and no charges were filed." CP 111.
2. Some months later, on August 20th, 2009, Detective Tim Scott applied for a search warrant for the same property located at 860

Chelan Hills Acres Rd./71 Chelan Hills Acres Rd.. *See Clerk's papers (CP), p. 4.* The affidavit stated, in part,

- a. Detective Scott believed there was evidence of manufacturing marijuana at 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd, owned by Earl S. Amos and Paul D. Browne. *Id.* at 3.
- b. Detective Scott stated he “observed a vehicle on the property that look[ed] like a black SUV... [that there were] several structures on the property that [appeared] to be portable. [He] could see an older small travel trailer with a blue tarp covering the roof and old tires set on top...[and there was] also a larger structure on the property where only the brown roof [could] be seen. [To Detective Scott] the roof [appeared] to be made from role asphalt roofing. *Id.*
- c. Detective Scott listed his commissions and date of hire with the Douglas County Sheriff's Office, and his education related to his employment. *Id.*
- d. Detective Scott stated that
 - a. “On August 20th, 2009 at about 10:30 hours Deputy Poppie flew over 860 Chelan Hills Acres Rd. in a fixed wing aircraft operated by the Civil Air patrol and flown by Shane Esson.” *Id.* at 3-4.
 - b. “Deputy Poppie observed marijuana plants growing on the property.” *Id.* at 4
 - c. “Deputy Poppie took aerial photographs of the property and the marijuana plants.” *Id.*
 - d. “Deputy Poppie told [him] he observed more than a dozen mature marijuana plants growing.” *Id.*
 - e. “Deputy Poppie is a certified marijuana spotter and [had] confirmed the plants [were] marijuana plants. *Id.*

- f. “Deputy Poppie told [him] the coloring and leaf designs depicted in the photograph, and from his personal observations, [were] consistent with growing marijuana plant.” *Id.*
- g. “During the fly over a male subject, white with brown hair was seen running from the area of the grow.” *Id.*
- h. “Deputies Poppie, Schlaman and Black were sent to secure the scene.” *Id.*

Commissioner J. McCauley signed the Search Warrant. *Id.* at 9.

The search warrant commanded the seizure of “Marijuana plants including, leaves, stems, seeds, buds, and root balls,” and further required that the officer “[s]afely keep the property seized at the Douglas County Sheriff’s Office.” *Id.* at 8-9.

- 3. Detective Tim Scott amended his affidavit for search warrant, and obtained permission to enter an “outbuilding” on property located at 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd.. *See* CP 1.
- 4. On August 21st, 2009, Detective Scott created an Inventory and Return of Search Warrant, stating that he seized 88 growing marijuana plants found in constructive possession of Paul D. Browne, and that the property was stored at Douglas County Sheriff’s Evidence Storage Facility. CP 10-11. The document was filed on August 24th, 2009. CP 10.
- 5. Also on August 21st, 2009, Detective Scott presented a proposed Destruction Order to Commissioner J. McCauley. CP 38. The Destruction Order reads, in part, that the Court was advised that

[t]he Douglas County Sheriff's Office anticipates seizing in excess of 50 marijuana plants during the execution of said Search Warrant, and that many of the marijuana plants appear to be more than 8 feet in height, that storage and preservation of the marijuana plants has limited evidentiary value, and is unnecessary to ensure the defendant has the opportunity for independent laboratory analysis conducted on said marijuana plants..

Id. at 37.

6. The August 21st, 2009, Order of Destruction ordered the following:

...Officers charged with service of said warrant are hereby authorized to destroy or arrange for the destruction of marijuana being manufactured in violation of the laws of the State of Washington found during the service of said warrant after said items have been inventoried, photographed, and a representative sample collected to preserve their evidentiary value for subsequent proceedings.

CP 37-38.

7. On September 15th, 2009, Deputy Prosecuting Attorney Eric C. Biggar filed Information alleging that Paul D. Browne, “[o]n or about August 20, 2009...knowingly manufactur[ed] a controlled substance, to-wit: marijuana; contrary to the Revised Code of Washington 69.50.401(1), 69.50.201(2)(c) and 69.50.204(c)(14).”
- CP 12.
8. On September 13th, 2010, Mr. Browne’s Omnibus Application was signed by the Court. CP 21. Section “5” orders that the prosecution “permit inspection and copying of any books, papers, documents, photographs or tangible objects which the prosecution:

(a) obtained from or belonging to the defendant, or (b) Which will be used at the hearing or trial.” CP 20.

9. On April 18th, 2011, Mr. Browne, through counsel, motioned the Court for dismissal of all charges based on the destruction of the marijuana plants Detective Scott stated he seized as evidence. CP 22. The prosecution responded on April 27th. CP 39.
10. On May 5th, 2011, the defense submitted the Affidavit of Gary Ackerson in support of Defendant’s Motion and Memorandum to Dismiss. CP 52. Attached to this declaration were 72 pictures. *See CP, 55-90.*
11. Also on May 5th, 2011, the State filed their Supplemental Memorandum in Response to Affidavit of Gary Ackerson. CP 91.
12. On May 9th, 2011, the Trial Court heard Mr. Browne’s Motion to Dismiss, and denied the motion. CP 95. The Court requested briefing on the *Franks* issue. *Id.* The *Franks* hearing was set for June 13th, 2011. *Id.* at 96.
13. On May 17th, 2011, Gary Ackerson submitted his affidavit to the Trial Court in regard to growing marijuana, with attachments. CP 97.
14. Also on May 17th, 2011, Mr. Browne filed his affidavit in Support of Defendant’s Motion to Dismiss. CP 108.
15. On June 10th, 2011, Mr. Browne filed his motion for a *Franks* Hearing, and Motion to Dismiss for Governmental Conduct. CP

110. Attached to this motion was a search warrant from Chelan County for the property located at 71 Chelan Hills Acres Rd., and dated October 10th, 2008. *Id.* at 115-116.
16. On June 13th, 2011, the Court held a hearing for Readiness and *Franks*. CP 117. The Court took the matter under advisement. *Id.* at 117.
17. On June 17th, 2011, the Court issued an Order on Mr. Browne's Motion to Dismiss. CP 118.
18. On July 30th, 2011, the Court held a Readiness hearing and set the trial date for August 9th, 2011. *Report of Proceedings (RP) 75*.
19. On August 5th, 2011, the State filed Motions *In Limine*;
- a. Sequestering witnesses with the exception of Detective Tim Scott.
 - b. Excluding the defense from introducing the medical marijuana defense pursuant to RCW 69.51A without first establishing a foundation for the defense.
 - c. Excluding the marijuana prescription for Daniel DeHart unless testimony is presented at trial from the physician issuing the prescription.
 - d. Excluding evidence of law enforcement searches of defendant's property prior or subsequent to August 20th, 2009, wherein the defendant maintained a marijuana grow in compliance with RCW 69.51A.

CP 125.

20. On September 9th, 2011, the State filed their Second Supplemental Motions *In Limine*;

- a. Excluding the testimony of Gary Ackerson on the basis that he lacked sufficient qualifications as an expert regarding the production and yield of marijuana plants.
- b. Excluding the testimony of Gary Ackerson as irrelevant.

CP 128-129.

21. On September 15th, 2011, Mr. Browne filed his Response to Prosecution's Second Motion *In Limine* and Motion for Clarification of Court's Decision on Motion to Dismiss. CP 130.

22. On September 20th, 2011, the Court issued an Order on the States Motion *In Limine*. CP 138. The Court issued, in part, that

- a. "Mr. [Gary] Ackerson [had] sufficient qualifications to be an expert and [was] not prohibited from testifying as a result of any alleged bias, the Court does not believe that his testimony is relevant as he [had] already testified that he [could not] testify as to how much of the marijuana was useable marijuana."
 - b. "[The] Court believes that although the presumption may be overcome concerning useable marijuana, the presumption may not be overcome by the number of marijuana plants."
 - c. "[T]he State's motion to exclude the testimony of Gary Ackerson [was] granted as the Court [believed it to be] irrelevant."
 - d. "[T]he Defendant may not produce evidence that the qualifying patient's necessary medical use exceeds 15 plants."
- CP 138, 139.

23. On September 12th, 2012, the State filed their proposed jury instructions. CP 142.
24. On September 13th, 2012, the Court held Mr. Browne's stipulated trial. RP 77.
25. On September 13th, 2012, Defendant signed the Statement on Submittal of Stipulated Facts. CP 157-158.
26. Also on September 13th, 2012, Stipulated Facts were signed and entered. CP 160-162.
27. On September 24th, 2012, Findings of Fact, Conclusions of Law, and Verdict on Stipulated Facts Bench Trial, and Felony Judgment and Sentence Jail one Year or Less, were entered. CP 163, 166.
28. On October 30th, 2012, the Court entered the Order on State's Motion *In Limine*, eliminating Mr. Browne's ability to present the medical marijuana affirmative defense. CP 178.

V. ARGUMENT

A. The Affidavit for a Search Warrant lacked probable cause; the flyover and aerial photographs by a certified marijuana spotter constituted a warrantless search.

The affidavit for search warrant begins with Detective Tim Scott stating that he believes that evidence of the crime of manufacturing marijuana could be located at 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd.. CP 2, 3. Next, Detective Scott specifically and concisely

relays his education and experience as a Law Enforcement Officer in the State of Washington since 1995. CP 3.

The next three paragraphs of the affidavit contain only information relayed from Detective Poppie¹ to Detective Tim Scott. CP 3,4.

Detective Scott states that

On August 20th, 2009, at about 10:30 hours Deputy Poppie flew over 860 Chelan Hills Acres Rd. in a fixed wing aircraft operated by the Civil Air Patrol and flown by Shane Esson. During the flight Deputy Poppie observed marijuana plants growing on the property.

Deputy Poppie took aerial photographs of the property and the marijuana plants. A couple of the photos are attached to this search warrant affidavit. Deputy Poppie told me he observed more than [sic] a dozen mature marijuana plants growing. Deputy Poppie is a certified marijuana spotter and has confirmed the plants are marijuana plants. Deputy Poppie told me the coloring and leaf designs depicted in the photograph, and from his personal observations, are consistent with growing marijuana plant.

During the fly over [sic] a male subject, white with brown hair was seen running from the area of the grow. Deputies Poppie, Schlaman and Black were sent to secure the scene.
CP 3,4.

Detective Scott provided two photographs as attachments to the affidavit, supposedly taken by Officer Poppie. CP 5-6.

In addition to this, the Fourth Amendment to the Constitution of the United States reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

¹ Detective Poppie's first name is not given in the affidavit for search warrant.

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

However, 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). *See also, State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). The Washington State Constitution, Article I, § VII states that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

In order for a magistrate to determine an affidavit establishes probable cause,

...the affidavit must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity. *State v. Seagull*, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981); *State v. Henker*, 50 Wn.2d 809, 811, 314 P.2d 645 (1957). Great deference is accorded the issuing magistrate's determination of probable cause. *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 66 L. Ed. 2d 93, 101 S. Ct. 213 (1980).

State v. Cord, 103 Wn. 2d 361at 365-366, 693 P.2d 81 at 84-85 (1985).

“The experience and expertise of an officer can be taken into account in determining whether probable cause has been established.”

State v. Maddox, 152 Wn.2d 499 at 511; 98 P.3d 1199 at 1205 (2004), *see also State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282 (1992).

In Washington, “[a]n officer's testimony ‘under oath, and his statements of personal knowledge are *presumptively reliable*.’” *State v.*

Cord, 103 Wn.2d 361 at 372; 693 P.2d 81 at 88 (1985), *citations omitted*, *emphasis in original*.

However, the *Aguilar-Spinelli* test, adopted by the Washington Supreme Court, states when an affidavit contains *an informant's* tip the officer must provide additional information. *See State v. Jackson*, 102 Wn.2d 432 at 437; 688 P.2d 136 at 139 (1984) "Underlying the *Aguilar-Spinelli* test is the basic belief that the determination of probable cause to issue a warrant must be made by a magistrate, not law enforcement officers who see warrants." *Id.*

The two prongs of the *Aguilar-Spinelli* test have an independent status; they are analytically severable and each insures the validity of the information. The officer's oath that the informant has often furnished reliable information in the past establishes general trustworthiness. While this is important, it is still necessary that the "basis of knowledge" prong be satisfied -- the officer must explain how the informant claims to have come by the information in this case. The converse is also true. Even if the informant states how he obtained the information which led him to conclude that contraband is located in a certain [location], it is still necessary to establish the informant's credibility.

Jackson at 437; 139-140.

In Washington, the statements of an officer *under oath* are presumed reliable, but Detective Poppie did not provide the magistrate a sworn statement in support of a search warrant. Mr. Browne contends that Detective Poppie's statements to Detective Scott are hearsay, and that he is effectively an informant relaying information to Detective Scott. While Mr. Browne does not contest that Detective Poppie told him the information contained in Detective Scott's affidavit, Mr. Browne does contest the reliability of Detective Poppie's statements, and the reliance on them for the magistrate to issue a search warrant.

In Detective Scott's affidavit, Detective Poppie does not disclose how he came to come by the observation of marijuana plants on Mr. Browne's property.

For what reason was he flying over the property? Had he singled out Mr. Browne in some other operation, or was this flight a routine procedure conducted by him at the request of the Douglas County Sheriff's office? Or was this a personal, extracurricular, activity and Detective Poppie just so happened to see marijuana on the ground? It is Mr. Browne's opinion that Deputy Poppie and Detective Scott were well aware of the previous search and seizure in August, 2008, which he failed to disclose in his affidavit, and, knowing medical marijuana plants had been left at the location prior, took advantage of an opportunity to conduct a flyover. The only other logical explanation is that the officer's viewed marijuana in some other way, not advantageous to reveal in the affidavit,

and positioned themselves to 'discover' the marijuana for the first time in a legal place.

And how did he have the certainty that he was flying over 860 Chelan Hills Rd./71 Chelan Hills Rd.? Flying in a plane is much different than driving by a home and being able to see the address posted on the front porch. Were there aerial maps that he was referencing? Or did the pilot tell Detective Poppie what location they were flying over²? In addition, Detective Poppie's statements proffered by Detective Scott are void of the height of the aircraft, whether he used binoculars, or a telephoto lens to take the photos which Detective Scott attached to his affidavit.

Also missing in Detective Scott's affidavit is information to show the magistrate that Detective Poppie is credible.

In *State v. Cord*, 103 Wn.2d 361; 693 P.2d 81 (1985), the Washington State Supreme Court denied the defendant's challenge to the affidavit for search warrant because

the affidavit set forth that the affiant was a police officer with 13 years' experience in the Stevens County Sheriff's Department. He had completed marijuana identification school and had attended numerous drug identification seminars. He had experience identifying marijuana in all stages of its growth; and he had identified patches of

² If that were the case, the pilot's statements, also, would be hearsay and subject to *Jackson's Aguilar-Spinelli* informant statement requirements.

marijuana from an airplane on 10 prior occasions each of which resulted in the seizure of marijuana. The affidavit then set forth that the affiant had conducted a flyover of appellant's property and had "observed and identified the marijuana growing in a field on the above described property." It then described the precise area to be searched and the location of the marijuana. There [was] nothing speculative about the affiant's statements... They provided a sufficient basis for the issuing judge to conclude that a crime was probably being committed.

Id. at 366; 85.

The affidavit in this case is completely void of the qualifying information for the identifier of the marijuana. While Detective Scott states that "Deputy Poppie is a certified marijuana spotter," the affidavit is void of what that means, who certified him, how many successful "identifications" Deputy Poppie conducted prior, or how long Deputy Poppie has worked for the Douglas County Sheriff's office. An oath by Detective Scott that Deputy Poppie had often furnished reliable aerial marijuana identification in the past would have established general trustworthiness, but the warrant lacks such an oath. For all the magistrate knew, Deputy Poppie could have been on his first flyover on his first day on the job and had only seen marijuana plants in a text book.³

³ In addition, it should be noted that Deputy Poppie only identified "over a dozen" marijuana plants to Detective Scott, but Detective Scott states that they collected 88

The affiant, Detective Tim Scott, fails to provide any *firsthand knowledge or corroboration* of the possibility of a crime having been committed. If the statements relayed to Detective Scott by Detective Poppie are removed, there is no probable cause in the affidavit for a search warrant, and the magistrate thereby erred in issuing a search warrant for Mr. Browne's property.

In the alternative, if the Court rejects the above argument in favor of dismissing the charges against him for lack of probable cause, then Mr. Browne argues that the flyover and photography of Mr. Browne's home constituted an illegal search, for which a search warrant should have been previously obtained.

Mr. Browne contends that an average person could not readily identify marijuana from the air at the height of 1000 feet or even 500 feet without the aid of a telephoto lens or binoculars. If the warrant is to be viewed in light most favorable for the issuance, Deputy Poppie viewed the marijuana from a legal distance from the ground with an unaided eye. That is not to say, however, that an average person could not *see* marijuana from that altitude, but that they could not *readily identify marijuana* from that altitude. Deputy Poppie served as a tool uncommon in the populous and the Douglas County Sheriff's office, as he was able, from whatever altitude he was at, to readily identify marijuana without aid. This is evidenced by Deputy Poppie's title in the affidavit.

plants from the property. This indicates to Mr. Browne that either Deputy Poppie or Detective Scott misidentified or miscounted the supposed marijuana plants.

Detective Scott listed his qualifications, training, and experience, in detail. CP 3. The qualification of “Certified Marijuana Spotter” is not mentioned. Detective Scott, does, however, provide that designation to Deputy Poppie. CP 4. By setting aside Deputy Poppie as an individual who had specialized training within the Sheriff’s office, and noting that the affiant does not contain the requisite knowledge, it would then logically follow that an average citizen would not have the requisite knowledge, either.

Deputy Poppie served as a tool uncommon and unavailable to the general populous, and a specialized tool available only to law enforcement. Deputy Poppie’s training *enhanced* his ability to detect marijuana from the air. Thereby, any information or evidence, especially the photographs attached to Detective Scott’s affidavit, constituted a search without a warrant.

In *Kyllo v. U.S.* 533 U.S. 27; 121 S. Ct. 2038 (2001), the Supreme Court, while expressly noting their previous authorization of aerial flyovers without warrant, expressly stated that using sense-enhancing technology not in public use to gain information regarding a protected area that could not have been gathered but for physical intrusion, constituted a search. *Id.* at 34; 2043.

Mr. Browne argues that obtaining, by enhanced ability not in general public use, any information regarding the immediate curtilage of Mr. Browne’s home that could not have been otherwise obtained without

physical intrusion onto Mr. Browne's property⁴, constituted a warrantless search under Washington State Constitution Article I, § VII and the Fourth Amendment to the Constitution of the United States.

It is therefore requested that this Court rule that there was no probable cause to issue a search warrant and order the dismissal of all charges against Mr. Browne.

B. The purported marijuana plants were destroyed one day after they were removed from the property located at 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd., and before charges were filed, eliminating Mr. Browne's ability to examine, identify, or count, the evidence for defense, and constituting a violation of CrR 3.3, *Brady v. Maryland*, subsequent case law, and constitutional protections.

“To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense.” *State v. Wittenbarger*, 124 Wn.467 at 475 (1994), referencing *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

⁴ Detective Scott expressed in detail the contents of Mr. Browne's property, including outbuildings, vehicles, and roofing materials, but failed to mention seeing any marijuana plants; it is Mr. Browne's contention that Detective Scott was not able to see any marijuana on his property from land.

One day after Mr. Browne's property was searched Detective Scott obtained an ex parte order of destruction from the same Commissioner that signed the original search warrant. CP 4, 38.

Contrary to the June 17th, 2011, Trial Court order, the Commissioner that ordered that the marijuana be destroyed did not find that the marijuana had limited evidentiary value. CP 119, 37. The Commissioner stated the Court was *advised* by the Douglas County Sheriff's Office, via Detective Scott, that the plants had little to no evidentiary value. CP 37. The detective was placed in an unqualified role. The detective made a determination that the evidence had little value, not the judge. The order was done ex parte and without notice to Mr. Browne or Mr. Browne's son, Mr. Daniel DeHart, without an opportunity to request the order be stayed, or arguments for procedure before it was destroyed.

The Commissioner states that the Court was advised that there were "in excess 50 plants...and that many of the marijuana plants appear to be more than 8 feet in height." CP 37. Mr. Browne believes that picture no. 1 and 2, attached to Mr. Ackerson's affidavit, shows the same vehicle and load, but from different angles. CP 55. Mr. Browne finds it unlikely that 50, 8 foot tall marijuana plants could fit into the back of one pickup truck, much less 88.

The charge against Mr. Browne centers on the officer's word that there were 88 plants. Not 40. Not 15. The photographs taken by the

Douglas County Sheriff's Office do not individually count and identify each marijuana plant. How many times has an attorney counted, and recounted, the number of copies of pleadings they had to serve and deliver, only to get to their final destination and realize they miscounted? Or an offender score miscalculated?

Mr. Browne told Detective Scott at the time of the seizure he thought there were 40 plants on the property for three medical marijuana patients, but that he was only the provider for his son. CP 160, 161. Detective Scott was, on August 20th, 2009, immediately put on notice that Mr. Browne thought there were 40 plants.

Detective Scott was put on notice that the *number* of plants would be an issue in any charge filed, but preceded to petition the Court for an order of destruction the next day.⁵

In addition to this notice, Mr. Browne has contended from the beginning of his case that if he did have in his possession as a provider for his son more than 15 marijuana plants, he would be able to present evidence of his son's medical need to overcome the presumption in WAC 246-75-010. Detective Scott was aware that Mr. Browne was a medical provider and that his son was a medical marijuana patient, and that they believed they were complying with the law. CP 160-161. Regardless of Detective Scott's opinion of what the law said, he was made aware that Mr. Browne was maintaining that he was properly providing medicine for

⁵ Mr. Browne, also, finds it odd that the order of destruction was created in the future tense; "...the Douglas County Sheriff's Office *anticipates* seizing." CP 37-38, emphasis added.

his son, and should have realized that the marijuana plants seized would be of contested value.

The count was not scientific. Mr. Browne contended there were 40 plants. The Douglas County Sheriff's office says there were 88. The exculpatory value was apparent to Detective Scott at the time of the seizure, and Mr. Browne is unable to obtain comparable evidence. In this instance, the Court has previously held that all charges are to be dismissed. *See generally State v. Wittenbarger*, 124 Wn.467 (1994), *California v. Trombetta*, 467 U.S. 479 (1984).

In addition, once the plants were destroyed, the defense's expert witness, Mr. Gary Ackerson, had no ability to testify as to how much marijuana was useable. The destruction of the evidence collected barred Mr. Browne from any sort of defense. Had the officers stated there were 30 ounces of marijuana and then destroyed it, Mr. Browne, under the trial Court's logic, would not have been able to present a defense to that prong, either.

Fortunately for defendants as a whole, counsel for Mr. Browne has been unable to find Washington Case law where the issue centers on evidence being destroyed before charges are filed. Unfortunately for Mr. Browne, this creates a unique case not yet commented upon.

As an issue of fairness, should evidence of a crime, where the amount of contraband will determine the ability to raise an affirmative defense, be able to be destroyed without notice to the defendant, much less

before charges are even filed? If the answer to that question is yes, it would seem that the Fourth Amendment and the Washington State Constitution have severely failed in their intent on protecting civilians from overzealous law enforcement.

C. Failing to divulge in the affidavit for a search warrant that police had previously been to 860 Chelan Hills Acres Rd./71 Chelan Hills Acres Rd. and left marijuana plants at that location as part of a medical marijuana grow, constitutes a reckless material omission by the officer affiant.

In *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), the Supreme Court held that where a

defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks, at 155-56.

If, at the hearing, the defendant establishes his allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit. If the affidavit then fails to support a finding of probable cause, the warrant will be held void and the evidence excluded. The *Franks* test for material misrepresentations has also been extended to material omissions of fact. *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980); *United States v. Park*, 531 F.2d 754, 758-59 (5th Cir. 1976).

State v. Cord, 103 Wn. 2d 361 at 366-367, 693 P.2d 81 at 85 (1985).

In October of 2008, law enforcement officers obtained a warrant to search Mr. Browne's property for marijuana. CP 114-116. After their investigation, and seeing that Daniel DeHart was a medical marijuana patient, law enforcement *left 6 marijuana plants along with those that were drying.* CP 111. When Detective Scott applied for a search warrant, he failed to disclose that, not only has officers been to the location before, but they had left marijuana there for Mr. DeHart's medical use.

Failure to inform the magistrate that officers had, just months prior, declined to press charges after confiscating marijuana at that location, and seemingly giving the 'go-ahead' to the medical marijuana patient that lived there to continue to grow and use the medicine, constitutes a severe material omission on the part of the affiant.

If the information had been included, Mr. Browne argues that the search warrant would not have been granted because it would have cast doubts on the affiant's reasons and desires for obtaining the search warrant, and would therefore cast doubt on the affiant's reliability, sincerity, and intentions. This position is confirmed by the prosecutor's statement that he was contacted by law enforcement in October of 2008 and the prosecutor had advised law enforcement to leave marijuana at that location for medical use. RP 21.

D. The rebuttable presumption in WAC 246-75-010(3)(c) applies to the entire section of WAC 246-75-010(3), and thereby applies to the presumption of fifteen marijuana plants.

Mr. Browne believes that the term “presumption” applies to both the 24 ounces of useable marijuana and the number of plants needed to produce the medicine. In order to prove his argument, a review and dissection of the plain language and definitions used in WAC 246-74-010 must occur.

WAC 246-75-010(3) reads as follows:

(3) Presumptive sixty-day supply.

(a) A qualifying patient and a designated provider may possess a total of no more than twenty-four ounces of useable marijuana, and no more than fifteen plants.

(b) Amounts listed in (a) of this subsection are total amounts of marijuana between both a qualifying patient and a designated provider.

(c) The presumption in this section may be overcome with evidence of a qualifying patient’s necessary medical use.

WAC 246-75-010

Merriam Webster defines *presumption* as follows:

1: presumptuous attitude or conduct : AUDACITY

2 a : an attitude or belief dictated by probability : ASSUMPTION

b : the ground, reason, or evidence lending probability to a belief

3: a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact.

<http://www.merriam-webster.com/dictionary/presumption>, accessed

January 31st, 2013.

As a *coordinating conjunction*⁶, the term “and” creates a parallel joint between the two prepositional phrases and the direct object, “total.” The prepositional phrases “twenty-four ounces of useable marijuana” and “fifteen plants” hold equal weight linguistically. This is evidenced by the sentence structure remaining the same when the prepositional phrases “twenty-four ounces of useable marijuana” and “fifteen plants” change places.

Therefore, the terms “presumptive” and “presumption,” located in WAC 246-75-010(3)(a) and (c), respectively, apply to both prepositional phrases equally.

The Department of Health had no intent to have WAC 246-75-010(3)(c) to apply to only *half* of the sentence which forms WAC 246-75-010(3)(a). The intent does not exist, the linguistic reasoning does not exist, and the logic does not exist.

Mr. Browne has a right to provide evidence on his behalf to rebut the presumption that he is only to have fifteen plants.

The only legislative intent for WAC 246-75-010 was to have the Department of Health designate what constitutes a 60-day supply of Marijuana. The Department of Health’s *Significant Analysis for Rule Concerning Medical Marijuana – Definition of 60-Day Supply WAC 246-75-010* (Attached as Exhibit A), explicitly states that “[p]atients can overcome the presumptive *amounts* with evidence of medical necessity.”

⁶ “[A] conjunction (as in *and* or *or*) that joins together words or word groups of equal grammatical rank.” <http://www.merriam-webster.com/dictionary/coordinating%20conjunction>, accessed 01-30-13.

Attachment A, p. 4, emphasis added. The Department of Health further expressed the limitations that could not be resolved in the rule making of the 60 day amount:

There are too many variables to create a “one-size-fits-all” rule. Examples of variables include the patient’s condition or disease, tolerance level, varying method of use (e.g., smoking, ingestion, vaporization, tinctures, lotions, or suppositories), *the skill of a particular grower*, physical limitations, levels of active ingredients such as THC in the plant, type and size of plant, and growing environment.”

Attachment A, p. 3, *emphasis added*.

It was the intention of the Department of Health to establish flexibility for patients and providers, and to be able to fully use marijuana in whatever medical need the patient required. Mr. Browne is deserving of that flexibility, and should be allowed to present an affirmative defense to the charge of manufacturing marijuana.

E. The Trial Court erred in denying testimony of Gary Ackerson to overcome the presumptive medical need in WAC 246-75-010, as he had adequate education and training in the growing and processing of marijuana, and could have provided testimony in regard to plant yields and growing efficacy.

It is Mr. Browne’s argument, as discussed above, that he can present evidence of his son’s medical need. The Court ordered that it believed that Mr. Ackerson was qualified as an expert to testify to plant

yields and growing procedures. Mr. Ackerson's testimony that he cannot determine how much useable medical marijuana was present is vital, as Mr. Browne's defense relies upon showing the amount of plants present under his care were needed for the supply of required medicine for his son.

VI. CONCLUSION

There was no probable cause for the warrant in this case to be issued. Detective Scott provided no corroboration of Deputy Poppie's unsworn statements, and Deputy Poppie's statements do not stand against the *Aguilar-Spinelli* test set forth in *Jackson*.

In addition, any search by Deputy Poppie as an enhanced tool of the Douglas County Sheriff's Office, uncommon in the general populous, and subsequent photography of Mr. Browne's home, constituted a warrantless search under the Fourth Amendment to the Constitution of the United States and Article 1 § VII of the Washington State Constitution.

The charge against Mr. Browne centered on the number of marijuana plants seized from his property, but the number cannot be verified or challenged because authorities destroyed the plants one day after they were seized, and three weeks before the information was filed, and as such, the case against Mr. Browne should be dismissed for violations of Mr. Browne's due process rights.

In addition, the failure of the affiant officer to disclose to the magistrate that law enforcement had previously left marijuana on Mr. Browne's property, and that it was left there, without charges being filed,

for purposes of medical use for a properly papered medical marijuana patient, was a reckless and impactful omission, which would have negated probable cause for the search warrant to be issued in this case.

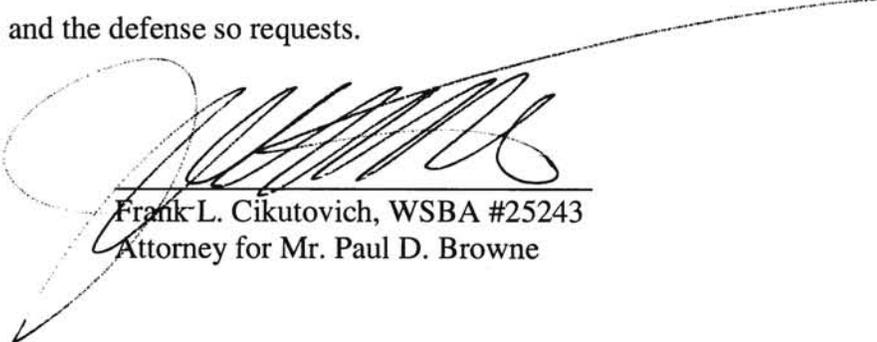
The presumption set forth in WAC 246-75-010(3) lacks legislative intent to be interpreted to only apply to the number of ounces a provider and patient may possess, instead of applying to both the number of ounces of medicine and the number of plants.

As such, the denial of Mr. Ackerson's testimony was in error; his testimony was vital to Mr. Browne's defense that he only was growing the number of plants necessary to facilitate his sons medical use of medical marijuana.

Mr. Browne is a father of a severely ailing son, who faces deportation if he is not successful on appeal. RP 6. He holds the reasonable reading of WAC 246-75-010 to mean that the presumptive amount described, applies to plants as well as useable ounces. Mr. Browne is forced to rely upon the medical marijuana defense because his due process rights were violated when a search warrant lacking probable cause, and omitting vital information, was granted.

The interests of justice require the dismissal of all charges against Mr. Browne, with prejudice, and the defense so requests.

Submitted this
5th day of February, 2013.



Frank L. Cikutovich, WSBA #25243
Attorney for Mr. Paul D. Browne

EXHIBIT A



Rebekah McIntire [REDACTED]

Medical Marijuana Recommendations in 2007/2008

Weeks, Kristi (DOH) [REDACTED]

Thu, Jan 10, 2013 at 9:15 AM

To: Rebekah McIntire [REDACTED]

Cc: "Gilnett, Erin (DOH)" [REDACTED]

Thank you for your email.

The rule was created following significant stakeholder input, public comment, and an open hearing. There is no report on the rulemaking, per se, because the Legislature did not request one. However, as part of the regular rulemaking process, we were required to create a document called a significant analysis. I have attached a link below. It is probably the best document for your questions, although you may find it somewhat vague. We were hindered by the lack of scientific evidence and limited participation by law enforcement and the medical community, as well as huge variations in opinion by the stakeholder community.

<http://medicalmarijuana.procon.org/sourcefiles/WASignifAnalysis.pdf>

Kristi

Kristi Weeks**Director, Office of Legal Services****HSQA, Department of Health****PO Box 47873****Olympia, WA 98504-7873****Phone (360) 236-4621****Fax (360) 236-4626****Email Kristi.Weeks@doh.wa.gov****Public Health - Always Working for a Safer and Healthier Washington**

From: Rebekah McIntire [REDACTED]**Sent:** Wednesday, January 09, 2013 2:41 PM**To:** Weeks, Kristi (DOH)**Subject:** Medical Marijuana Recommendations in 2007/2008

[Quoted text hidden]

Final
Significant Analysis
for Rule Concerning Medical Marijuana - Definition of 60-Day Supply
WAC 246-75-010

Briefly describe the proposed rule.

RCW 69.51A.080 (Chapter 371, Laws of 2007) requires the Department of Health to define a presumptive 60-day supply of medical marijuana for qualifying patients.

The proposed rule:

- Establishes that the intent of the rule is to provide clarification to patients, law enforcement and others about the presumptive amount of medical marijuana that constitutes a 60-day supply; to allow medical practitioners to exercise their best professional judgment; and to allow designated providers to assist patients.
- Defines a presumptive 60-day supply of medical marijuana as 24 ounces of useable marijuana and no more than 15 plants.
- Is consistent with chapter 69.51A RCW, states that the 60-day supply is the total amount that may be possessed between the qualifying patient and designated provider.
- Is consistent with chapter 69.51A RCW, states that the presumptive 60-day supply may be overcome with evidence of a qualifying patient's necessary medical use.
- Defines the terms "designated provider", "qualifying patient", "plant" and "useable marijuana."

Is a Significant Analysis required for this rule?

State law makes the sale and possession of marijuana subject to penalty. The medical marijuana law creates an affirmative defense for the possession of medical marijuana. These rules clarify the law by defining a presumptive 60-day supply of medical marijuana. The department has chosen to complete an analysis of WAC 246-75-010 (3)(a) - Presumptive 60-Day Supply.

WAC 246-75-010 subsections (1), (2) and (3)(b) and (c) clearly do not require analysis because they clarify proposed intent, restate provisions of the law, or only define terms.

A. Clearly state in detail the general goals and specific objectives of the statute that the rule implements.

The goal of RCW 69.51A.080 is to clarify the medical marijuana law so that the lawful use of marijuana is not impaired, medical practitioners are able to exercise their best judgment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by the law. It is also intended to provide clarification to law enforcement and all participants in the judicial system.

B. Determine that the rule is needed to achieve these goals and objectives, and analyze alternatives to rulemaking and the consequences of not adopting the rule.

RCW 69.51A.080 directs the department to adopt rules defining a presumptive 60-day supply of marijuana for qualifying patients. The statute provides no alternatives.

C. Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

The proposed rule does not create a cost to patients, physicians, designated providers, law enforcement, or the court system. The use of medical marijuana is a patient's choice, and physicians may choose to recommend it as a therapy. There may be a cost savings to law enforcement, the court system and defendants/patients as a result of defining a 60-day supply (for example, reduced costs of litigation). However, there is no way to calculate the cost-savings that may result from clarifying what a 60-day supply is. This analysis considers only the qualitative benefits of defining a 60-day supply.

In addition, this analysis does not establish or analyze the medicinal value of marijuana. Washington voters approved the use of medical marijuana by passage of Initiative 692 in 1998. Also, this analysis does not address the means and methods to obtain medical marijuana.

The department conducted extensive research and outreach to stakeholders on development of the rule. The department held four public workshops in the fall of 2007, and a formal hearing in August 2008. The department also developed a dedicated website and email box for receiving comments throughout the process. The department received and reviewed well over 800 comments and staff spent many hours reviewing studies, searching out information on the internet, and exploring laws in other countries and states.

The proposed rule is based on information available in studies, comments received through the workshops, hearing, email and website, and consideration of other state laws.

Considering the information available, there are limitations that could not be resolved or addressed, including:

- The Washington State medical marijuana law and adopted rule conflict with other state and federal laws that prohibit the possession of marijuana as a Schedule I controlled substance.
- There are too many variables to create a "one-size-fits-all" rule. Examples of variables include the patient's condition or disease, tolerance level, varying method of use (e.g., smoking, ingestion, vaporization, tinctures, lotions, or suppositories), the skill of a particular grower, physical limitations, levels of active ingredients such as THC in the plant, type and size of plant, and growing environment.
- There are published studies, but there is no definitive research available at this time on dosing standards that addresses all those variables.

- Washington State law does not authorize the department to address patient-to-patient transfers, co-ops or “group grows.”

The rule considers the following:

- Patients indicated that they use a combination of different methods to administer medical marijuana.
- Patient comments and studies suggest that using other forms, such as eating, vaporizing, tinctures, lotions and suppositories requires more marijuana than smoking it.
- Allowing possession of plants at varying stages of growth assists patients and designated providers with maintaining a consistent supply of useable medical marijuana.
- Although use of medical marijuana is a health care issue, and patients should rely on their physician for guidance, the rule must be clear to all individuals who rely on the law and to individuals enforcing the law.
- Law enforcement comments indicated that defining a large quantity as a 60-day supply could encourage illegal trafficking.
- Other states have experience with creating and enforcing specific supply limits for patients and providers.
- Patients can overcome the presumptive amounts with evidence of medical necessity.

1. WAC 246-75-010 (3) Presumptive 60-Day Supply

Description:

The presumptive 60-day supply is defined as 24 ounces of useable marijuana and no more than 15 plants.

Analysis:

The proposed rule is based on the average daily amount of 8.24 grams of marijuana prescribed to patients in the federal government’s Compassionate Investigational New Drug (IND) Program, Oregon medical marijuana law, and Chris Conrad’s *“Cannabis Yields and Dosage: A Guide to Production and Use of Medical Marijuana,”* August 2007.

Patients in the IND program receive on average about 17.5 ounces of medical marijuana in a 60-day period. The IND program assumes that participants in the study only use marijuana by smoking. Oregon has adopted a higher amount, allowing for other methods of use, such as ingestion.

Conrad’s study, based on DEA research completed in 1992, indicates the average plant grown outdoors was about 11.25 square feet and yielded an average of .41 ounces of air-dried bud per square foot. Although the study was based on ideal growing conditions outdoors, the study also suggests that indoor gardens can be harvested more often than outdoor gardens and when harvested three times a year will yield often about the same as outdoors.

The proposed amounts are similar to those in the Oregon law. They allow flexibility for using different methods, such as ingesting or inhaling; are based on the average amount provided to patients in the only federally recognized program in existence; and provide plant counts that should yield the amount of marijuana necessary for the proposed 60-day supply.

The benefits of the proposed 60-day supply include:

- Clarity for patients, designated providers, physicians, law enforcement, the court system, and others.
- Similarity with the state of Oregon.
- Flexibility to allow patients the option of using medical marijuana through methods other than just smoking.
- Clearly identifiable plant count and amount, that is easy to coordinate between a patient and designated provider.
- Ability for patients and designated providers to have plants in various stages of growth.

D. Determine, after considering alternative versions of the rule, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.

The following alternative versions of the rule were considered:

Alternative version #1: 24 ounces, 6 mature plants, and 18 immature plants (proposed version)

Compared to this alternative version, the final rule is less burdensome for those required to comply with it because:

- The alternative version restricts the number of mature plants a patient or caregiver can have to six.
- The final rule does not restrict the number of mature plants or immature plants a patient can have within the limit of 15 plants. The final version allows more flexibility for the patient or caregiver to manage his/her supply.

Alternative version #2: 71 ounces and 99 plants

Compared to this alternative version, the proposed rule is less burdensome for those required to comply with it because:

- Amounts this large could promote illegal activity, which would violate state and federal drug laws, and could negatively affect medical marijuana use for qualifying patients.

- This plant amount is not based on a rational analysis of medical need. Rather, it is based on the federal sentencing guidelines, which reduce penalties for possession of less than 100 plants.
- This alternative is not consistent with any other state. It is greater than the limits under California law where some counties allow for dispensaries, and cooperative and collective cultivation.
- During public comment, we heard from a number of concerned and affected individuals that this amount could put patients and designated providers at risk of being robbed.

Alternative version #3: 35 ounces and 100 square feet of canopy

Compared to this alternative version, the proposed rule is less burdensome for those required to comply with it because:

- Although canopy is a reliable predictor of plant yield, using canopy instead of plant count creates coordination issues for patients and designated providers not living together. It is also more complicated to determine canopy size if plants are in different stages of growth and grown in different areas.
- Amounts this large could promote illegal activity, which would violate state and federal drug laws, and could negatively affect medical marijuana use for qualifying patients.
- This alternative is not consistent with any other state. It is greater than California where some counties allow for dispensaries, and cooperative and collective cultivation.
- During public comment, we heard from a number of concerned and affected individuals that this amount could put patients and designated providers at risk of being robbed.

Alternative version #4: In inverse proportion, up to 35 ounces and up to 100 square feet of canopy. The amounts in each category would change in order to create a combined potential amount of no more than 35 ounces. For example, a patient could have 100 square feet of canopy and 0 ounces of marijuana or 0 square feet of canopy and 35 ounces of marijuana.

This amount is closer to the proposed rule, however the proposed rule is less burdensome for those required to comply with it because:

- Although canopy is a reliable predictor of plant yield, using canopy instead of plant count creates coordination issues for patients and designated providers not living together. It is also more complicated, for patients, caregivers and law enforcement, to determine canopy size if plants are in different stages of growth and grown in different areas.
- The patient and/or designated caregiver would have to monitor and adjust the 60-day supply more often.
- Amounts this large could promote illegal activity, which would violate state and federal drug laws, and could negatively affect medical marijuana use for qualifying patients.
- This alternative is not consistent with any other state. It is greater than California where some counties allow for dispensaries, and cooperative and collective cultivation.

- During public comment, we heard from a number of concerned and affected individuals that this amount could put patients and designated providers at risk of being robbed.

Alternative version #5: 17.5 ounces

Compared to this alternative version, the proposed rule is less burdensome for those required to comply with it because:

- Patients indicated that this is an insufficient amount to meet most needs.
- The proposed rule allows a greater amount to account for other methods of using marijuana other than smoking.
- The proposed rule allows for growing plants in order to maintain a supply of medical marijuana.
- The proposed rule provides more clear guidance.

E. Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

Washington has enacted medical marijuana laws that conflict with other laws. The proposed rule only clarifies the law that already exists; it does not eliminate the conflicts.

F. Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The rule does not impose more stringent performance requirements on private entities than on public entities.

G. Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary.

Washington has enacted medical marijuana laws that conflict with the federal law. The proposed rule is required by RCW 69.51A.080 in order to clarify the state law that already exists.

H. Demonstrate that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

The department has coordinated with other laws to the extent allowed by mandate.

EXHIBIT B

RCW 69.51A.005
Purpose and intent.

The people of Washington state find that some patients with terminal or debilitating illnesses, under their health care professional's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion.

Therefore, the people of the state of Washington intend that:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their health care professionals, may benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

Persons who act as designated providers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and

Health care professionals also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the health care professional's professional judgment, medical marijuana may prove beneficial.

[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.]

EXHIBIT C

(1) Purpose. The purpose of this section is to define the amount of marijuana a qualifying patient could reasonably expect to need over a sixty-day period for their personal medical use. It is intended to:

- (a) Allow medical practitioners to exercise their best professional judgment in the delivery of medical treatment;
- (b) Allow designated providers to assist patients in the manner provided in chapter 69.51A RCW; and
- (c) Provide clarification to patients, law enforcement and others in the use of medical marijuana.

(2) Definitions.

(a) "Designated provider" means a person as defined in RCW 69.51A.010.

(b) "Plant" means any marijuana plant in any stage of growth.

(c) "Qualifying patient" means a person as defined in RCW 69.51A.010.

(d) "Useable marijuana" means the dried leaves and flowers of the *Cannabis* plant family Moraceae. Useable marijuana excludes stems, stalks, seeds and roots.

(3) Presumptive sixty-day supply.

(a) A qualifying patient and a designated provider may possess a total of no more than twenty-four ounces of useable marijuana, and no more than fifteen plants.

(b) Amounts listed in (a) of this subsection are total amounts of marijuana between both a qualifying patient and a designated provider.

(c) The presumption in this section may be overcome with evidence of a qualifying patient's necessary medical use.

[Statutory Authority: RCW 69.51A.080 and 2007 c 371. 08-21-001, § 246-75-010, filed 10/2/08, effective 11/2/08.]