FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 930462-3
COA No. 33245-4-III

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED

SEP 27 2016

WASHINGTON STATE
SUPREME COURT

RHONDA L. DUNCAN, d/b/a THE COMPASSIONATE KITCHEN,
Respondent-Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellant-Respondent.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Rhonda L. Duncan asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner Duncan timely seeks review of the unpublished decision in Case No. 33245-4-III, issued on August 18, 2016. See Appendix A.

C. ASSIGNMENT OF ERROR and ISSUES PRESENTED FOR REVIEW

Petitioner Duncan makes the following assignments of error:

The appellate court erred in rewriting unambiguous statutory language under the guise of interpretation. Specifically, the lower court interpreted the text of a statutory definition ("prescription" as defined in 82.02.0281(4)) by unwarranted recourse to technical dictionaries to interpret the words "formula" and "order." The definitions found in the technical dictionaries used the medical term "prescription" as part of the definition. In essence, the lower court interpreted a plain-word statute by resort to circular logic and technical terminology. The lower courts' error is in direct conflict with state law, represents a significant misuse of the proper tools for construing a statute, and thus involves a general issue of public interest. RAP 2.3.

The issues are as follows:

1. Whether the plain wording of the statute providing for tax exemption for

"prescription" sales was ambiguous as found by the lower court?

2. Whether the Court of Appeals erroneously applied technical medical definitions to mis-interpret the plain language in a non-ambiguous statute?

D. STATEMENT OF THE CASE

The following facts are taken from the decision below. Appendix A at 1.

Rhonda Duncan operated a lawful "medical marijuana dispensary"[1] doing business as The Compassionate Kitchen. Initially in 2008 she was advised that retail sales tax did not apply and she consequently did not charge tax. In 2009, however, she learned that the Department of Revenue took a contrary view, and accordingly she reported her retail sales revenue and personally paid the required tax. In 2011, Ms. Duncan sought a refund of the taxes paid for the January – December 2009 tax period. The amount in question was $19,312.38. She argued that the statutory exemption for prescriptions found in RCW 82.08.0281 applied to medical cannabis sales.

The Department rejected Duncan's arguments. Ms. Duncan then appealed to the Board of Tax Appeals arguing that former RCW 82.08.0281

[1] Over time the state has moved to referencing marijuana under its botanical name: *cannabis*. For example, the Liquor and Cannabis Board regulates recreational and medical cannabis use. The parties agree that Ms. Duncan operated a lawful dispensary for medical cannabis or marijuana in 2009. This petition will use the term cannabis to align the terminology, the two terms are synonymous.

specified that retail sales of drugs intended for human use were exempt from taxes. She relied upon the plain language of the tax exemption rule which provides a unique definition for "prescription". This definition is far broader in scope than the term is used in RCW 69 (controlled substance regulations), or in analogous federal legislation, or by the medical profession.

The relevant portions of the tax exemption rule states as follows:

> The tax levied by RCW 82.02.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription. * * *
>
> "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

RCW 82.08.0281(1) (2004).

The Board upheld the Department's order denying Duncan an exemption for medical cannabis retail sales, ruling that medical cannabis was not dispensed pursuant to a prescription because no physician is allowed to prescribe (as that term is used by medical practitioners and pharmacists) cannabis. Ms. Duncan appealed to the Superior Court for Spokane County. That court determined that the plain wording of RCW 82.08.0281 broadly included a physician's *authorization*

for medical cannabis and, under the statutory definition of a "prescription," that authorization was tantamount to a "prescription" as defined in the statute.

The Department appealed to Division III. The appellate court held that the superior court erred and reversed. Appendix A at 4, 6-12.

The appellate court analyzed the tax exemption statute in conjunction with RCW 69.51A.010(5)(a) (2007) — the state's controlled substance statutory scheme. This scheme provides that a physician may authorize the use of medical cannabis and provide "valid documentation" allowing the patient to obtain the drug from a lawful dispensary. The court conceded that the controlled substance exception for medical cannabis use did not provide any cannabis patients with the equivalent of a prescription — as that term is generally used in the medical field — but that here, given the tax statute's definition of prescription, the court would have to examine whether authorization by a physician permitting a patient to use medical cannabis under RCW 69 met the tax provision's definition of a prescription in RCW 82.02. Appendix at 4.

The lower court noted that Duncan conceded that a "prescription" — as that term is used in medical parlance — for cannabis was not recognized under state or federal law. Duncan's argument was not that a medical cannabis authorization by a Washington State physician was the equivalent to a prescription under controlled

substance laws; Duncan argued that a medical cannabis authorization, however, was a "prescription" as that term was specifically defined by RCW 82.08.0281(4)(a) (2004). Appendix at 7.

The lower court correctly set forth the standard of review and noted that Washington State used the plain meaning rule to construe a statute's language. Appendix at 5-6. The court agreed that where no ambiguity arose, the court must give effect to the statute's plain meaning and that any exemption in a tax statute must be proven by the taxpayer. Appendix at 6. The lower court further agreed with Duncan that the definition for "prescription" had to follow the explicit statutory language. Appendix at 8.

The lower court, however, held that Duncan was not entitled to a refund as her retail sales of medical cannabis did not come under the exemption statute. The lower court gave two reasons.

Lower court's first rationale. The lower court first analyzed the phrase, "by a duly licensed practitioner authorized by the laws of the state to prescribe" and concluded that it must be interpreted as if "prescribe" was used as a transitive verb — one requiring an object — and the object here is "cannabis." Since no physician can prescribe cannabis under state or federal law, cannabis cannot be a proper prescription under the tax exempt statute. Appendix at 8-10. The court

reached this conclusion by reference to "related statutes" and by the rule requiring that a court not construe a statute in a manner that resulted in "unlikely, absurd or strained consequences." Appendix at 10. The court held that it was absurd that the legislature would exempt from tax a sale that was for a drug that could not be legally prescribed. Note that the court did not address that it was not illegal to sell the cannabis, just that it was illegal to prescribe it. In reaching that conclusion, the court necessarily used the term "prescribe" as it is generally used, not as the statue set forth. For example, the court rested its logic on this statement:

> It is not unlikely or absurd to infer a legislative intent to tax revenue or income from criminal activity. It *is* unlikely and absurd to infer a legislative intent to bestow a tax benefit on such activity."

Appendix at 11. No analysis addressed whether this rationale was appropriate given the fact that in Washington, a physician could lawfully recommend cannabis and provide a patient with the legal authority to obtain cannabis from a dispensary.

In reaching this conclusion, the lower court rejected Duncan's grammatical arguments that the "nearest-reasonable-referent" canon of construction. As Duncan argued, the statute was not ambiguous when read grammatically. When read grammatically, the phrase modifying "licensed practitioner" required that the doctor be "authorized by the laws of this state to prescribe," not that the physician be authorized by the laws of this state to (in a general sense) "prescribe" cannabis.

The lower court took Duncan's plain reading as an argument that the statute was ambiguous and, upon that interpretation, held that the ambiguity must be applied against the taxpayer. Duncan in fact never argued that the statue was ambiguous. Her brief to the Superior Court plainly stated in quoting the statute that: "The text is unambiguous…" Respondent Tax Board acknowledged that Duncan had never argued ambiguity. Board's Opening Brief at 20. The sole argument available to the Tax Board was that Duncan disputed the ungrammatical reading the Board advanced in its belief that the statute required a licensed practitioner *who could prescribe the item in question.*

The lower court also brought legislative history into the discussion to construe the plain meaning of the statue, finding a reference from a Senate Bill Report in which the key language for an amendment was offered to clarify that " '[a] prescription for items or drugs that are exempt must be prescribed by a person whose license authorizes him or her to prescribe the item or drugs.' S.B. REP. ON S.B. 6515, at 1, 3, 58th Leg., Reg. Sess. (Wash. 2004)." Appendix at 12. The lower court did not justify its resort to legislative history to interpret the statute's plain language other than its suggestion, contrary to Duncan's argument, that the statute was ambiguous.

Lower court's second rationale. The lower court further held that a

physician's authorization for medical cannabis could not be a prescription under the statute because the statute's definition of prescription required an "order, formula, or recipe" and medical cannabis authorizations were merely a statement of an opinion about possible benefits of medical cannabis — not an order, formula, or recipe. As a mere "statement of opinion," the authorization documents were not a prescription udner RCW 82.08.0281(4)(a). As proof, the lower court interpreted the text allowing dispensing of cannabis on an authorization as falling short of indicating "the type of product, the quantity, or dosage, *all elements of a prescription.*" Appendix at 13, emphasis added. The lower court did not justify its return to the general definition of prescription — which requires these elements plus an Rx symbol on the form — in derogation of the statute's explicit definition of prescription. The lower court however did note that its conclusions were in line with the Department's argument that "federal law requires that medical orders for dispensing controlled substances be specific" by requiring drug names, strengths, dosage forms, quantity, and directions for use. Appendix A at 14. Then in justification of its logic, the lower court resorted to technical medical dictionaries to interpret the word "order." Appendix at 14-15.

Duncan, for her part, has steadfastly argued that the statute is plainly worded and that the legislature's intent was to exempt the cost of sales tax for the people of

Washington who, on their physician's recommendation, purchase legally obtainable drugs for medical relief. This result is neither absurd nor in conflict with any of portion of RCW 82.08.0281's text.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. A finding of ambiguity must be genuine and faithful to the text of the statute; because the characterization "ambiguous" results in a benefit to the agency interpreting the statute, the courts must be especially careful not to overwrite the intent of the legislature.

Duncan has never argued that the statue was ambiguous. Indeed, she has argued that the rules governing ambiguity are not applicable. The statute provided its own definition of the term prescription and that term was broadly defined with ordinary words. Nothing in the statute's tax exemption language states that a physician's authorization to obtain a controlled substance must be a substance that is legal under *federal* law. Nothing in the statute's language states that the ordinary terms used in the text — other than the word "prescription" itself — requires technical interpretation.

This Court has determined that ambiguity requires more than conceivable contesting meanings:

> Ambiguity arises "when it is " 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.' " *Estate of Haselwood v. Bremerton Ice Arena, Inc.,* 166 Wash.2d 489, 498, 210 P.3d 308 (2009) (quoting *State v. Hahn,* 83 Wash.App. 825, 831, 924 P.2d 392 (1996)).

State v. Gonzalez, 168 Wn.2d 256, 263 (2010). Only where a genuine ambiguity exists may the interpreting court "attempt to discern the legislative intent" from legislative history. Similarly, where a statute is ambiguous, a court may look to "authoritative agency interpretations of disputed statutory language." *State v. Armendariz*, 160 Wn.2d 106, 110-111 (2007). Specifically, a state board's "policy decision" is owed great weight when filling a legislative gap and some deference when it interprets an ambiguous statute that it is charged with implementing, *Department of Labor & Indus. v. Rowley*, 185 Wn.2d 186, slip op. at 10 (2016). Here there is no gap and no textual ambiguity.

The error below arises from a poorly considered application of the term ambiguity.[2] A mis-characterization of a statute as ambiguous opens the doors to considerable mischief. In particular, in cases such tax challenges where ambiguity is resolved against the taxpayer and in favor of the agency, the characterization

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[2] The standard example of ambiguity used in contemporaneous texts gives this example: "Send us 100 bolts and nuts." *From the text alone, without amplification*, the command could mean send 100 bolts and 100 nuts, or send 100 units of a mix of bolts and nuts, or send 100 pairs of bolts or nuts. All three meanings are packed within the original sentence. To be ambiguous, however, does not mean that — with the addition or deletion of some of the text — a different meaning could arise. To the text "by a duly licensed practitioner authorized to prescribe" the lower court added a phrase that utterly changes the meaning; the court then said that its new meaning was more plausible; and the court then concluded that the statute was therefore ambiguous. This is not a proper test. Changing a sentence's meaning by

grants wide latitude to the agency that interprets the statute. Washington's rule granting wide latitude to Revenue Department when its statutes are ambiguous is a departure from the general rule putting the drafter at risk for ambiguity. The criminal rule of lenity encourages the legislature to spell out clearly its desires and intentions; the contract rule for adhesion documents works similarly. In Washington, however, the Revenue Department is the beneficiary of any statutory ambiguity. Duncan does *not* challenge that rule; Duncan challenges the *method* by which a court reaches the determination that a statute is ambiguous.

First, the term should not be favored over the plain text of a straightforward statute. In this instance, the court argued that because it could imagine another interpretation, that alone created ambiguity. This test is too easy: to permit a court's wide ranging survey of inapposite statutes and non-conforming uses is an invitation to unwarranted judicial creativity.

Having defined "prescription" in broad terms, the legislature's intent for the remainder of its plainly worded statute should not be ascertained by reference to technical dictionaries or by speculating whether additional words (not actually contained in the statue) render a different meaning. Both approaches are wrong:

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adding or subtracting words is emphatically not how one tests for ambiguity.

First, technical dictionaries obviously employ the standard medical meaning for the word "prescription" — not the meaning mandated within the statute. The use of such dictionaries in effect re-writes the statute.

Second, the lower court's finding of ambiguity stems from its willingness to edit the text by adding language found in a committee report and *then* interpret the statute as modified. Appendix at 10-11. Had the court stayed with the plain text, it cannot convert the text's intransitive use of the term "authorized by the laws of this state to prescribe" into the new unpassed version along the lines suggested by the committee: "prescribed by a person whose license authorizes him or her to prescribe the item or drugs."

This Court should grant review so that litigants and lower courts are disabused of the practice of characterizing a statute as being ambiguous unless there has been a genuine and faithful reading of the text and ambiguity naturally arises from the text, not from a desire to rewrite the statute.

2. The non-technical statutorily-defined term "prescription" cannot be interpreted by resort to *technical* definitions that themselves employ a medical version of the term "prescription."

By using technical medical dictionaries to define "order" and "formula" the lower court rewrote the statute's definition of prescription: for example, at page 15

of the decision, the lower court interprets the term "formula." The definition it chose was from two medical dictionaries. Both definitions define formula as part of a "prescription" — and neither dictionary use the term "prescription" as it was defined in RCW 82.08. This alone makes the lower court's use of a medical dictionary problematic: the term "prescription" is statutorily defined in Washington's tax exemption statute in an manner completely distinct from its common medical use. Resort to a medical definition to provide a meaning for the statute's other terms is inconsistent with the legislatures *stated* intent to treat the term prescription in a broad non-technical manner.

Duncan acknowledges that the appellate court initially agreed that it was confined to the statute's definition of "prescription" but it nevertheless ushered into its rationale for reversal the *medical* version of the word prescription when it turned to interpret the remainder of the statute. Had the legislature intended "prescription" to be used in its medical sense, as a technical term, it would not have provide the broad plain language definition found in RCW 82.08. As matters stand the court of appeals has used the term prescript both as it was defined and as it is used in common medical parlance. This was done in order to construe a plainly worded statute.

Although Duncan is accused of circular logic in some of the decisions

leading up to this petition, the fact is that the Court of Appeals cannot reach its conclusions except by disregarding the statutory definition. Under the guise of making an interpretation of technical terms ("order" or "formula") the lower court simply jettisoned the legislature's intended definition for "prescription" and substituted a non-complying version. The lower court's dictionaries define "order" and "formula" by circular reference to the very term the court states it is interpreting.

Given the statute's non-standard definition of "prescription," *Stedman's* and *Taber's* medical dictionaries are not appropriate sources to define "order" and "formula."

3. Judicial interpretation of a statute is not an opportunity to rewrite a statute's plain language.

The rules for statutory interpretation are worthy of Supreme Court attention when misused. In this case, the lower court has departed from the standards to such a degree that review is warranted in this non-published case.

> The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *[Citation omitted]*. To determine legislative intent, we first look to the plain language of the statute. *[Citation omitted]*. In evaluating the statute's language we consider "the language of the provision in question, the context of the statute in which the provision is found, and related statutes." *[Citation omitted]*.
>
> To discern the plain meaning of undefined statutory language, we give words their usual and ordinary meaning and interpret them in the context of

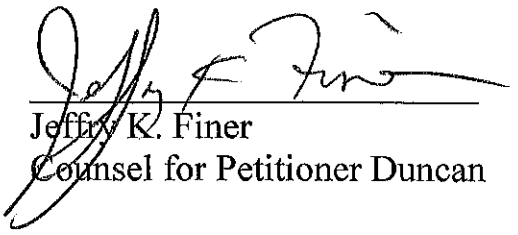
> the statute in which they appear. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395-96, 325 P.3d 904 (2014). If the plain meaning of a statute is unambiguous, we must apply that plain meaning as an expression of legislative intent without considering extrinsic sources. *Jametsky*, 179 Wn.2d at 762. We do not rewrite unambiguous statutory language under the guise of interpretation. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

Isaiah William Newton, Jr., v. State of Washington, 192 Wash.App. 931, 936 (Div. II, 2016), *petition denied*, ___ Wn.2d ___, 2016 WL 4542108.

F. CONCLUSION

This court should accept review of the Court of Appeals decision in order to clarify the rules governing the determination of when a statue is ambiguous and when a non-ambiguous statute's definitional terms may be interpreted by resort to extraneous sources.

DATED THIS 16th day of September, 2016.



Jeffry K. Finer
Counsel for Petitioner Duncan

CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 16th day of September, 2016, I caused the foregoing *Petition for Discretionary Review* to be served via USPS postage prepaid and email on the following:

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DATED this 16th day of September, 2016.

Danette Lanet

APPENDIX

ORDERS

FILED
AUGUST 18, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

RHONDA L. DUNCAN d/b/a THE COMPASSIONATE KITCHEN, Respondent, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Appellant.	)	No. 33245-4-III UNPUBLISHED OPINION

SIDDOWAY, J. — At issue in this appeal is whether the retail sale in 2009 of medical marijuana was exempt from retail sales tax as a prescribed drug. We agree with the Department of Revenue and the Board of Tax Appeals that it was not. We reverse the superior court's contrary decision, thereby reinstating the Department's denial of Rhonda Duncan's request for a refund of retail sales tax she paid for that period.

FACTS AND PROCEDURAL BACKGROUND

In 2008, Rhonda Duncan opened a medical marijuana dispensary doing business as The Compassionate Kitchen. Believing that her method of operation was not subject to retail sales taxation, she did not collect sales tax on transactions with customers.[1] But

[1] In seeking a tax refund, Ms. Duncan asserted she provided consultation services on the medical use of cannabis in exchange for donations. She claimed to have provided medical cannabis to her customers free of charge. She abandoned that argument in

in light of the Department's contrary view, she reported retail sales revenue in 2009 and paid the required tax.

In 2011, Ms. Duncan filed an amended return for the January-December 2009 tax period and requested a refund of the $19,312.38 she had paid. The Department denied the refund request, and Ms. Duncan appealed to the Department's appeal division. It affirmed denial of the refund.

Ms. Duncan appealed to the Board of Tax Appeals. The only issue before the Board was whether pursuant to former RCW 82.08.0281 (2004)[2]—an exemption from retail sales tax for drugs dispensed to patients pursuant to a prescription—her sale of medical marijuana in 2009 had been tax exempt. In response to a motion for summary judgment, the Board ruled that the exemption provided by former RCW 82.08.0281 did not apply to sales of medical marijuana and affirmed the Department's denial of the refund request.

Ms. Duncan sought judicial review of the Board's decision by the Spokane County Superior Court. It concluded the sales were exempt from retail sales tax and reversed the Board. The Department appeals.

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proceedings before the Board.

[2] An amendment in 2014 substituted language that the retail sales tax "does not apply" to such drug sales for prior language that it "shall not apply." LAWS OF 2014, ch. 140, § 19.

ANALYSIS

Statutory background

In 1971, the Washington Legislature enacted the Uniform Controlled Substances Act, chapter 69.50 RCW (UCSA), which made it a crime to manufacture, deliver, or possess marijuana. RCW 69.50.401-.445. The same activities are criminalized under federal law. 21 U.S.C. ch. 13; *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 222, 351 P.3d 151 (2015).

In the 1998 general election, Washington voters approved Initiative 692 (I-692), which became effective December 3, 1998, and was later codified at chapter 69.51A RCW. Initiative 692, LAWS OF 1999, ch. 2. "By passing [I-692], the people of Washington intended that '[q]ualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would 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.'" *State v. Fry*, 168 Wn.2d 1, 6-7, 228 P.3d 1 (2010) (second alteration in original) (quoting former RCW 69.51A.005 (1999)). RCW 69.51.040(1) created an affirmative defense to the crimes of providing or possessing marijuana used by qualifying patients.

In order to assert the affirmative defense, a qualifying patient or designated marijuana provider was required to present the patient's "valid documentation" to any law enforcement official questioning the asserted medical use of marijuana. Former

RCW 69.51A.040(4)(c). The definition of "valid documentation" has been amended since 1998; most recently, the legislature has replaced the term with "authorization." *See* LAWS OF 2015, ch. 70, § 17 (substituting "authorization" for "valid documentation") *codified as* RCW 69.51A.010(7).

Notwithstanding the amendments, the substance of the required documentation has remained the same. Relevant here, "valid documentation" was defined in 2009 as:

> A statement signed by a qualifying patient's physician . . . which states that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana.

Former RCW 69.51A.010(5)(a) (2007).

Based on the law's requirement for a written physician authorization, Ms. Duncan argues that her sales of medical marijuana in 2009 were exempt from retail sales tax under RCW 82.08.0281(1), which exempts sales of drugs for human use dispensed "pursuant to a prescription." She concedes that medical marijuana authorizations are not "prescriptions" under the UCSA. *See* RCW 69.50.308 (identifying the requisites to dispensing a controlled substance). But she contends that the retail sales tax exemption provided by RCW 82.08.0281 uses a definition of "prescription" that is broader than that used by laws dealing with controlled substances—broad enough to encompass her customers' medical marijuana authorizations.

Standard of review and construction of tax statutes

The Administrative Procedure Act, chapter 34.05 RCW (APA) authorizes courts to grant relief from an agency order in an adjudicative proceeding in nine enumerated instances; here, Ms. Duncan obtained superior court review on the basis that the Board had "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); Clerk's Papers (CP) at 92. Challenges to an agency's interpretation or application of the law are reviewed de novo. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202, 286 P.3d 417 (2012).

"In reviewing a superior court's final order on review of a Board decision, an appellate court applies the standards of the [APA] directly to the record before the agency, sitting in the same position as the superior court." *Honesty in Envtl. Analysis & Legis. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). We do not give deference to the superior court's ruling. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

In this case, the Board's task and our own is to construe the breadth of RCW 82.08.0281, including its definition of the term "prescription." "The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). "'Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the

provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.'" *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002)). Where the meaning of a statute is plain and unambiguous on its face, the court must give effect to that plain meaning. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). Only if a statute is ambiguous will we give substantial weight to the agency's interpretation of the statute it administers—here, the Department's interpretation. *Bi-Mor*, 171 Wn. App. at 202.

Because the statute we construe is a tax exemption, the burden of showing qualification for the tax benefit rests with the taxpayer. *Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967). Statutes providing for either exemptions or deductions "are, in case of doubt or ambiguity, to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer." *Id.* (citing *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *Helvering v. Ohio Leather Co.*, 317 U.S. 102, 63 S. Ct. 103, 87 L. Ed. 113 (1942)).

Tax provisions at issue

Under RCW 82.08.020, a retail sales tax is levied on each retail sale of tangible personal property unless a specific statute exempts the transaction from the tax. RCW

82.08.020; RCW 82.04.050. In 2009, the statutory exemption for the sale of prescribed drugs provided:

> The tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.

Former RCW 82.08.0281(1) (2004). "Prescription" is a defined term for purposes of the exemption:

> "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

RCW 82.08.0281(4)(a).

As previously noted, Ms. Duncan concedes that a medical marijuana authorization is not a "prescription" within the meaning of controlled substance statutes. As pointed out by the Department, this is no accident. A physician would violate UCSA and commit a crime by "prescribing" marijuana as the term is used in UCSA. Both federal and state statutes list marijuana as a schedule I controlled substance. Former RCW 69.50.204(c)(14) (2008); 21 C.F.R. § 1308.11(d)(19). And

> [c]ontrolled substances listed in schedule I under federal law may not be prescribed or dispensed anywhere in the United States unless a specific registration to do so is obtained to use the substance for research purposes. *See* 21 U.S.C. §§ 822-23, 872 (1981). *Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington unless a federal registration is granted.*

Seeley v. State, 132 Wn.2d 776, 783, 940 P.2d 604 (1997) (emphasis added); RCW 69.50.308 (2001) (identifying the only manner in which controlled substances may be dispensed).

We agree with Ms. Duncan that we construe "prescription" for retail sales tax purposes based on its definition by RCW 82.09.0281(4)(a), however, not by how it is defined elsewhere. "It is an axiom of statutory interpretation that where a term is defined we will use that definition." *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005).

The Department argues there are two grounds on which we should conclude that a medical marijuana authorization is not a "prescription" as defined by RCW 82.08.0281(4)(a). One—the argument adopted by the Board—is that a physician's medical marijuana authorization is not "issued . . . by a duly licensed practitioner authorized by the laws of this state to prescribe." The other is that a medical marijuana authorization is not an "order, formula, or recipe." We turn first to the reasoning that persuaded the Board.

Practitioners "authorized by [law] to prescribe"

The Department persuaded the Board that a medical marijuana authorization is not a "prescription" in light of the last clause of the statutory definition: that it be issued "by a duly licensed practitioner *authorized by the laws of this state to prescribe*." RCW 82.08.0281(4)(a) (emphasis added). Ms. Duncan argues that plainly read, the definition

merely provides that as long as a practitioner is authorized by Washington law to prescribe *something*, then the exemption applies to any order he or she issues—legally or illegally—for a drug to be dispensed to a patient. "Everyone knows that Al Capone, for example, was nailed for income-tax evasion, not for the bootlegging, loan-sharking, extortion and prostitution that generated the income." *United States v. Ytem*, 255 F.3d 394, 397 (7th Cir. 2001).

The Department's argument persuaded the Board, whose final decision characterized Ms. Duncan's reading as "either circular or vague." CP at 27.

> First, if the Taxpayer is contending that the definition requires only the authority to prescribe the order itself, the Taxpayer is ignoring the ordinary meaning of the verb "to prescribe": "to direct, designate, or order the use of as a remedy <the doctor *prescribed* quinine>." Practitioners do not prescribe a prescription; they prescribe medications. Second, if the Taxpayer is arguing that the practitioner need only have the authority under state law to prescribe *something*, then, as the Department observes, the Taxpayer is "interpret[ing] this last phrase in a vacuum" and "employ[ing] a simplistic reading" of the statute.

And:

> The Board concludes that, by its plain meaning, the statute defines a "prescription" as an order issued by a practitioner who is authorized to prescribe the drugs or devices referenced in that order.

Id. at 27-28 (alterations in original) (footnotes omitted).

We do not entirely agree. The verb "to prescribe" can be both transitive and intransitive. A transitive verb is one that must take a direct object, while an intransitive verb does not. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2428, 1186 (1993).

The transitive use of "to prescribe" is the one that the Board characterizes as its "ordinary meaning;" it means "**3 :** to direct, designate, or order the use of as a remedy <the doctor *prescribed* quinine>." *Id.* at 1792. The object of the transitive verb "to prescribe" is the substance being prescribed.

Yet "to prescribe" can also mean "**2 :** to lay down a rule: give directions: DICTATE, DIRECT **3 a :** to write or give medical prescriptions <~ for a patient> **b :** to give advice in the manner of a doctor giving a medical prescription." *Id.* This form does not take a direct object. So we cannot reject Ms. Duncan's argument on the basis that use of the verb "to prescribe" always implicates the substance being prescribed.

We agree with the Board, however, that it is not reasonable to read the prescribed drug exemption in a vacuum. The legislature has exempted from retail sales taxation only those drugs that are "dispensed to patients," "by a duly licensed practitioner authorized . . . to prescribe." RCW 82.08.0281(1), (4)(a). No duly licensed practitioner in Washington can legally prescribe marijuana. We may look to related statutes when determining a statute's plain meaning, *City of Seattle*, 148 Wn.2d at 81 (citing *Campbell & Gwinn, LLC*, 146 Wn.2d at 10), and we must avoid constructions that yield unlikely, absurd or strained consequences. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). In carrying out our fundamental objective of ascertaining and carrying out the legislature's purpose, we cannot overlook the unlikelihood—indeed, the absurdity—that the legislature required a prescription to be issued by a "duly-licensed practitioner

authorized by the laws of this state to prescribe" but didn't care whether the prescription was illegal.

And the fact that criminals are liable for taxes on ill-gotten gains does not undercut our conclusion. It is not unlikely or absurd to infer a legislative intent to tax revenue or income from a criminal activity. It *is* unlikely and absurd to infer a legislative intent to bestow a tax benefit on such activity.

The Board concluded that the last clause of the definition plainly means that a "prescription" is an order issued by a practitioner authorized to prescribe the drug he or she prescribes. We are inclined to agree, but even if we found ambiguity, several principles would then support the Department's construction.[3] As earlier discussed, tax

[3] Ms. Duncan invokes the nearest-reasonable-referent canon of construction that, while not applied in plain meaning analysis, can be applied where a statute is ambiguous. *Overlake*, 170 Wn.2d at 52. It provides that "'[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.'" *Goldberg v. Companion Life Ins. Co.*, 910 F. Supp. 2d 1350, 1353 (M.D. Fla. 2012) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152-53 (2012)). Ms. Duncan argues the canon requires that we read the phrase "authorized by the laws of this state to prescribe" as modifying only "licensed practitioner," not the substance that the practitioner prescribes. As pointed out by the Board, however, her reliance on the canon "is unnecessary, since the Department also reads the phrase 'authorized . . . to prescribe' as modifying the word 'practitioner.'" CP at 27 (alteration in original).

exemptions, if ambiguous, are construed strictly, though fairly, against the taxpayer. *Group Health*, 72 Wn.2d at 429. Where a tax statute is ambiguous, we give substantial weight to the Department's interpretation. *Bi-Mor*, 171 Wn. App. at 202.

Finally, legislative history predating the tax period at issue supports the Department's interpretation of the statute's plain meaning. Before 2004, RCW 82.08.0281(4)(a) provided that a "prescription" was issued "by a duly licensed practitioner authorized by the laws of this state." By amendment in 2004, the legislature added two concluding words, "authorized by the laws of this state *to prescribe*." Former RCW 82.08.0281(4)(a) (LAWS OF 2004, ch. 153, § 108) (emphasis added). According to the Senate Bill Report, which described the legislation as intended to correct "errors, omissions, and inconsistencies," "[a] prescription for items or drugs that are exempt must be prescribed by a person whose license authorizes him or her to prescribe the item or drugs." S.B. REP. ON S.B. 6515, at 1, 3, 58th Leg., Reg. Sess. (Wash. 2004).

Bill reports may be relevant in the interpretation of a statute being enacted. *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991). For periods after the effective date of the change, the 2004 amendment and bill report support the Department's interpretation of "prescription" as requiring issuance by a practitioner

authorized to prescribe the drug prescribed.[4]

For the reasons stated, the Board properly concluded that sales of medical marijuana were not exempt from retail sales tax in 2009.

Order, formula, or recipe

The Department also argues that a medical marijuana authorization is not an "order, formula, or recipe" as required by the retail sales tax provision's definition of "prescription," since an authorization "merely indicates that 'in the health care professional's professional opinion, the patient may benefit from the medical use of marijuana.'" Br. of Appellant at 22 (quoting former RCW 69.51A.010(5). It "does not indicate the type of product, the quantity, or dosage, all elements of a prescription." *Id.* at 23.

Ms. Duncan responds that a practitioner's order of a drug—a prescription in "the common parlance," as she describes it—"can be terse affairs," with "[DRUG] PRN" or

[4] The Department also relies on subsequent legislation explicitly excluding marijuana from the definition of drugs exempted from retail sales tax, which it argues was an intended clarification, LAWS OF 2014, ch. 140, § 19; and on 2015 amendments to chapters 69.51A and 82.02 RCW that clarified that a medical marijuana "authorization is not a prescription as defined in RCW 69.50.101," and explicitly exempted qualifying sales of medical marijuana from retail sales tax. RCW 69.51A.010(1)(c) (amended by LAWS OF 2015, ch. 70, § 17(7)(c), effective July 24, 2015); RCW 82.08.9998 (amended by LAWS OF 2015, 2d Spec. Sess., ch. 4, § 207, effective July 1, 2015). Ms. Duncan responds that these amendments "point out [her] argument quite nicely: without the amending language," she argues, "a grammatical fair-reading of the statute as it existed in 2009-10 excludes medical marijuana from taxation." Br. of Resp't at 11.

"as needed" sufficing. Br. of Resp't at 5, 7. She cites no authority in asserting that a prescription in common parlance need not contain specifics. As the Department points out, federal law requires that medical orders for dispensing controlled substances be specific:

> All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, *the drug name, strength, dosage form, quantity prescribed, directions for use*, and the name, address and registration number of the practitioner.

Reply Br. at 4-5 (emphasis added) (citing 21 C.F.R. § 1306.05(a) (2015)).

And terse or not, there is still a difference between what Ms. Duncan characterizes as an order or prescription ("marijuana as needed") and a medical marijuana authorization ("patient may benefit from the medical use of marijuana"). The former is an instruction or directive to take marijuana as needed; the latter is a declaration of the practitioner's professional opinion.

The distinction is borne out by relevant dictionaries. The ordinary meaning of "order" is "to give orders to : COMMAND . . . : require or direct (something) to be done." WEBSTER'S, *supra*, at 1588. As a medical term, "order" is defined by *Taber's Cyclopedic Medical Dictionary* as meaning:

> Instructions from a health care provider specifying patient treatment and care. A directive mandating the delivery of specific patient care services.

TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1678 (22d ed. 2013).

We conclude that the technical meanings of "order," "formula," and "recipe" are the appropriate meanings to apply. Where words carry special significance in a particular field, the court should resort to a technical definition. *See Tingey v. Haisch*, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). Because the exemption from retail sales tax is for "drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription" issued by a "duly licensed practitioner," we are dealing with a particular field: the practice of medicine. RCW 82.08.0281(1); (4)(a).

Both *Taber's* and *Stedman's*[5] define "formula." *Taber's* defines it as "[a] rule prescribing ingredients and proportions for the preparation of a compound," and *Stedman's* defines it as "[a] recipe or prescription containing directions for the compounding of a medicinal preparation." TABER'S, *supra*, at 960; STEDMAN'S, *supra*, at 762.

Both medical dictionaries define "recipe." *Taber's* defines it, "Take, indicated by the sign ℞. **2.** A prescription or formula for a medicine. SEE: *prescription*." TABER'S, *supra*, at 1995. *Stedman's* defines it, "The superscription of a prescription, usually indicated by the sign ℞. **2.** A prescription or formula." STEDMAN'S, *supra*, at 1654.[6]

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[5] STEDMAN'S MEDICAL DICTIONARY (28th ed. 2005).

[6] "Prescription," which both *Taber's* and *Stedman's* use in defining "recipe," is itself defined by both dictionaries. *Taber's* defines it as:

> A written direction or order for dispensing and administering drugs. It is signed by a physician, dentist, or other practitioner licensed by law to

"Valid documentation" under former RCW 69.51A.010(5)(a) is not a command, instruction, or directive. Medical marijuana authorizations do not require or direct anyone to dispense marijuana. They do not specify or mandate treatment or services. They do not prescribe ingredients, proportions, or directions for compounding. There is no ℞ sign on the medical marijuana authorization forms in use in 2009. *See* Administrative Record at 111, 113. "Valid documentation"—stating only that a patient may benefit from the use of marijuana—is not an "order, formula, or recipe."

> prescribe such a drug. Historically, a prescription consists of four main parts:
> 1. *Superscription*, represented by the symbol ℞, which signifies *Recipe*, meaning "take"
> 2. *Inscription*, containing the ingredients
> 3. *Subscription*, directions to the dispenser how to prepare the drugs
> 4. *Signature*, directions to the patient how to take the dosage; the physician's signature, address, and telephone number; the date; and whether the prescription may be refilled. When applicable, the physician's Drug Enforcement Administration number must be included.

TABER'S, *supra*, at 1901.

> A written formula for the preparation and administration of any remedy. **2.** A medicinal preparation compounded according to formulated directions, said to consist of four parts: 1) *superscription*, consisting of the word *recipe*, take, or its sign, ℞; 2) *inscription*, the main part of the p., containing the names and amounts of the drugs ordered; 3) *subscription*, directions for mixing the ingredients and designation of the form (pill, powder, solution, etc.) in which the drug is to be made, usually beginning with the word, *misce*, mix, or its abbreviation, M.; 4) *signature*, directions to the patient regarding the dose and times of taking the remedy, preceded by the word *signa*, designate, or its abbreviation, S. or Sig.

STEDMAN'S, *supra*, at 1556-57.

For this additional reason, Ms. Duncan cannot establish that her retail sales fell within the exemption from taxation provided by RCW 82.08.0281.

The superior court's order is reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, J.