NO. 94469-5

COA 33944-1-III

IN THE SUPREME COURT OF THE STATE OF

WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

CLIFFORD MENARD, Petitioner.

ANSWER TO PETITION FOR REVIEW

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the published court of appeals decision filed on February 23, 2017 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Is the court of appeals decision consistent with *State v. Ceglowski,* 103 Wn. App. 346 (2000)?

D. STATEMENT OF THE CASE

The Petitioner, Rodney Clifford Menard, was charged with maintaining a drug dwelling under RCW 69.50.402. CP 4. Prior to trial, Menard filed a *Knapstad* motion, arguing that any drug-related activity at Menard's house was merely incidental to the primary purpose of the residence. CP 5-11. The State filed a response, alleging more facts as contained in Detective Posada's report, which was filed with the State's reply. CP 12-38. The defense did not dispute the additional facts as set forth by the State. RP 7.

Here are some of the undisputed facts from the detective's report:

1. There were several complaints of foot traffic coming and going from Menard's residence during all times of the day and night.
2. On July 15, Detective Posada was provided a small zip-loc baggie that contained suspected

methamphetamine after a controlled-buy from the residence using a confidential source (CS).

3. Detective Posada obtained a search warrant for the residence and the warrant was executed. The residence had an upstairs and a basement. There was a primary living room and 3 bedrooms upstairs and 2 bedrooms and 1 pseudo-bedroom in the basement. Menard was using the living room as his bedroom. 12 persons were located inside the house and 2 persons were located outside the house.
4. Post-*Miranda*, Menard stated that he lived in the house and inherited it from his parents. He rents out four bedrooms. He said he was a meth user who smokes daily. He said that he was aware of all the people coming and going from his residence. He posted a sign on his back door telling people to stop coming over after 12 am. He said that most people who come to visit are there to use drugs. Menard said that occasionally, he gets drugs in lieu of rent money.
5. Sherry Payne reported that she rents from Menard. She was arrested for possessing meth. She stated that 10 to 15 individuals come to the house per day and that they come over to use drugs.
6. Renter Edward Purdom stated that he believed that 10 to 15 different individuals come and go every day and that most of them use drugs. Purdom stated that he uses meth on a limited basis. Purdom said that he was going to move out because he had no idea there was so much traffic coming and going from the house.
7. Elaine Bowen was charged with possession of meth. She had meth and heroin and a digital scale inside of her purse. She stated that the meth was hers and that it was for personal use.
8. There were numerous items of drug paraphernalia located throughout the entire residence. Menard admitted that the glass smoking devices found in the living room (converted to his bedroom) belonged to him and had been used to smoke meth. A baggie of suspected meth was found on the couch in the

> downstairs southeast bedroom. There was a glass crack pipe in an ashtray next to the couch.

CP 22-25.

At the *Knapstad* hearing, the defense argued that assuming all the facts from the detective's report are presented, those facts did not support the conclusion that the substantial purpose for owning or possessing the home was to maintain a drug dwelling. RP 7, 10. The State argued that Menard knew his house was a place that drug users resorted to for the purpose of using controlled substances. RP 12, 18. The defense, in rebuttal, argued that drug use must be a primary purpose for maintaining the dwelling. RP 25, 28. The State countered that the test is whether the purpose is a *substantial* one, not the *primary* purpose. RP 29.

Relying on *State v. Fernandez*, 89 Wn. App. 292, 948 P.2d 872 (1997), the trial court granted the *Knapstad* motion. RP 44-5, CP 39. The court held that "…clearly here we have a house that's being rented out by people who are, in fact, using drugs in the house; but…it has to be shown, again, that it was one of the primary purposes and we can't find that here." RP 44. The State filed a timely appeal.

The Court of Appeals held that the evidence supported ongoing drug use that was a substantial purpose for maintaining the home. As a

result, the court reversed the dismissal of the charges and remanded the case.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) states that:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals decision is consistent with *State v. Ceglowski*, 103 Wn. App. 346 (2000).

A trial court's dismissal under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), will be affirmed if no rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *See State v. Wilhelm*, 78 Wn. App. 188, 191, 896 P.2d 105 (1995). Review is de novo. *State v. Henjum*, 136 Wn. App. 807, 810-11, 136 Wn. App. 807 (2007). No deference is given to the trial court's ruling. *Id.* The question is solely one of law – whether the State has shown facts that satisfy the elements of the crime charged when viewing those facts and reasonable

inferences therefrom in a light most favorable to the State. *Id.* The review does not require that the court decide whose version of the events is correct. *Id.*

The crime at issue here is maintaining a drug dwelling. There are two ways to commit this crime. RCW 69.50.402(1)(f) states as follows:

> (1) It is unlawful for any person: (f) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, *or* which is used for keeping or selling them in violation of this chapter.

(emphasis added).

Menard claims that the Court of Appeals decision conflicts with *State v. Ceglowski*, 103 Wn. App. 346, 12 P.3d 160 (2000). However, the analysis in *Ceglowski* pertained to the latter prong, "for keeping or selling drugs." In that case, Division Two held that "the totality of the evidence must demonstrate more than a single isolated incident of illegal drug activity in order to prove that the defendant 'maintains' the premises *for keeping or selling* a controlled substance in violation of the drug house statute." 103 Wn. App. at 350 (emphasis added). The *Ceglowski* case did not involve the other means of committing this crime, keeping a dwelling

"resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances."

And as pointed out by the Court of Appeals, "the statute refers to the purpose for which the drug users employ the residence, not the owner's purpose for the residence. The statute does not insert the word "primary" or any other term similar in meaning." *State v. Menard*, 197 Wn. App. 901, 904, 392 P.3d 1105 (2017).

The *Ceglowski* case held that "to constitute the crime of maintaining a premises for the purpose of unlawfully *keeping or selling* controlled substances there must be: (1) some evidence that the drug activity is a continuing or recurring character; and (2) that a substantial purpose of maintaining the premises is for illegal drug activity." *Id.* at 352-3 (emphasis added). Under this test, even a small quantity of drugs found on one occasion could be sufficient if the totality of the evidence proves that the defendant maintained the premises for selling or keeping controlled substances. *Id.* at 353. But, under the facts of *Ceglowski*, the "mere possession of .9 grams of meth" in an office desk at a bait and tackle shop was not enough to prove that *Ceglowski* maintained a shop that was used for keeping or selling drugs.

Clearly the court's holding in *Ceglowski* was limited to the case where the purpose alleged was the *selling or keeping* of drugs. Even

assuming for sake of argument that this standard applies to the "resorting to" prong, the standard was clearly met here. In this case, Menard admitted that most people who come to his house are there to use drugs. CP 22-25. Witnesses said that ten to fifteen individuals come to the house per day to do drugs. *Id.* This was not just a recurring event. It happened daily. *Id.* It was further corroborated by the physical evidence, drugs and drug paraphernalia, found scattered throughout the house. *Id.* This is much more than a single isolated incident of mere possession, but rather, activity that is of a continuing or recurring character – 10 to 15 persons coming over each day to use drugs. CP 22-25.

In sum, the evidence, if believed, was sufficient to show ongoing drug use and that the drug use was a substantial purpose for the home. As such, on the facts presented, any rational jury could have found that Menard maintained a drug house in violation of RCW 69.50.402(1)(f).

F. CONCLUSION

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of

substantial public interest that should be determined by the Supreme Court. As such, his petition for review should be denied.

Based on the undisputed facts, and reasonable inferences from those facts, a rational fact finder could have found all of the elements of maintaining a drug dealing. The court's opinion does not conflict with *Ceglowski*. As such, Menard's petition for review should be denied.

Respectfully submitted this 7th day of July, 2017,

__s/Tamara A. Hanlon_____
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on July 7, 2017, by agreement of the parties, I emailed a copy of ANSWER TO PETITION FOR REVIEW to Kenneth H. Kato at hkhato@comcast.net. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of July, 2017 at Yakima, Washington.

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA#28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us

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