

NO. 46304-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

ALFRED G. BURTON, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-02167-0

Brief of Appellant

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A. ASSIGNMENTS OF ERROR.

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B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether probable cause supports issuance of the search warrant?
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3. Whether the trial court properly applied principles of reviewing the affidavit of probable cause for the search warrant?
4. Whether the smell of marijuana, detected by a trained and experienced law enforcement officer supplies probable cause to support a search warrant?

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6. Whether the Medical Use of Cannabis Act negates probable cause for a search warrant?
7. Whether marijuana produced at a collective garden under RCW 69.51A.085 may be possessed and distributed at a place other than a collective garden?
8. Whether the phrase “available at all times on the premises of the collective garden” is ambiguous in plain meaning and in context of RCW 69.51A?
9. Whether the trial court erred where it failed use the rules of statutory construction to apply the language and provisions of RCW 69.51A?
10. Whether the trial court erred by employing the Rule of Lenity?
11. Whether the trial court erred in relying on erroneous dicta in *State v. Shupe*?
12. Whether “revolving memberships” as described in *State v. Shupe*, comply with the requirements of RCW 69.51A.085?

13. Whether, in order to demonstrate probable cause to obtain a search warrant, law enforcement officers were required to show that an alleged community garden had more than ten members?

C. STATEMENT OF THE CASE.

1. Procedure

On June 12, 2012, the Pierce County Prosecutor's Office charged Alfred Gustav Burton, the defendant, with unlawful possession of a controlled substance with intent to deliver in violation of the Uniform Controlled Substance Act, RCW 69.60.401(2)(c). CP 1. On December 16, 2013, the parties appeared before the Honorable Stanley J. Rumbaugh. 1 RP 1.¹ The court heard oral argument on defendant's motion to dismiss the charges pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), and defendant's challenge to the validity of the search warrant pursuant to *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1987). 1 RP 5. The court denied the *Franks* motion. 1 RP 76. Defendant additionally moved to suppress evidence obtained during the execution of search warrant. 1 RP 79. The court found that the Affidavit

¹ The State will refer to the Verbatim Report of Proceedings as follows: the pretrial proceedings from December 16, 2013 as 1 RP, and the pretrial proceedings from April 25, 2014 as 2 RP.

for Probable Cause failed to provide probable cause to issue the search warrant. The court granted the defense's motion to suppress the evidence. 1 RP 100-07.

The trial court dismissed the case because the ruling to suppress evidence prevented the State from presenting the necessary evidence. CP 37-40. On May 23, 2014, the State sought review by Division II of the Court of Appeals of the trial court's ruling to suppress evidence of the controlled substance.

2. Facts

The following facts are from the affidavit for search warrant written on May 2, 2012 by Pierce County Sheriff Deputy Wesley R. Jarvis:

On April 27, 2012, at about 1345 hours, Deputy Nordstrom #357, Deputy Johnson #525 and I contacted the business at 10118 224th St E called Green Path of Washington.

Green Path of Washington is a store which distributes marijuana. The front of the store is separated from the rest of the business. There is a small window through which initial contact with the employee is made; access to the back part of the store is via a locked metal door. There is a letter affixed to the glass front door which advised Law Enforcement that they are not welcome at the business, unless directed there by appointment with the business's attorney.

Inside the business, we contacted Alfred G Burton, who told us that he was one of owners of the business. Burton said that Green Path of Washington was established

as a "collective garden", which, under Washington State RCW, allows a collective of 10 medicinal marijuana patients to gather their resources and cultivate and possess marijuana. When Deputy Nordstrom commented that he could neither see nor smell growing marijuana, Burton told Deputy Nordstrom that the actual "garden" was elsewhere (Burton declined to say exactly where the garden was). Burton explained that the store front in which we stood actually served as the garden's "Club House" and functioned as a gathering place for members and served as the garden's distribution hub.

Washington State Law mandates that a "collective garden" have a copy of each of its ten patients' ID and Medicinal Marijuana Authorizations available for inspection at all times. Burton told us that those documents were located in two black file holders on the office wall, but he refused to allow us to view them. In the black file holders, I could see about a 3" stack of papers clipped into 6 different bunches.

Burton told us that members of his collective garden signed up in a revolving-style membership. Burton explained that when a customer arrived at the store and signed in, they became a member of the collective garden for as long as they remained in the business (or, to use Burton's words, "Club House"). When the customer left, they relinquished their membership in the garden, allowing another member to take their place. This system of transient membership would allow Burdon to dispense marijuana to significantly more than the 10 people allowed by Washington State Law.

...

Curiously, Burton, by his own reasoning, as there were no customers in the store when we visited, rendering his collective garden member-less and, as Burton said that he was not a medicinal marijuana patient, therefore had no legal reason to be in possession of marijuana.

Burton was eventually able to reach his lawyer, who invited us back to the store by appointment to see Burton's members' records; Burton said that, despite the Law cited below, he would take his attorney's advice and he refused to allow us to review his garden's membership paperwork.

During our contact with Burton, he remained in the back of the business and our conversation was through a small window.

Burton did explain that he kept several different strains of marijuana on-hand. Burton told us he made every effort to make sure that a patient got a strain of marijuana that would benefit their particular ailment. The lobby of the building smelled strongly of marijuana.

. . . Green Path of Washington, as it stands, does not contain a garden of growing marijuana. Green Path of Washington, as it stands, is not a collective of ten medicinal marijuana patients bonding together to support their medical needs; it is a business, which appears to focus solely on the distribution, sale, and dispensation of marijuana for profit.

Based on all the foregoing information your Affiant verily believes that the illegal distribution of marijuana and/or the possession of marijuana with the intent to distribute exists at the above described property and that there is probably cause to search the property listed above, to include the structure as described in the preceding section. The cultivation, propagation, and/or distribution of marijuana is a felonious violation of the **Revised Code of Washington, section 69.50.401.**

CP 49-51 (bold in original).

D. ARGUMENT.

1. THE WARRANT WAS PROPERLY ISSUED UPON THE PROBABLE CAUSE FOUND WITHIN THE FOUR CORNERS OF DEPUTY JARVIS' AFFIDAVIT.

a. Probable cause and review of a search warrant.

“Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). The appellate court reviews a judge’s determination that a warrant should issue for abuse of discretion. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A trial court's legal conclusion as to whether an affidavit establishes probable cause is reviewed de novo. *See, Neth, supra ; In re Detention of Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002).

When reviewing probable cause at either a suppression hearing or on appeal, both the trial and the appellate courts are limited to a review of

the facts contained within the four corners of the search warrant declaration itself to support probable cause. *State v. Neth*, 165 Wn.2d at 182.

Great deference is afforded the issuing magistrate. *Neth*, at 182 (citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). Doubts are to be resolved in favor of the warrant. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (quoting, with approval from *United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965)).

In reviewing the four corners of the search warrant itself, probable cause to search is established if the affidavit in support of the warrant sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can

be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *State v. Cole*, 128 Wn.2d at 286.

Probable cause for a search warrant also requires two nexuses: first, a nexus between criminal activity and the item to be seized; and second, a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Where each nexus is established, the warrant is valid. *Id.*

Under the Uniform Controlled Substances Act (CSA), codified in RCW chapter 69.50, marijuana is a Schedule I controlled substance. RCW 69.60.204(c)(22). The possession, manufacture, and delivery of marijuana is generally prohibited under Washington law.² See RCW 69.50.401-.405 (establishing offenses and penalties).

b. The Medical Use of Cannabis Act does not negate probable cause.

Under RCW chapter 69.51A, the Medical Use of Cannabis Act (MUCA) provides an affirmative defense to violations of CSA to patients,

² Because the warrant was executed in 2012, it is not necessary to consider the November 2012 amendments made by Initiative 502, Laws of 2013, ch. 3 (codified in chapters 46.04, 46.20, 46.1, and 69.50 RCW). Initiative 502 passed in November 2012, legalized possession of small amounts of marijuana for individuals over 21 years of age.

providers, and caregivers who meet certain requirements. The affirmative defense is limited in scope:

Nothing in this chapter shall be construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale, or use of cannabis for nonmedical purposes. Criminal penalties created under chapter 181, Laws of 2011 do not preclude the prosecution or punishment for other crimes, including other crimes involving the manufacture or delivery of cannabis for nonmedical purposes.

RCW 69.51A.020.

The medical use affirmative defense does not negate probable cause supporting a search warrant. *See, State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010). In *Fry*, the Washington Supreme Court considered whether a search warrant was supported by probable cause where police officers were informed that marijuana was being grown at a certain residence and smelled marijuana upon arrival, but the defendant presented a purported medical authorization form for marijuana. *Fry*, 168 Wn.2d at 5. A plurality of the Court noted that RCW 69.51A.040 established an affirmative defense against marijuana related charges, and concluded that the *presentment of a person's purported authorization* for medical marijuana was *required* for the affirmative defense, but nonetheless did not negate probable cause for a search. *Id.* at 7-10. The Court explained:

As an affirmative defense, the [medical marijuana] defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor's authorization does not indicate that the presenter is totally complying with the Act: e.g., the amounts may be excessive. An

affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed.

Id. at 10.

Divisions I and III of this Court have concluded that after the 2011 amendments to MUCA, qualifying patients and designated providers are entitled only to an affirmative defense under 69.51A because no registry was established. *See State v. Reis*, 180 Wn. App. 438, 449, 322 P.3d 1238 (2014); *State v. Ellis*, __ Wn. App. __, 327 P.3d 1247, 1250 (2014). Divisions I and III have held that the holding of *Fry* continues to apply after the 2011 amendments, and therefore, the possible existence of an affirmative defense does not negate probable cause. *Reis*, 180 Wn. App. at 454; *Ellis*, 327 P.3d at 1250.

In *Ellis*, Division III considered an issue very similar to the present case. 327 P.d 1247. In that case, law enforcement smelled the odor of marijuana at defendant's house and saw a bright light emitting from the edges of windows mostly covered with black plastic. *Id.* 327 P.3d at 1248. Based on the belief that the defendant was growing marijuana at his residence, law enforcement obtained a warrant to search the residence for evidence of marijuana manufacturing. *Id.*

While executing the search warrant, law enforcement found marijuana growing rooms, two valid medical marijuana authorizations, and a loaded shotgun. *Id.* The defendant was charged with second degree

unlawful firearm possession. *Id.* The defense moved to suppress the shotgun, arguing that the search warrant lacked probable cause to believe the defendant's marijuana growing operation was criminal. The trial court denied the motion. *Id.* On appeal, the defendant argued that "while the affidavit may have presented probable cause to believe he was growing marijuana, it did not, considering the activities decriminalized by MUCA, present probable cause he was violating the CSA by doing so." *Id.* at 1249.

After interpreting the MUCA in conjunction with the CSA, Division III concluded that MUCA created a potential medical use exception to the CSA's general rule criminalizing marijuana. *Id.* at 1250.

The court held:

[A]n affidavit supporting a search warrant presents probable cause to believe a suspect committed a CSA violation where, as here, it sets forth enough details to reasonably infer the suspect is growing marijuana on his or her property. *The affidavit need not also show the MUCA exception's inapplicability.* . . . Here, the trial court did not err in denying Mr. Ellis's suppression motion.

Id. at 1250 (emphasis added).

Here, the probable cause declaration contains information to show that the defendant possessed marijuana in violation of the CSA. The defendant admitted that he was an owner of the business, and described Green Path of Washington as a collective marijuana garden. CP 49. The store front on 10118 224th St. E. was the garden's "Club House" and

served as the distribution hub for marijuana. *Id.* The marijuana was distributed at the "Club House", but is not grown there, but at an undisclosed location. *Id.* The lobby smelled strongly of marijuana and the defendant informed the officers that he kept several different strains of marijuana on hand. CP 50. The garden had a "revolving-style" membership, meaning an individual is only a member for as long as they remain on the premises of the "Club House." CP 50. There were no members of the collective garden present at Green Path during the officer's visit. *Id.*

The defendant indicated he was not a medical marijuana patient. CP 50. He informed the officers that a copy of each member's identification and medical marijuana authorization was located in two black file folders on the office wall. *Id.* The defendant refused to provide this documentation when the deputies requested it. *Id.*

The facts alleged in the affidavit provided the issuing magistrate with probable cause to find that marijuana was being manufactured and distributed in violation of the CSA. There was also probable cause to believe that the business possessed records of its members, as the defendant claimed. There was no evidence to show that Green Path was operating properly as a collective garden, as permitted by RCW 69.51A.085.

Because the defendant refused to provide his own medical marijuana authorization or the documentation of any garden member, it

was impossible for the officers to ascertain whether the operation was indeed a collective garden and, if it was, whether it complied with the requirements and limits of the law. In order to receive the benefit of the protections afforded by RCW 69.51A.085, the documentation of each member of the collective garden "must be available at all times on the premises of the collective garden." RCW 69.51A.085(d). Because the documentation was not made available to the officers, the magistrate properly issued the search warrant.

In addition to the defendant's admission that the business possessed marijuana with the purpose of distributing it, the lobby of Green Path smelled strongly of marijuana. CP 50. Contrary to Conclusion 4 (CP31), the odor of marijuana, detected by a law enforcement officer with sufficient training and experience, such as the deputies in the present case, *does* provide probable cause for a search warrant. *See, State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995). The same provides probable cause to arrest, provided that the probable cause is individualized to a specific person. *See, State v. Grande*, 164 Wn.2d 135, 145-146, 187 P.3d 248 (2008), and *State v. Marcum*, 149 Wn. App. 894, 912, 205 P.3d 969 (2009).

Thus, the officers had sufficient evidence that marijuana was kept on the premises in order to be distributed. Without access to the

documentation of the garden's members, the officers had reason to suspect that defendant possessed marijuana, a controlled substance, with the intent to distribute, a violation of the CSA.

Thus, the totality of the facts and inferences are sufficient to overcome the low threshold to establish probable cause. For this reason, the issuing magistrate properly issued the warrant, which was valid. The trial court erred by denying the motion to suppress the evidence.

2. THE TRIAL COURT ERRED BY FAILING TO PROPERLY CONSTRUE THE APPLICABLE STATUTES UNDER RCW 69.51A.

a. Principles of statutory construction.

Issues of statutory construction are questions of law reviewed de novo. *See, State v. Evans*, 177 Wn.2d 186, 298 P.3d 724 (2013). The first task for a court interpreting a statute is to ascertain and give effect to the intent and purpose of the Legislature as expressed in the act. *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *Tommy P. v. Board of Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). “In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent.” *State v. Sweat*, 180 Wn.2d 156, 159, 322 P.3d 1213 (2014), quoting *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). Second, the court interprets statutes to give

effect to all language in the statute and to render no portion meaningless or superfluous. *State v. Donaghe*, 152 Wn. App. 97, 106, 215 P.3d 232 (2009), citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Third, the court views the provisions of an act in relation to each other and, if possible, harmonizes the provisions to effect the act's overall purpose. *State v. Donaghe*, 152 Wn. App. 97, 106, 215 P.3d 232 (2009); *Tommy P*, at 391. The court looks at the general context of the statute, related provisions, and the statutory scheme as a whole. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Fourth, strained or absurd results must be avoided. *J.P.*, at 450.

The rule of lenity is applied only after the court employs all the tools of statutory construction. *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2013). Here, the trial court jumped to the Rule of Lenity without employing the proper rules of statutory construction first.

- b. The Legislature has expressed its general intent to tightly regulate and limit the possession and distribution of marijuana.

As pointed out *infra*, marijuana is highly regulated as a Schedule I controlled substance. *See*, RCW 69.50.204(c)(22). The possession, manufacture, and delivery of marijuana is generally illegal. *See*, RCW 69.50.401-404. Marijuana is still a controlled substance and highly regulated under Washington law. *See, State v. Hanson*, 138 Wn. App.

322, 157 P. 3d 438 (2007). Although the law in Washington was recently changed to permit possession and sale of marijuana for personal use, this new industry is highly regulated by the State. *See*, RCW 69.50, Article III (301-369).

Also, despite recent changes in Washington State law, marijuana is still illegal under federal law. *See*, 21 U.S.C. §§811-812, 841-865. The United States Supreme Court has rejected a medical necessity defense under federal law for marijuana distribution, despite authorization under a California law similar to that in Washington. *See, United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 121 S. Ct. 171, 1149 L. Ed. 2d 722 (2001).

On November 3, 1998, Washington voters approved Initiative 692, the Medical Use of Marijuana (Cannabis) Act (MUCA) I-692, which permitted the use of marijuana for medical purposes by qualifying patients suffering a terminal or debilitating medical condition. The MUCA became effective on December 3, 1998. 1999 Wash. Legis. Serv. Ch. 2 (I.M. 692). The Legislature subsequently amended the chapter on medical use of marijuana in 2007 and in 2010.

The Medical Use of Cannabis Act only provides an affirmative defense to the drug crime under RCW 69.51A.040(1). *See, Hanson*, at 330. Like other affirmatives in law, the MUCA defense does not negate the elements of a crime; it excuses the conduct. *Id.*, at 331.

c. Legislative history of the MUCA.

Prior to 2011, the MUCA provided qualifying patients with an affirmative defense to drug charges. Former RCW 69.51A.040 (2007). Patients could grow medical marijuana for themselves or designate a provider to grow on their behalf. Former RCW 69.51A.005 (2007). Both patients and providers were limited to possession of an amount of marijuana necessary for the patient's personal medical use. RCW 69.51A.040(2)(b), (4)(b).

The Legislature amended much of the MUCA in 2011 through the adoption of ENGROSSED SECOND SUBSTITUTE S.B. (ESSSB) 5073 § 101, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 181. The bill aimed to create a comprehensive regulatory scheme whereby all patients, physicians, processors, producers, and dispensers of medical marijuana would be registered with the state Department of Health. It required the state Department of Health, in conjunction with the state Department of Agriculture, to establish a state-run registry for qualified patients and providers, which would be "optional for qualifying patients." ESSSB 5073, §901(1), (6). If a patient opted into registering with the Department of Health, he or she would not be subject to prosecution for marijuana-related offenses. ESSSB 5073, § 405.

The legislature's intended purpose in amending the statute, as stated in section 101 of the bill, was so that:

(a) Qualifying patients and designated providers complying with the terms of this act and registering with the department of health will no longer be subject to arrest or prosecution, other criminal sanctions, or civil consequences based solely on their medical use of cannabis;

(b) Qualifying patients will have access to an adequate, safe, consistent, and secure source of medical quality cannabis; and

(c) Health care professionals may authorize the medical use of cannabis in the manner provided by this act without fear of state criminal or civil sanctions.

ESSSB 5073. The Legislature also amended RCW 69.51A.005, the MUCA's preexisting purpose and intent provision, to state, in relevant part:

Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of cannabis, shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of the law.

ESSSB 5073, § 102.

The bill was passed by the Senate and the House in April of 2011, and sent to Governor Gregoire for her signature. ESSSB 5073.

However, the Governor vetoed over 36 of the 58 sections of the bill, including section 101, the legislature's statement of intent. This extensive veto substantially changed the meaning, intent and effect of the bill. LAWS OF 2011, ch. 181, Governor's veto message. The Governor

vetoed all sections of the bill which might have subjected employees of the state departments of Health and Agriculture to federal charges, including all sections that established a state registry.

I am not vetoing Sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed.

....

I have been open, and remain open, to legislation to exempt qualifying patients and their designated providers from state criminal penalties when they join in nonprofit cooperative organizations to share responsibility for producing, processing and dispensing cannabis for medical use. Such exemption from criminal penalties should be conditioned on compliance with local government location and health and safety specifications.

LAWS of 2011, ch. 181, governor's veto message at 1376.

d. The affirmative defense for medical marijuana.

As originally drafted, the 2011 amendments to the MUCA were designed to provide three levels of protection to “qualifying patients” who used medical marijuana. First, for those "qualifying patients" and "designated providers" registered in a state registry and provided proof of that registration to any peace officer who questioned the patient regarding the use of medical cannabis, the patient's conduct was not a crime; they

were not subject to arrest or civil action, and their medical marijuana was not subject to seizure, so long as they complied with other conditions, including limits on quantity. See RCW 69.51A.040. RCW 69.51A.010(4);³ RCW 69.51A.010(1).⁴ RCW 69.51A.040(emphasis added) outlines all of the requirements that must be met in order for the medical use of cannabis to not constitute a crime:

The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance, if:

³ RCW 69.51A.010(4): “Qualifying patient” means a person who:

- (a) Is a patient of a health care professional;
- (b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
- (c) Is a resident of the state of Washington at the time of such diagnosis;
- (d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and
- (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana.

⁴ RCW 69.51A.010(1): “Designated provider” means a person who:

- (a) Is eighteen years of age or older;
- (b) Has been designated in writing by a patient to serve as a designated provider under this chapter;
- (c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and
- (d) Is the designated provider to only one patient at any one time.

...

(2) The qualifying patient or designated provider presents his or her *proof of registration with the department of health*, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;

(3) The qualifying patient or designated provider keeps a copy of his or her *proof of registration with the registry* established in *section 901 of this act and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence;

As detailed *infra*, the Governor vetoed the registry established in section 901. Because no registry was established, it is impossible for an individual to comply with RCW 69.51A.040(2) or (3), and therefore impossible to act in accordance with the terms and conditions of the chapter. As a result, the medical use of marijuana was *not decriminalized* and qualifying patients and designated providers could not take advantage of the first level of protection.

The second level of protection applies to patients and providers who opted to not register with the registry. These individuals may present an affirmative defense for violations under state law if they were in compliance with various requirements for the use of medical cannabis. An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *See, Fry*, 168 Wn.2d at 7 (*citing State v. Votava*, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003)); RCW 69.51A.043.

RCW 69.51A.043 delineates the requirements of the affirmative

defense:

(1) A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act may raise the affirmative defense set forth in subsection (2) of this section, if:

(a) The qualifying patient or designated provider *presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;*

(b) The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1);

(c) The qualifying patient or designated provider is in compliance with all other terms and conditions of this chapter;

(d) The investigating peace officer does not have probable cause to believe that the qualifying patient or designated provider has committed a felony, or is committing a misdemeanor in the officer's presence, that does not relate to the medical use of cannabis;

(e) No outstanding warrant for arrest exists for the qualifying patient or designated provider; and

(f) The investigating peace officer has not observed evidence of any of the circumstances identified in *section 901(4) of this act.

(2) A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act, *but who presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis, may assert an affirmative defense to charges of violations of state law*

relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she otherwise meets the requirements of RCW 69.51A.040. A qualifying patient or designated provider meeting the conditions of this subsection but possessing more cannabis than the limits set forth in RCW 69.51A.040(1) may, in the investigating peace officer's discretion, be taken into custody and booked into jail in connection with the investigation of the incident.

RCW 69.51A.043 (emphasis added).

The third level of protection allows qualified patients and providers who are neither registered nor present valid documentation to a law enforcement officer to establish at trial an affirmative defense that they were a qualifying patient in compliance with the law. RCW 69.51A.047.

In sum, an individual may currently invoke the protections of the affirmative defense at two stages in a criminal case: 1) by presenting his or her medical marijuana authorization to a peace officer when questioned about his or her cannabis use; or 2) by asserting an affirmative defense through proof at trial. RCW 69.51A.043(1)(a); RCW 69.51A.047. In the present case, the defendant failed to comply with the requirements. He had no personal authorization to present, and refused to present any other authorizations to law enforcement.

e. “Designated provider” and the affirmative defense.

A “designated provider” under RCW 69.51A.010 may assert the affirmative defense. However, under .010(1)(d), the provider is limited to being “the designated provider to *only one patient at any one time*”(emphasis added). By using the words “only one” and “at any one time”, the Legislature plainly intends to strictly limit the number of patients “at any one time”. Washington courts have consistently held that legislative use of the word “any” means “every and all”. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999); *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991). Thus, the provider is limited to only one patient at “every and all” times.

Some defendants, as the present one, have asserted that this phrase is ambiguous. *See, State v. Shupe* 172 Wn. App. 341, 347, 269 P.3d 741 (2012); *see also, State v. Brown*, 166 Wn. App. 99, 106, 269 P. 3d 359 (2012). However, while a statute is ambiguous if it is susceptible to two or more reasonable interpretations, it is not ambiguous merely because different interpretations are conceivable. *Tili*, at 115. Read in the context of RCW 69.51A as a whole, and the overall statutory scheme, including RCW 69.50, this statute is not ambiguous. The Legislature and the Governor have thus demonstrated their intent that marijuana (cannabis) be tightly regulated, and its possession and distribution limited. Significantly, while “retail” marijuana was recently legalized; medical marijuana

remains illegal, but with an affirmative defense. *Cf.*, RCW 69.50.4013 with 69.51A.043.

Among other principles of statutory construction, the Court must interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *Donaghe*, 152 Wn. App. at 106. Likewise, the Court must avoid strained or absurd results. *J.P.*, 149 Wn. 2d at 450.

The *Shupe* court states in dicta that “‘only one patient at any one time’ means one transaction after another so that each patient gets individual care”. 172 Wn. App. at 356. This reasoning renders the overall regulatory scheme meaningless and leads to absurd results. Instead of the ten member limit for collective gardens, as provided in RCW 69.51A.085(1)(a), a garden may provide marijuana to every “qualified patient” in the State, as long as it is “one at a time”. Under this reasoning, if the State restricted Starbucks to serving only ten patrons, millions would still obtain their coffee, as long as the patrons are only served “one customer at any one time”. In the context of the MUCA and the general statutory scheme of regulating marijuana, this is clearly not the intent of the Legislature in limiting and regulating medical marijuana.

The Legislature and the Supreme Court have used the phrase “at any one time” in other statutes and in court rules. For example, in RCW

10.64.060, an inmate may not be imprisoned in solitary confinement for more than 20 days “at any one time”. RCW 71.24.455(1) establishes a program to provide specialized access and services to mentally ill offenders upon release from prison. The statute limits enrollment to a maximum of 25 offenders “at any one time”. Under APR 9(f)(6), a qualified attorney in private practice may supervise only one Licensed Legal Intern “at any one time”.

The term used, and the meanings of these statutes and court rule must be read in the context of their respective sections, just as the provisions of RCW 69.51A.010. However, in all these examples, the plain meaning is clear. The language is intended to limit the number the provision is dealing with. To read it any other way would be absurd and render the intended limitation meaningless.

In the present case, the defendant may still raise the affirmative defense at trial. Whether and when someone is a designated provider to a particular “qualifying patient” is a factual issue for the jury. *See, Brown*, 166 Wn. App. at 106. Whether and when the defendant was the designated provider to a particular person was not a question before the trial court during the suppression hearing, but for the jury at trial.

f. Collective gardens and the affirmative defense under the MUCA:

The 2011, proposed amendments to the MUCA allowed qualified patients to establish collective gardens for the purpose of growing medical marijuana for personal use. RCW 69.51A.085 was enacted, containing the authorization and requirements for collective gardens:

(1) Qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting, and delivering cannabis for medical use subject to the following conditions:

(a) No more than ten qualifying patients may participate in a single collective garden *at any time*;

(b) A collective garden may contain no more than fifteen plants per patient up to a total of forty-five plants;

(c) A collective garden may contain no more than twenty-four ounces of useable cannabis per patient up to a total of seventy-two ounces of useable cannabis;

(d) A copy of each qualifying patient's valid documentation or proof of registration with the registry established in *section 901 of this act, including a copy of the patient's proof of identity, *must be available at all times on the premises* of the collective garden; and

(e) No useable cannabis from the collective garden is delivered to anyone other than one of the qualifying patients participating in the collective garden.

(2) For purposes of this section, the creation of a “collective garden” means qualifying patients sharing responsibility for acquiring and supplying the resources required to produce and process cannabis for medical use such as, for example, a location for a collective garden; equipment, supplies, and labor necessary to plant, grow, and harvest cannabis; cannabis plants, seeds, and cuttings; and equipment, supplies, and labor necessary for proper construction, plumbing, wiring, and ventilation of a garden of cannabis plants.

(3) A person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter.

RCW 69.51A.085(emphasis added). The statute does not legalize collective gardens, but rather provides them with the same affirmative defense available to individual qualifying patients and designated providers. “An affirmative defense does not per se legalize an activity.” *Fry*, 168 Wn.2d at 10.

Under the plain meaning of the statutory language, the collective garden must, indeed, be a garden. The word “garden” has a plain meaning that does not require elaboration. Subsection (2) is quite clear in specifying the acts and conduct contemplated by the statute, and generally taking place in a “garden”. All of the terms and descriptors relate to the growing and processing cannabis in a garden.

Contrary to the reasoning of the trial court in the present case, nothing in RCW 69.51A.085 authorizes an off-site distribution center like

the Green Path “clubhouse”. Further, reading the statutory provisions together in context and the scheme as a whole, the Legislature intended that medical marijuana be transported or delivered from the collective garden itself. The trial court failed to use the rules of statutory construction to properly read and apply the MUCA in this case.

Moreover, only qualifying patients are entitled to participate in collective gardens. *See* RCW 69.51A.085(1). Whether the defendant is in fact a qualifying patient is a question of fact that he must establish at trial as part of the affirmative defense. In presenting that defense, the defendant is required to show that he was in compliance with all the terms and conditions of Chapter 69.51A RCW. *See* RCW 69.51A.047.

In this case, the trial court misinterpreted the medical marijuana statute. During the *Franks* hearing, defense counsel attempted to admit a medical marijuana authorization to prove an individual was an authorized marijuana patient and was in possession of the document when the officers entered Green Path on April 27, 2013. 1 RP 50. The State objected on the grounds it was an affirmative defense for trial and irrelevant evidence for a *Franks* hearing. *Id.* The court responded:

It's not an affirmative defense anymore after the 2010 amendments. As I understand the statutory amendments, and maybe this would be a good time to argue, the amendments went from changing the ownership of a medical marijuana authorization as an affirmative defense

to being simply a document that would essentially eliminate the ability to bring a charge.

Id. at 51. The court later further stated:

[T]here was a substantive change in the statute, and I do have to pay attention to what the legislature intended. That's what I'm trying to interpret. So when it says 'use in accordance with this section does not constitute a crime,' it is effectively a decriminalization as opposed to an affirmative defense to something that remains criminal activity.

1 RP 58.

While the court was correct in stating that the legislature intended to decriminalize the medical use of marijuana, the trial court did not seem to realize that not only did the Governor veto the legislature's statement of intent, the Governor also vetoed all provisions establishing the registry. The court's analysis would have been correct if the registry had been established. But, as a result of the Governor's veto, the 2011 amendments did not decriminalize the medical use of marijuana.

Division I recently addressed the issue of whether collective gardens were legal under the statute in *Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 322 P.3d 1246 (2014); and *State v. Reis*, 180 Wn. App. 438, 322 P.3d 1238 (2014).

In *Cannabis Action Coalition*, the Coalition filed a civil action against the City of Kent, seeking declaratory, injunctive and mandamus

relief against the City in response to a city ordinance that banned collective gardens within city limits. 180 Wn. App at 466. In response to the contention that the plain language of the MUCA legalized collective gardens, Division I held that the amendments did *not* legalize medical marijuana or collective gardens. *Id.* at 469. The court discussed, in depth, the 2011 amendments to MUCA and the effect of the governor's veto. Noting that after the governor's veto, it was no longer possible for an individual to be registered with the registry, the court concluded that, by default, the only available "protection" available to collective gardens is an affirmative defense to prosecution. *Id.* at 471-72.

In *Reis*, the defendant was charged with a violation of the Uniform Controlled Substances Act as a result of an investigation that he was manufacturing marijuana at his residence. 180 Wn. App. at 441. The defendant moved to suppress the evidence found during the execution of the search warrant, arguing that because the plain language of RCW 69.51A.040 made the use and cultivation of medical marijuana presumptively legal in certain circumstances, the search warrant was not supported by probable cause. *Id.* at 441, 448. The trial court denied his motion, and Division I granted discretionary review. *Id.* at 441. Division I concluded that because the registry which would have provided protection for registered qualifying patients and designated providers

against arrest, prosecution, criminal sanctions and civil consequences was vetoed by the governor, they are left to assert an affirmative defense. *Id.* at 454. The court noted:

[W]hile the legislative intent of the 2011 amendments, as codified in RCW 69.51A.010(2), was that qualifying patients and designated providers shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences based solely on their use of or assistance with medical cannabis, RCW 69.51A.040 cannot currently be enforced to the extent an individual asserts medical marijuana use “in accordance with the terms and conditions of this chapter.” The protections against arrest, prosecution, criminal sanctions, and civil consequences would apply only to qualifying patients and designated providers who are registered. Currently no one can register. Thus, qualifying patients and designated providers are left to assert an affirmative defense.

Id. at 453-54. The court concluded that the trial court did not err in denying the defendant's motion to suppress. *Id.* at 454.

Therefore, the affirmative defense may be asserted by individuals acting in a collective garden. While the qualifying members may assert a “collective” affirmative defense, the “garden” or the organization itself cannot. The defendant was not a qualifying patient, nor designated provider, nor working at the garden. He could not assert an affirmative defense and was not covered under RCW 69.51A.085. The entity “Green Path” has only the affirmative defense that its members can exercise as individuals. Under its “revolving membership” model, a member only

exists while he is in the “clubhouse”. Thus, if no qualifying patient is present, the Green Path entity, which has no lawful status, also has no affirmative defense. The trial court erred in finding that there was no probable cause to support the search warrant.

g. Collective gardens and compliance with RCW 69.51A.085.

As detailed above, collective gardens do not “legalize” the manufacture of cannabis for medical purposes. Collective gardens only provide an affirmative defense to the individual patients that comprise a collective garden. In order to be eligible for the affirmative defense, the patients and collective must comply with the terms of RCW 69.51A.085: “(3) A person who knowingly violates a provision of subsection (1) of this section is not entitled to the protections of this chapter.” *Id.*

The provisions of RCW 69.51A.085 include limits on the number of patients who may be members, the number of plants that may be grown, and the amount of useable cannabis that may be kept on hand. *Id.*, (1)(a)-

(c). The statute also requires:

(d) A copy of each qualifying patient's valid documentation or proof of registration with the registry established in *section 901 of this act, including a copy of the patient's proof of identity, must be available at all times on the premises of the collective garden.

The plain language of “available at all times” should require no further interpretation, yet the trial court read this to mean “available at all times that police have a search warrant”. Again using the rules of statutory construction, the trial court’s interpretation is contrary to the clear intent of the Legislature.

As outlined above, the general statutory scheme is to closely regulate and limit the possession and distribution of marijuana, an illegal, controlled, substance. Even with the legalization of small amounts under RCW 69.50.4013, the Legislature established a complex regulatory and licensing scheme. *See*, RCW 69.50, Article III. Among other provisions, a manufacturer or distributor must register with the State. RCW 69.50.303. They must keep records and inventories. *Id.*, at .306. They must be licensed by the State. *Id.*, at .325. The Liquor Control Board is authorized to adopt rules for the enforcement of the laws and regulations, including inspection of premises, books and records. *Id.*, at .342(1) and (2).

Collective gardens have a comparatively minimal requirement to have the patient’s valid documentation available at all times on the premises of the garden. The legislative intent is obviously to provide ease of inspection so that law enforcement may ascertain that the garden and the patients are operating within the limits of the law. These requirements

minimize the amount of contact, and reduces conflict with law enforcement. It also facilitates the task of the patients.

Nowhere in the existing general statutory scheme, or the specific provisions of RCW 69.50. Article III or 69.51A., including .085, requires law enforcement to obtain a search warrant to inspect records, or even the premises, of persons or organizations asserting the lawful manufacture of cannabis or a statutory affirmative defense. To the contrary, the onus and responsibility for making these records available is placed upon the qualifying patient or the manufacturer/distributor of marijuana, not on law enforcement. *See*, RCW 69.51A.040(2), (3);.043(1)(a), (2). The Legislature, in referring to such records and documents, uses verbs like “display”, “present”, and “post[ed] prominently”. *Id.*

The trial court acknowledged that “available at all times” could be “interpreted to reasonably to allow police officers to see the files of patients merely on demand”. Conclusion 6; CP 31. However, the court went on to erroneously find “available”, as used in this statute, to be ambiguous.

The court incorrectly focused its analysis on the meaning of "available" in RCW 69.51A.085(d), which states: "[a] copy of each qualifying patient's valid documentation . . . must be *available* at all times

on the premises of the collective garden." During its ruling at the CrR 3.6 hearing, the court stated:

So the statute requires authorization documentations to be available at all times on the premises, and by all accounts they were available⁵.

The statute does not talk about how those documents are to be accessed. It does not equate availability with accessibility. The statute could be interpreted reasonably to, one, allow police officers to see the files of patients merely on demand, or, two, to have the authorizations present but to be accessible only with a warrant. We have an ambiguous statute, and the Rule of Lenity, therefore, requires that I interpret this statute in a way that is most favorable to Mr. Burton. And, therefore, I do not equate availability with accessibility without a warrant and that allegation would, therefore, not establish probable cause.

1 RP 104.

The word "available" has a commonly understood meaning that should not require in-depth analysis. The court should use the language of the statute to interpret its meaning in the context of the statute. *See, State v. Mashek*, 177 Wn. App. 749, 756-757, 312 P. 3d 774 (2013). However, where there may be ambiguity, a court may use a dictionary definition to determine the usual and ordinary meaning of a term not otherwise defined by statute. *Id.*, at 756.

⁵ The trial court did not include the oral "finding" that "by all accounts" the documents "were available" in its formal, written, Findings and Conclusions. Therefore, although the State obviously disputes this, the State has not formally assigned error to this "finding". The Affidavit, Search Warrant, testimony, and argument all contradict the court's statement.

The dictionary definition also supports the intent of the Legislature in the context of the statutory scheme. “Available” is defined by Webster’s Dictionary as:

3. capable for use for the accomplishment of a purpose: *immediately utilizable*; 4. that is accessible or may be obtained: *personally obtainable: at disposal, esp. for sale or utilization.*

Webster’s Third New International Dictionary, unabridged ed., Merriam-Webster, Inc., 2002 (emphasis added).

All personal and business records, and other “private affairs”, are accessible with a search warrant or court order. *See*, Washington State Constitution Article I, §7. Government investigators may access and inspect corporate books or an individual’s bank account by obtaining a court order or search warrant. But that does not mean that these records are all “available” for immediate use or at the disposal of law enforcement. Likewise, in this case, the records and documents were not “available”, in the ordinary meaning of the word, or plain meaning of the statute, to officers investigating whether a collective garden is operating within RCW 69.51A.085. Again, the trial court failed to properly apply the statute and the statutory language.

Regardless of whether the correct interpretation of "available" is accessible upon request or accessible with a search warrant, defendant did

not provide the officers with any proof that Green Path was legitimately functioning as a collective garden and met the requirements of RCW 69.51.085. If the defendant wished to exercise the statutory protection, he had the burden to assert it as provided by the statute. Without the required evidence that Green Path operated under the MUCA exception, the officers properly suspected that defendant possessed marijuana in violation of the CSA; and thus, probable cause for a search warrant.

Even if the statute is interpreted to mean that the documentation of the garden's members must be "available at all times" *to peace officers who present a search warrant*, Deputy Jarvis' affidavit of probable cause still supports the search warrant. The mere fact that Green Path was purportedly in compliance with the statute does not eliminate probable cause. The defendant did not assert the initial protection provided by the statute and present the documentation to the officers. Therefore, he was left with the second statutory protection of presenting the documentation at trial as his affirmative defense.

h. *State v. Shupe* and the concept of “revolving memberships”.

State v. Shupe 172 Wn. App. 341, 347, 269 P.3d 741 (2012), is often cited, as in the present case, as authorizing collective gardens with “revolving memberships”. However, as was pointed out earlier, and

argued further below, this section of *Shupe* is both dicta and wrongly decided.

i. The *Shupe* opinion regarding RCW 69.51A.010 is dicta.

Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *orbiter dictum*, and need not be followed. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn. 2d 518, 531, 79 P. 3d 1154 (2003), quoting *State v. Potter*, 68 Wn. App. 134, 149 n. 7, 842 P.2d 481 (1992); accord *State v. Berg*, 177 Wn. App. 119, 133, 310 P. 3d 866 (2013). Gratuitous analysis of issues not before the Court or necessary to the decision should be confined to the facts and issues of that particular case and not be extended to others. See, *In re Estate of Burns*, 131 Wn. 2d 104, 113, 928 P. 2d 1094 (1997). The word “dicta” means observations or remarks made in pronouncing an opinion concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. *Amalgamated Transit Union Local 587 v. State*, 142 Wn. 2d 183, 262 n. 4, 11 P. 3d 762 (2000)(Sanders, J., concurring).

In *Shupe*, Division III of the Court of Appeals held that there was insufficient evidence in the affidavit for search warrant to satisfy the

requirements of *Aguilar–Spinelli*⁶. Therefore, the evidence should have been suppressed. *Shupe*, 172 Wn. App. at 351. In addition, the Court held that, even with the illegal evidence, the evidence adduced at trial was insufficient to convict the defendant. *Id.*, at 352. The drugs were never recovered. The seller was never identified. Police never saw Shupe sell any drugs. *Id.*

After finding that the search warrant affidavit failed to meet the *Aguilar–Spinelli* test and that the evidence at trial was insufficient to convict, the Court of Appeals went on to gratuitously discuss the meaning of RCW 69.51A.010(1)(a). 172 Wn. App. at 353ff. At trial, Shupe asserted that he was an authorized designated provider and argued the phrase "designated provider to only one patient at one time" only meant that he could not physically give marijuana to "more than one person at a time". *Id.* at 353. Division III determined that the phrase was ambiguous and adopted the defendant's interpretation. *Id.* at 354-55. The court thus concluded that the defendant had established a prima facie case to support a medical marijuana defense, which the State had not rebutted. *Id.* at 456.

As the dissent in *Shupe* points out, the Court's analysis of RCW 69.51A.010(1)(a) is gratuitous and completely unnecessary to the Court's

⁶ *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct 1509, 12 L. ED. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

holding. 172 Wn. App. at 356-357. Further, changes in the law under Initiative 502 and the Laws of 2011, Ch. 181, § 201 were likely to require a different result in the future; Shupe did not challenge the law at trial or preserve the issue for appeal; and Shupe could not use the affirmative defense because he possessed far more marijuana than the MUCA permitted. 172 Wn. App. at 361-362.

Therefore, as dicta, the last section of *Shupe* has no precedential value. It was error for the trial court in the present case to conclude that a “revolving-style” membership is lawful as result of *Shupe*.

ii. *Shupe* incorrectly interprets language of RCW 69.51A.010

As argued above, the dicta in *Shupe* failed to interpret the statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *See, Donaghe*, 152 Wn. App. at 106. Also, the Court’s reasoning led to strained or absurd results. *J.P.*, 149 Wn. 2d at 450.

The *Shupe* dicta states that “‘only one patient at any one time’ means one transaction after another so that each patient gets individual care”. 172 Wn. App. at 356. This reasoning renders the overall regulatory scheme meaningless and leads to absurd results. Instead of the ten member limit for collective gardens, as provided in RCW

69.51A.085(1)(a), a garden may provide marijuana to every “qualified patient” in the State, as long as it is “one at a time”. This is clearly not the intent of the Legislature in limiting and regulating medical marijuana.

i. Even as a collective garden, the defendant and Green Path violated the law.

Even assuming that a “revolving membership” in a collective garden is a legal business model, its execution in the present case violated the law. A collective garden may contain no more than 15 plants per member, up to a maximum total of 45. RCW 69.51A.085(1)(b). The garden can contain no more than 24 ounces of marijuana per member, or a total maximum of 72 ounces. RCW 69.51A.085(1)(c). Therefore, a collective garden must have at least one permanent member in order to possess any marijuana. Likewise, it must have at least one permanent member to grow any plants. To grow the maximum number of plants, and possess the maximum amount of useable marijuana, the garden must have at least three permanent members. Under “revolving membership”, the organization could have up to seven transitory members and still possess the maximum amount of plants and useable cannabis.

In the present case, Green Path had no permanent members. All of the “members” were transitory. The defendant had no medical marijuana

authorization. Therefore, neither the defendant, nor Green Path had a legal excuse to possess or grow *any* marijuana. For this business model, the organization cannot keep marijuana on hand to distribute. Green Path would have to acquire marijuana from another authorized source for the “current” member. This supply method is not authorized under the MUCA.

E. CONCLUSION.

The issues in this case are legal ones: whether the defendant and Green Path complied with the law in manufacture and distribution of marijuana, and whether police had probable cause to obtain a search warrant to investigate whether the defendant and Green Path were complying with the law.

The issues are not whether the defendant and Green Path were engaged in an activity that is condoned or tolerated by society as a whole, or by state and local governments. The issue is not even whether the defendant could raise, or succeed in, the MUCA affirmative defense at trial.

It is crucial that law enforcement possess the ability to regulate the medical marijuana market in the absence of a formal registry and regulatory scheme, as was contemplated in the vetoed provisions of the

2011 amendments. Law enforcement must be allowed to fulfill their duty of ensuring public safety and investigating potential criminal activity

The trial court erred in finding that there were insufficient facts to support probable cause for the search warrant. The trial court further erred by failing to properly construe and apply the statutes, and by adopting the erroneous dicta reasoning in *Shupe*.

The State respectfully requests that the trial court be reversed and the case be remanded for trial.

DATED: October 9, 2014.

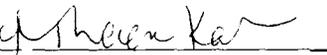
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Certificate of Service:

The undersigned certifies that on this day she delivered by LLS mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.09.14 
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PIERCE COUNTY PROSECUTOR

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