

**FILED**

JAN 17 2012

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NO. 302954

BENTON COUNTY SUPERIOR COURT NO. 10-1-00664-1

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMISON BRUCE ZELLER,

Appellant.

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant's motion to suppress evidence by oral ruling entered on April 1, 2011.

2. The trial court erred in denying defendant's motion for Frank's hearing by oral ruling entered on April 1, 2011.

3. The trial court erred in finding that there was articulable suspicion to justify an investigative detention of the defendant.

4. The trial court erred in finding that the seizure of the defendant was merely an investigative detention.

5. The trial court erred in finding that information regarding a valid medical marijuana prescription was not recklessly or intentionally withheld from the magistrate issuing the search warrant.

6. The trial court erred in finding that the existence a valid medical marijuana prescription is not material information for purposes of a *Franks* hearing.

7. The trial court erred in finding that *State v. Fry* holds that the existence of a valid medical marijuana prescription need not be provided to the magistrate at the time of determining probable cause.

8. The court erred in finding there was probable cause to search the defendant's vehicle.

9. The trial court erred in upholding *State v. Fry* as Constitutional.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a law enforcement officer have duty to disclose the existence of a valid medical marijuana license or prescription in an affidavit for a search warrant when the basis for the search is the odor of marijuana? (Assignment of Error 1, 2, 5, 6 & 7)

2. Does the omission of the existence of a valid medical marijuana license or prescription in an affidavit for a search warrant when the basis for the search is the odor of marijuana constitute a material omission under *Franks v. Delaware*? (Assignment of Error 1, 2, 5, 6 & 7)

3. The law enforcement officer requesting a search warrant in this case declared to the issuing magistrate only two objective factual bases for probable cause: a “hand to hand” and the odor of marijuana emanating from the passenger compartment of a car. Both of these bases were negated by evidence, or lack thereof during the initial investigation, before the affiant sought the search warrant. Is the omission of such evidence, negating the proffered justification for probable cause, material? (Assignment of Error 1, 2, 5, 6 & 7)

4. Does a law enforcement officer have a right to conduct a warrantless seizure and search of a defendant when the justification advanced for the search and seizure is an alleged “hand to hand” yet none of the officers who witnessed the alleged transaction were able to identify the item passed between two men

who had been seen talking for at least thirty minutes in broad daylight in a public parking lot at a busy intersection? (Assignment of Error 1, 3, 4 & 8)

5. Does a law enforcement officer have a right to conduct a investigative detention of a defendant when the justification advanced is an alleged “hand to hand” drug transaction yet none of the officer’s who witnessed the alleged transaction were able to identify the item passed between two men who had been seen talking for at least thirty minutes in broad daylight in a public parking lot located at a busy intersection? (Assignment of Error 1, 3, 4 & 8)

6. Should the odor of marijuana be sufficient to establish probable cause for a search warrant even though a valid medical marijuana prescription or license exists and is made known to law enforcement? (Assignment of Error 1, 3, 4, 7, 8 & 9)

7. Should *State v. Fry* be overruled on the basis that it is inconsistent with legislative intent and related statutory provisions regarding medical marijuana? (Assignment of Error 1, 7 & 9)

8. Is Equal Protection violated by the selective searches, seizures and arrests of medical marijuana patients? (Assignment of Error 1, 7 & 9)

C. STATEMENT OF THE CASE

On June 23, 2010 at approximately 6:00 pm, Jamison Zeller had parked his car in the parking lot in between a McDonalds and 7601 West Clearwater

Avenue in *Kennewick*, also known as the “flash cube building,” in order to catch up with some old friends. 04/01/11 RP 43. On June 23, 2010 the Drug Metro Task Force (“task force”) office was located on the second floor of the flashcube building. 04/01/11 RP 9. Mr. Zeller’s car along with the car driven by his acquaintances Ismael Diaz and Raul Diaz drew the attention of the Task Force because they were “flashy vehicles” parked in such a way that “they were sitting there like they were showing off.” 04/01/11 RP 10. It was “still very light out.” 04/01/11 RP 13.

Officer White of the Kennewick Police Department (KPD) recognized one of the individuals, not Mr. Zeller, from prior interactions approximately three to four years earlier and began observing the trio more closely through binoculars. 04/01/11 RP 11 & 16. Mr. Zeller and the others were approximately 80 – 100 feet away from the officers observing them. 04/01/11 RP 13. Officer White observed one of the individuals, not Mr. Zeller, holding the waistline of his baggy pants. 04/01/11 RP 11. He also observed that the trio was “having conversations” and testified that “you could tell they were talking and just hanging out.” 04/01/11 RP 11.

This observation of Mr. Zeller and the other two individuals continued for approximately thirty minutes. 04/01/11 RP 12. At some point during the course of this observation, exact time-line is unknown, Officer White observed Mr. Zeller enter the passenger compartment of his car, go out of Officer

White's view for a "split second" before returning and handing one of the other two individuals something. 04/01/11 RP 11-12 & 17. Mr. Zeller testified that the item handed to Mr. Diaz was a pamphlet regarding medical marijuana. 04/01/11 RP 63. This fact was corroborated by the statements of Mr. Diaz to police as well as the discovery of the pamphlet on Mr. Diaz' person. 04/01/11 RP 50. After handing Mr. Diaz the pamphlet, Mr. Zeller once again returned to the passenger compartment of his vehicle to "sit down just while in the middle of the conversation." 04/01/11 RP 17. Officer White testified that the object he was "something very small...that made me believe it was something small like a pill." 04/01/11 RP 12. Officer White believed that this was a drug transaction and contacted KPD. 04/01/11 RP 12. Officer White was unable to see what the object transferred between Mr. Zeller and Mr. Diaz was, even with the magnification of the binoculars, but testified that it was the "the movement itself that led me to believe something small was exchanged." 04/01/11 RP 18 & 20. Officer White also testified that, as a general rule, drug transactions last only a couple of minutes. 04/01/11 RP 18.

Detective Schwartz, of the Criminal Apprehension Team (CAT) of the KPD, spoke with Detective Black and was advised that he had been watching them for approximately half an hour and that they observed Mr. Zeller hand "what they believed to be a pill bottle" to another individual. 04/01/11 RP 53. However, Detective White testified that "there was no pill bottle exchanged that

I saw. 04/01/11 RP 21. At approximately 7:08 pm CAT arrived to Mr. Zeller's location in at least three unmarked patrol cars in response to Detective Black's call to Detective Schwartz regarding a "hand-to-hand." 04/01/11 RP 25, 26. Detective Trujillo, also a member of CAT, along with approximately five other officers in three different unmarked cars arrived on the scene, "immediately told the individuals to keep their hands clear" and seized Mr. Zeller along with the other two individuals by handcuffing them. 04/01/11 RP 36.

Detective Dorame of CAT also assisted in detaining Mr. Zeller after arriving on the scene by immediately handcuffing him, placing him in the back of his patrol car and reading Mr. Zeller Miranda warnings. 04/01/11 RP 42. A brief pat-down of Mr. Zeller upon detaining him did not result in discovery of anything significant. 04/01/11 RP 47. Mr. Zeller spoke with Detective Dorame about this very shortly after being detained at approximately 7:08 p.m. 04/01/11 RP 446-47. Mr. Zeller informed Detective Dorame that he and the other individuals were old friends and that they just happened to run into each other and decided to stop and catch up. 04/01/11 RP 43 & 48. Mr. Zeller informed Detective Dorame that he had marijuana in his possession along with a medical marijuana card and that he had other medication in his vehicle as well. 04/01/11 RP 43 & 48. Mr. Zeller offered to let Detective Dorame search the passenger compartment of his vehicle to obtain his medical marijuana license along with

the medical marijuana itself. 04/01/11 RP 43. Detective Dorame declined.  
04/01/11 RP 43.

Detective Trujillo was made aware that Mr. Zeller had in his car a medical marijuana prescription but testified that he could not remember when he became aware of this fact. 04/01/11 RP 28. Detective Trujillo and Detective Dorame both assisted in detaining Mr. Zeller, though how long Detective Trujillo remained with Mr. Zeller after he was detained is unclear. 04/01/11 RP 36 & 42. Detective Schwartz was also made aware that Mr. Zeller had a medical marijuana prescription but could not remember when he learned this information. 04/01/11 RP 55.

Detective Dorame admitted that he very easily could have gone to tell Detective Trujillo about the medical marijuana while he was applying for the search warrant and that the six other officers could overhear the conversation and were waiting for him to explain what Mr. Zeller had reported. 04/01/11 RP 49-50. Detective Schwartz testified that he was “kind of in between just talking with the individuals...just kind of worked in between the detectives on the scene.” 04/01/11 RP 55. There were never any pills or pill bottles found on Mr. Zeller, Raul Diaz or Ismael Diaz. 04/01/11 RP 50 & 59.

While in the process of detaining Mr. Zeller, Detective Trujillo smelled the odor of marijuana emanating from Mr. Zeller’s car. 04/01/11 RP 27. Detective Trujillo then decided to apply for a telephonic search warrant on Mr.

Zeller's vehicle. 04/01/11 RP 27. Detective Trujillo went to his car to begin the process of applying for a search warrant at approximately 7:39 pm. 04/01/11 RP 36 (Detective Trujillo testified that it took him 20 minutes from the time he sat down in his car until he had Judge Runge's approval for the warrant. Judge Runge granted permission for the search warrant at 7:59 pm.). Before applying for the search warrant Detective Trujillo spoke with Detective White on his cell phone regarding what he had observed earlier. 04/01/11 RP 27. Detective White told him that he had seen a drug transaction. 04/01/11 RP 35. Detective White did not disclose to Detective Trujillo that he could not see what was exchanged. 04/01/11 RP 35. Detective White did not tell Detective Trujillo about the individual who had been grabbing at the waist of his baggy pants. 04/01/11 RP 35.

The telephonic search warrant was applied for at 7:54 pm and was granted by Judge Carrie Runge at 7:59 pm. CP 49-50. Detective Trujillo immediately executed the search warrant by opening and searching the trunk. 04/01/11 RP 28. Upon searching the trunk of Mr. Zeller's car Detective Trujillo found a pistol grip shotgun. 04/01/11 RP 28. Detective Trujillo then searched the driver's side portion of the vehicle and saw two bags of green vegetable matter later identified as marijuana. 04/01/11 RP 29. Detective Trujillo found a valid medical marijuana card in the passenger compartment of the car where

Mr. Zeller had indicated it would be. 04/01/11 RP 32-33. After finding the gun, headquarters confirmed that Mr. Zeller was a convicted felon. 04/01/11 RP 45.

Mr. Zeller was not charged with possession of marijuana. Mr. Zeller was charged with unlawful possession of a firearm. A pre-trial hearing on Mr. Zeller's motion to suppress along with his *Frank's* motion was held on April 1, 2011. CP 67-69. The trial court made the following oral findings of fact and conclusions of law:<sup>1</sup> 1) The initial contact by law enforcement with the defendant was a detention. This detention was based upon reasonable suspicion that a drug transaction had occurred or was occurring. 04/01/11 RP 86- 87. 2) The initial detention of the defendant was based on reasonably articulable suspicion. 04/01/11 RP 87. 3) Law enforcement had the right to detain and search the defendant and the other individuals based on the observations made by Detective White. 04/01/11 RP 87. 4) Once the odor of marijuana was smelled there was probable cause to request a search warrant the search the defendant's vehicle. 04/01/11 RP 87. 5) Assuming that the information regarding the medical marijuana card, the fact that pill bottles would be found and that the defendant had provided information that the officers could search his vehicle should have been provided to the Judge issuing the warrant, it has to be shown that the information was either recklessly or intentionally withheld from the magistrate. 04/01/11 RP 88. 6) There has not been a showing that such

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1. The trial court did not issue written findings of fact and conclusions of law. However, Appellant asserts that the trial court's oral rulings are sufficient for appellate review.

information was recklessly or intentionally withheld. 04/01/11 RP 88-89. 7) Had information regarding the medical marijuana card, the fact that pill bottles would be found and that the defendant had provided information that the officers could search his vehicle been provided to the magistrate it would not have provided a reason to negate probable cause such that the magistrate would not likely have issued the search warrant. 04/01/11 RP 89. 8) The holding in *State v. Fry* indicates that having a medical marijuana card is an affirmative defense to be addressed at trial. 04/01/11 RP 89-90. 9) The holding in *State v. Fry* does not require law enforcement to provide information regarding medical marijuana licensing or prescriptions to the issuing magistrate to be used in determining whether probable cause exists to issue a warrant. 04/01/11 RP 89-90. 10) Whether an individual states that they have a medical marijuana card does not negate probable cause. 04/01/11 RP 90. 11) The defendant's motion for a *Frank's* hearing is denied because the court does not believe that withholding of the information referred to above would likely have resulted in a different finding regarding probable cause. 04/01/11 RP 90. 12) There was probable cause to allow law enforcement to search the vehicle. 04/01/11 RP 91. 13) When a search warrant is issued for the searching of a vehicle that warrant includes the entire vehicle where evidence of that crime might be found. 04/01/11 RP 91. 14) The search of the trunk of the vehicle was not outside the scope of the search warrant. 04/01/11 RP 91. 15) The holding of *State v. Fry* is

Constitutional. 04/01/11 RP 91. 16) The defendant's motion to suppress is denied. 04/01/11 RP 92.

A stipulated facts bench trial was held on September 26, 2011 and Mr. Zeller was found guilty of unlawful possession of a firearm. CP 74-77. This appeal followed.

F. SUMMARY OF ARGUMENT

Mr. Zeller was in a public parking lot in broad daylight having a conversation with friends for over half an hour before police began observing him with binoculars. Police began observing Mr. Zeller and his companions because their cars were "flashy." Police continued observing Mr. Zeller for at least 30 minutes and at some point during that time observed what was described as a "hand to hand." Police never saw what was transferred but assumed it was a drug. Based on this information, a six officer raid descended upon Mr. Zeller and his companions and they were seized, put in handcuffs in the back of patrol cars and read Miranda warnings. Mr. Zeller immediately told police he had medical marijuana, a medical marijuana card and other prescription medications for Crohn's disease. Police refused to retrieve the documentation and instead sought a warrant because of the odor of marijuana emanating from Mr. Zeller's vehicle. In requesting this warrant police did not tell the issuing Judge about the existence of the medical marijuana card or Mr. Zeller's statements. Mr. Zeller was never charged with possession of marijuana.

The police action in this case violated the United States Constitution as well as the Washington Constitution. The initial seizure of Mr. Zeller was unconstitutional because it was a warrantless arrest that was not supported by probable cause. Should this court determine that the initial seizure of Mr. Zeller was investigatory detention, it still would have been an unlawful seizure as it was not supported by reasonable suspicion. The warrant that was issued was invalid as officers intentionally withheld material information from the judge, the existence of a valid medical marijuana card and other factual information obtained during the course of their initial investigation that alleviated officer suspicion that a hand-to-hand drug transaction had occurred.

Furthermore, the holding in *State v. Fry* is inconsistent with legislative intent because it allows for individuals like Mr. Zeller to be arrested on the basis of lawful behavior. The selective arrest of Mr. Zeller and other medical marijuana patients violates Equal Protection clauses of both the United States Constitution and the Washington State Constitution.

G. ARGUMENT

1. *The initial seizure of the defendant was unconstitutional*

Appellate review of a denial of a motion to suppress requires the reviewing court to determine “whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law.” *State v. Diluzio*, 162 Wn.App. 585, 254 P.3d 218 (Div. 3 2011) *quoting*

*State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The standard of review applied in determining whether police have seized an individual is a mixed question of law and fact. *State v. Bailey*, 154 Wn.App. 295, 299, 224 P.3d 852 (Div. 3 2010). The questions of fact are issues such as what the defendant said and did and what the police said and did. *Id.*; *State v. Montague*, 73 Wn.2d 381, 389, 438 P.2d 571 (1968). The legal consequences which flow from these facts are questions of law. *State v. Lee*, 147 Wn.App. 912, 916, 199 P.3d 445 (2008). Whether a warrantless seizure “passes constitutional muster” is a question of law which is reviewed de novo. *Bailey*, 154 Wn.App. at 299.

The Fourth Amendment of the United States Constitution protects its citizens from unreasonable searches and seizures. U.S. Const. amend IV. The Washington Constitution affords greater protections than the U.S. Constitution against unreasonable searches and seizures, by providing its citizens an express Right to Privacy. Wash. Const. art I, § 7. *State v. Wallin*, 125 Wn.App. 648, 654, 105 P.3d 1037 (citing *State v. Young*, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994)). This greater protection was recently emphasized by Division 1:

The Fourth Amendment protects only against ‘unreasonable searches by the State, leaving individuals subject to ... warrantless, but reasonable, searches. Article I, section 7, is unconcerned with the reasonableness of a search, but instead requires a warrant before any search, whether reasonable or not. This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.... The distinction between article 1, section 7, and the Fourth Amendment arises because the word “reasonable” does not appear in any form in the text of article I, section 7, as it does in the Fourth Amendment.

Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

*State v. Monaghan*, --- P.3d ----, 2011 WL 6957596 (Div. 1 2011) (internal citations omitted).

Warrantless searches and seizures are "per se" unreasonable under both the state and federal constitutions. *State v. Walker*, 136 Wn.2d 678, 682 (1998); *State v. Chrisman*, 100 Wn.2d 814, 818 (1984); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The relevant inquiry for the court is whether, in view of all of the circumstances surrounding the incident, "a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter." *State v. Thorn*, 129 Wn.2d 347, 352-53 (1996).

An exception to this strict prohibition on warrantless seizures is a law enforcement officer's investigatory seizure if he or she has a reasonable suspicion to believe that criminal activity is indicated. *Diluzio*, 162 Wn.App. at 220; *State v. Little*, 116 Wn.2d 488, 497-98, 806 P.2d 749 (1991). The State must establish the exception by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266. To pass constitutional muster, an investigatory, or *Terry*, stop must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The standard for articulable suspicion is "a substantial possibility that criminal conduct has

occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). “A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct.” *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). “A person's presence in a high-crime area at a ‘late hour’ does not, by itself, give rise to a reasonable suspicion to detain that person.” *Id.*

Furthermore, an investigatory stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). When evaluating reasonableness a court must consider the totality of the circumstances surrounding the investigatory stop. *State v. Glover*, 116 Wash.2d 509, 514, 806 P.2d 760 (1991). In particular, the experience of the officer, the location of the stop, and the conduct of the defendant are factors used to determine if the officer's suspicions are reasonable. *Id.*

**a. The initial seizure of the defendant was more than mere investigatory detention, it was a warrantless arrest.**

An articulable suspicion is not enough to justify in hindsight a seizure that was carried out as an arrest. The reason probable cause is not required for a *Terry* stop is because a stop for investigative purposes is significantly less intrusive than an arrest. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Whether the detention of Mr. Zeller can legitimately be characterized as a *Terry* stop is analyzed under *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

In *Williams*, an officer responded to a radio dispatch to investigate a silent burglary alarm. As he arrived at the residence, the officer observed Williams turn on his headlights and attempt to pull away from in front of the house. The officer called for backup, blocked the car from leaving, ordered Williams out of the car, handcuffed him, and placed him in the back of the patrol car. Before asking Williams who he was and why he was in the area, the officer investigated the house and called a canine unit. The Supreme Court concluded the police actions “so exceeded the proper purpose and scope of a *Terry* stop as to be justified only if supported by probable cause sufficient to arrest petitioner.” *Williams*, 102 Wn.2d at 741. The court evaluated “the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.” *Williams*, 102 Wn.2d at 740.

In the case at hand, at 7:08 pm Mr. Zeller and his companions were surrounded by at least three unmarked patrol cars and six police officers. 04/01/11 RP 26. Mr. Zeller and his companions were told to keep their hands clear and were immediately handcuffed and placed in the back of the patrol cars. 04/01/11 RP 36. Mr. Zeller was then almost immediately read his Miranda warnings. 04/01/11 RP 42. Detective Trujillo testified that he did not begin the process of applying for a search warrant until at least 30 minutes later at 7:39 pm. 04/01/11 RP 27, and didn't actually initiate the telephonic affidavit until

7:54 pm. CP 49. While police officers smelled the odor of marijuana, it is unclear where, in this 30 minute interval, they first noticed it.

While handcuffing and detaining a suspect in a patrol car does not necessarily convert an investigative stop into an arrest, these facts combined with giving Miranda warnings have been found to amount to a warrantless arrest. *See, Burrell v. McIlroy*, 464 F.3d 853, 857 (2006) (holding “Burrell was removed from his car at gunpoint, handcuffed, Mirandized, and told that he was under arrest. Under our case law, this confluence of circumstances leads us to conclude that he in fact was under arrest.”); *United States v. Del Vizo*, 918 F.2d 821, 824 (9th Cir.1990) (holding the combination of the police's order to exit vehicle, hand-cuffing, and brandishing of weapons created an arrest); *United States v. Delgadillo–Velasquez*, 856 F.2d 1292, 1295 (9th Cir.1988) (holding an arrest occurred based on detention at gunpoint by police officers who stated they were making an arrest and gave *Miranda* rights). Mr. Zeller was placed under arrest when multiple officers surrounded him, told him to stop, handcuffed him, placed him in a patrol car and mirandized him.

In order to justify this warrantless arrest police were required to have probable cause. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Probable causes exists where the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a person in reasonable caution in believing that a crime has been committed and that the person seized committed

the crime. *State v. Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974). To justify an arrest, the officer must have probable cause to believe that a crime has been committed and that the person to be arrested committed the offense. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Probable cause is an objective standard and must be based on the facts known at or before the time of arrest. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Subsequent events or discoveries cannot retroactively justify a seizure. *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999) (overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007)). In a criminal proceeding, the burden of proving the existence of probable cause for a warrantless arrest is on the prosecution. *State v. Mance*, 82 Wn.App. 539, 544-45, 918 P.2d 527 (Div 2, 1996).

In the case at hand, police did not have probable cause to arrest Mr. Zeller immediately upon arriving at the scene. There is no indication that the area was a known drug location or even a high crime area, rather, it was a public parking lot at a busy intersection in broad daylight. 04/01/11 RP 13. Mr. Zeller and his companions were in the parking lot for approximately 30 minutes before police saw anything that could be legitimately categorized as suspicious. 04/01/11 RP 12. According to Detective White's observations, the men were simply "hanging out." 04/01/11 RP 11. Detective White testified that he saw what he thought was a "hand-to-hand" transaction of an item that he couldn't

see. 04/01/11 RP 18. However, after this movement had occurred, Mr. Zeller and the other men did not rush back to their cars and leave, despite the fact that drug transactions are usually classified as “hello and go” transactions. 04/01/11 RP 18. There is no indication that these men were looking around and watching over their shoulders or any other furtive movements. These facts simply do not amount to probable cause.

**b. Even if the initial seizure of the defendant was an investigative detention, law enforcement lacked reasonable suspicion.**

In *State v. Marcum*, this court gave an example of an investigative detention that was not supported by reasonable suspicion:

*State v. O’Cain* illustrates a stop based on no more than a hunch. There, an officer on drug detail patrolled a drug neighborhood. He saw people standing next to a car in a 7–Eleven parking lot. He had a hunch (a hunch based on experience but nonetheless a hunch) that they were buying and selling drugs.

*State v. Marcum*, 116 Wn.App. 526, 531, 66 P.3d 690 (2003) (citing to *State v. O’Cain*, 108 Wn.App. 542, 31 P.3d 733 (Div 1, 2001)). In contrast, this court has held that an initial *Terry* stop was justified where an individual was present in a high crime area and he followed the “normal mode of conduct” for drug transactions. *State v. Biegel*, 57 Wn.App. 192, 194, 787 P.2d 577, *review denied*, 115 Wn.2d 1004, 795 P.2d 1156 (1990). The defendant's acts in that case included parking his car in an area known for drug dealing, speaking with an individual (not a known drug dealer) for 30 seconds, following that person

into an apartment building and leaving within three or four minutes. This court held the initial stop was proper, given the police interest in the apartment building and because the circumstances leading up to the defendant's entering and leaving the building indicated he was there to purchase drugs. *Id.* at 194-95.

The present case is more analogous to *O'Cain* than *Biegel* for a number of reasons. First, there is no indication that the area was a known drug location or even a high crime area: it was a public parking lot at a busy intersection with a bank, professional offices and diamond store. It was daylight. 04/01/11 RP 10, 13. Mr. Zeller and his companions were in the parking lot for approximately 30 minutes before police saw anything that could be legitimately even considered suspicious. 04/01/11 RP 12. According to Detective White's observations, the men were simply "hanging out." 04/01/11 RP 11. So why would the detective start watching these men who were simply hanging out and having a conversation; because they were three Hispanic males that had "flashy vehicles" that "were sitting there like they were showing off." 04/01/11 RP 10. Detective White testified that he saw what he thought was a "hand-to-hand" transaction of an item that he couldn't see. 04/01/11 RP 18. However, after this movement had occurred, Mr. Zeller and the other men did not rush back to their cars and leave, despite the fact that Detective White testified that in his experience drug transactions are usually quick "hello and go." 04/01/11 RP 18. These men were not looking over their shoulders or making any other furtive

movements indicative of secrecy. There is no indication, other than an innocuous hand movement with an unidentified object, which could lead anyone to believe that there was a drug transaction. This is because there was no drug transaction. There was not enough evidence to establish a “well-founded suspicion that the defendant engaged in criminal conduct.” *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Since the initial stop of the defendant was not justified at its inception, the fact that police smelled the odor of marijuana after unlawfully seizing Mr. Zeller cannot be used to justify their further detention. *State v. Glover*, 116 Wash.2d 509, 514, 806 P.2d 760 (1991). As such, all subsequently discovered evidence is “fruit of the poisonous tree” and must be suppressed. *State v. Wallin*, 125 Wn.App. 648, 662-63, 105 P.3d 1037 (2005) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)); *see also State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

2. *The affiant recklessly or intentionally omitted facts from the affidavit which would have negated probable cause to issue a search warrant.*

An affidavit applying to a search warrant must state the underlying facts and circumstances on which probable cause is based, so the Judge or Magistrate can make a detached and independent assessment of the evidence. *See, e.g., State v. Merkt*, 124 Wn.App. 607, 612, 102 P.3d 828 (Wash.App.Div.3, 2004). A warrant may be invalidated, and the fruits of a search may be suppressed if

there were intentional or reckless omissions of material information from the warrant affidavit. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). If a defendant makes a substantial preliminary showing that the affiant intentionally, or with reckless disregard for the truth, misstates a fact in the search warrant affidavit, and the alleged misstatement is necessary to the finding of probable cause, then the Fourth Amendment requires that a hearing be held at the defendant's request. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). The *Franks* test for material misrepresentations also applies to material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Garrison*, 118 Wn.2d 870, 873, 872 P.2d 1388 (1992).

Although the issuance of a warrant and the denial of a *Franks* hearing are generally reviewed for abuse of discretion, the assessment of probable cause is a legal conclusion is reviewed de novo. *State v. Neth*, 165 Wash.2d 177, 182, 196 P.3d 658 (2008) (warrant); *State v. Wolken*, 103 Wash.2d 823, 829-30, 700 P.2d 319 (1985) (hearing).

Detective Trujillo incorrectly informed the Judge that he had responded to the location at 7:20 pm, when he had in fact responded at 7:08 pm. 04/01/11 RP 25, CP 49. Detective Trujillo declared to the Judge only two objective factual bases for probable cause: 1) that another officer had witnessed “what he called a hand-to-hand exchange between two Hispanic male subjects;” and 2) that an odor of marijuana emanated from the passenger cabin of the car. CP 50.

Both bases were negated during the course of investigation, *before* Detective Trujillo sought a search warrant. Such negating information is necessary to a determination of probable cause, thus omission of that information was material and misrepresentative. Mr. Zeller immediately informed the officers, (while separated from the other individuals), that he did not give Mr. Diaz any of his marijuana or other medicine, but instead Mr. Zeller had given Mr. Diaz a flyer, which remained in Mr. Diaz's shirt pocket. 04/01/11 RP 63. The officers searched Mr. Diaz during the pat-down and found the flyer in his shirt pocket, corroborating the information. 04/01/11 RP 50, 67. The brief pat downs discovered no marijuana or other illegal substances on either of the Diaz brothers. 04/01/11 RP 50. Given this information about the hand-to-hand, there is no objective, factual basis for a reasonable person to conclude that more likely than not, evidence of a particular crime would be found in Mr. Zeller's vehicle. The officers intentionally or recklessly excluded this information in the affidavit for the search warrant.

Mr. Zeller notified the officers that the vehicle in question is his, that he has a license to take marijuana medicinally because of his clinical illness, and that he had a small amount of medicinal marijuana in the passenger cabin of his vehicle. 04/01/11 RP 43 & 48. Mr. Zeller voluntarily granted the officers permission to search for those items, but they refused. 04/01/11 RP 43. Given this information, there is no objective, factual basis for a reasonable person to

conclude based on the odor, that more likely than not, evidence of a particular crime would be found in Mr. Zeller's vehicle. In light of Mr. Zeller's license, marijuana found would be equally consistent with a lawful use and under *Neth* it could not support probable cause of a crime. The officers intentionally or recklessly excluded this information in the affidavit for the search warrant.

It should be noted that in the State's Memorandum in Opposition to *Frank's* Motion, CP 36-50, the State did not deny that information regarding the defendant's medical marijuana license was intentionally or recklessly withheld. Taken cumulatively, the officers' behaviors clearly evince their intent to disregard the truth. The Kennewick Police Department responded by executing a raid with incapacitation and detention upon three pedestrians standing between two cars in a public parking lot in broad daylight, in full view of the public, 20 feet away from a major artery in Kennewick, because one officer, after observing the "Hispanic males" for over half an hour, thought he might have observed one innocuous hand gesture. After executing their raid, handcuffing the pedestrians upon arrival, and placing them in their patrol cars, the officers learned simple, objective facts, which would negate all probable cause that any crime had taken place. Furthermore, the officers were given full and voluntary consent to search for evidence that in less than one minute would verify the facts offered to negate probable cause. The search of Mr. Diaz negated the hand-to-hand, and merely retrieving the license from the console in

Mr. Zeller's vehicle would have verified that there was no crime, and the officers were given voluntary permission to do so. Instead, the officers intentionally disregarded those facts and chose to keep that information from the Judge.

In the alternative, if the affiant's disregard for the truth were not intentional, it is at least reckless. Reckless disregard for the truth may be shown by establishing that the affiant entertained serious doubts about the veracity of the informant. *State v. Chenoweth*, 160 Wn.2d 454, 479, 158 P.3d 595 (Wash. 2007) (citing *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (citing *State v. O'Connor*, 39 Wn. App. 113, 117, 692 P.2d 208 (1984))). "Serious doubts" may be inferred from either (a) an affiant's actual deliberation or (b) the existence of obvious reasons to doubt the informant's veracity or the information provided. *Id* at 479 (citing *Clark*, 143 Wn.2d at 751, 24 P.3d 1006 (quoting *O'Connor*, 39 Wn. App. at 117, 692 P.2d 208)). In Washington, the test for reckless disregard for the truth has been well-established where the matter regards the veracity of informants. Washington does not, however, have any case law on point *outside* the topic of informants. Nevertheless, the purpose behind this case law is to establish veracity and indicia of reliability for the facts that are before the officers. The case of an informant is but one particular type of information, and the reckless disregard test easily applies to other types of information, as it does here. In accepting the facts that they heard

from the officer who relayed the hearsay about a hand-to-hand, and ignoring the facts they were presented by Mr. Zeller and Mr. Diaz, the officers should have entertained serious doubts about their facts establishing probable cause. The fact that the affiant with such precision was able to relay certain facts to the Judge, while withholding precisely those facts inconsistent with the officers' suspicions, is evidence that the officer entertained doubts about the information that he relayed. In short, the officer knew that the warrant would be denied, and because of this officer's quest for arrests he chose not to disclose.

As demonstrated above, if the omitted information is added to the affidavit, then the only remaining evidence offered toward probable cause is the officers' suspicions. Suspicions are not sufficient for probable cause, (*Neth*, 165 Wn.2d at 183. Stating no objective facts or circumstances from which a reasonable person could infer that Mr. Zeller is involved in criminal activity, the affidavit is insufficient for probable cause, and therefore the search warrant is void. Under the long line of cases following *Franks* and *Kennedy*, therefore, the Constitution requires that the evidence *must* be suppressed. *See, e.g., Kennedy*, 107 Wn.2d 1; *Franks*, 438 U.S. 154; *Ladson*, 138 Wn.2d 343.

3. *The existence of a facially valid medical marijuana license is a fact that must be disclosed to an issuing magistrate when applying for a search warrant.*

*State v. Fry*, 168 Wn.2d 1, 228 P.3d 1(2010), does not stand for the proposition that police now no longer need to inform the judge issuing the

warrant of the relevant fact that the suspect of a search warrant based on the crime of marijuana possession has a medical marijuana license. In *Fry*, police disclosed this information to the Judge issuing the search warrant. *Id* at 6. There is no indication here that the police doubted the validity of the license, or that Mr. Zeller possessed more than allowed by the statute, only that they failed to disclose its existence. The existence of a medical marijuana license is an important factor for a judge to be able to consider in making an unbiased determination of probable cause sufficient to issue a warrant. This factor, when combined with the statements of Mr. Zeller and Mr. Diaz, the pamphlet found on Mr. Diaz and the lack of discovery of marijuana or any other drugs on Mr. Zeller Mr. Diaz's person during their brief pat-down would have been sufficient to negate probable cause. It may be true that in the case of medical marijuana, "the officer is not the judge or jury," but this only supports the defendant's position that the existence of a medical marijuana license as well as the other factors present here, should have been presented to a Judge. *State v. Fry*, 142 Wn.App. at 460.

"Probable cause depends on all of the surrounding facts, including those that reveal a person's status as a qualified patient or primary caregiver under" [the CUA or MMPA], *People v. Mower*, 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 335, 49 P.3d 1067 (2002) (citations omitted). In *State v. Blair*, Division 1 of the court of appeals held:

It is an affirmative defense to criminal trespass that [t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain. Thus, whether Officer Williams had probable cause to believe that Blair was committing a crime depends on whether the circumstances known to the officer indicated that Blair was not on the property for legitimate purposes.

*State v. Blair*, 65 Wn.App. 64, 69, 827 P.2d 356 (1992) (internal citations omitted).

Generally, in determining probable cause an arresting officer does not have to consider the validity of any possible defense. *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). An exception to the general rule exists, however, when the arresting officer actually has knowledge of facts and circumstances conclusively establishing an affirmative defense. In *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), the Sixth Circuit considered whether the defendant police officers were entitled to a qualified immunity defense against a Fourth Amendment claim arising out of their arrest of the plaintiffs who claimed they had been arrested without probable cause. The court said: "The law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132, 162 (1925), that probable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest.*" *Id.* See also, *Painter v. Robertson*, 185 F.3d 557, 571 (6th Cir. 1999) (stating that an officer "in

assessing probable cause to effect an arrest, may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification for his suspected criminal actions"); *Radich v. Goode*, 886 F.2d 1391, 1396-97 (3d Cir. 1989) (assuming without deciding that in determining probable cause the arresting officers should consider facts establishing affirmative defenses).

All of the officers involved in detaining Mr. Zeller admit that they had knowledge of the existence of a medical marijuana license. 04/01/11 RP 28, 43 and 55. However, when confronted during testimony, all these officers conveniently forgot when this information was learned.<sup>2</sup> Detective Trujillo testified that he could see the other officers talking to Mr. Zeller and the Diaz brothers and admitted that it would have been easy to bring important information to his attention even *after* he began applying for the search warrant. 04/01/11 RP 36-37. Detective Dorame admitted that he very easily could have gone to tell Detective Trujillo about the medical marijuana while he was

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2. Testimony of Detective Trujillo: "Q: Do you remember if and when you found out he had a marijuana prescription? A: I don't recall specifically, but it would have been after I obtained the search warrant." 04/01/11 RP 44

Testimony of Detective Dorame: "Q: Okay. And after you found out that he had a marijuana prescription, did you get out of the car and leave him in there and go tell anybody about that, or what was – after you found that out do you recall what you did with that information? A: I don't recall exactly the time frame, but I know eventually he had to tell the rest of the detectives what Mr. Zeller had reported." 04/01/11 RP 55.

Testimony of Detective Schwartz: "Q: At some point did you learn from anybody at the scene the defendant had a medical marijuana license, do you remember – a medical marijuana prescription? A: Yes. Q: Do you remember around when that was? I'm not positive exactly at what point."

applying for the search warrant and that the six other officers could overhear the conversation and were waiting for him to explain what Mr. Zeller had reported. 04/01/11 RP 49-50. Detective Schwartz testified that he was “kind of in between just talking with the individuals...just kind of worked in between the detectives on the scene” making it easy for him to report this important information as well. 04/01/11 RP 55.

Officers arrived on the scene at 7:08 pm, immediately handcuffed and detained Mr. Zeller and gave him Miranda warnings which Mr. Zeller promptly waived before telling officers that he had Crohn’s disease<sup>3</sup>, medications (including marijuana) and prescriptions for all those medications. The State would have this court believe that officers simply were not aware of this information in time to tell Judge Runge when the telephonic affidavit was given at 7:54, CP 49, almost an hour after Mr. Zeller was initially detained. That assertion is without merit. Law enforcement was aware of this information and chose not to disclose it to the judge issuing the warrant. For the reasons outlined below, this information should be determined material for the purpose of finding probable cause.

4. *State v. Fry is inconsistent with the legislative intent and related statutory provisions*

The State argued below that seeing even one marijuana plant in the

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3. RCW 69.51A.010(6)(b) classifies Crohn’s disease as a “terminal or debilitating medical illness” qualifying an individual for use of medical marijuana.

possession of a licensed user is sufficient for a warrant. This reading violates legislative intent that a qualifying patient may fully participate in the medical use of marijuana “*without fear of state criminal prosecution.*” Former RCW 69.51A.005. Shortly after *State v. Fry* was decided, the legislature began the process of amending Chapter 69.51A.<sup>4</sup> This is an indication that the legislature was displeased with the holding set forth in *Fry*. This Statute has since been amended and is now even clearer about the intent of the legislature:

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*, notwithstanding any other provision of law.

Current RCW 69.51A.005(2)(a). This is not the only amended portion of Chapter 69.51A. The 2011 amendments also dramatically altered RCW 69.51A.040 which now states in part:

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...

Current RCW 69.51A.040(1) (emphasis added).

Under the State’s reading, all medical marijuana users will be subject to

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4. Senate Bill 5073 was first read and referred to Health and Long Term Care on January 12, 2011.

arrest and prosecution and forced to obtain legal counsel, often at their own expense, in order to prove to a jury that the license, which they expended so much time and effort to obtain, is actually valid. The State's reading is inefficient and counterproductive because it would appear to render the licensing procedures and requirements ineffective. Mr. Zeller's position is further bolstered by the new amendments to the statute which show that medical marijuana users should not even be *arrested* for their use, because such use is *not a crime*.

Both the State and *Fry* assert that "the officer is not the judge or jury" with regards to medical marijuana licensing. *State v. Fry*, 142 Wn.App. at 460.

However, the former statutory scheme itself stated that it was the officer's place to decide whether an individual was a licensed medical marijuana user:

If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana.

Former RCW 69.51A.040.

The medical marijuana statute in effect at the time Mr. Zeller was arrested placed on law enforcement the duty and ability to determine whether marijuana is being lawfully possessed and grown. It is inconsistent to assert that police are not in a position to decide compliance with medical marijuana laws while at the same time acknowledging and granting them authority to do just that. The interpretation set forth by *Fry* and the State allow for an unequal application of the law. Officers may decide that some individuals, apparently

complying with medical marijuana laws, are going to be arrested and charged, while others will not.

This interpretation also renders the presentment requirement of former RCW 69.51A.040(c) meaningless. Former RCW 69.51A.040(c) required that a patient “present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.”<sup>5</sup> If this requirement was to have any meaning, presentation of a patient’s authorization must constitute evidence of lawful possession of marijuana, and thereby the absence of criminal activity. Otherwise, no purpose is served by presenting the documentation to the investigating officers, rather than simply presenting the authorization later at trial.

*Fry* suggests that because an authorization to use medical marijuana is an affirmative defense, the presentation of the documentation to law enforcement cannot negate probable cause. Such an approach undermines both the specific statutory scheme of the Medical Use of Marijuana Act and the heightened protections afforded by Article I, section 7. *Fry*’s interpretation that evidence of an affirmative defense is irrelevant to the probable cause analysis is also particularly troubling where investigating officers had no basis to doubt the validity of the affirmative defense, and recorded none in their reports or warrant application.

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Under the amended statute patients are no longer required to present valid documentation of medical marijuana but are rather instructed to be in a registry. RCW 69.51A.040(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.”) This registry requirement is unclear as the portion of the statute relating to the creation, maintenance and use of a registry was vetoed. Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Apr 29, 2011).

In the Sixth Circuit cases of *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6<sup>th</sup> Cir. 1999) and *Painter v. Robertson*, 185 F.3d 557 (6<sup>th</sup> Cir. 1999), held that there was no probable cause where a reasonable officer would know that a defendant's behavior was protected by an affirmative defense. In *Robertson*, the court specifically held that "a peace officer, in assessing probable cause to effect an arrest, may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification for his suspected criminal actions. *Id* at 571.

Even though the statute was an affirmative defense, qualified patients and their caregivers still retain the basic right to be free from unreasonable searches and seizures that the Fourth Amendment guarantees. The United States Supreme Court in *Illinois v. Gates*, held that a determination of probable cause must be based on the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213 (1983). That Court stated that "[p]erhaps the central teaching of our decisions bearing on the probable cause standard is that it is a 'practical, nontechnical conception.'" *Gates* at 231. Clearly, if there are facts present and obvious to law enforcement officers, such as the existence of a physician's recommendation approving the use of marijuana for medical use, officers cannot, as Respondent would argue, simply ignore such evidence, make an arrest and allow the courts to sort it out later. Such would not be consistent with common sense notions of probable cause to believe that the suspect is acting in violation of the law in some way. There must, as the *Gates* court stated, be a "fair probability that contraband or evidence of a crime will be found in a particular place." *Gates* at 238.

When an individual provides an investigating officer with his medical marijuana authorization, that officer does not have probable cause to arrest him or search his premises absent some other indicia of criminal activity (i.e., possession of more than amount granted by authorization). Evidence of some criminal act is the touchstone of probable cause. *See State v. Thein*, 138 Wn.2d at 140. Detective Trujillo testified that the reason he obtained a warrant was the odor of marijuana. 04/01/11 RP 40. The odor of marijuana was not enough to support probable cause because there was a valid prescription and therefore the odor was not evidence of unlawful activity. There is no indication that the officers in this case ever doubted the validity of Mr. Zeller's illness or license for medical marijuana or indicated that he appeared to be in possession of more than the statute allowed for. As there was only evidence of lawful activity, there was no probable cause. The search of Mr. Zeller's vehicle therefore violated Article 1, Section 7 of the Washington State Constitution as well as the Fourth Amendment of the United States Constitution.

5. *Equal protection is violated by the selective searches, seizures and arrests of medical marijuana patients*

Article 1, Section 12 of the Washington Constitution is violated by the selective arrests of individuals like Mr. Zeller. The protections under the state and federal provisions related to equal protection are coextensive and as such Washington courts use the federal equal protections analysis. *Seeley v. State*, 132 Wn.2d 776, 791, 940 P.2d 604 (1997). The first step in an equal protection analysis is to determine the standard of review. *Id.* If governmental action

threatens a “fundamental right” it will be upheld only if “necessary to accomplish a compelling state interest.” *Id* at 792. While Washington courts once held that the right to medical marijuana was not a fundamental right, these cases no longer apply because they were decided prior to the enactment of RCW 69.51A, the Washington State Medical Use of Marijuana Act. *Seeley v. State*, 132 Wn.2d 776, 791, 940 P.2d 604 (1997); *State v. Smith*, 93 Wash.2d 329, 346-47, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). The enactment of the Act was a conscious decision by the citizens of Washington State to provide a right to patients with terminal or debilitating illnesses to use medical marijuana in compliance with the statutory provisions. Equal protection of the laws is denied when state officials enforce the law with an “unequal hand or evil eye.” *City of Spokane v. Hjort*, 18 Wn.App. 606, 569 P.2d 1230 (Div.3 1977) quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

An Equal Protection claim may arise when a plaintiff is subjected to selective enforcement of the laws in retaliation for the exercise of a fundamental right. *Oyler v. Boyles*, 368 U.S. 448, 456 (1982). A defendant making such a claim must show:

(1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him has been invidious or in bad faith, ie, based upon ... the desire to prevent exercise of his constitutional rights.

*United States v. Hazel*, 696 F.2d 473 (6th Cir.1982).

As explained above, the right to be prescribed and to use medical

marijuana in compliance with RCW 69.51A should be considered a fundamental right. Mr. Zeller was exercising that fundamental right when he was stopped, questioned and investigated by law enforcement. Mr. Zeller indicated the lawful nature of his possession and attempted to provide the necessary documentation. 04/01/11 RP 28, 43 and 55. Had Mr. Zeller been found with a different prescription medication with a valid prescription such as presentment of valid authorization to possess would likely have been sufficient to dispel the investigation and interrogation which then ensued. Are all firearm owners subject to search and seizure in all circumstances just because it may take minimal additional investigation by a law enforcement officer to ascertain whether or not they possess the proper paperwork? If an officer finds a firearm in a person's home, that person is not immediately subject to search and seizure. That fact pattern is ridiculous, but no more so than a legitimate medical marijuana user following the law to the letter, yet finding himself subject to search and seizure for his actions. The only difference between the presentment of valid authorization in all of these circumstances is that Mr. Zeller was exercising his right to possess and use medical marijuana in compliance with the statute.

In addition, the holding urged by the State below would give law enforcement uncontrolled discretion to disregard the provisions of the Washington State Medical Marijuana Act and force the prosecutor to sort it out later. Although “the fact that an ordinance may require a subjective evaluation by a police officer to determine whether the enactment has been violated does not mean the ordinance is unconstitutional. *American Dog Owners Ass'n*, 113

Wn.2d at 216, 777 P.2d 1046 (1989); *State v. Maciolek*, 101 Wn.2d at 267, 676 P.2d 996 (1984). The enactment will violate the Due Process Clause if it invites an inordinate amount of police discretion. *See American Dog Owners Ass'n*, 113 Wn.2d at 216, 777 P.2d 1046. Both the State and *Fry* assert that “the officer is not the judge or jury” with regards to medical marijuana licensing. *State v. Fry*, 142 Wn.App. 456, 460, 174 P.3d 1258.

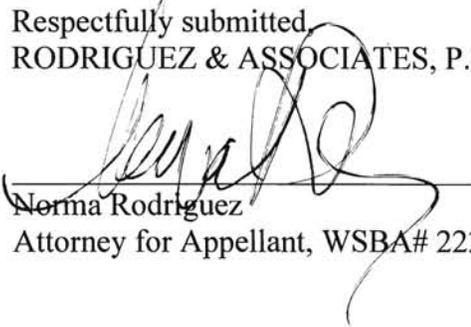
As described in the section 3, the medical marijuana statutes place on law enforcement the duty and ability to determine whether marijuana is being lawfully possessed and grown. Former RCW 69.51A.040. It is inconsistent to assert that police are not in a position to decide compliance with medical marijuana laws while at the same time acknowledging and granting them authority to do just that. The interpretation set forth by *Fry* and the State allow for an unequal application of the law. Officers may decide that some individuals, apparently complying with medical marijuana laws, are going to be arrested and charged, while others will not.

#### H. CONCLUSION

The trial court erroneously admitted evidence obtained in violation of the Washington Constitution as well as the United State Constitution. Based on the forgoing, Mr. Zeller respectfully requests that this Court reverse his conviction for unlawful possession of a firearm.

January 13, 2012

Respectfully submitted,  
RODRIGUEZ & ASSOCIATES, P.S.



Norma Rodriguez  
Attorney for Appellant, WSBA# 22398

APPENDICES

Appendix 1: Former RCW 69.51A.005

Appendix 2: Former RCW 69.51A.040

**APPENDIX 1 – Former RCW 69.51A.005**

West's RCWA 69.51A.005

To view the full text of this section, click on the following citation. [WA ST 69.51A.005](#)

### Proposed Legislation

- 1** 2011 WA H.B. 1100 (NS), 2011 Washington House Bill No. 1100, Washington Sixty-Second Legislature - 2011 First Special Session (Jan 12, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.
- 2** 2011 WA H.B. 1100 (NS), 2011 Washington House Bill No. 1100, Washington Sixty-Second Legislature - 2011 Regular Session (Jan 12, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.

### Bill Drafts

- 1** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Apr 29, 2011), VERSION: Adopted, ACTION: Amended.
- 2** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Apr 22, 2011), VERSION: Enrolled, ACTION: Amended.
- 3** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Mar 02, 2011), VERSION: Engrossed, ACTION: Amended.
- 4** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Mar 02, 2011), VERSION: Engrossed, ACTION: Amended.
- 5** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Feb 25, 2011), VERSION: Amended/Substituted, ACTION: Amended.
- 6** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Feb 10, 2011), VERSION: Amended/Substituted, ACTION: Amended.
- 7** 2011 WA S.B. 5073 (NS), 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Jan 12, 2011), VERSION: Introduced, ACTION: Amended.
- 8** 2009 WA S.B. 5798 (NS), 2009 Washington Senate Bill No. 5798, Washington Sixty-First Legislature - 2010 Regular Session (FULL TEXT - NETSCAN), (Apr 01, 2010), VERSION: Adopted, ACTION: Amended.
- 9** 2009 WA S.B. 5798 (NS), 2009 Washington Senate Bill No. 5798, Washington Sixty-First Legislature - 2010 Regular Session (FULL TEXT - NETSCAN), (Mar 11, 2010), VERSION: Enrolled, ACTION: Amended.
- 10** 2009 WA S.B. 5798 (NS), 2009 Washington Senate Bill No. 5798, Washington Sixty-First Legislature - 2009 Regular Session (FULL TEXT - NETSCAN), (Feb 25, 2009), VERSION: Amended/Substituted, ACTION: Amended.
- 11** 2009 WA S.B. 5798 (NS), 2009 Washington Senate Bill No. 5798, Washington Sixty-First Legislature - 2009 Regular Session (FULL TEXT - NETSCAN), (Feb 02, 2009), VERSION: Introduced, ACTION: Amended.
- 12** 2007 WA S.B. 6032 (NS), 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (May 08, 2007), VERSION:

Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (May 08, 2007), VERSION: Adopted, ACTION: Amended.

- 13** 2007 WA S.B. 6032 (NS), 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Apr 22, 2007), VERSION: Enrolled, ACTION: Amended.
- 14** 2007 WA S.B. 6032 (NS), 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Mar 14, 2007), VERSION: Engrossed, ACTION: Amended.
- 15** 2007 WA S.B. 6032 (NS), 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Feb 28, 2007), VERSION: Amended/Subbed, ACTION: Amended.
- 16** 2007 WA S.B. 6032 (NS), 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Feb 14, 2007), VERSION: Introduced, ACTION: Amended.

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2007 c 371 § 2

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Washington Vote Roll Call, 2007 Regular Session, Senate Bill 6032, [WA Votes, 2007 Reg. Sess. S.B. 6032, April 18, 2007](#)

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Washington Vote Roll Call, 2007 Regular Session, Senate Bill 6032, [WA Votes, 2007 Reg. Sess. S.B. 6032, March 14, 2007](#)

### Executive Messages

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[2010 c 284 § 1](#)

### Reports

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Washington Bill History, 2010 Regular Session, Senate Bill 5798, [WA B. Hist., 2010 Reg. Sess. S.B. 5798, February 10, 2010](#)

Washington Bill History, 2009 Regular Session, Senate Bill 5798, [WA B. Hist., 2009 Reg. Sess. S.B. 5798, August 10, 2009](#)

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[2011 c 181 § 102](#)

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**Executive Messages**

Washington Governor s Message, April 21, 2011, WA Gov. Mess., 4/21/2011, April 21, 2011

➔69.51A.005. Purpose and intent

**CREDIT(S)**

[2011 c 181 § 102, eff. July 22, 2011; 2010 c 284 § 1, eff. June 10, 2010; 2007 c 371 § 2, eff. July 22, 2007; 1999 c 2 § 2 (Initiative Measure No. 692, approved November 3, 1998).]

**HISTORICAL AND STATUTORY NOTES**

Intent--2007 c 371:

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

**2007 Legislation**

Laws 2007, ch. 371, § 2 rewrote the section, which formerly read:

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

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

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

"Qualifying patients with terminal or debilitating illnesses who, in the judgment of their 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;

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

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

#### 2010 Legislation

Laws 2010, ch. 284, § 1, substituted references to health care professional for references to physician.

#### 2011 Legislation

Laws 2011, ch. 181, § 102, rewrote the section, which formerly read:

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

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

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

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

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

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

**APPENDIX 1 – Former RCW 69.51A.040**

WA ST 69.51A.040  
West's RCWA 69.51A.040



### Proposed Legislation

- 1 2011 WA H.B. 2118 (NS), 2011 Washington House Bill No. 2118, Washington Sixty-Second Legislature - 2011 Regular Session, (May 17, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.
- 2 2011 WA H.B. 2118 (NS), 2011 Washington House Bill No. 2118, Washington Sixty-Second Legislature - 2011 First Special Session, (May 17, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.
- 3 2011 WA S.B. 5955 (NS), 2011 Washington Senate Bill No. 5955, Washington Sixty-Second Legislature - 2011 Regular Session, (May 10, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.
- 4 2011 WA S.B. 5955 (NS), 2011 Washington Senate Bill No. 5955, Washington Sixty-Second Legislature - 2011 First Special Session, (May 10, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.
- 5 2011 WA H.B. 1100 (NS), 2011 Washington House Bill No. 1100, Washington Sixty-Second Legislature - 2011 First Special Session, (Jan 12, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.
- 6 2011 WA H.B. 1100 (NS), 2011 Washington House Bill No. 1100, Washington Sixty-Second Legislature - 2011 Regular Session, (Jan 12, 2011), VERSION: Introduced, PROPOSED ACTION: Amended.

### Bill Drafts

- 1 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Apr 29, 2011), VERSION: Adopted, ACTION: Amended.
- 2 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Apr 22, 2011), VERSION: Enrolled, ACTION: Amended.
- 3 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Mar 02, 2011), VERSION: Engrossed, ACTION: Amended.
- 4 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Mar 02, 2011), VERSION: Engrossed, ACTION: Amended.
- 5 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Feb 25, 2011), VERSION: Amended/Substituted, ACTION: Amended.

- 6 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Feb 10, 2011), VERSION: Amended/Substituted, ACTION: Amended.
- 7 2011 WA S.B., 2011 Washington Senate Bill No. 5073, Washington Sixty-Second Legislature - 2011 Regular Session, (Jan 12, 2011), VERSION: Introduced, ACTION: Amended.
- 8 2007 WA S.B., 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (May 08, 2007), VERSION: Adopted, ACTION: Amended.
- 9 2007 WA S.B., 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Apr 22, 2007), VERSION: Enrolled, ACTION: Amended.
- 10 2007 WA S.B., 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Mar 14, 2007), VERSION: Engrossed, ACTION: Amended.
- 11 2007 WA S.B., 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Feb 28, 2007), VERSION: Amended/Subbed, ACTION: Amended.
- 12 2007 WA S.B., 2007 Washington Senate Bill No. 6032, Washington Sixtieth Legislature - 2007 Regular Session (FULL TEXT - NETSCAN), (Feb 14, 2007), VERSION: Introduced, ACTION: Amended.

### **Reports and Related Materials**

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2011 c 181 § 401

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Washington Final Bill Report, 2011 Regular Session, Senate Bill 5073, WA F. B. Rep., 2011 Reg. Sess. S.B. 5073, September 15, 2011

### Executive Messages

Washington Governor s Message, April 21, 2011, WA Gov. Mess., 4/21/2011, April 21, 2011

→ **69.51A.040. Compliance with chapter--Qualifying patients and designated providers not subject to penalties--Law enforcement not subject to liability**

CREDIT(S)

[2011 c 181 § 401, eff. July 22, 2011; 2007 c 371 § 5, eff. July 22, 2007; 1999 c 2 § 5 (Initiative Measure No. 692, approved November 3, 1998).]

### HISTORICAL AND STATUTORY NOTES

\***Reviser's note:** Section 901 of this act was vetoed by the governor.

**Intent--2007 c 371:** See note following RCW 69.51A.005.

2007 Legislation

Laws 2007, ch. 371, § 5 rewrote the section, which formerly read:

“(1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

“(2) The qualifying patient, if eighteen years of age or older, shall:

“(a) Meet all criteria for status as a qualifying patient;

“(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

“(c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana.

“(3) The qualifying patient, if under eighteen years of age, shall comply with subsection (2)(a) and (c) of this section. However, any possession under subsection (2)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.

“(4) The designated primary caregiver shall:

“(a) Meet all criteria for status as a primary caregiver to a qualifying patient;

“(b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply;

“(c) Present a copy of the qualifying patient's valid documentation required by this chapter, as well as evidence of designation to act as primary caregiver to any law enforcement official requesting such information.

to act as primary caregiver by the patient, to any law enforcement official requesting such information;

“(d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and

“(e) Be the primary caregiver to only one patient at any one time.”

#### 2011 Legislation

Laws 2011, ch. 181, § 401, rewrote the section, which formerly read:

“(1) If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.

“(2) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated provider who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

“(3) A qualifying patient, if eighteen years of age or older, or a designated provider shall:

“(a) Meet all criteria for status as a qualifying patient or designated provider;

“(b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and

“(c) Present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana.

“(4) A qualifying patient, if under eighteen years of age at the time he or she is alleged to have committed the offense, shall demonstrate compliance with subsection (3)(a) and (c) of this section. However, any possession under subsection (3)(b) of this

section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient.”

**FILED**

JAN 17 2012

CLERK OF SUPERIOR COURT  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 15<sup>th</sup> day of January, 2012, I caused a true and correct copy of Appellant's Brief for case 302954, to be served on the following in the manner indicated below:

Court  
Court of Appeals  
Division III  
500 N Cedar St  
Spokane, WA 99201-1905

- U.S. Mail
- Hand Delivery
- Fax
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Counsel for Respondent  
Andy Miller  
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7122 West Okanogan Place Bldg A  
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Appellant  
Jamison Zeller  
617 Hartford,  
Richland, WA 99352

- U.S. Mail
- Hand Delivery
- Fax
- e-mail

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of January, 2012

By:   
Michelle Trombley, WSBA 42912