COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent vs. PAUL D. BROWNE, Defendant/Appellant.	NO. 311562	FILED Apr 24, 2013 Court of Appeals Division III State of Washington

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BRIEF OF RESPONDENT

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I. INTRODUCTION

On August 20, 2009 the Douglas County Sheriff's Office executed a marijuana search warrant at the property of Paul D. Browne located in a rural area of Douglas County. Officers discovered eighty-eight (88) marijuana plants on the property. Mr. Browne was present during the execution of the search warrant and presented the officers with a medical marijuana authorization for his son, Daniel DeHart, and a form designating himself as a medical provider for his son. Mr. Browne was subsequently charged in Douglas County Superior Court with Manufacture of Marijuana.

After a series of motions were litigated, and the denial of a motion for interlocutory appeal by the Court of Appeals, Mr. Browne entered into a stipulated facts trial on September 13, 2012 and was found guilty of Manufacture of Marijuana. Mr. Browne was sentenced on September 24, 2012 to 20 day's jail. The sentence was stayed by the court pending this appeal.

II. STATEMENT OF FACTS

Respondent adopts the statement of the case as set forth in appellant's brief at pages 3 through 10, with the following supplementation.

On May 9, 2011 Mr. Browne's potential motion under Franks v. Delaware was discussed with the court. (RP 17-21). Mr. Browne's position was that the details of a prior search at his property in 2008 should have been included in Detective Scott's search warrant affidavit. (RP 18-19). The 2008 search warrant was processed through Chelan County and was conducted by the "task force". (RP 19-20). In that search the officers apparently educated Mr. Browne's son, Daniel DeHart, as to the amount of marijuana that could be legally possessed under the medical marijuana law. (RP 20-21). Mr. DeHart was allowed to retain some of the marijuana as he had a medical marijuana authorization. (RP 21).

On June 10, 2011 Mr. Browne filed his motion to dismiss under Franks v. Delaware. (CP 110-116). On June 13, 2011 the court considered whether Mr. Browne Frank's motion presented a substantial preliminary showing of reckless disregard for the truth by the officer, and whether it had an impact on the finding of probable cause thus warranting a hearing. (RP 44-49). There was no evidence or argument by Mr. Browne that Detective Scott was aware of the 2008 task force search warrant prior to applying for the August 24, 2009 warrant. (RP 44-48). The court orally

ruled that Mr. Browne had not made a sufficient showing to warrant a full Franks hearing. (RP 49).

On October 6, 2011 appellant petitioned to the Court of Appeals, Division III, for interlocutory appeal of the trial court's order excluding testimony of defense expert, Gary Ackerman, at trial, and order in limine excluding evidence the appellant's son's medical needs exceeded the fifteen (15) plant limit. (CP 184-191). The Court of Appeals declined review and issued the Certificate of Finality in 30293-8-III on June 19, 2012. (CP192-194).

The parties appeared for trial on September 13, 2012. (RP 77). Prior to trial the State had filed three (3) separate motions relative to Mr. Browne's presentation of a medical marijuana defense. (CP 125-126; CP 128-129, RP 77). The trial court had previously ruled defense expert, Gary Ackerman, was excluded from testifying concerning the amount of useable marijuana that could be harvested from plants, as the testimony was irrelevant. (CP 138-139). However, the court had not ruled on the State's pretrial motion to exclude the medical marijuana defense:

> Excluding the defense from introducing the medical marijuana defense pursuant to RCW 69.51 A without first establishing a foundation for the defense; and
>
> Excluding the marijuana prescription for Daniel DeHart unless testimony is presented at trial from the physician issuing the prescription

(CP 128-129). At the trial appellant made an oral offer of proof to the court for admission of the affirmative defense that provided the following information:

> Paul Browne provided officers with medical authorization for his son, Daniel DeHart;
>
> Paul Browne provided officers with a form designating him as the care provider for his son, Daniel DeHart;
>
> Paul Browne is over 18 years old;
>
> Paul Browne was the care provider for only one patient, his son Daniel DeHart;
>
> Daniel DeHart would authenticate his medical authorization, and affirm that he had designated his father, Paul Browne, as his care provider;
>
> Daniel DeHart would testify that his medical condition is cyclical vomiting syndrome;
>
> Daniel DeHart would testify what his medical marijuana needs were;
>
> Gary Ackerson, proposed defense expert, would testify that upon his review of pictures of the marijuana plants seized on appellant's property he observed no useable marijuana.

(RP 79-80, 83-86). The State challenged the offer of proof on the basis that; (1) appellant possessed 88 plants, which exceeded the presumptive 60 day supply of 15 plants under the statute and WAC, (2) there was no showing of medical testimony establishing that Daniel DeHart had a qualified condition under the statute or WAC for medical marijuana, (3) there was no showing of anticipated testimony from the physician issuing the medical marijuana authorization for authentication of the prescription, and (4) there was no showing of anticipated medical testimony concerning what Daniel DeHart's medical needs were for a 60 day supply. (RP 80-83). The court granted the State's motion to exclude the medical marijuana affirmative defense. (RP 86-87, CP 178-179). In granting the State's motion the court limited it's ruling by holding that the rebuttable presumption under WAC 246-75-010 did not apply to possession of marijuana plants. (RP 86-87). The court did not rule on the other basis for exclusion of the affirmative defense argued by the State. (RP 86-87). Subsequent to the court's ruling Mr. Browne entered into a stipulated facts trial. (CP 160-162). Mr. Browne was found guilty by the court of Manufacture of Marijuana and was

sentenced on September 24, 2012. (CP 163-165; 166-175).

On October 11, 2013 the State filed a notice of hearing for presentation of the court's order on limine excluding the medical marijuana defense, which had not been entered at the stipulated facts trial. (CP 195). On October 29, 2013 the State presented its proposed order on motion in limine. (CP 181-183; RP 110-111). The State's proposed order addressed all grounds argued by the State for exclusion of the medical marijuana defense. (CP 181-183). The court declined to sign the State's order, instead signed the proposed defense order which limited its ruling on the basis the rebuttable presumption under WAC 246-75-010 did not apply to marijuana plants. (CP 178-179).

III. ISSUES

3.1 Can Mr. Browne challenge probable cause for issuance of the search warrant for the first time on appeal?

3.2 Was there probable cause for issuance of the search warrant for Mr. Browne's property?

3.3 Did the trial court error in denying Mr. Browne's motion to dismiss for destruction of evidence?

3.4. Did the trial court error in denying Mr. Browne's motion for a Franks hearing and dismissal?

3.5 Did the trial court error in excluding the medical marijuana defense on the basis that the presumption in WAC 246-75-101 could not be overcome with evidence of medical need?

3.6 Did the trial court error in excluding defense expert, Gary Ackerson, from testifying concerning yield of marijuana plants to overcome the presumptive medical need in WAC 246-75-101?.

IV. ARGUMENT

4.1. The appellant may not raise a challenge to probable cause for issuance of the search warrant for the first time on appeal.

Appellant brought two pretrial motions for dismissal in this case. (CP 22-38; 110-116). The issues raised in the motions were; destruction of evidence (CP 25-32), altitude of aircraft from which the officer's observations of the marijuana occurred (CP 33), and Franks violation (CP 110-116). At no time did appellant challenge issuance of the August 20, 2009 search warrant on the basis that it lacked probable cause. As such, appellant should not be allowed to argue for the first time on appeal that the warrant lacked probable cause.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Tolias, 135 Wash.2d 133, 140, 954 P.2d 907 (1998); State v. McFarland, 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995). However, a claim of error may be raised for the first time on

appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). State v. Walsh, 143 Wash.2d 1, 7, 17 P.3d 591 (2001); *Tolias,* 135 Wash.2d at 140, 954 P.2d 907.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be "manifest" and truly of constitutional dimension. State v. WWJ Corp., 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wash.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. McFarland, 127 Wash.2d at 333, 899 P.2d 1251; Scott, 110 Wash.2d at 688, 757 P.2d 492. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. McFarland, 127 Wash.2d at 333, 899 P.2d 1251; State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992).

As stated in State v. Trout, 125 Wash. App. 313, 103 P.3d 1279 (Division III, 2005), citing State v. Lynn, 67 Wash.App. 339, 342–43, 835 P.2d 251 (1992):

> This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms. Judge Marshall Forrest thoughtfully outlined the problem:
>
> > RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. Suppression motions involve the Fourth Amendment. Admissions and confessions involve the Fifth and Sixth Amendments. Instructional errors may implicate constitutional due process. Hearsay involves Sixth Amendment confrontation rights.

Trout at 317.

In the present case appellant did not challenge probable cause for issuance of the search warrant at the trial court, and has not herein explained why such a challenge should be permitted on appeal. Appellant has not explained on appeal that this alleged error is manifest affecting a constitutional right warranting review for the first time on appeal, in light of the general rule. Accordingly, this court should not accept review of appellant's challenge to probable cause for issuance of the warrant.

4.2 There was sufficient probable cause for issuance of the search warrant to look for marijuana plants

The guidelines for restricting intrusions into the personal affairs of persons is set forth in both the U.S. Const., Amend. IV; and State Constitution Art. I, Section 7:

> The Fourth Amendment states:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and not warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> The Washington State Constitution, Art. I, Section 7, states:
>
> No person shall be disturbed in his private affairs, or his home invaded without authority of law.

Const. Art. 1, Section 7 prohibits unreasonable intrusions into those privacy interests which citizens of this state have held, and should be entitled to hold, free from governmental trespass without valid legal process. State v. Butterworth, 48 Wn. App. 152, 737 P. 2d 1297 (1987).

A court reviewing the sufficiency of probable cause for a search warrant must determine whether the affidavit provided the magistrate with a substantial basis for the issuance of the warrant. Such determination will only be reversed if a reviewing court finds issuance of the search warrant to be

clearly erroneous. United States v. Ayers, 924 F.2d 1468, 1478 (9th Cir. 1991); United States v. Terry, 911 F.2d 272 (9th Cir. 1990).

"Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed". State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). This determination rests on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). The officer does not have to have knowledge of evidence sufficient to support a guilty verdict. State v. Hendricks, 25 Wn. App. 775 (1980).

A probable cause determination is a practical, non-technical, common sense inquiry based on the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause exists when, under the totality of circumstances known to the officers, there is fair probability that contraband or

evidence of a crime will be found in a particular place. Gates, 462 U.S. at 238; Beck v. Ohio, 379 U.S. 89, 91 (1964); United States v. Garza, 980 F.2d 546, 550 (9th Cir. 1992). Probabilities "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Gates, 462 U.S. at 231. "[P]robable cause is a fluid concept...not readily, or even usefully reduced to a neat set of legal rules" and must be determined by analyzing the "totality of the circumstances." Gates, 462 U.S. at 232. On that basis, courts do not apply a *de novo* standard of review when evaluating the sufficiency of an affidavit. Gates, 462 U.S. at 236. Rather, the standard for the inquiry is whether a judge had a "substantial basis" for issuing of the search warrant. 462 U.S. at 236. As such, great deference is shown to the issuing magistrate's determination. Ayers, 924 F.2d at 1478.

Generally "[a] magistrate's task in issuing a search warrant is 'simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found

in a particular place." United States v. Calabrese, 825 F.2d 1342, 1348 (9th Cir.1987) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). The duty of a reviewing court is merely "to ensure that the magistrate had a substantial basis ... for conclud[ing] that probable cause existed." In re Grand Jury Subpoenas Dated Dec. 10, 1987, 926 F.2d 847, 856 (9th Cir.1991) (quotation omitted) (alteration in original).

The affidavit of Detective Tim Scott for search warrant detailed that; (1) on August 20, 2009 Deputy Poppie flew over 860 Chelan Hills Acres Rd. in an aircraft, (2) Deputy Poppie is a certified marijuana spotter, (3) Deputy Poppie personally observed more than one dozen mature growing marijuana plants on the property, and (4) that the plant leaves coloring and design were consistent with growing marijuana plants. (CP 3-4). Two pictures of the plants were attached to the affidavit in support of issuance of the search warrant. (CP 4). Clearly the affidavit sets forth sufficient facts to support the crime of manufacture of marijuana was occurring on the property subject to the search.

Appellant challenges the court's ability to rely upon statements made by Deputy Poppie to Detective Scott which

were detailed in the affidavit for search warrant to provide a factual basis for probable cause, arguing Deputy Poppie is basically an informant subject to the Aguilar-Spinelli test. This argument fails under the "fellow officer rule". Under the fellow officer rule information conveyed by one law enforcement officer to another is sufficient to support probable cause. State v. Maesse, 29 Wash. App 642, 647, 629 P.2d 1349, rev. denied, 96 Wash.2d 1009 (1981). Deputy Poppie was not acting as an "informant" as argued by appellant, rather he was a fellow officer providing details of his observations to Detective Scott. Accordingly, conformity with the requirements of Aguilar-Spinelli was not required.

Defendant's next argument is difficult to discern. It appears appellant is arguing the use of a certified marijuana spotter is tantamount to using "sense-enhancing technology not in public use" under Kyllo v. U.S. 533 U.S. 27; 121 S. Ct. 2038 (2001), and therefore the observations of Deputy Poppie of the marijuana plants constituted an illegal search. Kyllo is clearly distinguishable. In that case law enforcement agents used a thermal imaging device to see if the amount of heat emanating from a garage was consistent with the high-intensity lamps

typically used for indoor marijuana growth. The United States Supreme Court held that when the government uses a "device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant." The court suppressed evidence gathered through use of the thermal imaging device. Clearly no "device" was used in the present case. While appellant's argument is novel, his position is not supported by Kyllo, nor has he provided other supporting legal authority that a certified marijuana spotter is considered a "device" under the Fourth Amendment.

Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude. State v. Cord, 103 Wash.2d 361, 365, 693 P.2d 81 (1985); State v. Myrick, 102 Wash.2d 506, 513-14, 688 P.2d 151 (1984); State v. Cockrell, 102 Wash.2d 561, 569, 689 P.2d 32 1984); State v. Wilson, 97 Wash. App. 578, 581-82, 988 P.2d 463, 465 (1999). Appellant makes assertions in his brief that Deputy Poppie could not have possibly observed the marijuana plants with an unaided eye

from a distance of 500 feet or even 100 feet. However, those are factual assertions not supported by the record. Appellate courts are limited to the record before it.. State v. Crane, 116 Wash.2d 315, 335, 804 P.2d 10, *cert. denied,* 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Smith, 104 Wash.2d 497, 510, 707 P.2d 1306 (1985). The affidavit in support of the search warrant in this case does not contain any statement concerning the use of visual aids to enhance Deputy Poppie's observation of appellant's property or of the marijuana plants. Accordingly, the fly over and observations by Deputy Poppie did not constitute an unlawful search.

The court properly found probable cause existed for issuance of the search warrant of appellant's property.

4.3 The trial court did not error in denying Mr. Browne's motion to dismiss for destruction of evidence.

A. Preservation of Evidence – Two Different Tests - Materially Exculpatory Evidence vs. Potentially Useful Evidence

The Fourteenth Amendment of the United States Constitution and Const. article 1, §3 of the Washington State Constitution requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal

defendants be given a meaningful opportunity to present a complete defense. To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense.[1]

When evidence is lost or destroyed while in the State's custody, a court must first determine whether the evidence is materially exculpatory, potentially useful, or neither. This preliminary determination is essential because there are different tests for determining whether the loss or destruction of evidence constitutes a due process violation. Which test is applied depends on whether the evidence in question is materially exculpatory evidence or potentially useful evidence.

B. Materially Exculpatory Evidence–Defense Must Show Apparent Exculpatory Value and No Other Comparable Evidence

The Washington Supreme Court has explained that evidence must clear two hurdles before it can be considered "materially exculpatory evidence"–

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[1] *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994), *citing California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984) and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

> In order to be considered "material exculpatory evidence", the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. [[2]]

A defense showing that the evidence **<u>might</u>** have exonerated the defendant is not enough to transform the evidence into "materially exculpatory evidence."[3]

If the destroyed or lost evidence meets both prongs of the above <u>Wittenbarger/Trombetta</u> test and is thus "materially exculpatory evidence," then the good or bad faith of the police or prosecutor in failing to preserve that evidence is irrelevant.[4] When "materially exculpatory evidence" has been lost or destroyed, charges must be dismissed.[5]

Several cases illustrate what is **<u>not</u>** materially exculpatory evidence.

In <u>Trombetta</u>, the evidence at issue consisted of several DWI defendants' breath test samples tested by the State and

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[2] *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994), *citing California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984).
[3] *State v. Wittenbarger*, 124 Wn.2d at 475.
[4] *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988).
[5] *State v. Wittenbarger*, 124 Wn.2d at 475.

then discarded. Applying its test, the Court held that the destroyed breath samples were not material exculpatory evidence and reinstated the DWI convictions. The Court found the exculpatory value of the samples to be quite low, pointing out that given the accuracy of California's Intoxilyzer the breath test samples would have been much more likely to be inculpatory than exculpatory. Furthermore, the Court found that the defendants had means, other than retesting the original breath samples, to demonstrate their innocence.[6]

> In similar circumstances, we held in *State v. Straka*[[7]], that due process did not require the State to generate and preserve records of invalid message codes on the DataMasters. These messages appear to alert the operator that the DataMaster is unable to perform a reliable test due to either an electrical misadjustment or the presence of mouth alcohol. We found the invalid sample messages were not material exculpatory evidence because they do not confirm or deny the accuracy of a particular breath test and, thus, are not directly related to guilt or innocence of an individual charged under the DWI statute.[[8]]

In 2001, Division 2 of the Court of Appeals held that a .241 blood alcohol test result from blood taken in Oregon which did not meet the State Toxicologist WAC blood test standards

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[6] *State v. Wittenbarger*, 124 Wn.2d at 474-76 (internal citations omitted).
[7] *State v. Straka,* 116 Wn.2d 859, 810 P.21d 888 (1991).
[8] *State v. Wittenbarger*, 124 Wn.2d at 474-76 (internal citations omitted).

was admissible in a vehicular homicide DUI case for the "under the influence" prong of committing DUI even though the blood evidence was destroyed prior to the defense having an opportunity to independently test the blood. Donahue.[9]

Although Donahue's automobile accident occurred in Washington, a Portland, Oregon hospital treated Donahue for serious injuries and administered blood tests. The driver of the other automobile died and another passenger in that car was injured. The drawn blood was tested on an Ektachem machine which runs tests by spectrophotometry methods. In Washington, the State Toxicologist approved method for testing blood alcohol concentration is gas chromatography. At trial, the State Toxicologist testified that Washington's gas chromatography method is not necessarily more reliable than the Oregon method of spectrophotometry. Donahue's alcohol level was .241. The Washington detective testified that he did not think about asking the Oregon hospital for the blood sample for evidence. The Oregon hospital had the blood sample in its

[9] *State v. Donahue,* 105 Wn.App. 67, 18 P.3d 608, *review denied,* 144 Wn.2d 1010 (Div. 2 2001).

possession and disposed of it according to its standard procedure.

The Court of Appeals provided the following discussion concerning the Wittenbarger/Trombetta standards in rejecting Donahue's dismissal request due to a claimed failure to preserve material exculpatory evidence–

> To comport with due process, the State has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. *State v. Wittenbarger,* 124 Wn.2d 467, 475, 880 P.2d 517 (1994). To be material exculpatory evidence, the evidence must possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Wittenbarger, 124 Wash.2d at 475.
>
> Here, the exculpatory value of the blood was not apparent; it was more than twice over the per se limit. There was no hint that the test results had been tampered with or that the test results were faulty. There was nothing to indicate that the blood sample contained any exculpatory value. Thus, it was not material exculpatory evidence. It was, at best, only potentially useful to the defense.[[10]]

As these cases demonstrate, a defendant has a high two-fold burden under Wittenbarger and Trombetta to successfully obtain dismissal based upon a claimed failure to

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[10] *Donahue*, 105 Wn.App. at 77-78. (Footnote omitted.)

preserve "material exculpatory evidence"–(1) the evidence must possess an exculpatory value that was apparent before it was destroyed or lost; and (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

The Defense herein has failed to meet its burden under either prong.

C. Potentially Useful Evidence–Defense Must Show Police Bad Faith

"Potentially useful evidence" is evidence which, had it been preserved, **might** have exonerated the defendant.[11] In regard to this evidence, a defendant must show bad faith on the part of the police in destroying or failing to preserve such evidence.[12] The United States Supreme Court[13] has limited such a finding of bad faith to–

> ... those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad

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[11] *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988).

[12] *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988).

[13] Washington law is coextensive with federal law on this issue. *See State v. Ortiz,* 119 Wn.2d 294, 304, 831 P.2d 1060 (1992) and *State v. Wittenbarger*, 124 Wn.2d at 481.

> faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.[[14]]

The reasons for treating these two types of evidence–materially exculpatory and potentially useful–differently has been explained by the courts.

> Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it … [[15]]

The Supreme Court in Youngblood illustrated how courts are to treat "potentially useful evidence." In Youngblood, a young boy was sexually assaulted. A doctor took semen swabs from the boy's rectum and collected the boy's clothes (which had semen stains). The clothes were not refrigerated, which

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[14] *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988).
[15] *State v. Wittenbarger*, 124 Wn.2d at 481(internal citations omitted).

would have helped preserve any potential evidence, and no tests were performed on the samples or clothes for over a year. When tests finally were performed the results were inconclusive.[16] The Supreme Court explained why the evidence that was not preserved was not "potentially useful evidence"–

> The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*. Second, we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent "*before* the evidence was destroyed." Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.[17]

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[16] *Arizona v. Youngblood*, 109 S.Ct. at 335.

[17] *Arizona v. Youngblood*, 109 S.Ct. at 336, n.* (internal citations omitted). *See also State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992) (semen samples putrefied from bacterial growth because they were not properly preserved through either freezing or drying; unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law); *State v. Hanna*, 123 Wn.2d 704, 714, 871 P.2d 135 (1994), *cert. denied* 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994) (in vehicular homicide prosecution state patrol failed to preserve photographs of skid marks and vehicle for defense expert; defendant showed neither bad faith nor reasonable possibility the missing evidence affected defendant's ability to present a defense, so dismissal not warranted).

In Illinois v. Fisher,[18] the defendant was charged with cocaine possession in 1988. The defense made a discovery request seeking all physical evidence the prosecution intended to use at trial. The prosecution responded that all such evidence would be made available at a reasonable time. Four tests conducted by the state crime lab confirmed the substance seized from the defendant was cocaine. The defendant thereafter failed to appear and remained a fugitive for over ten years. He was finally caught in Tennessee in November 1999. The defense thereafter learned from the prosecution that the cocaine had been destroyed in September 1999 in accordance with established police evidence retention policies. The defense's motion to dismiss due to the destroyed evidence was denied by the trial court and the defendant was convicted as charged. An Illinois appellate court reversed the conviction holding that no showing of police bad faith was necessary when the State destroys evidence in existence when sought by the defense through a discovery request.

The Supreme Court reversed the Illinois appellate court and reinstated the conviction, saying–

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[18] *Illinois v. Fisher,* 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).

We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. In *Youngblood*, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." We concluded that the failure to preserve this "potentially useful evidence" does not violate due process *"unless a criminal defendant can show bad faith on the part of the police."* (emphasis added).

The substance seized from respondent was plainly the sort of "potentially useful evidence" referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady* and *Agurs*. At most, respondent could hope that, had the evidence been preserved, a fifth test conducted on the substance would have exonerated him. But respondent did not allege, nor did the Appellate Court find, that the Chicago police acted in bad faith when they destroyed the substance. Quite the contrary, police testing indicated that the chemical makeup of the substance inculpated, not exculpated, respondent, and it is undisputed that police acted in "good faith and in accord with their normal practice". Under *Youngblood*, then, respondent has failed to establish a due process violation.

We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police. Indeed, the result reached in this case demonstrates why such a per se rule would negate the very reason we adopted the bad-faith requirement in the first place: to "limi[t] the extent of the police's obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests

> of justice most clearly require it."
>
> We also disagree that *Youngblood* does not apply whenever the contested evidence provides a defendant's "only hope for exoneration" and is "'essential to and determinative of the outcome of the case.'" In *Youngblood*, the Arizona Court of Appeals said that the destroyed evidence "could [have] eliminate[d] the defendant as a perpetrator." Similarly here, an additional test might have provided the defendant with an opportunity to show that the police tests were mistaken. It is thus difficult to distinguish the two cases on this basis. But in any event, the applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between "material exculpatory" evidence and "potentially useful" evidence. As we have held, the substance destroyed here was, at best, "potentially useful" evidence, and therefore *Youngblood's* bad-faith requirement applies.[[19]]

D. Discussion.

Wittenbarger/Trombetta Does Not Apply

Detective Tim Scott obtained a destruction order for the marijuana plants from the court prior to disposing of the marijuana seized from the defendant's property (order signed August 21, 2009). (CP 37-38). In signing the destruction order the court specifically found that "storage and preservation of the marijuana plants has limited evidentiary value, and is

[19] *Illinois v. Fisher,* 124 S.Ct. at 1202-03. (Citations omitted.)

unnecessary to ensure the defendant has the opportunity for independent laboratory analysis conducted on said marijuana plants . . . ". (CP 37). The order authorized destruction of the plants "after said items have been inventoried, photographed, and a representative sample collected to preserve their evidentiary value for subsequent proceedings." (CP 37-38). The Defendant does not argue that Detective Scott failed to follow the court's order by failing to inventory, photograph and take a representative sample of the marijuana plants prior to destruction.

On the onset the State argues that the destruction of the marijuana plants does not fall within the parameters of Wittenbarger/Trombetta. The principles discussed in Wittenbarger/Trombetta, and in the other cases addressing evidence destruction apply to situations where the State unilaterally destroyed or lost evidence. Those cases are distinguishable from the facts in this case where the court ordered the destruction after finding preservation of the plants had limited evidentiary value. Accordingly, Defendant's motion herein fails.

If Wittenbarger/Trombetta Applies, The Defense Has Failed To Show That Dismissal Is Appropriate For The Loss Of Evidence.

The Defendant argues that destruction of the marijuana plants prevented him from evaluating the "amount of useable marijuana" to determine whether it exceeded the sixty (60) day supply under the statute. WAC 246-75-010(3) defines a sixty (60) day supply as; nor more than twenty-four (24) ounces of usable marijuana, and no more than fifteen (15) plants. The report of Detective Scott indicates that eighty-eight (88) growing marijuana plants were seized from defendant's property when the search warrant was executed. Thus, whether the Defendant possessed more than twenty-four (24) ounces of useable marijuana is irrelevant as he exceeded the fifteen (15) plant restriction.

Accordingly, the Defendant fails to establish the first prong of the Wittenbarger/Trombetta materially exculpatory evidence test (that the marijuana plants possessed an exculpatory value that was apparent prior to destruction). Unless both prongs of the Wittenbarger/Trombetta test are met, the argument fails. The inventory and pictures of the seized plants are sufficient preservation of the plants such that the

second prong of the Wittenbarger/Trombetta test, availability of comparable evidence for the defense, remains intact.

Potentially Exculpatory Evidence

To support a challenge based upon destruction of potentially useful evidence, the Defendant must establish bad faith on the part of the police in destroying or failing to preserve the marijuana plants. Potentially useful evidence is evidence that might have exonerated the defendant. Youngblood, supra.

Because the issue in this case is whether the Defendant possessed more than fifteen (15) plants, not whether he possessed more than twenty-four (24) ounces of useable marijuana, the marijuana plants do not meet the standard of potentially useful evidence. The Defendant has not otherwise advanced any argument why the marijuana plants constitute evidence which might exonerate him. Absent some showing by the defendant that the marijuana plants meet the definition of "potentially useful evidence", his argument fails. Furthermore, there is no evidence in the record to support an allegation or inference that the police herein acted in bad faith in permitting the evidence to be destroyed. To the contrary, the State argues that procurement of a court order by the police to

destroy the marijuana plants, thus subjecting the issue of destruction to judicial review, eliminates any possible claim of bad faith. The burden is on the appellant to prove bad faith by the police. The appellant has not met his burden in establishing that the marijuana plants were potentially useful evidence, or that the policed acted in bad faith. Accordingly, the court did not error in denying appellant's motion to dismiss.

4.4 The court did not error in denying defendant's motion to dismiss for alleged Franks violation.

The seminal federal case involving the review of a search warrant alleged to have material omissions of fact is Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978). The Washington Supreme Court thoroughly analyzed the current impact of Franks in State v. Garrison, 118 Wn.2d 870, 872-75, 827 P.2d 1388 (1992). This analysis is so complete that the entire excerpt of the opinion is as follows:

> Defendant contends that Detective Jensen "recklessly omitted [from his affidavit] the informant's [Nichols] statement that the contraband had been moved from the residence to be searched to another, unknown location." Brief of Appellant, at 26. The only support for a claim of "reckless" omission is a transcript, prepared by defendant, of five questions and answers from the taped interview with Nichols. The transcription is set forth in the appendix.

Defendant's challenge falls far short of what is required. The seminal case is Franks v. Delaware, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). The Court held that where

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

Franks, at 155-56.

The Franks test for material misrepresentations applies to allegations of material omissions. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The Franks opinion is clear that there must be allegations of deliberate falsehood [or deliberate omission] or of a reckless disregard of the truth. Allegations must be accompanied by an offer of proof. Also, "[a]llegations of negligence or innocent mistake are insufficient." Franks, at 171; State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981).

If these requirements are not met the inquiry ends. If these requirements are met, and the false representation or omitted material is relevant to establishment of probable cause, the affidavit must be examined. If relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are considered as part of the affidavit. If the affidavit with the matter deleted or inserted, as appropriate, remains

sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing. Franks, at 171-72; State v. Cord, supra.

Defendant's motion to suppress is not part of the record. We have only the transcript of the five questions and answers and defendant's assertion that omission of this information was a reckless omission. The rest of the 45-minute interview is not in the record.

To prove reckless disregard of the truth, as is defendant's burden, defendant relies solely on State v. Jones, 55 Wn. App. 343, 777 P.2d 1053 (1989) which seems to hold that an inference of reckless disregard must be made from the omission of facts "clearly critical to a finding of probable cause". The Court of Appeals relied on State v. Jones, supra, and dicta in United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980).

Relying on such an inference to establish reckless disregard is not proper. The court in United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990) cogently recognized the error in such reliance: "[S]uch an inference collapses into a single inquiry the two elements - 'intentionally' and 'materiality' - which Franks states are independently necessary.

Defendant failed to prove anything about reckless disregard for the truth by the omission, except the content of the omission. That is insufficient. In any event, even if the omitted material were contained in the affidavit, it would not defeat the establishment of probable cause. All it suggests is that if defendant and her mother had found another place to live then the informant "guessed" they would have moved the items with them. It is clear that the informant did not know whether they

had moved. The affidavit sets forth sufficient statements of the detective's investigation, subsequent to the recording, leading him to believe defendant still lived at the mobile home. Given a reasonable belief that defendant still lived at the mobile home, the omitted material supports the belief that these personal items would still be there. Judge Hanley, in denying the motion, accurately observed:

> The types of materials sought were, as the State argues, the type normally to be used by or in the proximity to defendant and her family. It seems at least as logical for the officer seeking the search warrant to believe that they would be so found rather than rely upon the "belief" of the informant. There is no sufficient showing that the omission was made intentionally or with reckless disregard for the truth.

Clerk's Papers, at 55.

One additional observation is necessary. The Court of Appeals stated that the omitted statement vitiated the search warrant because it "tends to negate probable cause". That is not the proper inquiry. The challenged information must be necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 156, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). The Court of Appeals' statement confuses materiality or relevance as it relates to establishment of bad motive with the separate inquiry whether the information is necessary to the probable cause determination. See United States v. Reivich, 793 F.2d 957 (8th Cir. 1986). A court finding "materiality" in the sense that an omission may be said to rise to the requisite level of misrepresentation under Franks

> may think it has made the second Franks finding and may invalidate a warrant after concluding only that the additional information *might* have affected the probable cause determination and not that the supplemented warrant *could not* have supported the existence of probable cause.

Reivich, at 962. See Colkley, at 301 ("[o]mitted information that is potentially relevant but not dispositive is not enough to warrant a Franks hearing").

In Garrison the Supreme Court upheld the conviction and search warrant, reversing the Court of Appeals, and found that the omission of the officer did not rise to the level of a reckless, was not related to a material fact, and that such inferences could not be properly made by the court absent proof by the defendant. Garrision has been followed in several subsequent cases. State v. Herzog, 73 Wn.App. 34 (Feb. 1994)(recantation unknown to officers due to rapidly developing circumstances and identification of defendant qualified by "it could be him" not material, nor intentionally or recklessly omitted from affidavit); State v. Taylor, 74 Wn.App. 111(April 1994)(informant's drug addiction and pending charges, as well as misstatement of "moving controlled buy" as occurring at residence, held not material, reckless or intentional); State v.

Olson, 74 Wn.App. 126 (April 1994)(use of inaccurate or false information, innocently or merely negligently, not subject to excise from affidavit) State v. Gentry, 125 Wn.2d 570 (Jan. 1995)(Defendant's claim of omission of dissimilarities between two witness statements not intentional or reckless and, even if revised, affidavit established probable cause).

Appellant's position is that Detective Scott recklessly omitted from his search warrant affidavit details of the October 2008 search of appellant's property. Specifically, that on that occasion Daniel DeHart showed officers a medical authorization, after which the officers allowed him to keep six (6) marijuana plants along with those that were drying. Appellant argues that the officer's actions somehow gave Mr. DeHart a "go-ahead" to continue to grow marijuana, and that this was relevant information for the magistrate signing the present warrant. Appellant does not allege in his brief that Detective Scott was aware of the prior search, or explain how this information is relevant to probable cause.

The court found that appellant had failed to present a substantial showing of deliberate falsehood or omission, or of a reckless disregard for the truth, or that it was relevant to the

determination of probable case. Thus the court ruled appellant was not entitled to an evidentiary Franks hearing. The court based its decision on the fact that the medical marijuana defense is an affirmative defense, and does not defeat probable cause. This ruling is supported by case law.

> "As an affirmative defense, the compassionate use 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."

State v. Fry, 168 Wash. 2d 1, 10, 228 P.3d 1, 6 (2010). Accordingly, if medical marijuana authorization does not defeat probable cause, existence of a prior authorization is not material under the context of Franks v. Delaware, supra.

The court did not error in denying appellant an evidentiary hearing under Franks v. Delaware.

4.5 The rebuttable presumption in WAC 246-75-010 does not apply to possession of marijuana plants.

The appellant was charged with Unlawful Manufacture of Marijuana under RCW 69.50.401(2)(c)., not Unlawful

Possession of Marijuana. Although the medical marijuana affirmative defense applies to both charges, it is important to recognize this distinction. The allegations in this case involved appellant's growing of eighty-eight (88) marijuana plants. The stipulated facts supporting the court's finding of guilt include a statement that law enforcement found eighty-eight (88) plants on appellant's property. (CP 160-162). Appellant confessed to possessing at least forty (40) marijuana plants. (CP 160-162). RCW 69.51A.040 provides an affirmative defense (medical marijuana) to the charge if the defendant satisfies the provisions of the statute, including possession of no more than a sixty (60) day supply of marijuana.

> (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.

RCW 69.51A.040 (Emphasis added).

WAC 246-75-010 defines the presumptive sixty-day supply of medical marijuana as:

> (3) Presumptive sixty-day supply.
>
> (a) A qualifying patient and a designated provider may possess a total of no more than twenty-four ounces of useable marijuana, and no more than fifteen plants.
>
> . . .

"Useable marijuana" and "plant" have separate and distinctive meanings under WAC 246-75-010. They are not interchangeable.

Useable marijuana is defined under WAC 246-75-010(1)(d) as:

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

Under this definition "useable marijuana" does not include the growing plants. Plants are defined within the WAC as:

> "Plant" means any marijuana plant in any stage of growth.

WAC 246-75-010(1)(b). Thus, as used within the WAC, plant or plants do not encompass the harvested dried leaves and flowers of the marijuana plant. A defendant may violate the presumptive sixty day supply by; (1) possessing more than twenty-four useable ounces, or (2) by possessing more than fifteen plants.

WAC 246-75-101(3)(c) provides "the presumption in this section may be overcome with evidence of a qualifying patient's necessary medical use." In granting the State's motion to exclude the medical marijuana defense the trial court ruled that this section could be used to overcome the presumptive sixty-day supply for useable marijuana (24 ounces), but could not be used to overcome the presumptive fifteen (15) plant limitation. The reasoning behind the court's ruling was based on its clear

reading of the definition of "plant". As that definition included marijuana plants "at any stage of growth", it would require a strained or nonsensical interpretation to then allow a person to overcome the presumptive fifteen (15) plant limitation with evidence of medical need. The definition of plant takes into consideration those that are non-producing (any stage of growth), or those that have been harvested. With that in mind, a person could possess 500, 1000 or more non-producing plants or harvested plants, arguing that because they were not producing, his or her medical needs exceeded the fifteen (15) plant limitation. Clearly this was not the intent of our legislature in establishing the presumptive sixty-day supply.

Respondent has been unable to find any comparable cases in Washington or outside the state which address this particular issue. However, a plain reading of the statute and WAC 246-75-101 supports the court's ruling. The court did not commit error.

Alternatively respondent requests this court to review de novo the additional grounds argued for exclusion of the medical marijuana defense not ruled upon by the trial court. At trial the

State asked the court to exclude the medical marijuana affirmative defense as follows:

> Excluding the defense from introducing the medical marijuana defense pursuant to RCW 69.51 A without first establishing a foundation for the defense; and
>
> Excluding the marijuana prescription for Daniel DeHart unless testimony is presented at trial from the physician issuing the prescription

(CP 128-129, RP 80-83). Appellant's offer of proof failed to include medical testimony establishing the patient, Daniel DeHart, met the conditions of a qualifying patient, or testimony establishing his medical marijuana needs exceeded the presumptive limit of fifteen (15) plants, or establish a foundation for admission of the medical authorization. (RP 79-80, 83-86). The State specifically argued the offer of proof failed as; (1) appellant possessed eighty-eight (88) plants, which exceeded the presumptive sixty (60) day supply of fifteen (15) plants under the statute and WAC, (2) no showing of medical testimony establishing that Daniel DeHart's condition qualified under the statute or WAC for medical marijuana, (3) no showing of anticipated testimony from the physician issuing the medical marijuana authorization for authentication of the

prescription, (4) no showing of medical testimony concerning what Daniel DeHart's medical needs were for a sixty (60) day supply. (RP 80-83). The court failed to rule on the specific basis argued by the State for exclusion of the defense. On October 29, 2012 the State again asked the court to rule on the States alternative basis for exclusion of the medical marijuana defense, and presented the court with its proposed order. (RP 110-111, CP 181-183). The court declined to do so. (CP 180).

Respondent requests this court review de novo the additional legal basis for the State's motion to exclude the medical marijuana defense and hold the appellant failed to make a prima facie showing the defense applied.

In 1998 Washington State enacted the Medical Use of Marijuana Act, 69.51A. To avail themselves of the medical marijuana affirmative defense a patient, or designated provider, must:

> (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 (medical authorization, designation as caregiver) to law enforcement who questioned the patient regarding his medical use of marijuana.

69.51A.040 (4). A qualifying patient means:

> (a) is a patient of a physician licensed under chapter 18.71 or 18.57 CW;
>
> (b) has been diagnosed by that physician as having a terminal or debilitating medical condition;
>
> (c) is a resident of the state of Washington at the time of the diagnosis; and
>
> (d) has been advised by that physician that they may benefit from the medical use of marijuana.

The patient or designated provider must prove compliance with the statute to avail them of the affirmative defense. RCW 69.51A.040(2).

Respondent argues that without the testimony of the physician that diagnosed Daniel DeHart (patient), and issued the medical marijuana authorization, appellant would have been unable to meet his burden at trial to establish the affirmative defense. Appellant's offer of proof did not include testimony from Mr. DeHart's treating physician that diagnosed him, or issued him the marijuana authorization. Appellant would have been unable to establish that Mr. DeHart, in fact, was a qualified patient under

the statute, or that his medical marijuana needs exceeded the fifteen (15) plant presumptive limit, or establish a foundation for admission of the medial authorization. Therefore, the State's specific basis for exclusion of the affirmative defense should have been granted. Respondent asks this court to rule that appellant's offer of proof was insufficient to warrant admission of the medical marijuana affirmative defense.

4.6 The court properly excluded the proposed testimony of defense expert, Gary Ackerson, as his testimony was irrelevant to whether Mr. Browne exceeded the fifteen (15) plant limitation.

The court ruled that because defense expert, Gary Ackerson, proposed testimony involved ascertaining how much useable marijuana could be harvested from growing plants, it was irrelevant when the allegation involved possession of marijuana plants. The court's ruling on this issue dovetails with its ruling that the rebuttable presumption under WAC 246-75-101 does not apply to the fifteen (15) plant limitation. The State incorporates its argument as set forth in paragraph 4.5 above.

V. CONCLUSION

Whereas the appellant did not challenge probable cause for issuance of the search warrant with the trial court, he is foreclosed from doing so for the first time on appeal. The affidavit for search warrant contained sufficient probable cause for issuance of the search warrant for appellant's property. The eighty eight (88) marijuana plants were not materially exculpatory or potentially useful such that their destruction pursuant to court order violated appellant's due process rights. Appellant made an insufficient showing of deliberate or intentional falsehoods, or reckless disregard for the truth, by Detective Scott when the October 2008 search of appellant's property was not included in the affidavit for search warrant, thus no Franks hearing was warranted. Furthermore, inclusion of the 2008 search in the affidavit for search warrant would not have affected the magistrate's probable cause determination.

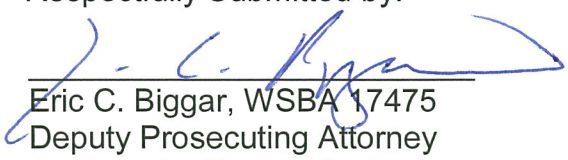
The trial court did not error in excluding the medical marijuana affirmative defense on the basis the rebuttable presumption under WAC 246-75-101 does not apply to the fifteen (15) plant limitation for a sixty (60) day supply. Accordingly, the

court also did not error in excluding proposed defense expert, Gary Ackerman, from testifying about the yield of useable marijuana from marijuana plants as such was irrelevant. Lastly, the court should review de novo the State's additional basis for exclusion of the medical marijuana affirmative defense not ruled upon by the trial court. Appellant failed to establish in his offer of proof that he would have been able prove by a preponderance of the evidence that he could have met the standards under RCW 69.51A.040 for admissibility.

The court should affirm appellant's conviction and sentence for Unlawful Manufacture of Marijuana.

Dated: 4/24/13

Respectfully Submitted by:



Eric C. Biggar, WSBA 17475
Deputy Prosecuting Attorney
Attorney for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Appellant,	)	NO. 311562
vs.	)	AFFIDAVIT OF MAILING
PAUL D. BROWNE, Respondent.	)	

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 24th day of April, 2013, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of Respondent, addressed to:

Frank L. Cikutovich
Attorney at Law
1403 W. Broadway Ave.
Spokane, WA 99201-1901

Paul Desmond Browne
P.O. Box 261
Manson, WA 98831-0261

SUBSCRIBED AND SWORN to before me this 24th day of April, 2013.

NOTARY PUBLIC in and for the State of Washington, residing at East Wenatchee; my commission expires 02/26/2015.