

Supreme Court No. 90281-0
Court of Appeals No. 69911-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent.

v.

WILLIAM MICHAEL REIS, Petitioner.

PETITION FOR REVIEW

Kurt Boehl, WSBA No. 36627
Law Office of Kurt E. Boehl, PLLC
8420 Dayton Ave N, Suite 102
Seattle, WA 98103
kurt@keblaw.com
Phone 206-728-0200
Fax 206-624-6224

Stephanie Boehl, WSBA No. 39501
Law Office of Kurt E. Boehl, PLLC
8420 Dayton Ave N, Suite 102
Seattle, WA 98103
stephanie@keblaw.com
Phone 206-728-0200
Fax 206-624-6224

Received
Washington State Supreme Court

MAY 27 2014

Ronald R. Carpenter
Clerk

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2014 MAY 30 PM 3:19

TABLE OF CONTENTS

A. Identity of Petitioner 1

B. Court of Appeals Decision..... 1

C. Issues Presented for Review 1

1. In 2011, the Washington State Legislature amended the state’s medical cannabis laws, and accordingly, the plain language of RCW 69.51A.040 states that the possession of cannabis in accordance with the terms and conditions of Chapter 69.51A RCW “does not constitute a crime.” Does this provision legalize the possession of medical cannabis under certain circumstances, or does it merely allow patients’ to assert an affirmative defense?..... 1

2. Mr. Reis’ home was searched with regard to a suspected cannabis grow. In the affidavit for search warrant, law enforcement failed to provide any evidence Mr. Reis’s small grow was in violation of the state’s medical cannabis laws. Assuming RCW 69.51A.040 legalizes the possession of cannabis in certain circumstances, did the search of Mr. Reis’ home violate his rights under article I, section 7 of the Washington State Constitution?..... 1

D. Statement of the Case..... 1

E. Summary of Argument 4

F. Argument 6

1. RCW 69.51A.040 Legalizes the Possession of Cannabis in Certain Circumstances. 7

a. The court of appeal’s decision conflicts with decisions by this Court regarding the legal effect of a governor’s partial veto on provisions not vetoed. 10

b. Assuming there is an ambiguity, the court of appeal’s decision conflicts with decisions by this Court regarding statutory interpretation of criminal and remedial statutes. 15

i.	Under the rule of lenity, the court must construe the statute strictly against the state and in favor of the accused...	16
ii.	As a remedial statute, RCW 69.51A.040 must be construed in favor of the patients it was enacted to protect, necessitating decriminalization of cannabis, not an affirmative defense.....	16
iii.	The governor’s veto message is not conclusive of legislative intent.	17
2.	The Search of Mr. Reis’ Home was Unlawful Because the Affidavit Failed to Address Whether Mr. Reis’ Activity Violated Chapter 69.51A RCW.	19
G.	Conclusion	20

TABLE OF AUTHORITIES

Cases

Hallin v. Trent, 94 Wn.2d 671, 619 P.2d 357 (1980) 11

In re Bankruptcy of F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303
(1992)..... 19

Matter of Myers, 105 Wn.2d 257, 714 P.2d 303 (1986)..... 17

Peet v. Mills, 76 Wn. 437, 136 P. 685 (1913)..... 17

Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 104 P.2d 478 (1940) 11, 14

Spokane County Health Dist. v. Brockett, 120 Wn.2d 140, 839 P.2d 324
(1992)..... 19

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201, (2007)..... 10

State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001)..... 20

State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995) 6, 7

State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010) 5, 7

State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984)..... 16

State v. Grant, 89 Wn.2d 678, 575 P.2d 210 (1978)..... 17

State v. Hobart, 94 Wn.2d 437, 617 P.2d 429 (1980)..... 20

State v. Jackson, 61 Wn.App. 86, 809 P.2d 221 (1991) 16

State v. Knowles, 46 Wn.App. 426, 730 P.2d 738 (1986)..... 16

State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013)..... 5, 14, 15

State v. Neth, 165 Wn.2d 177, 196 P.3d 658, (2008)..... 6, 7, 19, 20

State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973)..... 6

State v. Ramirez, 140 Wn.App. 278, 165 P.3d 61 (2007) 19

<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	7
<u>United States v. \$186,416.00 in U.S. Currency</u> , 590 F.3d 942, 948 (9th Cir. 2010).....	7
<u>Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State</u> , 101 Wn.2d 536, 682 P.2d 869 (1984).....	12, 13, 14
<u>Washington State Grange v. Locke</u> , 153 Wn.2d 475, 105 P.3d 9 (2005)	12, 18
<u>Washington State Legislator v. Lowry</u> , 131 Wn.2d 309, 931 P.2d 885 (1997).....	18

Statutes

RCW 69.51A.005.....	8
RCW 69.51A.010.....	8, 19
RCW 69.51A.040	1, 19
RCW 69.51A.085.....	8

Other Authorities

2011 Wash. Laws ch. 181	9
E2SSB 5073 (2011)	5, 9, 10
Governor Gregoire's veto message on E2SSB 5073 (April 29, 2011).....	17

Constitutional Provisions

Const. art. 3, § 12 (amend. 62).....	11
--------------------------------------	----

A. Identity of Petitioner

William Reis asks this Court to accept review of the court of appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Mr. Reis seeks review of the published opinion of the Court of Appeals, Division I, filed March 31, 2014, which affirmed the denial of his motion to suppress evidence. A copy of the decision is in the Appendix at pages A-Q.

C. Issues Presented for Review

1. In 2011, the Washington State Legislature amended the state's medical cannabis laws, and accordingly, the plain language of RCW 69.51A.040 states that the possession of cannabis in accordance with the terms and conditions of Chapter 69.51A RCW "does not constitute a crime." Does this provision legalize the possession of medical cannabis under certain circumstances, or does it merely allow patients' to assert an affirmative defense?
2. Mr. Reis' home was searched with regard to a suspected cannabis grow. In the affidavit for search warrant, law enforcement failed to provide any evidence Mr. Reis's small grow was in violation of the state's medical cannabis laws. Assuming RCW 69.51A.040 legalizes the possession of cannabis in certain circumstances, did the search of Mr. Reis' home violate his rights under article I, section 7 of the Washington State Constitution?

D. Statement of the Case

Defendant, Mr. Reis, and codefendant, Rachel Lynn Reis, are charged with a violation of the controlled substances act, manufacturing of

marijuana.¹ CP 1. The evidence supporting this charge was obtained from a search of Mr. Reis' home at 12225 Shorewood Dr. SW, Burien, WA 98146 ("Shorewood Drive Property" or "Mr. Reis' home"). Rachel Lynn Reis is Mr. Reis' daughter. She also resides at the Shorewood Drive Property, with her father. Rachel Lynn Reis is not a party to this petition for review.

The search of Mr. Reis' home was executed pursuant to a search warrant issued on May 15, 2012. CP 50-51. Probable cause to support the search warrant was based on the affidavit of Officer Thomas Calabrese. CP 21-27. Officer Calabrese's affidavit can be summarized as follows.

At an undisclosed date and time, an anonymous informant contacted Officer Calabrese and said merely that a "William" was growing marijuana in the Shorewood area of Burien. CP 23. Sometime thereafter, Officer Calabrese, while driving in the Shorewood area, noticed an undisclosed number of teenage cannabis plants sitting on the back deck of Mr. Reis' home. Id. Officer Calabrese parked his vehicle and entered a neighbor's property. CP 23. From the neighboring property, the officer claimed to hear "the distinct sound of humming coming from . . . the Northwest side of the home" and observed that "one of the daylight

¹ The terms "marijuana" and "cannabis" are synonymous with each other. That said, Chapter 69.51A RCW refers only to the term "cannabis," whereas Chapter 69.50 RCW generally refers to the term "marijuana."

basement windows was covered on the inside with black plastic.” Id.

Officer Calabrese also noticed that “there was a small amount of condensation on the interior of this window.” Id.

Officer Calabrese’s affidavit also includes a summary of Mr. Reis’ prior criminal history, which included a 2005 arrest and VUCSA and VUFA charge for growing cannabis in the basement of his home, and a pending charge related to a 2011 arrest for possession of 1.3 grams of cannabis. CP 26.

Officer Calabrese’s affidavit fails to mention or address Washington State’s medical cannabis laws (Chapter 69.51A RCW). For example, Officer Calabrese’s affidavit fails to indicate the number of cannabis plants he witnessed Mr. Reis attending to on his back deck, and whether the number of plants exceeded the fifteen plant limit under RCW 69.51A.040(1).

Based on the forgoing information, Officer Calabrese sought and obtained a search warrant for Mr. Reis’ home. Upon executing the warrant, officers discovered and seized 6 cannabis plants located on Mr. Reis’ back deck, and from inside the home officers seized 31 juvenile plants and roughly 13 pounds of cannabis. CP 5-6. It is unclear, from the Certification for Determination of Probable Cause, whether those 13 pounds included leaf, trim, or other non-useable plant matter. Id. Under

the state's medical cannabis laws, patients may collectively grow up to 45 plants and possess 24 ounces (4 pounds, 8 ounces) of useable cannabis. RCW 69.51A.085.

Mr. Reis moved to suppress the evidence obtained from the search of his home. CP 9-20. On February 6, 2013, the trial court denied Mr. Reis' motion. CP 88-93. Mr. Reis filed a Notice for Discretionary Review on February 12, 2013, and an emergency motion for discretionary review on February 27, 2013. CP 95. The Court of Appeals granted discretionary review and issued a published opinion on March 21, 2014. This petition for review presents a very similar issue as provided in a separate petition for review filed with this Court on February 10, 2013, State of Washington v. Daniel Kenneth Ellis, Supreme Court no. 89928-2.

E. Summary of Argument

In 2011, the Washington State Legislature amended the state's medical cannabis laws, as provided in Chapter 69.51A RCW. As a result of this amendment, the possession of cannabis, in compliance with the terms and conditions of Chapter 69.51A RCW, "does not constitute a crime." RCW 69.51A.040 (emphasis added). Assuming an individual may legally possess medical cannabis under certain circumstances, this activity, in and of itself, is not evidence of a crime, and law enforcement may not arrest individuals or search their home based solely on such

activity. Something more is required; specifically, probable cause that the individual is in violation of the terms and conditions of Chapter 69.51A RCW.

In its published opinion, the court of appeals held that despite the language cited above, qualifying patients under the Act are able to assert only an affirmative defense at trial to a charge of a violation of marijuana laws. An affirmative defense does not legalize an activity, nor negate probable cause that a crime has been committed.²

The court's interpretation of RCW 69.51A.040 is in error. The court relied upon legislative history, specifically, the governor's partial veto of E2SSB 5073 (2011), to frustrate the plain language of the statute.³ Even assuming the plain language of the statute is ambiguous. The court's interpretation is contrary to rules of statutory interpretation and in conflict with established case law by this Court regarding the legal effect of a governor's partial veto and this Courts recent decision that "in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense."⁴

Review by this Court is also imperative because this petition involves a substantial public interest that should be determined by the

² See *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

³ See CP 53-81 for a copy of E2SSB 5073, subject to the governor's partial veto.

⁴ *State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472, 478 (2013).

Supreme Court. Hundreds, if not thousands, of Washington patients, who rely on medical cannabis in the treatment of their terminal or debilitating illness, are confused and distraught by the court of appeal's decision. Compassion for those patients necessitates this Court's review of this decision, which if left unchanged, will result in the arrest of patients who are making every effort to comply with state law. This heavy handed approach to medical cannabis, and the resulting humiliation to patients who are arrested, is not necessary and contrary to the law.

Here, law enforcement failed to introduce any evidence of such a violation. Therefore, Mr. Reis respectfully requests this Court to reverse the trial court's order to deny the defendant's motion to suppress evidence.

F. Argument

A search is a governmental intrusion into a person's reasonable and justifiable expectation of privacy.⁵ For a search warrant to be valid, it must be supported by probable cause.⁶ In determining the validity of a search warrant, the court is limited to the information and circumstances contained within the four corners of the underlying affidavit.⁷ A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the

⁵ State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973).

⁶ State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

⁷ State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658, (2008).

criminal activity will be found in the place to be searched⁸. State officers cannot obtain a valid search warrant when there is no probable cause of a state crime, even if there is probable cause that the defendant is involved in federal criminal activity.⁹

1. RCW 69.51A.040 Legalizes the Possession of Cannabis in Certain Circumstances.

In November 1998, the citizens of Washington enacted Initiative 692, the Medical Use of Marijuana Act. The Act is codified in Chapter 69.51A RCW. The Act provided patients and caregivers who meet the Act's requirements with an affirmative defense when charged by the state with possession or manufacturing medical cannabis. Courts interpreted the Act not to prohibit the arrest of those found with medical cannabis, but to provide for their eventual exoneration through court proceedings. See State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). In an effort to correct this issue, the legislature, effective July 2011, amended the Act, converting what had been an affirmative defense to an exception to the general controlled substances statute. The applicable statutory provision now reads:

⁸ Neth, 165 Wn. 2d at 182; State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing Cole, 128 Wn.2d at 286).

⁹ See United States v. \$186,416.00 in U.S. Currency, 590 F.3d 942, 948 (9th Cir. 2010) (because evidence supporting a marijuana grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed.)

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

(Emphasis added).

The Washington legislature also codified their intent to legalize medical cannabis, stating in RCW 69.51A.005:

[T]he legislature intends that:

- (a) Qualifying patients with terminal or debilitating medical conditions . . . shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis . . .

(Emphasis added). Thus, the Act legalizes the growing and possession of pursuant to the terms and conditions of Chapter 69.51A RCW. For a medical patient, who is not participating in a collective garden pursuant to RCW 69.51A.085, these conditions include generally that the patient is diagnosed with a terminal or debilitating medical condition (RCW 69.51A.010(4)); the patient obtained a valid authorization to use cannabis for medical purposes (RCW 69.51A.010(7)); the patient does not possess more than 15 cannabis plants (RCW 69.51A.040(1)); and law enforcement does not possess evidence that the patient converted cannabis for his or her

medical use to a personal, nonmedical use or benefit (RCW 69.51A.040(4)(b)).

It is the court of appeal's position, however, that patients must comply with a *term and condition* of Chapter 69.51A RCW that was vetoed by the governor. As noted above, the legislature significantly amended the state's medical cannabis laws in 2011.¹⁰ This legislation was subject to a partial governor veto. The governor's partial veto left intact the language cited above, but vetoed sections of the law which involved the Department of Health and the Department of Agriculture overseeing a state licensed medical cannabis industry.

Relevant to this matter, such vetoed sections included Section 901, which required the Department of Health to develop a secure, state-wide patient registry for all individuals authorized to use medical cannabis.¹¹ As a result of the Governor's veto, no such registry exists.

Even though no such registry exists, RCW 69.51A.040 still references Section 901. See generally, RCW 69.51A.040(3) ("The qualifying patient or designated provider [must] keep[] a copy of his or her proof of registration with the registry established in *section 901 of this act . . . posted prominently next to any cannabis plants.") At the bottom of the statute, however, the Code Reviser clarifies that Section 901 was

¹⁰ E2SSB 5073, 2011 Wash. Laws ch. 181; CP 53-81.

¹¹ See CP 74-76 (vetoed copy of Section 901).

vetoed by the governor. See RCW 69.51A.040 (“Reviser’s note: Section 901 of this act was vetoed by the governor.”)

As a result of these references, the court of appeals held that a patient must register in order to fully comply with the terms and conditions of the chapter. Accordingly, if “no one can register . . . qualifying patients and designated providers are left to assert an affirmative defense.” Appendix at P. This conclusion is in error.

- a. The court of appeal’s decision conflicts with decisions by this Court regarding the legal effect of a governor’s partial veto on provisions not vetoed.

The language of RCW 69.51A.040 is plain and unambiguous—the possession of cannabis, under certain circumstances, “does not constitute a crime.” Accordingly, the governor’s veto and related legislative history is irrelevant. The “court looks first to its plain language. If the plain language of the statute is unambiguous, then this court's inquiry is at an end.”¹²

Accordingly, the governor’s veto of the state-wide registry, in Section 901 of E2SSB 5073 (2011), may not defeat the plain and unambiguous language. Any reference to Section 901 within RCW 69.51A.040 was effectively removed by the partial veto. “The Governor’s veto of a portion of a measure, if the veto is not overridden, removes the

¹² State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201, (2007) (internal citations omitted).

vetoed material from the legislation as effectively as though it had never been considered by the legislature.” Hallin v. Trent, 94 Wn.2d 671, 677, 619 P.2d 357 (1980) (emphasis added). “In exercising the veto power, the governor acts as a part of the legislative bodies, and the act is to be considered now just as it would have been if the vetoed provisions had never been written into the bill at any stage of the proceedings.” Id. at 678; Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 506, 104 P.2d 478 (1940).

The court of appeals repeats the above quotes from Shelton Hotel and Hallin in its decision, but nevertheless, the opinion disregards this language. Appendix at L. Respecting the holding in Hallin, the Act must “be considered now just as it would have been if [Section 901] had never been written into the bill at any stage of the proceedings.” Hallin, 94 Wn.2d at 678. Continuing to impose the state registry as a controlling term and condition of the Act effectively writes Section 901 back into the bill. Thus, the court’s decision conflicts with this Court’s established precedent on the legal effect of vetoed material, as provided in Hallin and Shelton Hotel

No meaning should be taken from the fact that the partial veto did not actually strike out the language relating to the state registry in the legislation not vetoed. Pursuant to the state Constitution, article III, section 12, the governor may only veto entire sections of nonappropriation

bills, not portions of sections.¹³ As a result, any remaining references to Section 901 are “incidentally vetoed” and “manifestly obsolete.” Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State, 101 Wn.2d 536, 682 P.2d 869 (1984).

To the contrary, however, the court of appeals determined that Washington Federation was distinguishable because, according to the court, in that case, references to the vetoed section could be removed “without changing the meaning of the sections of the legislation not vetoed.” Appendix at N. This distinction is in error. Washington Federation is on point.

The veto in Washington Federation and the veto at issue here are almost identical in their significance to the legislation not vetoed. Washington Federation concerned a bill which significantly amended the state’s civil service laws to permit performance to be considered in matters of compensation, reduction in force, and reemployment. Washington Federation, 101 Wn.2d at 538. The governor vetoed Section 30 of the bill, which required the legislature’s future approval of subsequent rules enacted by the Department of Personnel and the Higher Education Personnel Board in regard to implementing the act. Id. The bill

¹³ Const. art. 3, § 12 (amend. 62); see generally, Washington State Grange v. Locke, 153 Wn.2d 475, 486-89, 105 P.3d 9 (2005) (history of the governor’s veto power both before and after the 62nd Amendment).

specifically provided that the rules could not become effective until after approval by the legislature. Id. If the legislature failed to adopt the resolution, numerous sections of the bill would also be null and void. Id. at 551.

Thus, in both cases, the vetoed sections imposed a condition in the law. In Washington Federation the vetoed condition was that the legislature must approve the rules. In this case, the vetoed condition was that a patient must register with the Department of Health. Likewise, in both cases, the original legislation imposed punitive measures for noncompliance with the vetoed condition. In Washington Federation the punitive measure was that sections of the law were null and void. In this case, the punitive measure was the loss of arrest protection for patients.

Nevertheless, the court of appeal's determined Washington Federation is distinguishable because in that case, reference to Section 30, and the requirement for legislative approval of the rules, had "no practical effect on the intended functioning of the statute." Appendix at N. To the contrary, "by vetoing section 30, the Governor altered the legislative scheme from one in which the Legislature reserved to itself the final decision to implement the act, to one in which the executive branch

suddenly had that power.”¹⁴ Thus, the partial veto in Washington Federation had a significant and practical effect on the intended functioning of the statute. Thus, the court’s decision conflicts with this Court’s decisions in Hallin, Shelton Hotel, and Washington Federation in regard to the interpretation and legal effect of a partial governor veto.

Under Washington Federation, when the condition precedent was removed by veto, the consequence for failing to comply was also removed. Similarly here, when the registry was removed, the consequence for failing to register was also removed. Hence, the plain language of RCW 69.51A.040 legalizes the possession of cannabis under certain circumstances, and such circumstances do not include registering with the Department of Health pursuant to Section 901. The court is not permitted to “speculate as to what the legislature intended, had it foreseen the veto . . . courts may not engage in such conjecture.”¹⁵

Moreover, the 2011 Amendment to legalize possession was recently acknowledged by this Court in Kurtz, 309 P.3d 472. In Kurtz, this Court determined that “in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense.” Id. at 478. At issue was whether the Act abrogates the common law medical necessity defense to cannabis prosecution. This Court held

¹⁴ Washington Federation, 101 Wn.2d at 551 (Rosellini, J. dissenting).

¹⁵ Shelton Hotel, 4 Wn.2d at 500.

that the Act did not, and therefore, the medical necessity defense remains available. Id. According to the opinion, the question of whether the Act legalized qualifying cannabis use was influential in the decision.¹⁶

- b. Assuming there is an ambiguity, the court of appeal's decision conflicts with decisions by this Court regarding statutory interpretation of criminal and remedial statutes.

In the alternative, assuming there is an ambiguity, under the rules of statutory construction, Chapter 69.51A RCW decriminalizes cannabis in certain circumstances, despite the governor's veto of Section 901.

The state has argued that Chapter 69.51A RCW presents an ambiguity because a separate statutory provision, RCW 69.51A.043, authorizes patients to assert an affirmative defense should they fail to register with the Department of Health, pursuant to Section 901. Thus, the state argues, because registry is impossible, the law only allows for an affirmative defense.

Assuming RCW 69.51A.043 creates an ambiguity, pursuant to the rules of statutory construction, the existence of this provision is not controlling. The fact that the law may be construed to provide qualified patients and designated providers both arrest protection (RCW 69.51A.040) and an affirmative defense (RCW 69.51A.043) is not reason

¹⁶ Id. at 478 (“The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.”).

to simply do away with the former. Especially in light of the law discussed below.

- i. Under the rule of lenity, the court must construe the statute strictly against the state and in favor of the accused.*

Assuming there is ambiguity, the rule of lenity requires Chapter 69.51A RCW to be construed in favor of Mr. Reis. “Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.”¹⁷ The policy underlying the rule of lenity is to “place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.”¹⁸ A decriminalization statute, that in effect, only provides an affirmative defense, does not “clearly and unequivocally warn people of the actions that expose them to liability.”¹⁹

- ii. As a remedial statute, RCW 69.51A.040 must be construed in favor of the patients it was enacted to protect, necessitating decriminalization of cannabis, not an affirmative defense.*

Chapter 69.51A.RCW is remedial, meant to grant protection and relief to patients and their providers. As remedial legislation, it is

¹⁷ State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

¹⁸ State v. Jackson, 61 Wn.App. 86, 93, 809 P.2d 221 (1991) (citing State v. Knowles, 46 Wn.App. 426, 432, 730 P.2d 738 (1986)).

¹⁹ Jackson, 61 Wash.App. at 93.

construed liberally in favor of the individuals it is meant to protect.²⁰ The legislature clearly enacted RCW 69.51A.040 to remedy the prior statutory scheme, which resulted in the arrest without prosecution of countless patients.

iii. The governor's veto message is not conclusive of legislative intent.

The governor's veto message is not controlling when analyzing the legislative history of Chapter 69.51A RCW; moreover, the governor's comments are contradictory and ambiguous with regard to legislative intent. To begin, the governor's veto message states that signed sections of E2SSB 5073 "provide additional state law protections."²¹ And accordingly, "[q]ualifying patients or their designated providers may grow cannabis for the patient's use or participate in a collective garden without fear of state law criminal prosecution." *Id.* This language implies that the governor interprets Chapter 69.51A RCW to legalize possession of cannabis in some instances, since an affirmative defense is only triggered

²⁰ "This court construes remedial statutes liberally in order to effect the remedial purpose for which the Legislature enacted the statute." *Matter of Myers*, 105 Wn.2d 257, 267, 714 P.2d 303 (1986) (citing *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978)). "It is a well-accepted rule that remedial statutes, seeking the correction of recognized errors and abuses in introducing some new regulation for the advancement of the public welfare, should be construed with regard to the former law and the defects or evils sought to be cured and the remedy provided." *Peet v. Mills*, 76 Wn. 437, 439, 136 P. 685 (1913). "[I]n so construing such statutes they should be interpreted liberally . . . courts will look to the old law, the mischief sought to be abolished, and the remedy proposed." *Id.*

²¹ Governor's veto message on E2SSB 5073 (April 29, 2011).

upon arrest and prosecution. Similarly, the governor goes on to state that the legislature “may remove state criminal and civil penalties While such activities may violate the federal Controlled Substances Act, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law.” Id.

In contradiction to these statements, however, the governor subsequently implies that in vetoing Section 901, patients may only assert an affirmative defense pursuant to RCW 69.51A.043.

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

Id. Thus, the governor’s veto message is ambiguous with regard to legislative intent. Moreover, these statements are not controlling. The governor, in vetoing legislation, acts in a legislative capacity. See Locke, 153 Wn.2d 475. Accordingly, the governor’s veto message is merely an expression of personal opinion as to the interpretation of the law. Id. at 490. As an opinion, the remarks of a legislator are not conclusive authority with regard to legislative intent.²²

²² “The intent of legislative sponsors of a measure is noteworthy, but not conclusive as to our interpretation of the plain language of a measure. ‘The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.’” Washington State Legislator v. Lowry, 131 Wn.2d 309, 326-27, 931 P.2d 885 (1997)

2. The Search of Mr. Reis' Home was Unlawful Because the Affidavit Failed to Address Whether Mr. Reis' Activity Violated Chapter 69.51A RCW.

Pursuant to the Fourth Amendment, a search warrant may only be issued if the application shows probable cause that the defendant is involved in criminal activity and that the evidence of the criminal activity will be found in the place to be searched.²³ Here, state law says that certain activity “does not constitute a crime,” and such individuals in compliance with the law “may not be arrested, prosecuted, or subject to other criminal sanctions.” RCW 69.51A.040. Hence, where certain activity may be legal, there is no probable cause to search.

Although Officer Calabrese’s affidavit includes evidence of an alleged cannabis grow, there is no assertion in the affidavit that the grow violated what is expressly permitted by Washington’s medical cannabis laws. This omission is fatal to the search warrant, as the warrant then does not show probable cause of a state crime. Here, there was no evidence that the grow operation exceeded the fifteen plant limit under RCW 69.51A.040(1). Nor was there evidence that Mr. Reis was not a qualified patient or designated provider under RCW 69.51A.010(1), (4).

(internal citations omitted; quoting Spokane County Health Dist. v. Brockett, 120 Wn.2d 140, 154-55, 839 P.2d 324 (1992); see also, State v. Ramirez, 140 Wn.App. 278, n. 7, 165 P.3d 61 (2007) (citing In re Bankruptcy of F.D. Processing, Inc., 119 Wn.2d 452, 461, 832 P.2d 1303 (1992)) (Statements in a Final Bill Report are not “conclusive authority” with regard to legislative intent. “On the contrary, generally, we will not turn to the comments of a single legislator to establish legislative history.”)

²³ State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

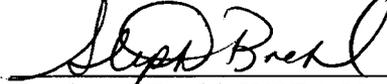
Absent Officer Calabrese’s observations of Mr. Reis tending to cannabis plants on his back deck, the facts and circumstances to support probable cause largely consisted of Mr. Reis’s criminal history. “[H]istory of the same or similar crimes . . . without other evidence . . . falls short of probable cause to search.”²⁴

G. Conclusion

In conclusion, Mr. Reis respectfully requests that this Court reverse the trial court’s order denying Mr. Reis’ motion to suppress. The court’s published decision conflicts with established precedent regarding the legal effect of legislation removed by veto. In addition, this matter involves a substantial public interest—the potential arrest and search of countless patients using medical cannabis in the treatment of a terminal or debilitating illness—and for that reason, this petition should be determined by the Supreme Court.

Respectfully submitted April 30, 2014

Law Office of Kurt E. Boehl, PLLC,



Stephanie Boehl, WSBA No. 39501
Kurt Boehl, WSBA No. 36627
Attorneys for Petitioner, Mr. Reis

²⁴ Neth, 165 Wn.2d at 185-86 (citing State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); State v. Hobart, 94 Wn.2d 437, 446, 617 P.2d 429 (1980)). “Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches.” Neth, 165 Wn.2d at 186.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 69911-3-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
WILLIAM MICHAEL REIS,)	PUBLISHED OPINION
)	
Petitioner.)	FILED: <u>March 31, 2014</u>

2014 MAR 31 AM 9:24
 COURT OF APPEALS DIV 1
 STATE OF WASHINGTON

SPEARMAN, A.C.J. — William Reis was charged with manufacturing a controlled substance in violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, after a search of his residence pursuant to a warrant revealed evidence of a marijuana growing operation. The trial court denied his motion to suppress the evidence. The issue on discretionary review is whether, following the 2011 amendments to the Medical Use of Cannabis Act, chapter 69.51A RCW, a search warrant must be based on probable cause of a violation of medical marijuana laws.¹ We conclude that “qualifying patients” and “designated providers” under the Act are able to assert only an affirmative defense at trial to a charge of a violation of marijuana laws. The search warrant here was supported by probable cause where it was based on evidence of a marijuana growing operation. We affirm.

¹ The terms “marijuana” and “cannabis” are synonymous and will be used interchangeably throughout our opinion. Chapter 69.51A RCW uses both terms.

No. 69911-3-1/2

FACTS

On May 15, 2012, King County Sheriff's Detective Thomas Calabrese sought a search warrant for William Reis's residence in Burien. Calabrese's affidavit contained the following information. After receiving an anonymous tip that a person named "William" was growing marijuana in the Shorewood area of Burien, Calabrese drove through Shorewood and observed marijuana plants on the back deck of Reis's home. He saw a man transferring the plants from smaller pots to larger ones. From the vantage point of a neighboring property, Calabrese saw black plastic covering one of the basement windows of Reis's home and condensation on that window, which was slightly open. He heard a distinct humming sound coming from the northwest side of the home. Based on his training and experience, Calabrese concluded that these were indications marijuana was being grown indoors. He ran the license plate of the car in the home's driveway and learned it was registered to William Reis. He learned that Reis had been arrested in 2005 and been charged with violation of the Uniformed Controlled Substances Act (VUCSA) and violation of the Uniformed Firearms Act (VUFA) after a search of the same house revealed a marijuana-growing operation in the basement. He also learned that Reis was found in possession of 1.3 grams of marijuana during a 2011 traffic stop. A booking photo of Reis matched the appearance of the man Calabrese had seen tending to the marijuana plants on the deck. Calabrese then attempted to contact Reis's neighbors to inquire about unusual short traffic stays or circumstances around the home that would indicate a drug-dealing operation. The neighbors refused to

No. 69911-3-1/3

speaking to Calabrese, other than to state that they were fearful of Reis. On a later date, Calabrese drove by Reis's home and again saw marijuana plants on the back deck.

The district court concluded there was probable cause to believe a violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, had been committed and issued a search warrant. The search warrant was served on May 21, 2012. Officers seized six mature cannabis plants from Reis's back deck. From inside the home, they seized 31 juvenile cannabis plants and roughly 13 pounds of cannabis. Officers also found a digital scale, high-intensity grow lights, a ledger, receipts for marijuana sales, and a bill of sale from "Chronic LLC." Clerk's Papers at 4-5, 33.

Reis was charged with a violation of the Uniform Controlled Substances Act, manufacturing of marijuana, during a period of time intervening between April 29, 2012 and May 21, 2012.² Reis moved to suppress the evidence found in his home, arguing that the search warrant was not supported by probable cause. The trial court denied his motion.³ Reis sought discretionary review, which this court granted.⁴

² Reis's daughter, Rachael Reis, resides at Reis's home and was also charged with a violation of the Uniform Controlled Substances Act. She is not a party to this petition for review.

³ The trial court concluded, "[I]t is clear that the legislature did not intend to decriminalize all marijuana grow operations, nor put the burden upon law enforcement to demonstrate that a grower of marijuana is not a qualified medical marijuana patient or a designated provider." CP at 92. Thus, it concluded, probable cause for a search warrant does not require law enforcement officers to investigate whether a person growing marijuana is authorized to possess or cultivate marijuana for medical purposes.

⁴ The trial court certified that its order involved a controlling question of law under RAP 2.3(b)(4).

No. 69911-3-1/4

DISCUSSION

This court reviews conclusions of law in an order pertaining to suppression of evidence de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

A search warrant may be issued only upon a determination of probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause requires “facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” State v. Shupe, 172 Wn. App. 341, 348, 289 P.3d 741 (2012) (quoting State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)), rev. denied, 177 Wn.2d 1010, 302 P.3d 180 (2013). In reviewing the issuance of a search warrant, the court is limited to the information contained within the affidavit supporting probable cause. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Whether the search warrant in this case was supported by probable cause involves the interpretation of RCW 69.51A.040. This court’s purpose when interpreting a statute is to enforce the intent of the legislature. Rental Housing Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). If the plain language of the statute is unambiguous, this court’s inquiry ends and the statute is enforced “in accordance with its plain meaning.” State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Under the “plain meaning rule,” this court examines the statutory scheme as a whole, considering

No. 69911-3-1/5

the language of the statute, related statutes, and other provisions of the same act. City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). This court attempts to interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the statute is subject to more than one reasonable interpretation, it is ambiguous, and the court may resort to aids of statutory construction, including examining legislative history. State v. Slattum, 173 Wn. App. 640, 649, 295 P.3d 788, rev. denied, 178 Wn.2d 1010, 308 P.3d 643 (2013).

Initially, a brief discussion of relevant Washington marijuana laws is useful. Following the state legislature's 1971 passage of the Uniform Controlled Substances Act, codified as chapter 69.50 RCW, marijuana has been a Schedule I controlled substance. RCW 69.50.204(c)(22). The possession, manufacture, and delivery of marijuana is generally prohibited under Washington law.⁵ See RCW 69.50.401-.445 (establishing offenses and penalties). In 1998, however, Washington citizens enacted Initiative 692, codified as chapter 69.51A RCW.⁶ The purpose of the Washington State Medical Use of Cannabis Act (MUCA) was to allow certain individuals suffering from terminal or debilitating medical conditions to use marijuana medicinally. RCW 69.51A.005. The MUCA provided patients and caregivers who met certain requirements an affirmative defense:

⁵ Initiative 502, passed in November 2012, legalized possession of small amounts of marijuana for individuals over 21 years of age. See RCW 69.50.4013 (possession, by person twenty-one years of age or older, of useable marijuana in amounts not exceeding those set forth in RCW 69.50.360(3) is not a violation of any provision of Washington state law). Initiative 502 has no bearing on this case.

⁶ The legislature has amended the Act several times since its enactment.

No. 69911-3-1/6

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.

Former RCW 69.51A.040(1) (1999). The statute was amended in 2007 but continued to provide for an affirmative defense to qualifying patients or designated providers charged with a violation of state laws relating to marijuana. Laws of 2007, ch. 371, § 5; former RCW 69.51A.040(2) (2010).

In State v. Fry, 168 Wn.2d 1, 5, 228 P.3d 1 (2010), the Washington Supreme Court considered whether a search warrant was supported by probable cause where police officers were informed that marijuana was being grown at a certain residence and smelled marijuana upon arrival but the defendant, Fry, presented a purported medical authorization form for marijuana. Fry argued that probable cause to search was negated when he produced the authorization. Id. at 3-4, 6. A plurality of the Court,⁷ observing that RCW 69.51A.040 established an affirmative defense against marijuana charges, concluded that the presentment of a person's purported authorization for medical marijuana was a

⁷ This opinion was signed by four justices. Four other justices concurred in result only. Id. at 20 (Chambers, J., concurring).

No. 69911-3-1/7

requirement for the affirmative defense but nonetheless did not negate probable cause for a search.⁸ Id. at 7-10. The plurality explained:

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

Id. at 10.

In 2011, the legislature made amendments to the MUCA. Laws of 2011, ch. 181. The legislature's intent, in part, was to protect qualifying patients from arrest, prosecution, criminal sanctions, and civil consequences based solely on their medical use of marijuana and to protect designated providers from the same consequences based solely on their assistance with the medical use of marijuana. Laws of 2011, ch. 181, § 102, codified as RCW 69.51A.005(2).

Following the amendments, RCW 69.51A.040 now provides:

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

⁸ The Fry plurality also observed, "It is difficult to imagine how a law enforcement officer, having been presented with a medical marijuana authorization, would be able to determine that the marijuana is otherwise being lawfully possessed . . . without some kind of search." Id. at 6.

(1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:

(i) No more than twenty-four ounces of useable cannabis;

(ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or

(iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.

(b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;

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

(3) The qualifying patient or designated provider keeps a copy of his or her proof of registration with the registry established in *section 901^[9] of this act and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence;

(4) The investigating peace officer does not possess evidence that:

(a) The designated provider has converted cannabis produced or obtained for the qualifying patient for his or her own personal use or benefit; or

(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

(5) The investigating peace officer does not possess evidence that the designated provider has served as a designated provider to more than one qualifying patient within a fifteen-day period; and

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

⁹ The "**Reviser's note" to RCW 69.51A.040 states, "Section 901 of this act was vetoed by the governor."

RCW 69.51A.040 thus provides protection against arrest, prosecution, criminal sanctions, and civil consequences for qualifying patients¹⁰ and designated providers¹¹ who, among other things, register with the department of health.¹² In contrast, qualifying patients and designated providers who do not register but otherwise meet the requirements of RCW 69.51A.040 and other specified requirements may, as before the 2011 amendments, assert an affirmative defense at trial. RCW 69.51A.043.

Reis argues that the plain language of RCW 69.51A.040, following the 2011 amendments, made the use and cultivation of medical marijuana presumptively legal in certain circumstances. He contends Fry no longer applies and that law enforcement must demonstrate probable cause of a violation of the Act to obtain a search warrant. The State's response is two-fold. First it argues that the heightened protections in RCW 69.51A.040 against arrest, prosecution,

¹⁰ "Qualifying patient' means a person who:
(a) Is a patient of a health care professional;
(b) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
(c) Is a resident of the state of Washington at the time of such diagnosis;
(d) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and (e) Has been advised by that health care professional that they may benefit from the medical use of marijuana."

RCW 69.51A.010(4).

¹¹ "Designated provider' means a person who:
(a) Is eighteen years of age or older;
(b) Has been designated in writing by a patient to serve as a designated provider under this chapter;
(c) Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and
(d) Is the designated provider to only one patient at any one time."

RCW 69.51A.010(1).

¹² The legislature's intent in enacting the 2011 amendments, as stated in RCW 69.51A.005(2), was to protect qualifying patients and designated providers from arrest, prosecution, criminal sanctions, and civil consequences based solely on their use of or assistance with medical marijuana.

No. 69911-3-I/10

criminal sanctions, and civil consequences apply only to those qualifying patients and designated providers who are included in a registry. Second, it contends that because the registry was never established (due to the governor's veto of the sections of chapter 181 that would have established a registry for qualifying patients and designated providers), nobody can meet the requirements of the statute. Thus, the State argues, a defendant who is in compliance with the MUCA, as written subsequent to the governor's veto, may only assert an affirmative defense to an alleged violation of Washington state marijuana laws. We agree with the State.

The plain language of RCW 69.51A.040 provides that “[t]he 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” if certain specified requirements are met. RCW 69.51A.040 (emphasis added). But several of the “terms and conditions” of the statute, insofar as an individual, asserts that he or she did not commit a crime and seeks the protections against arrest, prosecution, criminal sanctions, and civil consequences, cannot be met. Subsections (2), (3), and (6) set forth requirements relating to registration with the department of health or Section 901. As the code reviser's note to RCW 69.51A.040 explains,

No. 69911-3-I/11

Section 901 was vetoed by the governor.¹³ Section 901 would have required the department of health to adopt, by January 1, 2013, rules for the establishment of a registration system. Section 901 also would have, with certain exceptions, required law enforcement investigating a marijuana-related incident to make reasonable efforts to determine whether the location or person under investigation was registered before seeking a nonvehicle search warrant or arrest warrant. Ch. 181, § 901(4) (vetoed). Because there was no registry established, it is impossible for anyone to be registered or for police to check the registry before seeking a search warrant. Thus, by default, qualifying patients and designated providers are entitled only to an affirmative defense.

Reis contends that, because Section 901 was vetoed by the governor, the MUCA must be read as though Section 901 and any provision referencing the registry was never considered by the legislature. He cites Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 104 P.2d 478 (1940) and Hallin v. Trent, 94 Wn.2d 671, 619 P.2d 357 (1980). Those cases support the proposition that when the governor

¹³ The governor was concerned that the sections of the legislation that would direct employees of the state departments of health and agriculture to authorize and license cannabis businesses would require such employees to violate federal criminal law and expose them to federal prosecution, particularly where "the United States Attorneys have made it clear that state law would not provide these individuals safe harbor from federal prosecution." Laws of 2011, ch. 181, governor's veto message at 1375. With regard to the registry provisions, the Governor explained that these were associated with or dependent upon the licensing sections:

I am also open to legislation that establishes a secure and confidential registration system to provide arrest and seizure protections under state law to qualifying patients and those who assist them. Unfortunately, the provisions of Section 901 that would provide a registry for qualifying patients and designated providers beginning in January 2013 are intertwined with requirements for registration of licensed commercial producers, processors and dispensers of cannabis. Consequently, I have vetoed section 901 . . . I am not vetoing sections 402 or 406, which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed.

Id.

acts on a bill voted on by both houses of the legislature, he or she acts in a legislative capacity and the intent of the legislature cannot be considered apart from the governor's intent. Shelton Hotel, 4 Wn.2d at 506; Hallin, 94 Wn.2d at 677. Furthermore, "[t]he Governor's veto of a portion of a measure, if the veto is not overridden, removes the vetoed material from the legislation as effectively as though it had never been considered by the legislature." Hallin, 94 Wn.2d at 677; see also Shelton Hotel, 4 Wn.2d at 506 ("In exercising the veto power, the Governor acts as a part of the legislative bodies and the act is to be considered now just as it would have been if the vetoed provisions had never been written into the bill at any stage of the proceedings.") (quoting State ex rel Stiner v. Yelle, 174 Wash. 402, 408, 25 P.2d 91 (1933)).

Thus, under Hallin and Shelton Hotel, the MUCA must be read without the sections that were actually vetoed by the governor. Here, the governor vetoed Section 901 but not Section 401, which amended RCW 69.51A.040.¹⁴ Reis contends, nevertheless, that any references to Section 901 or registration/the registry that remain in Section 401/RCW 69.51A.040 are "incidentally vetoed" and "manifestly obsolete" after the Governor's veto, quoting Washington Fed'n of State Employees, AFL-CIO, Council 8, AFSCME v. State, 101 Wn.2d 536, 682 P.2d 869 (1984). Thus, he contends, subsections (2) and (6) and part of subsection (3) (through the words "section 901 of this act") of RCW 69.51A.040 were effectively removed from the statute as "terms and conditions" of lawful use for qualifying patients and designated providers. Similarly, Reis contends that,

¹⁴ The governor did not strike any language relating to the registry/registration or Section 901 from Section 401. As Reis notes, the governor may only veto entire sections of nonappropriation bills, not portions within sections. Const. art. 3, § 12 (amend. 62).

following the governor's veto of Section 901, the affirmative defense established in RCW 69.51A.043 for those who fail to register is removed as though it had never been considered by the legislature. Thus, he contends, the 2011 amendments to the MUCA made medical marijuana use presumptively legal for all qualifying patients and designated providers who met the remaining terms and conditions set forth in RCW 61.51A.040.

We reject these arguments. Washington Federation does not support the proposition that subsections (2), (6), and part of subsection (3) must be read out of the statute and not considered "terms and conditions." In Washington Federation, the state legislature amended state civil service laws to permit performance to be considered in matters of compensation, reduction in force, and reemployment. Id. at 537. The Governor approved the bill, Substitute House Bill 1226, 47th Legislature, 1st Ex. Sess. (1982), but vetoed Section 30 and all references thereto. Section 30 would have called for legislative review and approval of the proposed administrative rules for implementing the act, and the legislature's failure to approve the rules would have voided several sections of the act. Id. at 538. The Governor found that implementation of Section 30 would have created too much uncertainty as to the effectiveness of the law. Id. A union brought suit against the State and Governor, among others, challenging certain sections of the law and the validity of the governor's veto of Section 30. Id. at 539. The union argued that the Governor's veto was invalid, in relevant part,

because it was prohibited under Const. art. 3, § 12 (amend. 62) as an item veto.¹⁵ Id. at 543. The Washington Supreme Court rejected the union's argument:

The veto of Governor Spellman was of an entire section and was valid. The deleted references to section 30 were incidentally vetoed purely as a ministerial act. If not deleted, the Code Reviser, pursuant to RCW 1.08.015(2)(m), would have taken out such "manifestly obsolete" references.

Id. at 544. RCW 1.08.015(2)(m) provides that the code reviser shall edit and revise laws enacted by the legislature, "to the extent deemed necessary or desirable by the reviser and without changing the meaning of any such law, in the following respects only . . . (m) Strike provisions manifestly obsolete."

In Washington Federation, Section 30 was vetoed, and the references to Section 30 could be removed from the other parts of the legislation without changing the meaning of the sections of the legislation not vetoed. Here, the registration requirements under RCW 69.51A.040 are substantive requirements under the legislation passed, particularly when read in conjunction with the affirmative defense under RCW 69.51A.043, which is available for those who do not register. A material distinction between the two categories of individuals under RCW 69.51A.040 and RCW 69.51A.043 is the fact of registration. The registration requirements are not merely "manifestly obsolete" references to a vetoed section that have no practical effect on the intended functioning of the statute. Washington Federation is distinguishable.

¹⁵ Under Const. art. 3, § 12 (amend. 62), If any bill presented to the governor contain[s] several sections or appropriation items, he may object to one or more sections or appropriation items while approving other portions of the bill: *Provided*, That he may not object to less than an entire section, except that if the section contain[s] one or more appropriation items he may object to any such appropriation item or items.

No. 69911-3-I/15

We disagree that the Governor's veto eliminated the affirmative defense. Such an interpretation is at odds with the plain language of the statute as amended by the legislation.¹⁶ The statute provides different protections for qualifying patients and designated providers who register and those who do not register. Under RCW 69.51A.043, qualifying patients and designated providers who are not registered but meet other requirements may only assert an affirmative defense at trial. Reis's interpretation would permit those who do not register to receive the same protection against arrest, prosecution, criminal sanctions, and civil consequences that the statute provides only for those who registered. Reis's argument ignores the affirmative defense set forth in RCW 69.51A.043 because, if medical marijuana use is presumed legal, there would be no need for an affirmative defense. An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. Fry, 168 Wn.2d at 7 (citing State v. Votava, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003)).

Reis also cites a recent Washington Supreme Court case, State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013) to support his contention that the Act legalizes medical cannabis possession. In Kurtz, the Court stated that "in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense." Id. at 476. But the issue in Kurtz was whether the former Act superseded the common law medical necessity defense for marijuana. The Court held that it did not. Id. at 479. Kurtz cannot be read to

¹⁶ Moreover, the governor did not intend to invalidate the affirmative defense provisions. As the governor pointed out in her veto message, because RCW 69.51A.043, RCW 69.51A.045, and RCW 69.51A.047 always governed those who are not registered, the affirmative defense provisions are "meaningful even though section 901 has been vetoed." Laws of 2011, ch. 181, governor's veto message at 1376.

No. 69911-3-I/16

stand for the proposition that the amendments decriminalized marijuana use for defendants who were unregistered and therefore not qualified marijuana users.

Reis argues that if there is any ambiguity in the statute, the rule of lenity requires this court to construe the statute strictly against the State and in his favor. The rule of lenity requires that, where two possible constructions of a statute are permissible, the statute must be strictly construed against the State and in favor of the accused. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). But RCW 69.51A.040 is not ambiguous; it plainly sets forth certain requirements that cannot be met by anyone until and unless the Act is amended to provide for a registry. The rule of lenity does not apply.

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

probable cause.¹⁷ The trial court did not err in denying Reis's motion to suppress.¹⁸

Affirmed.

WE CONCUR:

Speiman, A.C.J.

Dwyer, J.

Schubert, J.

¹⁷ Reis concedes that a search warrant affidavit need not defeat affirmative defenses and that, if the Act merely provides an affirmative defense, the court's inquiry would end.

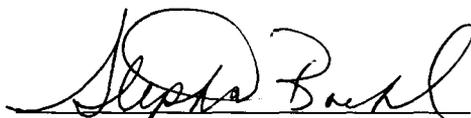
¹⁸ A recent decision by Division III, State v. Ellis, __ Wn. App. __, 315 P.3d 1170 (2014), addresses a similar issue. There, the defendant argued that while the affidavit for a warrant to search his home may have presented probable cause to believe he was growing marijuana, it did not present probable cause to believe he was violating the Act in doing so. Id. at 1172. Division III held that an affidavit supporting a search warrant need not also show the inapplicability of the Act. Id. at 1173. The Court reasoned that the Act created a potential medical use exception to the Controlled Substances Act's general rule criminalizing marijuana manufacturing, and that for probable cause purposes the exception "functions about the same as the old medical use affirmative defense provided in former RCW 69.51A.040(1) (1999)." Id. Because the Act did not per se legalize marijuana or alter the elements of a Controlled Substances Act violation, the court concluded that the reasoning of Fry survived the 2011 amendments to the Act. Id. We do not depart from the result in Ellis.

CERTIFICATE OF SERVICE

I certify that on April 30, 2013, I served via U.S. certified mail a copy of the foregoing Petition for Review, in *State of Washington v. Reis*, Court of Appeals, Division I, No. 69911-3-I, to the following:

Robin Romanovich
Attorney at Law
810 3rd Ave, Suite 800
Seattle, WA 98104

James Whisman
Senior Deputy Prosecuting Attorney
King Co. Prosecuting Attorney's Office
W554 King County Courthouse
516 Third Ave
Seattle, WA 98104


Stephanie Boehl

FILED
DIVISION I
COURT OF APPEALS
STATE OF WASHINGTON
2013 APR 30 PM 3:19