

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 24, 2014, 3:04 pm
BY RONALD R. CARPENTER
CLERK


RECEIVED BY E-MAIL

Supreme Court No. 90281-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

WILLIAM MICHAEL REIS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER, WILLIAM M. REIS

Kurt Boehl, WSBA No. 36627
Law Office of Kurt E. Boehl, PLLC
1001 4th Ave, Suite 3200
Seattle, WA 98154
kurt@keblaw.com
Phone 206-728-0200
Fax 206-624-6224

Stephanie Boehl, WSBA No. 39501
Garvey Schubert Barer
1191 2nd Avenue, Suite 1800
Seattle, WA 98101
sboehl@gsblaw.com
Phone 206-464-3939
Fax 206-464-0125

 ORIGINAL

TABLE OF CONTENTS

I. Introduction..... 1

II. Issues..... 3

 A. 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?..... 3

 B. 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?..... 3

III. Statement of the Case..... 3

IV. Argument 6

 A. The Plain Meaning Of The Act Is Ambiguous, Specifically The Conflicting Provisions In RCW 69.51A.040 And RCW 69.51A.043..... 7

 B. Because The Act Is Ambiguous, RCW 69.51A.040 Must Be Construed Strictly Against The State And In Favor Of Mr. Reis. 10

 C. The State’s Concerns Regarding Challenges Imposed On Law Enforcement Are Irrelevant and Overstated 15

 D. The *Ellis* Decision, Which Reasons That Patients Are Afforded Arrest Protection Under The Act, But Not Protection Against The Search Of Their Homes, Is Unconstitutional..... 16

E. The Search Of Mr. Reis' Home Was Unlawful Because There Was No Probable Cause Mr. Reis Was In Violation of the Terms and Conditions Of The Act..... 17

V. Conclusion 20

TABLE OF AUTHORITIES

Cases

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 9, 43 P.3d 4 (2002)..... 6

Hallin v. Trent, 94 Wn.2d 671, 619 P.2d 357 (1980) 8, 10

In re Bankruptcy of F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992)..... 14

Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 104 P.2d 478 (1940)..... 8, 10, 13

Spokane County Health Dist. v. Brockett, 120 Wn.2d 140, 839 P.2d 324 (1992)..... 14

State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001) 19

State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995)..... 17

State v. Ellis, 178 Wn. App. 801, 315 P.3d 1170 (2014), *review denied*, No. 89928–2 (Wash. June 6, 2014) 6, 16

State v. Ervin, 169 Wn.2d 815, 239 P.3d 354 (2010) 6

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

State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984)..... 11

State v. Hobart, 94 Wn.2d 437, 617 P.2d 429 (1980)..... 19

State v. Jackson, 61 Wn. App. 86, 809 P.2d 221 (1991) 11

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)..... 6

State v. Knowles, 46 Wn. App. 426, 730 P.2d 738 (1986) 11

State v. Kurtz, 178 Wn.2d 466, 309 P.3d 472 (2013) 11, 12

State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008)..... 16, 17, 19

State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973)..... 17

<i>State v. Ramirez</i> , 140 Wn.App. 278, 165 P.3d 61 (2007).....	14
<i>State v. Reis</i> , 180 Wn. App. 438, 322 P.3d 1238 (2014)	7, 10
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	17
<i>United States v. \$186,416.00 in U.S. Currency</i> , 590 F.3d 942 (9th Cir. 2010)	17
<i>Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State</i> , 101 Wn.2d 536, 682 P.2d 869 (1984).....	8, 9, 10
<i>Washington State Grange v. Locke</i> , 153 Wn.2d 475, 105 P.3d 9 (2005) ..	8, 14
<i>Washington State Legislator v. Lowry</i> , 131 Wn.2d 309, 931 P.2d 885 (1997).....	14

Statutes

chapter 69.50 RCW.....	3
chapter 69.51A RCW.....	passim
RCW 69.51A.005.....	13
RCW 69.51A.005(2).....	11, 13
RCW 69.51A.040.....	passim
RCW 69.51A.040 (2010).....	1
RCW 69.51A.040(1).....	18
RCW 69.51A.040(3).....	2
RCW 69.51A.040(5).....	18
RCW 69.51A.043.....	7, 10
RCW 69.51A.047.....	15
RCW 69.51A.085.....	5

Other Authorities

Governor’s Veto Message, Laws of 2011, ch. 181, E2SSB 5073 14
Laws of 2011, ch. 181, E2SSB 5073 1, 13

Constitutional Provisions

Const. art. 3, § 12 (amend. 62)..... 8
Const. art. I, § 7..... 3, 16

I. Introduction

Mr. Reis was charged with a violation of the control substances act, manufacturing marijuana. Mr. Reis moved to suppress evidence obtained from the search of his home because the underlying affidavit to search failed to assert that Mr. Reis was in violation of Washington's medical use of marijuana act (the "Act"), chapter 69.51A RCW.

In 2011, the Act was amended pursuant to Laws of 2011, ch. 181, E2SSB 5073. This amendment legalized activity which previously only afforded patients an affirmative defense.¹ "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." RCW 69.51A.040 (emphasis added).

Because a qualified patient may legally possess limited quantities of medical cannabis, law enforcement may not arrest individuals or search their home based solely on such activity. Something more is required;

¹ The prior version of RCW 69.51A.040 (2010) stated: "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." (Emphasis added).

specifically, probable cause that the individual is in violation of the terms and conditions of the Act.

The state argues that the governor's partial veto of the 2011 legislation renders compliance with the terms and conditions of the Act impossible, and therefore the Act merely affords patients an affirmative defense.² According to the state, the decriminalization provision in RCW 69.51A.040 depends upon a patient's compliance with vetoed section 901. Section 901 established a state-wide registry of patients authorized by their health care providers to use medical cannabis. Despite the governor's veto, numerous non-vetoed provisions of the legislation reference section 901, including RCW 69.51A.040.³ These references to section 901, in the state's opinion, cause section 901 to qualify as a requisite term and condition of the Act, even though no such registry exists.

The state's argument is in error. It misconstrues the legal effect of the governor's partial veto, frustrates legislative intent, violates the rule of lenity, and construes RCW 69.51A.040 against the very patients it was meant to protect.

² Mr. Reis acknowledges that if the Act merely provides an affirmative defense, the court's inquiry would end. *See State v. Fry*, 168 Wn.2d 1, 6, 228 P.3d 1 (2010) ("An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed.").

³ *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.")

Here, law enforcement failed to introduce evidence Mr. Reis' possession of six plants on his deck was in violation of the prevailing terms and conditions of the Act. Therefore, Mr. Reis respectfully requests this Court to reverse the trial court's order to deny the petitioner's motion to suppress evidence.

II. Issues

A. 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?

B. 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?

III. Statement of the Case

Mr. Reis is charged with a violation of the controlled substances act, manufacturing of marijuana.⁴ CP 1. The evidence supporting this charge was obtained from a search of Mr. Reis' home, at 12225 Shorewood Dr. SW, Burien, WA 98146, executed pursuant to a search

⁴ 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."

warrant issued on May 15, 2012. CP 50-51. Probable cause to support the 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 teenage cannabis plants sitting on the back deck of Mr. Reis' home. *Id.* Although the affidavit to search was silent on the number of plants located on the deck, the search uncovered only six. CP 5-6. Officer Calabrese also saw a man, matching Mr. Reis' physical description, transferring the plants from smaller pots to larger ones. *Id.*

Officer Calabrese parked his vehicle and entered a neighbor's property. *Id.* 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 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.* Based on his training and experience, Officer Calabrese concluded that the plants seen on the deck were likely grown in the basement. CP 23-25.

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 whether Mr. Reis' activity violated the terms and conditions of chapter 69.51A RCW. Based on the forgoing, 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, 31 plants located inside the home, 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 Act, a single patient, or designated provider, may possess 15 plants and 24 ounces (1.5 pounds) of useable cannabis, and three patients may collectively possess 45 plants and 72 ounces (4.5 pounds) of useable cannabis.⁵

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.

⁵ RCW 69.51A.040; RCW 69.51A.085.

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. On April 30, 2014, Mr. Reis filed a petition for review. By way of *En Banc* Conference, this Court accepted review on October 9, 2014.

This case presents the same issue that was raised in *State v. Ellis*, 178 Wn. App. 801, 806, 315 P.3d 1170 (2014), *review denied*, No. 89928–2 (Wash. June 6, 2014).

IV. Argument

At issue is the proper interpretation of RCW 69.51A.040. “When interpreting a statute, the court’s objective is to determine the legislature’s intent.”⁶ Legislative intent is first derived from the plain meaning of a statute.⁷ In determining plain meaning, the court looks to the text of the statutory provision, as well as the statutory scheme as a whole.⁸ If the statute is susceptible to more than one reasonable interpretation, it is

⁶ *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)) (internal quotations omitted).

⁷ *Id.* (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 9, 43 P.3d 4 (2002)).

⁸ *Id.*

ambiguous, and the court may resort to other means of statutory construction.⁹

A. The Plain Meaning Of The Act Is Ambiguous, Specifically The Conflicting Provisions In RCW 69.51A.040 And RCW 69.51A.043.

The court of appeals held that RCW 69.51A.040 is not ambiguous.¹⁰ This reading of the statute conflicts with decisions by this Court regarding the legal effect of the governor's partial veto. Contrary to the court's holding, the statutory scheme as a whole is ambiguous.¹¹ RCW 69.51A.040 decriminalizes the same activity which RCW 69.51A.043 affords an affirmative defense. RCW 69.51A.043 states, "A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act may raise the affirmative defense."

Pursuant to the decisions discussed below, section 901, and compliance therewith, is removed from the legislation as though it had never been considered, nor written into the bill. "The 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

⁹ *Id.* (citing *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

¹⁰ *State v. Reis*, 180 Wn. App. 438, 453, 322 P.3d 1238 (2014).

¹¹ Mr. Reis reserves his argument in prior briefing that, in the alternative, the plain meaning of the Act decriminalizes qualified possession, and such possession does not require patients to comply with section 901.

considered by the legislature.¹² “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.”¹³ By continuing to impose the state registry as a controlling term and condition of the Act, under RCW 69.51A.040, the state effectively writes section 901 back into the bill.

No meaning may be taken from the fact that the partial veto failed to strike out references to the vetoed section in RCW 69.51A.040. Under Article III, Section 12 of the Washington Constitution, the governor may only veto entire sections of nonappropriation bills, not portions of sections.¹⁴ As a result, remaining references to section 901 are “incidentally vetoed” and “manifestly obsolete.”¹⁵

The court of appeals, however, refused to disregard references to section 901 in RCW 69.51A.040, on the reasoning that the *Washington Federation* decision (quoted above) was distinguishable. This distinction is in error; *Washington Federation* is on point.

¹² *Hallin v. Trent*, 94 Wn.2d 671, 677, 619 P.2d 357 (1980) (emphasis added).

¹³ *Id.* at 678; *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 506, 104 P.2d 478 (1940)(emphasis added).

¹⁴ Const. art. 3, § 12 (amend. 62); see generally, *Washington State Grange v. Locke*, 153 Wn.2d 475, 486-89, 105 P.3d 9 (2005).

¹⁵ *Washington Federation of State Employees, AFL-CIO, Council 8, AFSCME v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984).

The veto in *Washington Federation* and the veto at issue here are equal in their significance to the surviving legislation. *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.¹⁶ 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 specifically provided that the rules would 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 qualifying condition. In *Washington Federation*, the vetoed provision required legislative approval. In this case, patients were required to 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*, absent legislative approval, sections of the law were null and void. In this case, patients who failed to register were afforded only an affirmative defense, to be asserted at trial.

¹⁶ *Washington Federation*, 101 Wn.2d at 538.

Despite these similarities, 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."¹⁷ To the contrary, as noted in Justice Rosellini's dissent, "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."¹⁸

Thus, RCW 69.51A.040 states that the "medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime." Under *Hallin*, *Shelton Hotel*, and *Washington Federation*, subsequent references in this statute to section 901 are obsolete and disregarded. Thus, RCW 69.51A.040 decriminalizes the same behavior which RCW 69.51A.043 affords an affirmative defense

B. Because The Act Is Ambiguous, RCW 69.51A.040 Must Be Construed Strictly Against The State And In Favor Of Mr. Reis.

Given this ambiguity, the rule of lenity requires chapter 69.51A RCW to be interpreted in Mr. Reis's favor. "Where two possible constructions are permissible, the rule of lenity requires us to construe the

¹⁷ *Reis*, 180 Wn. App. at 542.

¹⁸ *Washington Federation*, 101 Wn.2d at 551 (Rosellini, J. dissenting).

statute strictly against the State in favor of the accused.”¹⁹ 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.”²⁰ “Requiring that penal statutes give fair warning in advance allows for criminal laws to be subjected to general public scrutiny and allows each person to investigate if he or she is unsure about the legality of certain conduct.”²¹

A decriminalization statute, that in effect, only provides an affirmative defense, does not provide fair warning, nor “clearly and unequivocally warn people of the actions that expose them to liability.”²² A qualified patient, reading chapter 69.51A RCW—specifically, the legislature’s intent as provided in RCW 69.51A.005(2)—would logically conclude that the legislature intended to actually provide a means for patients to achieve such protection.

This conclusion was shared by this Court in *State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472 (2013). In *Kurtz*, this Court determined, without equivocation, that the Act legalizes medical cannabis possession. The state

¹⁹ *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

²⁰ *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).

²¹ *State v. Evans*, 177 Wn.2d 186, 204, 298 P.3d 724 (2013).

²² *Jackson*, 61 Wn. App. at 93.

disregards this conclusion by characterizing the statements as a “passing reference to legislative intent.” Resp Br at 21. But this attempt to disregard *Kurtz* is misguided.

At issue in *Kurtz* was whether, in light of chapter 69.51A RCW, defendants may continue to raise the common law medical necessity defense to cannabis prosecution. This Court held that the medical necessity defense remains an available defense to cannabis prosecution, despite established statutory defenses.

In attempting to disregard *Kurtz*, the state claims the court had “no occasion to decide the precise meaning of the statute, i.e., whether it decriminalized medical marijuana possession.” Resp Br at 21. This argument overlooks this Court’s analysis. According to the Court, the question of whether the Act legalized qualifying cannabis, or merely provided an affirmative defense, was influential to its decision.

Moreover, in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense. RCW 69.51A.040. . . . Only where one's conduct falls outside of the legal conduct of the Act, would a medical necessity defense be necessary. The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense.²³

Thus, the *Kurtz* decision cannot be flippantly disregarded. If, after quoting

²³ *Kurtz*, 178 Wn.2d at 478.

extensively from the Act, this Court failed to appreciate the “precise” meaning of the statute, what chance does the public have in discerning such meaning, and therefore, appreciating which actions expose them to criminal liability?

In addition, under the state’s interpretation the legislature’s codified intent, as provided in RCW 69.51A.005, is merely an illusory fiction. The 2011 legislation amended RCW 69.51A.005(2) as follows:

(2) Therefore, the ~~((people of the state of Washington))~~ legislature intends that:

(a) Qualifying patients wither terminal or debilitating ~~((illnesses))~~ medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of ~~((marijuana))~~ cannabis, shall not be ~~((found guilty of a crime under state law for their possession and limited use of marijuana))~~ arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law;”²⁴

The state’s interpretation would effectively nullify this definitive statement of legislative intent. Furthermore, 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.”²⁵

Oddly, the governor’s veto message echoes RCW 69.51A.005, but then subsequently contradicts such statements, rendering the veto message largely useless for purposes of conferring intent. At the outset, the

²⁴ E2SSB 5073, sec 102 (amending RCW 69.51A.005).

²⁵ *Shelton Hotel*, 4 Wn.2d at 500.

Governor states that pursuant to her veto, “[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.”²⁶ This language implies that the Governor interprets the prevailing terms of the Act, despite her veto, to decriminalize possession of cannabis, since an affirmative defense is only available at trial, after arrest and prosecution.

In contradiction to these statements, however, the governor subsequently implies that as a result of the veto, patients may only assert an affirmative defense.²⁷ Thus, the governor’s veto message is ambiguous with regard to intent, and moreover, such statements are not controlling. The governor’s veto message is merely an expression of personal opinion as to the interpretation of the law.²⁸ As an opinion, the remarks of a legislator are not conclusive authority with regard to legislative intent.²⁹

²⁶ Governor’s Veto Message, Laws of 2011, ch. 181, E2SSB 5073.

²⁷ “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.*

²⁸ *Locke*, 153 Wn.2d at 490.

²⁹ “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) (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))

C. The State's Concerns Regarding Challenges Imposed On Law Enforcement Are Irrelevant and Overstated

The state repeatedly argues that the Act must be construed to only provide an affirmative defense because the opposing interpretation presents insurmountable challenges to law enforcement. This argument is flawed for numerous reasons. First, there is no authority for the proposition that the court shall construe criminal statutes in the manner which most eases the job of law enforcement. Moreover, the state's concerns regarding law enforcement are overstated.

The state claims, absent a state-wide patient registry, "officers cannot know by normal investigative techniques" whether possession complies with terms and conditions noted above. Resp Br at 8. To the contrary, police have an inordinate number of "normal investigative techniques" at their disposal. For example, if an illicit grow is suspected, officers can question suspects, and request a copy of their authorization; conduct surveillance; question neighbors about possible illicit activity, like short traffic stays or acquisitions by minors; stage a control buy without a medical authorization; and pull power records, to determine the size of the grow operation or whether the suspect is bypassing the property's electrical system. In addition, under RCW 69.51A.047, if an officer questions a patient regarding his or her medical use of cannabis, and the

patient fails to present his or her authorization, the patient is limited to an affirmative defense. As a result, an officer can quickly rule out compliance with the Act. The state's excessive concerns over medical privacy imposing an impossibility for law enforcement are unfounded.

D. The *Ellis* Decision, Which Reasons That Patients Are Afforded Arrest Protection Under The Act, But Not Protection Against The Search Of Their Homes, Is Unconstitutional

A division III decision, *Ellis*, 178 Wn. App. 801, recently held that the decriminalization language in RCW 69.51A.040 applies to a determination of probable cause to arrest a patient, but not search.³⁰ Pursuant to the Article I, Section 7 of the Washington Constitution, 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.³¹

The medical cannabis exception, as the court refers to RCW 69.51A.040, 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. Where activity “does not constitute a crime,” there is no probable cause to

³⁰ *Ellis*, 178 Wn. App. at 807 (“The MUCA exception applies to marijuana-based arrests, prosecutions, and criminal sanctions, but not searches.”)

³¹ *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

arrest or search, regardless of whether a statute expressly says that such individuals may not be searched.

E. The Search Of Mr. Reis' Home Was Unlawful Because There Was No Probable Cause Mr. Reis Was In Violation of the Terms and Conditions Of The Act.

A search is a governmental intrusion into a person's reasonable and justifiable expectation of privacy.³² For a search warrant to be valid, it must be supported by probable cause.³³ 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.³⁴ 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 criminal activity will be found in the place to be searched.³⁵ 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.³⁶

Here, state law says that certain activity "does not constitute a crime," and such individuals in compliance with the law "may not be

³² *State v. Patterson*, 83 Wn.2d 49, 515 P.2d 496 (1973).

³³ *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

³⁴ *Neth*, 165 Wn.2d at 182.

³⁵ *Neth*, 165 Wn.2d at 182; *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)).

³⁶ 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.)

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. “[O]bjects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search. More is required to rise to the level of probable cause that a crime is being committed.”³⁷

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 exceeded the fifteen plant limit under RCW 69.51A.040(1). There was no evidence Mr. Reis was a designated provider to more than one qualifying patient within a fifteen-day period. RCW 69.51A.040(5). Likewise, there was no evidence of unlawful buying or selling activity from the property.

Absent Officer Calabrese’s observations of Mr. Reis tending to a few 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 . . .

³⁷ *Neth*, 165 Wn. 2d at 185 (internal citations omitted).

falls short of probable cause to search.”³⁸ “Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches.”³⁹ Thus, possession of a few plants, coupled with criminal history consisting of cannabis possession, is insufficient to establish probable cause.

In addition, the state, in its briefing, failed to address whether the search was lawful assuming RCW 69.51A.040 legalizes qualified possession. In addressing the search warrant, the state merely concludes “Detective Calabrese was not required to disprove the affirmative defense that Reis was a qualifying patient or designated provider complying with all the terms and conditions of RCW 69.51A.” Resp Br at 23. By conditioning its argument on this conclusion, the state fails to make any effort to address the issue before the court—whether the affidavit was sufficient assuming the Act legalizes possession of medical cannabis. By failing to present an argument, the state presumably concedes that the search warrant affidavit was sufficiently lacking, should the court hold that the Act legalizes the possession of cannabis in certain circumstances.

³⁸ *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)).

³⁹ *Neth*, 165 Wn.2d at 186; see also *Hobart*, 94 Wn.2d at 446-47 (“If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed.”)

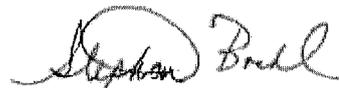
In summary, pursuant to Washington's medical cannabis laws, law enforcement is required to show probable cause that an individual in possession of cannabis is also in violation of the terms and conditions of chapter 69.51A RCW. That was not done here. Absent this showing, Mr. Reis' activity—tending to a small number of cannabis plants on his back deck—did not establish probable cause that a crime was being committed. The warrant was therefore unlawful.

V. Conclusion

In conclusion, Mr. Reis respectfully requests that this court reverse the trial court's order denying Mr. Reis' motion to suppress evidence, and remand the matter for dismissal.

DATED this 24th day of November, 2014.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

RECEIVED BY E-MAIL

I certify that on November 24, 2014, I caused a copy of the
foregoing *Supplemental Brief of Petitioner, William M. Reis*, Supreme
Court No. 90281-0, to be served via US certified mail to the following:

James Whisman
Senior Deputy Prosecuting Attorney
King Co. Prosecuting Attorney's Office
W554 King County Courthouse
516 3rd Ave
Seattle, WA 98104

Robin Romanovich, *attorney for co-defendant Rachel Reis*
Attorney at Law
810 3rd Ave, Suite 98104
Seattle, WA 98104


Stephanie Boehl

OFFICE RECEPTIONIST, CLERK

To: Stephanie Boehl
Cc: kurt@keblaw.com; 'Whisman, Jim'
Subject: RE: Filing, Petitioner's Supplemental Brief, State v. Reis, No 90281-0

Received 11-24-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Stephanie Boehl [mailto:SBoehl@gsblaw.com]
Sent: Monday, November 24, 2014 3:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: kurt@keblaw.com; 'Whisman, Jim'
Subject: Filing, Petitioner's Supplemental Brief, State v. Reis, No 90281-0

Please accept for filing the attached documents (Supplemental Brief of Petitioner, William M. Reis and Certificate of Service) in *State of Washington v. William Michael Reis*, Supreme Court No. 90281-0.

Kind regards,

STEPHANIE BOEHL

Attorney | 206.816.1506 Tel | 206.464.0125 Fax | sboehl@gsblaw.com

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► GSBLaw.com

This e-mail is for the sole use of the intended recipient(s). It contains information that is confidential and/or legally privileged. If you believe that it has been sent to you in error, please notify the sender by reply e-mail and delete the message. Any disclosure, copying, distribution or use of this information by someone other than the intended recipient is prohibited.