No. 81210-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON LEE FRY,

Petitioner.

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

In passing Initiative 692 (the Medical Use of Marijuana Act, or "the Act"), nearly 60 percent of Washington voters sent a clear message in support of the medical use of marijuana when authorized by a physician. The Act, however, did not decriminalize non-medical uses of marijuana. To allow law enforcement officers to distinguish lawful medical use of marijuana from still illegal, non-medical use, the Act requires that a patient "present his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana." RCW 69.51A.040(c). The issues before this Court turn on whether this requirement provides substantive protection to the medical marijuana patient that (1) negates probable cause for the police to believe the crime of marijuana possession has been committed; and (2) allows an innocent-minded medical marijuana defendant an affirmative defense to the crime of marijuana possession. Amici urge that the purpose of the presentment requirement of the Act is to provide these substantive protections. Moreover, these protections take on a heightened significance where the police seek to invade the sanctity of one's home.

It is undisputed that Jason Fry was authorized to use marijuana for medical purposes by his doctor. The search warrant that allowed police officers to violate the sanctity of his home was invalid because the officers

had been presented with documentation confirming that Mr. Fry's doctor had authorized his use of marijuana, and there was no evidence suggesting Mr. Fry was not in compliance with the Act. Evidence obtained in that search should have been suppressed. Moreover, at trial, the court further erred when it prohibited Mr. Fry from introducing his statutory affirmative defense to criminal possession due to his doctor's mistake. Because the search of Mr. Fry's home and his subsequent conviction were contrary to Washington law and unconstitutional, Amici urge this Court to reverse.

II. IDENTITY AND INTEREST OF AMICUS

Amici adopt and incorporate their statement of interest contained in their accompanying motion.

III. STATEMENT OF ISSUES

A. Under Art. 1, sec. 7 of the Washington state constitution, does probable cause to search a home exist when the homeowner is a patient whose physician has authorized his use of marijuana under the Act, he presents officers with facially valid authorization as required by the Act, and the officers are presented with no evidence of activity that would fall outside the scope of activities permitted under the Act?

B. Are a patient's due process rights violated when he is denied the opportunity to present evidence at trial, in his

defense against criminal charges, that he reasonably relied on his physician's mistaken authorization to engage in the medical use of marijuana?

IV. STATEMENT OF THE CASE

On December 20, 2004, Stevens County Sheriff's Sergeant Dan Anderson and Deputy Bill Bitton went to the home of Jason and Tina Fry based on their suspicion that marijuana was being grown at the house. CP 66. The officers stated they could smell burning marijuana or marijuana smoke as they approached the front door, and that an odor of marijuana emanated from the house when Mr. Fry opened the door. CP 66-67.

Mr. Fry informed the officers that he was an authorized medical marijuana patient and asked them to leave absent a search warrant. CP 67. Tina Fry presented the officers with Mr. Fry's authorization paperwork. *See* CP 8, 67. The authorization indicated that Mr. Fry's physician had diagnosed him with severe anxiety, anger and depression, and prescribed him medical marijuana. CP 9.

Sgt. Anderson applied for a search warrant telephonically and informed the magistrate that Mr. Fry had advised the officers that he was a medical marijuana patient immediately upon contact and that his wife had presented them with documentation of Mr. Fry's medical authorization to

possess marijuana. Sgt. Anderson did not inform the magistrate of the condition with which Mr. Fry had been diagnosed or any facts suggesting Mr. Fry's documentation was not valid.[1] The magistrate issued the warrant, and the officers searched Mr. Fry's home, discovering growing marijuana plants and harvested marijuana. CP 67. Mr. Fry was charged with manufacture of marijuana and, later, a second charge of possession of more than 40 grams of marijuana. *See* CP 35-36.

Mr. Fry moved to suppress the evidence obtained in the search of his home, arguing that the presentation of the medical marijuana authorization negated probable cause established by the officers' detection of the odor of marijuana. CP 4-11. The trial court denied this motion on the grounds that the defense created by the Act is an affirmative defense, and "allegations of an affirmative defense are to be proved to the trier of fact at trial." CP 40.

The State moved *in limine* to bar Mr. Fry from presenting a medical marijuana defense at trial on various grounds, including lack of proof that Mr. Fry had been diagnosed with a qualifying condition. CP 13-19. Despite its earlier suggestion that affirmative defenses are to be proved at trial, the court granted the motion *in limine*, ruling that Mr. Fry's

[1] See Exs. 1-3, which are submitted to this Court with Petitioner's motion to supplement.

diagnoses were not "terminal or debilitating medical conditions" as described by the Act, and, therefore, Mr. Fry did not meet the definition of a qualifying patient and could not present the medical marijuana defense to the jury despite his reliance on his physician's authorization. CP 66-67. By a trial to the court on stipulated facts, Mr. Fry was convicted of possession of more than 40 grams of marijuana, a felony. CP 68.

The Court of Appeals affirmed the trial court. *State v. Fry*, 142 Wn. App. 456, 174 P.3d 1258 (2008). The court held that "probable cause to search Mr. Fry's house existed as soon as officers smelled marijuana," and the presentation of a medical authorization merely presented an "issue for trial." 142 Wn. App. at 461. The court then affirmed the disallowance of Mr. Fry's medical marijuana defense at trial. *Id.* at 463. This Court granted review. 164 Wn.2d 1002, 190 P.3d 55 (2008).

V. ARGUMENT

A. The Washington Constitution Provides Heightened Protection for Private Homes.

The Fourth Amendment to the United States Constitution requires that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. The Washington Constitution demands that "[n]o person shall be disturbed in his private affairs, or his home invaded,

without authority of law." Const. art. 1, sec. 7. It is "well settled that article I, section 7 ... provides greater protection to individual privacy rights than the Fourth Amendment." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The State violates this provision when it unreasonably intrudes upon one's private affairs. *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990).

In this case, Mr. Fry's home was invaded without evidence of criminal activity and, therefore, without the "authority of law" required by the Washington Constitution. As one law review article recently put it, "the portion of article I, section 7 prohibiting the invasion of one's home without authority of law was likely meant to emphasize the 'sanctity of a man's home,' and the prohibition against any physical intrusion into the home and its surrounding areas as opposed to merely search or seizure." Hon. Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 443 (2008) (citing *Boyd v. United States*, 116 U.S. 616, 629 (1886)). For this reason, "the closer officers come to intrusion into a dwelling, the greater the constitutional protection." *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (citations and internal quotations omitted). Thus, under the facts of the present case, the protection afforded to Mr. Fry under the Washington Constitution is substantial.

B. Presentation of Documentation Under the Medical Use of Marijuana Act Negates Probable Cause Absent Evidence of Activity Not Permitted Under the Act.

Under the Washington Constitution, a search warrant may only issue upon a determination of probable cause to believe that criminal activity or contraband will be found within the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Accordingly, probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *Id.* (quoting *State v. Goble,* 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, *Search and Seizure* § 3.7(d), at 372 (3d ed.1996)) (internal quotations omitted).

1. Compliance with the presentment requirement must be interpreted as negating probable cause to give meaning to the provision.

The intent of the Medical Use of Marijuana Act is that "[q]ualifying patients . . . shall not be found guilty of a crime under state law for their possession and limited use of marijuana." RCW 69.51A.005. In furtherance of this goal, the Act requires that a patient "[p]resent his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana." RCW 69.51A.040(3)(c). If this requirement is to have any meaning, presentation of a patient's authorization must constitute evidence of lawful

possession of marijuana, and thereby the absence of criminal activity that would provide probable cause for a search or seizure. Otherwise, no purpose is served by presenting the documentation to the investigating officers, rather than simply presenting the authorization later at trial.

To hold that compliance with the presentation requirement has no bearing on the question of whether probable cause exists for a search warrant would render the provision meaningless, in violation of a "cardinal principle of statutory construction" – "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001) (citations and internal quotations omitted). The Court must avoid this result. Where a patient such as Mr. Fry is suspected of possessing or growing marijuana but presents law enforcement with documentation of medical authorization in compliance with the Act, there are no indicia of criminal activity. Absent additional evidence suggesting activity exceeding the scope of the Act's protection, probable cause does not exist for a search warrant.

The trial court and the Court of Appeals suggested that because an authorization to use medical marijuana is an affirmative defense, presentation of the documentation to law enforcement cannot negate probable cause. Such an approach undermines both the specific statutory scheme of the Medical Use of Marijuana Act and the heightened

protections afforded by Article I, section 7. The Court of Appeals' interpretation that evidence of an affirmative defense is irrelevant to the probable cause analysis is also particularly troubling where the investigating officers had no basis to doubt the validity of the affirmative defense, and recorded none in their reports or warrant application.

Thus, in *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), and *Painter v. Robertson*, 185 F.3d 557 (6th Cir. 1999), the Sixth Circuit held that there was no probable cause where a reasonable officer would know that a defendant's behavior was protected by an affirmative defense. In *Dietrich*, the father and son plaintiffs were private security guards who had obtained contracts with local businesses to safely transport cash deposits to and from their places of business. 167 F.3d at 1009. Dietrich was the former police chief of the town and most members of the current force knew him and knew that he was offering money courier services. *Id.* Dietrich and his son pulled their work van over when they noticed that they were being followed by a marked police car. *Id.* They were arrested for carrying concealed weapons, even though they had an affirmative defense to such charges under state law. *Id.*

The officers argued that "police officers cannot be expected to analyze the merits of every asserted affirmative defense prior to

completing an arrest." *Id.* at 1011. The Sixth Circuit rejected this claim, stating that,

> [T]he officers in this case had full knowledge of facts and circumstances that conclusively established, at the time of the Dietrichs' arrests, that the plaintiffs were justified – by statute – in carrying concealed weapons during their work. Consequently, none of the defendants had probable cause at the time of the arrests to believe the plaintiffs had violated, were violating, or were about to violate the law.

Id. at 1012.

In another case involving concealed weapons, the Sixth Circuit again held that the statutory affirmative defense negated probable cause. In *Painter v. Robertson*, 185 F.3d 557 (6th Cir. 1999), the plaintiff, Robert Painter, was the sole bartender at a tavern. *Id.* at 561. He was arrested on concealed weapons charges after pointing a handgun at an unruly patron who had threatened him. *Id.* at 562-64. After an Ohio state court found that "the search of Painter was unreasonable and further that he had an affirmative defense for the carrying of a concealed weapon," Painter filed suit. *Id.* at 565. The court held that "a peace officer, in assessing probable cause to effect an arrest, may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification for his suspected criminal actions." *Id.* at 571.

In the present case, when the deputies visited Mr. Fry's home based on their suspicion regarding the presence of marijuana, the Frys did

exactly what they were supposed to do under the Act: they presented Mr. Fry's medical use authorization form to the deputies. Nothing in the record suggests the deputies had reason to doubt its authenticity or validity at that time, or that they had any other basis to search Mr. Fry's home. The presentation of medical use authorization negated any cause to believe Mr. Fry was illegally possessing marijuana.

The Court of Appeals relied upon *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994), in stating that it "is well settled that when a trained officer smells marijuana, this alone provides probable cause for a search." But *Olson* was decided **before** Washington voters passed the Medical Use of Marijuana Act and in no way considered the impact of the statutory presentment provision of the Act.

The Court of Appeals also mistakenly relied on *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999). In *McBride*, the plaintiff was awakened by a fight between his two teenage sons. 95 Wn. App. at 35. When the father, Robert McBride, attempted to calm one of his sons, the young man threw two punches. *Id.* Acting in self-defense from an incoming third punch, McBride swung back and hit his son in the jaw. *Id.* When the authorities were contacted, McBride was arrested on charges of fourth degree assault-domestic violence. *Id.* The family argued that probable cause was lacking because McBride was acting in

self-defense, which negated probable cause. *Id.* at 36. The Court of Appeals disagreed, finding that the plaintiff's "claim of self-defense was then a mere assertion, not fact. The self-defense claim did not vitiate probable cause and the officer had a mandatory duty to arrest pursuant to RCW 10.31.100(2)(b)." *Id.* at 40.

Here, Fry's affirmative defense was based on medical authorization, not a "mere assertion". By requiring the presentation of authorizing documentation, the Medical Use of Marijuana Act provides a mechanism for informing officers that a person's possession of marijuana is legal. Moreover, there was no mandatory arrest in this case under RCW 10.31.100(2)(b). *See Jacques v. Sharp*, 83 Wn. App. 532, 543-544; 922 P.2d 145 (1996) ("If the officer has legal grounds to arrest pursuant to the [domestic violence] statute, he has a mandatory duty to make the arrest"). The Court of Appeals' reliance on *McBride* was misplaced.

When an individual provides an investigating officer with his medical marijuana authorization, that officer does not have probable cause to arrest him or search his premises absent some other indicia of criminal activity (i.e., unlawful distribution of marijuana, possession of more than a personal use amount). Evidence of some criminal act is the touchstone of probable cause. *See Thein*, 138 Wn.2d at 140. Because there was only

evidence of lawful activity at the Fry residence, there was no probable cause and thus the search of Mr. Fry's home was unlawful.

2. Compliance with the presentment requirement constitutes a waiver of substantial rights, and patients should be guaranteed protection against search and seizure in exchange.

The framers of Article I, Section 7, as well as other constitutional scholars on whom they drew, saw the seizure of evidence without probable cause as "functionally identical to compelling a person to give evidence against himself in violation of the spirit of the Fifth Amendment." *See The Origin of Article I, Section 7*, 31 SEATTLE U. L. REV at 458. Presentation of documentation authorizing the medical use of marijuana to law enforcement officers, pursuant to the terms of the Act, constitutes an admission that the patient likely possesses marijuana, a waiver of the patient's right against self-incrimination under the Fifth Amendment and Article 1, section 9. It also constitutes a waiver of the patient's privacy interests in sensitive medical information: the fact that he or she has been diagnosed with a terminal or debilitating condition, perhaps one that is embarrassing or stigmatizing. The import of these waivers must be taken just as seriously as, for example, the waiver of a right to require the issuance of a warrant by consent. *See Ferrier*, 136 Wn.2d at 118 ("While we recognize that a home dweller should be

permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision").

It is a reasonable interpretation of the presentment provision, then, that in exchange for the surrender of rights implicated by presentment, a search or seizure will be considered unreasonable unless evidence exists that the patient is violating or exceeding the scope of the Act. A ruling to the contrary undermines the clear intent of the Act that "[a]ny 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." RCW 69.51A.040(2). Moreover, a ruling allowing the arrest of patients who properly display their authorization under the Act bears no functional difference to a warrantless search of a home without informed consent, which this Court rejected in *Ferrier*. As a result, the evidence obtained in the search of Mr. Fry's home should have been suppressed under Washington's constitutionally-required exclusionary rule, and the trial court erred in failing to grant this motion.

C. Fry's Constitutional Due Process Rights Were Violated When He Was Prohibited From Presenting His Defense.

The trial court compounded its error in denying the motion to suppress by then refusing to allow presentation of Mr. Fry's defense at trial, especially after the trial court denied his suppression motion on the grounds that he could later present his affirmative defense.

Criminal defendants have a due process right to have their defense heard. U.S. CONST. amend. V, XIV; CONST. art. I, §§ 3, 22 (amend 10); *see also Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1972) (holding that "[t]he right of an accused in a criminal trial due process is, in essence, the right to a fair opportunity to defend against the state's accusations"); *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Due process is denied when (1) a defendant has reasonably relied upon affirmative assurances that certain conduct is lawful, and (2) when those assurances have been made by a "public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue." *State v. Leavitt*, 107 Wn. App. 361, 371, 27 P.3d 622 (quoting *Miller v. Commonwealth*, 25 Va. App. 727, 492 S.E.2d 482, 486-87 (Va. Ct. App. 1997)).[2] Because Fry

[2] Criminal defendants have long been able to defend charges on the basis of reliance upon misleading governmental conduct, *see Raley v. Ohio*, 360 U.S. 423, 438-39, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959); *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988), but

reasonably relied upon a statutorily established medical authorization procedure, he should have been allowed to present this defense at trial.

Under the Act, Washingtonians who believe they will benefit from medical marijuana must consult with a licensed doctor and receive authorization. RCW 69.51A.040(2).[3] This Court should not allow these patients, who suffer from serious medical problems, to be punished if their doctor erroneously authorizes their use of medical marijuana.

This Court has recently held that a party who reasonably relies on an authorization that appears legitimate will not face criminal liability when it is later learned that the authorization was erroneous. *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008). In *Minor*, the defendant was convicted of burglary, but the juvenile sentencing court failed to check the appropriate paragraph indicating that the defendant could not possess firearms. *Id.* at 800-01. Several years later, the defendant was convicted in juvenile court for unlawful possession of a firearm. *Id.* at 799. The Court of Appeals affirmed because it found that the young man had not shown any reliance on the mistake or prejudice resulting from the

courts have also expanded the contours of this defense to authorizations from quasi-government actors such as federally licensed firearms dealers. *See United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987) (conviction for illegal possession of firearms overturned after defendant was misled by firearms dealer and his defense attorney).

[3] There is no requirement that the authorization specify the condition with which the patient has been diagnosed. RCW 69.51A.010(5)(a).

trial court's affirmative acts. *Id.* at 800. This Court reversed, concluding that the failure to check this paragraph "affirmatively represented to [the defendant] the firearm prohibition did not apply to him." *Id.* at 804.

The reasonable reliance defense has well-recognized corollaries in other areas of the law. For example, a defendant charged with criminal trespass may defend on such grounds where they "*reasonably believed* that the owner of the premises ... would have licensed him to enter or remain." RCW 9A.52.080 (emphasis added); *see also State v. Montague*, 10 Wn. App. 911, 916-20, 521 P.2d 64 (1974) (discussion of "reasonable belief" defense in burglary case). A person accused of theft has a defense if she appropriated the subject property or service openly and avowedly under a claim of title made in good faith, even if the claim is untenable. RCW 9A.56.020(2)(a); *State v. Mora*, 110 Wn. App. 850, 43 P.3d 38, *review denied*, 147 Wn.2d 1021, 60 P.3d 92 (2002). Similarly, a person is not guilty of possession of a controlled substance if the possession is unwitting. This unwitting possession defense requires the defendant to show by a preponderance of the evidence that he did not know the substance was in his possession or he did not know the nature of the substance. *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citing 11 Wash. Pattern Jury Instructions: Criminal 52.01 (2d ed. 1994)). The unwitting possession defense is a "judicially created affirmative

defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute." *State v. Rowell*, 138 Wn. App. 780, 785, 158 P.3d 1248 (2007) (citing *State v. Buford*, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998)). In each of these contexts, those charged with crimes were not held criminally liable because, like Fry, they lacked the requisite culpable mental state.

This case can be distinguished from the Court's most recent consideration of the Medical Use of Marijuana Act. In *State v. Tracy*, the defendant had received a valid California medical marijuana card to help ease her chronic pain from a hip deformity, migraine headaches, and a series of corrective surgeries for various intestinal conditions. 158 Wn.2d 683, 687, 147 P.3d 559 (2006). Sharon Tracy had also received authorization from an Oregon doctor who agreed that she could benefit from medical marijuana. *Id.* at 686. When she was charged in Washington with unlawful possession and manufacture of marijuana, Tracy sought to assert the compassionate use defense. *Id.* After analyzing the statutory language of the Act, this Court affirmed the Court of Appeals' decision that Tracy was not a qualifying patient because she had not received authorization from a doctor licensed in Washington. *Id.* at 690.

There is a significant distinction, however, between the requirement that a patient seeking to avail herself of Washington's medical marijuana law obtain authorization from a Washington licensed doctor and the suggestion that a patient may be held criminally responsible for that doctor's mistake in authorizing the medical use of marijuana. It is reasonable to expect that a medical marijuana patient would question whether her use authorization from an out-of-state doctor would be recognized in Washington; the political debate over various states legalizing the medical use of marijuana continues to receive extensive media coverage, and it is widely understood that not all states have approved medical marijuana laws. On the other hand, it is unreasonable to expect a patient such as Mr. Fry to question whether he is a qualifying patient after a doctor licensed in the state in which he resides has examined and diagnosed him, and then issued him medical authorization to use marijuana.

In *Tracy*, this Court indicated that the defendant "bore the burden of producing at least *some evidence* that she was a qualified patient of a qualified physician before she could assert the compassionate use defense." *Id.* at 689 (emphasis added). Here, Mr. Fry did exactly that. He complied with the statute when he was authorized for the medical use of marijuana by a Washington licensed doctor, and he more than met the

"some evidence" burden set forth in *Tracy* when he sought to introduce his authorization form. Fry was entitled to present his defense at trial, and the trial court denied him due process by refusing to consider the defense.

VI. CONCLUSION

For the above reasons, Amici respectfully request that this court reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 26th day of November, 2008.

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Good afternoon,

Attached for filing today, please find the motion and proposed brief of amici ACLU of Washington and Washington Association of Criminal Defense Lawyers, along with proof of service. Please confirm receipt of filing.

Thank you,

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