No. 80964-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIRIZAK OMAR MOHAMED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment to the United States Constitution, and article I, sections 3 and 22 of the Washington Constitution, the court erred in concluding the State proved that Mr. Mohamed possessed methamphetamine.

2. The trial court erred in entering finding of fact 47. CP 130.

B. ISSUES

1. The possession of a controlled substance statute does not expressly require proof that the defendant knowingly possessed a controlled substance. This Court must construe statutes to avoid constitutional deficiencies. If construed to be a strict liability crime without a knowledge element, the statute is likely unconstitutional, as this construction is incompatible with due process. Consistent with the constitutional-doubt canon, does the possession of a controlled substance statute require proof of knowledge?

2. The presumption of innocence is a principle fundamental to America's history and tradition. Criminal laws that eliminate inherent elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. All states except Washington require the prosecution to prove that possession of a controlled substance

is knowing. Is it unconstitutional to make possession of a controlled substance a strict liability crime?

C. STATEMENT OF THE CASE

Abdirizak Mohamed awoke in a car to a police officer knocking on the car's door window. RP 23,[1] 96, 140, 146-48. Individuals who lived on the street where Mr. Mohamed fell asleep called 911 to report the car, believing the car was "suspicious." 10/11/19RP 6-8, 15; CP 120. When Mr. Mohamed opened the door, the officer spotted a pipe with a dark brown residue and a torch lighter in the driver's side pocket. 10/11/19RP 8; RP 28-29. The officer arrested Mr. Mohamed. RP 89. Upon a search incident to arrest, the officer discovered something in Mr. Mohamed's pocket. RP 67. The officer asked Mr. Mohamed if it was methamphetamine or crack, and he said it was "one of the two." RP 67. Later testing revealed the substance in Mr. Mohamed's pocket was methamphetamine. RP 121-22.

The officer later obtained a warrant to search the car. RP 98-99. Inside the car, officers discovered a gun hidden behind a CD player, and they also discovered a pair of pants with methamphetamine in the pocket. RP 52, 74-75. The State charged Mr. Mohamed with one count of

[1] Only one transcript is not in sequential order: the transcript for the 3.5/3.6 hearing. This brief will refer to this transcript as 10/11/19RP.

unlawful possession of a firearm in the first degree, criminal impersonation in the first degree,[2] and possession of a controlled substance: methamphetamine. CP 137-38.

Mr. Mohamed testified at his bench trial. He told the court he was walking around the evening before his arrest when he happened on a random male who was doing "weird stuff" and "tweaking" by his car. RP 142, 147-48. It was raining and Mr. Mohamed was homeless, so Mr. Mohamed asked the male for a ride. RP 132-33, 150. At some point, Mr. Mohamed bought methamphetamine from this person, and the two smoked heroin together and fell asleep. RP 132-34. When he awoke, the man was no longer there. RP 134-35. Mr. Mohamed denied knowing that the gun was in the car, and he denied ownership of the pants found in the back of the car. RP 135, 138. Mr. Mohamed testified that he did not recall placing methamphetamine in his own pocket. RP 132, 137-38, 142.

The court acquitted Mr. Mohamed of unlawful possession of a firearm in the first degree because the State failed to present any evidence regarding who owned the vehicle. CP 128, 130. However, the court found him guilty of criminal impersonation and possession of a controlled substance. CP 130. The court specifically found that the State met its

[2] These charges stemmed from officers alleging that Mr. Mohamed gave them a false name and birthdate upon arrest. CP 171-72.

burden in proving Mr. Mohamed possessed the methamphetamine only in his own front pocket. CP 130.

D. ARGUMENT

This Court should interpret the drug possession statute to have a knowledge element. Otherwise, this Court should declare the statute unconstitutional.

a. Due process restricts a state's authority to create strict liability crimes or to shift the burden of proof to defendants.

The presumption of innocence in favor of the accused is a fundamental principle of justice. *Nelson v. Colorado,* __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017); *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 93 L. Ed. 481 (1895). To overcome this presumption, due process requires the prosecution to prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The beyond a reasonable doubt "standard provides concrete substance for the presumption of innocence." *Winship*, 397 U.S. at 363.

A related principle is that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). "[T]he understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of

law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191, 2196, 139 L. Ed. 2d. 594 (2019) (quoting *Morissette*, 342 U.S. at 250); *accord State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). A "defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Apprendi v. New Jersey*, 530 U.S. 466, 493, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Dovetailing these principles is the "longstanding presumption, traceable to the common law," that criminal statutes require proof of a "culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)); *accord State v. A.M.*, 194 Wn.2d 33, 46-47, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring). Thus, courts presume a mental element even where the text is silent or when it results in an ungrammatical reading. *Rehaif*, 139 S. Ct. at 2197; *Anderson*, 141 Wn.2d at 367. The legislature has adopted this rule in providing that courts "supplement all penal statutes" in Washington with "[t]he provisions of the common law relating to the commission of crime and the punishment thereof" "insofar as not inconsistent with the Constitution and statutes of

this state." RCW 9A.04.060.

b. As interpreted, drug possession is a strict liability crime. The innocent must prove unwitting possession. The constitutionality of this scheme is doubtful.

As currently interpreted, Washington's possession of a controlled substance statute turns the presumption of innocence and the prosecution's burden of proof on their head. Notwithstanding the presumption that every criminal statute imposes a *mens rea* requirement, our Supreme Court has interpreted the offense of simple possession to be a strict liability crime with no *mens rea*. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). The prosecution need only prove the nature of the substance and the fact of possession. *Bradshaw*, 152 Wn.2d at 537-38.

A person convicted of simple possession is subject to a maximum punishment of five years in prison and a fine of up to ten thousand dollars. RCW 69.50.4013(1), (2)[3]; 9A.20.021(1)(c). A person convicted of this felony offense loses constitutional rights: the right to vote and the right to possess firearms. RCW 9.41.040; 10.64.120. A person convicted of a felony also experiences social stigma and numerous collateral

[3] Unlawful possession of marijuana, being a misdemeanor, is the exception. RCW 69.50.4013(2); RCW 69.50.4014.

consequences. *A.M.*, 194 Wn.2d at 66 (Gordon McCloud J., concurring).[4]

For the innocent accused of drug possession to avoid this fate, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. *Bradshaw*, 152 Wn.2d at 538. In other words, instead of a presumption of innocence, there is a presumption of guilt.

The constitutionality of this scheme is doubtful. Although legislatures have broad authority to define crimes and some strict liability crimes may be permitted, "due process places some limits on its exercise." *Lambert v. California,* 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (strict liability registration scheme violated due process when applied to a person who did not know of the duty to register). This limitation makes sense because the due process principles of proof beyond a reasonable doubt and the presumption of innocence are "concerned with substance," not "formalism." *Mullaney v. Wilbur,* 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Were it otherwise, states could evade these constitutional principles through labels. Thus, in defining the elements of crimes and allocating the burdens of proof and persuasion, "there are obviously

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[4] *Citing* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. L. & Soc. Change 585 (2006); Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 Yale L. J. F. 759 (2019).

constitutional limits beyond which the States may not go." *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *see Apprendi*, 530 U.S. at 467 (recounting that the Supreme Court had not "budge[d] from the position that . . . constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense"). For example, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899 (1916); *accord Speiser v. Randall*, 357 U.S. 513, 523-25, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

By imposing strict liability and allocating the burden of disproving knowledge to the accused, the drug possession scheme upends two fundamental values: the presumption of innocence and the requirement of proof beyond a reasonable doubt. *Winship*, 397 U.S. at 363-64. Moreover, this scheme is contrary to the drug possession laws of the federal government, all other 49 states, and the model Uniform Controlled Substances Act.[5] This is strong evidence that the drug possession law "has shifted the burden of proof as to what is an inherent element of the

[5] *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); *Bradshaw*, 152 Wn.2d at 534; *State v. Bell*, 649 N.W.2d 243, 252 (2002); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988); 21 U.S.C. § 844(a); Unif. Controlled Substances Act 1970 § 401(c).

offense." *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality). By not requiring the prosecution to prove knowledge, Washington's drug possession law has a "freakish definition of the elements" unlike "the criminal law of other jurisdictions." Id.

That Washington permits defendants to avoid guilt if they prove "unwitting" possession further shows that knowledge is an "inherent" element of the offense of drug possession. If what the law was genuinely concerned with is mere possession regardless of knowledge, it makes no sense to have an unwitting possession defense. *See Cleppe*, 96 Wn.2d at 380 (recognizing the defense "may seem anomalous"). Instead, unwitting possession is the key issue. It is the "tail which wags the dog of the substantive offense" of drug possession. *Apprendi*, 530 U.S. at 495 (internal quotation omitted).

"For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance." *Morrison v. California*, 291 U.S. 82, 90, 54 S. Ct. 281, 78 L. Ed. 664 (1934). Stripped of the traditional mental element of knowledge, there is nothing inherently "wrongful" or "sinister" about possessing a controlled substance. For example, if a person rents or buys a car, and drugs are hidden inside the vehicle, there is nothing blameworthy about the person's conduct. The same is true if a person borrows or receives clothing from

another but unbeknownst to them, drugs are present inside a small pocket. These people have done nothing other than innocently possess property. Making defendants disprove knowledge unconstitutionally shifts the burden of proof.

While some may argue defendants are better positioned to explain what they know, this does not justify shifting the burden of proof. *Mullaney*, 421 U.S. at 702; *Tot v. United States*, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship*, 397 U.S. at 364. As this case and others illustrate, shifting the burden to defendants to disprove knowledge creates an unacceptable risk of condemning the innocent. *See A.M.*, 194 Wn.2d at 64-65 (Gordon McCloud, J., concurring). Before a trier of fact brands a person a felon based on the innocent and unavoidable conduct of possessing property, due process requires proof of guilty knowledge.

c. Unless the drug possession statute is interpreted to require knowledge, it should be declared unconstitutional because strict liability for drug possession violates due process.

The constitutionality of the drug possession statute is doubtful. Consistent with the constitutional-doubt canon of statutory construction,

this Court should interpret the drug possession statute to require knowledge.

The constitutional-doubt canon instructs that courts must interpret statutes to avoid constitutional doubts when statutory language reasonably permits. *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). Interpreting the drug possession statute to require proof of knowledge "avoids a confrontation with the constitution." *A.M.*, 194 Wn.2d at 49 (Gordon McCloud, J., concurring).

In concluding that drug possession is a strict liability crime, *Cleppe* and *Bradshaw* overlooked this canon of construction and did not consider the due process argument presented here.[6] When the language of a court opinion appears to control an issue, but the court did not actually address or consider a novel issue raised in briefing in a different case, the opinion is not dispositive and this Court can reexamine it without violating stare decisis. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (citing *ETCO, Inc. v. Department of Labor & Industries*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)). Thus, *Bradshaw* and *Cleppe* do not control and stare decisis does not apply.

[6] In *Bradshaw*, the Court stated that the defendant's constitutional arguments were insufficiently briefed. *Bradshaw*, 152 Wn.2d at 539.

Moreover, the concurring justices in *A.M.* recognized, *Cleppe* and *Bradshaw* were "grievously wrong." 194 Wn.2d at 45 (Gordon McCloud, J., concurring). The Court failed to apply the *mens rea* canon of statutory interpretation properly. *Id.* at 46-51. Rather than follow the rules of statutory interpretation, the decisions in *Cleppe* and *Bradshaw* purported to interpret the meaning of the drug possession statute through legislative history. *Id.* at 50-52. This methodology is highly disfavored. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 369-96 (2012). As Justice Elana Kagan remarked, "we're all textualists now."[7] Further, when a *criminal* statute is ambiguous, the proper tool is the rule of lenity, not legislative history. *A.M.*, 194 Wn.2d at 51 (Gordon McCloud, J., concurring). Under the rule of lenity, ambiguous criminal statutes are resolved in the defendant's favor. *Id.*; *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2333, 204 L. Ed. 2d 757 (2019).

Under these principles, the reasonable reading of the drug possession statute is that the prosecution must prove knowledge.

However, the concurrence in *A.M.* reasoned the legislature could have changed the law and its failure to do so meant the statute had to be

[7] *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARVARD LAW TODAY 8:28 (Nov. 17, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation.

read as a strict liability crime per the doctrine of legislative acquiescence.[8] *A.M.*, 194 Wn.2d at 54-58 (Gordon McCloud, J., concurring) at 54-58. The concurrence, however, expressed doubts concerning whether it was constitutionally permissible to use legislative silence to construe the statute in this manner. *Id.*

These doubts were sound. As the United States Supreme Court has long recognized, "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible." *Zuber v. Allen*, 396 U.S. 168, 90 S. Ct. 314, 324, 24 L. Ed. 2d 345 (1969). "[T]he search for significance in the silence of [the legislature] is too often the pursuit of a mirage." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229 (1942). Thus, "evidence of legislative acquiescence is not conclusive, but is merely one factor to consider." *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232 (2016).

The theory of legislative acquiescence or inaction is just another form of legislative history, and a highly disfavored form at that. This is

[8] Under the doctrine of legislative acquiescence, "when considering challenges to previous statutory interpretations, this court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *State v. Otton*, 185 Wn.2d 673, 685, 374 P.3d 1108 (2016) (internal citations and quotations omitted).

because the theory is based on "the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 671, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) (Scalia, J., dissenting). Moreover, rather than "approval of the status quo," the failure to enact legislation may represent an "inability to agree upon how to alter the status quo," "unawareness of the status quo," "indifference to the status quo," or "political cowardice." *Johnson*, 480 U.S at 672 (Scalia, J., dissenting). Put bluntly, "vindication by congressional inaction is a canard" that "should be put to rest." *Id*. at 671-72.

Therefore, the fact that the legislature has not enacted legislation to overrule *Cleppe* or *Bradshaw* is not a barrier to the proper interpretation of the drug possession statute. Properly interpreted, the drug possession statute requires proof of guilty knowledge.

If not so interpreted, then this Court should declare the statute unconstitutional. Knowledge is an inherent element of the offense and due process does not permit shifting the burden to the defendant to disprove knowledge. *See Patterson*, 432 U.S. at 210; *Schad*, 501 U.S. at 640 (plurality). And as the concurring opinion in *A.M.* reasons, the legislature exceeds its power by creating a strict liability offense that lacks a public

welfare rationale, has draconian consequences, and criminalizes innocent conduct. *A.M.*, 194 Wn.2d at 59-67 (Gordon McCloud, J., concurring); *accord State v. Brown*, 389 So. 2d 48, 51 (La. 1980) (striking down a drug possession statute that made a person's unknowing possession a crime).

d. Reversal of Mr. Mohamed's drug conviction is required.

If this Court declares the drug possession statute unconstitutional, this Court must reverse Mr. Mohamed's conviction for possession of a controlled substance because unconstitutional statutes are void. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

But if this Court interprets the statute to require proof of knowledge, the trial court erred by failing to require the prosecution to prove beyond a reasonable doubt this essential element. The trier-of-fact's failure to consider an essential element of an offense is subject to constitutional harmless error analysis. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999*); State v. Banks*, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003). This Court presumes that this failure prejudiced Mr. Mohamed, and the State must prove the error harmless beyond a reasonable doubt. *A.M.*, 194 Wn.2d at 41-42. The State only meets this burden if uncontroverted evidence supports the missing element. *See Neder*, 527 U.S. at 18; *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The State cannot meet its burden because no uncontroverted evidence exists that Mr. Mohamed knew he possessed methamphetamine in his pants pocket. "Where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error harmless." *Neder*, 527 U.S. at 19. While Mr. Mohamed admitted he bought methamphetamine the evening before his arrest, he affirmatively testified he did not recall placing any methamphetamine in his pocket. RP 132, 137-38, 142. And when the police asked Mr. Mohamed whether it was crack or methamphetamine they had retrieved from his pocket, Mr. Mohamed responded it was "one of the two," which indicates Mr. Mohamed was unaware of the precise substance in his pocket at the time of his arrest. RP 67. These facts call into doubt Mr. Mohamed's knowledge of his possession of methamphetamine. This is critical because the court only found that the State met its burden in proving Mr. Mohamed possessed methamphetamine in his own pants pocket. CP 130.

Moreover, while the court made specific findings articulating that it found Mr. Mohamed's testimony "lacking in credibility" and "unreliable" in certain instances, it never found Mr. Mohamed's testimony regarding his lack of knowledge of the methamphetamine in his pocket to be "unreliable" or "lacking in credibility." *See* CP 126, 129. This further

undermines the State's ability to prove this error was harmless beyond a reasonable doubt.

This Court should reverse.

E. CONCLUSION

Based on the foregoing, Mr. Mohamed respectfully requests that this Court reverse.

DATED this 27th day of May, 2020.

Respectfully submitted,

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