No. 96873-0

IN THE WASHINGTON SUPREME COURT

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STATE OF WASHINGTON,

Respondent,

v.

SHANNON B. BLAKE,

Petitioner.

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# PETITIONER'S SUPPLEMENTAL BRIEF

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## A. INTRODUCTION

The presumption of innocence and the requirement that the prosecution must prove every element of an offense beyond a reasonable doubt are bedrock constitutional principles. As interpreted, the drug possession statute upends these principles. The prosecution need only prove the fact of possession, not that it was knowing. To avoid becoming a felon, the innocent bear the burden of disproving knowledge.

The constitutionality of this strict liability scheme—which criminalizes innocent conduct and requires the innocent to rebut a presumption of guilt or else become a felon—is doubtful. Under the canon of construction that statutes are interpreted to avoid constitutional doubts, the maxim that all criminal statutes are read to have a mental element, and the rule of lenity, the Court should hold the drug possession statute requires the prosecution to prove knowledge. If not, the drug possession statute should be declared unconstitutional. Either way, Shannon Blake's conviction for unlawful possession of a controlled substance should be reversed.

## B. ISSUE

Due process forbids states from shifting an "inherent" element of an offense to the defendant to disprove. Due process also limits the ability of states to create strict liability offenses lacking a *mens rea* element. In

Washington, the drug possession statute has been interpreted to be a strict liability offense unless the defendant disproves knowledge. The offense is a felony and may be committed based on the innocent conduct of possessing property. This strict liability scheme is contrary to the drug possession laws of every other state and the federal government, all of which require the prosecution to prove knowledge. Unless interpreted to require the prosecution to prove knowledge, is the drug possession statute unconstitutional in violation of due process?

## C. STATEMENT OF THE CASE

Shannon Blake[1] was experiencing difficulty in her living situation. RP 72. With winter fast approaching, Ms. Blake found an affordable room to rent through an acquaintance of her boyfriend. RP 73. Ms. Blake and her boyfriend moved into the room. RP 72-73.

About two weeks later, a friend of Ms. Blake's gave her a pair of jeans. RP 75; CP 25 (finding of fact) (FF) 41). Her friend got the jeans at a thrift store, but they were a bit too slim for her, so she gave them to Ms. Blake, who was thinner. RP 76, 90. Ms. Blake, who is six feet tall, lengthened the jeans with extensions. RP 76 CP 25 (FF 45). Ms. Blake's boyfriend watched her alter the jeans. RP 90; CP 25 (FF 46). Due to her

[1] Ms. Blake testified her correct last name is Bowman and that she had been married to a person with the last name of Blake. RP 69-70. Because the record uses the name Blake, this brief uses it as well.

height, Ms. Blake modified all her jeans. RP 76, 90.

Unfortunately, while the room they were renting was affordable, the other residents of the home may have been involved in illicit activity involving stolen vehicles. See RP 19; CP 21 (FF 7). About two weeks after moving in, police executed a warrant on the home. RP 74; CP 21 (FF 7). Police arrested the residents, including Ms. Blake. RP 75; CP 21 (FF 7-8). Ms. Blake was wearing the jeans her friend gave her two days earlier. RP 76; CP 25 (FF 44).

The police took Ms. Blake to jail. RP 78; CP 21 (FF 9). During booking, a nurse determined Ms. Blake's blood pressure was too high to be held in the jail. RP 78; CP 22 (FF 17). Ms. Blake has high blood pressure, and the circumstances of her arrest likely exacerbated her condition. RP 77; CP 22 (FF 17).

An officer took Ms. Blake to the hospital. RP 79; CP 22 (FF 18-19). This hospital was very busy. RP 80; CP 22 (FF 18). After waiting awhile, the officer took Ms. Blake to a different hospital. RP 80; CP 22 (FF 19).

At the second hospital, the officer removed Ms. Blake's handcuffs. RP 44, 80. After some tests and administration of blood pressure medicine, Ms. Blake's blood pressure went down. RP 80. About four hours later, the officer took Ms. Blake back to jail. RP 44, 80; CP 22-23

(FF 20-21).

During booking, a corrections officer found a tiny baggie in the coin pocket of Ms. Blake's jeans. RP 47; CP 21-23 (FF 11-12, 22-23). Ms. Blake never puts her hands in that pocket. RP 85. Ms. Blake had never seen the baggie before. She did not know it was there. CP 24 (FF 37). The baggie contained methamphetamine. CP 24 (FF 36).

Ms. Blake was ultimately charged solely with one count of possession of a controlled substance. CP 18. Ms. Blake waived her right to a jury, electing a bench trial. CP 19.

At the bench trial, Ms. Blake pleaded the affirmative defense of unwitting possession. RP 95. She stated she did not know the drugs were in the coin pocket of her pants. RP 76, 83. She testified she did not use drugs. RP 76. Ms. Blake's boyfriend provided corroborative testimony. RP 89-90. The officer who took Ms. Blake to the hospital testified that he was unsure if the drugs were found when he first took Ms. Blake to the jail, or afterward. CP 23 (FF 23); RP 42. Ms. Blake testified it was after the hospital visit. CP 23 (FF 22); RP 81.

Finding Ms. Blake failed to meet her burden to prove by a preponderance of the evidence the affirmative defense of unwitting possession, the trial court found Ms. Blake guilty. RP 107-08; CP 26.

The court sentenced Ms. Blake as a first time offender. CP 32. The

court warned Ms. Blake that as a result of the felony conviction, she had lost both her voting and firearm rights. RP 116-17. The court also warned Ms. Blake that because she was convicted of a drug offense, she may have lost eligibility for certain government benefits. RP 111.

Ms. Blake maintained her innocence. RP 120. She was upset at losing her firearm rights because this meant she would no longer be able to hunt, one of the ways she provided food for her family. RP 120-21.

The Court of Appeals dismissed Ms. Blake's claim that it was unconstitutional to convict her of felony drug possession without proof that her possession was knowing. This Court granted review.

## D. ARGUMENT

### The drug possession statute should be interpreted to have a knowledge element. Otherwise, it should be declared unconstitutional.

#### *1. 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 rooted in the traditions and conscience of our people. 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 (1895). To overcome this presumption, due process requires the prosecution to prove every element of a criminal offense to the trier-of-

fact 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 central to Anglo-American law 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 or "scienter" is required, 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.

*2. 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, this 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)[2]; 9A.20.021(1)(c). As a felony offense, the person 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 consequences. A.M., 194 Wn.2d at 66 (Gordon McCloud J., concurring).[3]

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

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

[3] 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).

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 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.[4] This is strong evidence that the drug possession law "has shifted the burden of proof as to what is an inherent element of the 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."

[4] 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).

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 and drugs are hidden inside a small pocket. These people have done nothing other than innocently possess property. Unlike other conduct that may result in strict criminal liability—like driving a car while voluntarily intoxicated,[5] giving legal advice in exchange for money without a license to practice law,[6] or having sex with a person who is below the age of consent[7]—people who unknowingly possess drugs were not put on notice that their conduct of possessing property might expose them to criminal prosecution. Making defendants disprove knowledge unconstitutionally shifts the burden of proof.

To be sure, Washington has a recent history of interpreting its drug possession laws not to require guilty knowledge. In 1951, Washington

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[5] See Kaiser v. Suburban Transp. Sys., 65 Wn.2d 461, 401 P.2d 350 (1965).

[6] See State v. Yishmael, No. 96775-0, 2020 WL 579202, at *6-7 (Wash. Feb. 6, 2020).

[7] See State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012).

adopted the Uniform Narcotic Drug Act, the predecessor to the Uniform Controlled Substances Act.[8] Because the language of the provision outlawing drug possession omitted the words "intent to sell," which had existed in the previous unlawful possession statute, this Court reasoned the legislature had not "intended to retain guilty knowledge or intent as an element of the crime of possession." State v. Henker, 50 Wn.2d 809, 812, 314 P.2d 645 (1957). Unwitting possession was then construed to be an affirmative defense. State v. Morris, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). This Court interpreted the current drug possession statute similarly. Cleppe, 96 Wn.2d 378-79.

This way of defining drug possession does not constitute "a long history." Schad, 501 U.S. at 640 (plurality). And in any event, history is not dispositive. Id. at 642-43; see, e.g., State v. Roberts, 88 Wn.2d 337, 341-43, 562 P.2d 1259 (1977) (longstanding statutory presumption that any homicide constituted second-degree murder held to violate due process). Thus, history does not save the statute.

It might also be argued that defendants are better positioned to explain what they know. But 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).

[8] Laws of 1951, 2nd Ex. Sess., chapter 22.

"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). Despite testimony from Ms. Blake that she did not know drugs were in the coin pocket of her jeans, and corroborative evidence supporting her claim, the court found she had not met her "burden" to prove unwitting possession. Before a person is branded a felon based on the innocent and unavoidable conduct of possessing property, due process requires proof of guilty knowledge.

*3. Unless the drug possession statute is interpreted to require proof of 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. If not, the statute should be declared unconstitutional.

The constitutional-doubt canon instructs that statutes are interpreted 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.[9] Thus, these decisions do not control and stare decisis does not apply:

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted).

Moreover, as two justices of this Court have recently recognized, Cleppe and Bradshaw were "grievously wrong." A.M., 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

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

the rules of statutory interpretation, the decisions in Cleppe and Bradshaw purported to divine the meaning of the drug possession statute through legislative history. Id. at 50-52. This now vogue methodology is highly disfavored. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, at 369-96 (2012). As Justice Elana Kagan remarked, "we're all textualists now."[10] This Court has also recognized that legislative history should only be consulted, if at all, when a statute's meaning remains ambiguous after applying a plain meaning analysis. A.M., 194 Wn.2d at 45 (Gordon McCloud, J., concurring) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 12, 43 P.3d 4 (2002)). 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.

Based on a theory of legislative acquiescence, the concurrence in A.M. reasoned that the drug possession statute could not now be properly

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

read to include a knowledge element. A.M., 194 Wn.2d at 54-58 (Gordon McCloud, J., concurring) at 54-58. The concurrence reasoned the legislature could have changed the law and its failure to do so meant the statute had to be read as a strict liability crime. The concurrence, however, expressed doubts 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). This principle makes sense because "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." Id. at 185 n.21; accord Star Athletica, L.L.C. v. Varsity Brands, Inc., __ U.S. __, 137 S. Ct. 1002, 1015, 197 L. Ed. 2d 354 (2017) ("congressional inaction lacks persuasive significance in most circumstances") (internal quotation and brackets omitted). "[T]he search for significance in the silence of Congress 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. 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); see Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). 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, 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 the statute should be declared 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).

*4. Reversal of the conviction is required.*

If the drug possession statute is declared unconstitutional, Ms. Blake's conviction must be reversed because unconstitutional statutes are void. City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

If interpreted to require proof of knowledge, however, 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). Prejudice is presumed and the prosecution must prove the error harmless beyond a reasonable doubt. A.M., 194 Wn.2d at 41-42. If the missing element is supported by uncontroverted evidence, this

standard may be satisfied. Neder, 527 U.S. at 18; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The prosecution cannot meet its burden. There is not uncontroverted evidence Ms. Blake knew she possessed the substance. Ms. Blake affirmatively testified she did not know the jeans had a small baggie of methamphetamine in the coin pocket. RP 76. She testified she was given the jeans only a couple of days earlier, from a friend who got them at a thrift store. RP 75-76, 90. Ms. Blake testified to not using drugs. RP 76. Her boyfriend corroborated her testimony. RP 89-90.

The trial court did not find this testimony credible. CP 25-26 (FF 49-50). But this does not make the error harmless. As explained by the United States Supreme Court, "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.

Moreover, the error was more than the omission of an essential element. The burden of proof regarding knowledge was improperly allocated to Ms. Blake, rather than the State. In misallocating the burden of proof, this Court "cannot overlook the fact that the trial judge, in making his credibility determinations, acted within the incorrect framework." State v. W.R., Jr., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014). "Creating a reasonable doubt for the defense is far easier than

proving the defense by a preponderance of the evidence." Id. at 770. The State cannot show that, but for the misapplication in the burden of proof, the result would have been the same. See id. (error in placing the burden of proof on the defendant to prove consent could not be found harmless).

Additionally, this conclusion is bolstered by the fact that the trial court did not resolve whether the drugs were found before or after the police took Ms. Blake to the hospital. CP 23 (FF 23). If the drugs were found *after* Ms. Blake had been at the hospital, where her hands were uncuffed for about *four hours*, this tends to show she did not know about the drugs. If Ms. Blake knew about the tiny baggie, she would have likely discretely thrown it away at the hospital rather than risk its discovery at jail. Given this and the other evidence, the error is not harmless beyond a reasonable doubt. This Court should reverse the conviction.

**E. CONCLUSION**

The drug possession statute should be interpreted to require proof of knowledge or else be declared unconstitutional. Ms. Blake's conviction for drug possession should be reversed.

Respectfully submitted this 2nd day of March, 2020.

/s Richard W. Lechich
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Washington Appellate Project – #91052
Attorney for Petitioner

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