No. 96873-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANNON B. BLAKE,

Petitioner.

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE

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IDENTITY AND INTEREST OF AMICUS

The Institute for Justice (IJ) is a non-profit, public-interest law firm committed to defending the essential foundations of a free society. IJ has been extremely active in cases concerning the imposition of criminal penalties that violate constitutional dictates, including successfully directly representing the petitioner in *Timbs v. Indiana*, __ U.S. __, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019). By letter dated February 26, 2020, this Court requested IJ submit an amicus brief on the question of "Whether requiring a defendant charged with possession of a controlled substance to prove the affirmative defense of unwitting possession violates constitutional due process principles." Letter from Michael E. Johnston, Commissioner, Supreme Court of the State of Washington, to William R. Maurer, Institute for Justice (Feb. 26, 2020) (on file with IJ). The following brief responds to that request.

ISSUE OF CONCERN TO AMICUS

Does the Due Process Clause permit the government to shift the burden of proof concerning an essential element of a crime to the defendant?

ARGUMENT

This Court should reverse Ms. Blake's conviction for possession of a controlled substance. Washington's unlawful possession statute is a strict liability statute with no *mens rea* requirement and, as such, it violates due

process. This Court has nonetheless attempted to salvage the statute by creating an affirmative defense of unwitting possession. However, this purported affirmative defense violates the presumption of innocence principle by shifting to the defendant the burden of disproving an element of the crime. It therefore violates due process. This Court should recognize that the unlawful possession statute is unconstitutional and not susceptible to judicial revision. Instead, this Court should (i) recognize that Washington's possession statute violates due process, (ii) overturn the decisions creating and affirming an affirmative defense of unwitting possession, and (iii) allow the Legislature to craft a constitutional statute with an explicit *mens rea* requirement.

I. As Written, Washington's Possession Statute Violates Due Process

The trial court found Petitioner Shannon Blake guilty of possession of a controlled substance pursuant to RCW 69.50.4013 ("Section 4013"). That statute provides in relevant part:

> (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.
>
> (2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony

punishable under chapter 9A.20 RCW.

Under Section 4013, then, unless a person has a valid prescription from a doctor or other provider, a person possessing a controlled substance violates the law, regardless of whether the person knew they had the substance on them. *See State v. Bradshaw,* 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) ("The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession.") (describing a previous version of the possession statute).[1] A postal employee delivering a package, a police officer securing evidence, the unknowing spouse whose partner hides drugs in her purse, and the person who mistakenly picks up the wrong bag in a restaurant would all be breaking the law and be subject to prison and substantial fines.[2]

Section 4013 thus creates significant penalties for someone who did not know and had no reason to know that they were breaking the law—it is

[1] Since the revision of the law, of course, the State must now also prove beyond a reasonable doubt that the defendant did not possess a prescription for the controlled substance.

[2] For the purposes of this brief, IJ assumes that this Court correctly viewed "possession" to include unwitting custody. *See State v. Bradshaw*, 152 Wn.2d at 546 (Sanders, J., dissenting) ("The legislative silence, however, is perfectly consistent with a proper understanding of 'possession' to include intent."). In common understanding, the word "possess" presupposes awareness of the existence of the thing possessed. *See Possess*, Webster's New World Dictionary (2d College ed. 1984) ("to hold as property or occupy in person; have as something that belongs to one; own"). A person who is near an object or who carries it while being completely oblivious of its existence is more accurately described as being adjacent to or touching that thing, not in possession of it.

a strict liability law. Such laws raise significant due process concerns. *See U.S. v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993) (noting the due process concerns inherent in a statute that criminalized gun possession on an airplane without a *mens rea* provision). Although the legislature may create strict liability statutes, such laws are disfavored, and the default view is that a defendant must operate with a culpable mental state. *Staples v. U.S.*, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). Consequently, the constitutionality of RCW 69.50.4013(1), as it is written, is at best doubtful. *See State v. A.M.*, 194 Wn.2d 33, 63-67, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring) (discussing how Washington's unlawful possession statute violates due process). *See also Lambert v. California*, 355 U.S. 225, 229, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) ("We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.").

To avoid or mitigate the unlawful possession statute's obvious due process problems, this Court, in *State v. Cleppe*, 96 Wn.2d 373, 377, 635 P.2d 373 (1981), created an extra-statutory affirmative defense to unlawful possession. *Cleppe* read into the statute a provision that permitted defendants to put forth an affirmative defense of unwitting possession. This defense "ameliorates the harshness of the almost strict liability our law

imposes for unauthorized possession of a controlled substance." *Id*. at 381. *Cleppe* also unambiguously placed the burden on the defendant to raise and prove, by a preponderance of the evidence, unwitting possession. *Id.* This Court upheld *Cleppe* in *Bradshaw*, and since that time, the lower courts have followed. *See State v. Schmeling*, 191 Wn. App. 795, 802, 365 P.3d 202 (2015).

The question before this Court now is: does the affirmative defense created in *Cleppe* impermissibly shift the burden of proof to the defendant? The answer is "yes." *Cleppe* rewrote an unconstitutional statute by adding knowledge as an element of the crime. But this attempt to save the statute created another constitutional problem: it unconstitutionally shifted the burden of proof to the defendant to prove his or her possession was unwitting when, constitutionally, the State must prove this element beyond a reasonable doubt.

II. *Cleppe's* Affirmative Defense Violates Due Process

A. The Presumption of Innocence Is a Fundamental Right Protected by the Due Process Clause

This case arises in an area of the law where due process concerns are at their zenith. "A state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it 'offends some principle of justice so rooted in the traditions and conscience

of our people as to be ranked fundamental.'" *Kahler v. Kansas*, __ U.S. __, 140 S. Ct. 1021, 1027, 206 L. Ed. 2d 312 (2020) (quoting *Leland v. Oregon*, 343 U.S. 790, 798, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952)). In determining this, the courts are to determine "whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another." *Kahler*, 140 S. Ct. at 1028.

It is difficult to think of a rule of criminal liability more rooted in the traditions and conscience of our people than the presumption of innocence. The presumption has been called "a general principle of our political morality,"[3] "a guardian angel,"[4] the "cornerstone of Anglo-Saxon justice,"[5] "a touchstone of American criminal jurisprudence,"[6] "the 'golden thread' that runs through the criminal law,"[7] and the "focal point of any concept of due process."[8] These panegyrics, if anything, undersell the long-standing, foundational nature the presumption in Anglo-American law:

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[3] William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 338 (1995) (quoting William Twining, *Rethinking Evidence: Exploratory Essays* 208 (1990)).
[4] Laufer, *supra*, at 338 (quoting James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 553 (1898) (hereinafter, "Thayer on Evidence")).
[5] Laufer, *supra*, at 338 (quoting Henry J. Abraham, *The Judicial Process* 96 (1993)).
[6] Laufer, *supra*, at 338 (quoting *People v. Layhew*, 548 N.E.2d 25, 27 (Ill. App. Ct. 1989).
[7] Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L. J. 457, 457 (1988-1989) (citations omitted) (quoting Rupert Cross, *The Golden Thread of English Criminal Law: The Burden of Proof* 2 (1976)).
[8] Sundby, *supra*, at 457 (quoting Sandra Hertzberg & Carmela Zammuto, *The Protection of Human Rights in the Criminal Process Under International Instruments and National Constitutions* 16 (1981)).

Deuteronomy speaks of convicting the accused only after investigation and Roman law presumed men to be good until the contrary is proved. *Deuteronomy* 19:15-20; James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 Yale L. J. 185, 190 (1897).

The presumption is given expression in the requirement that the government must prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (observing that the reasonable doubt standard "provides concrete substance for the presumption of innocence"). *See also* Thayer on Evidence at 559 ("In saying that the accused shall be *proved* guilty, it says that he shall not be presumed guilty; that he shall be convicted only upon legal evidence, not tried upon prejudice; that he shall not be made the victim of circumstances of suspicion which surround him, the effect of which it is always so difficult to shake off, circumstances which, if there were no emphatic rule of law upon the subject, would be sure to operate heavily against him").[9] Thus, due process mandates that the government prove "beyond a reasonable

[9] Ms. Blake's case certainly suggests that she was "made the victim of the circumstances which surround [her]" and, there being "no emphatic law upon the subject" in this state, the presumption of guilt has "operate[d] heavily against [her]."

doubt . . . every fact necessary to constitute the crime." *Winship*, 397 U.S. at 364.

In sum, in this country, it is a fundamental aspect of due process that a person is entitled to their liberty and their property and that, before the government may disturb either, it must prove beyond a reasonable doubt the need to do so. *See Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249, 1250, 1256, 197 L. Ed. 2d 611 (2017) ("[O]nce those convictions were erased, the presumption of their innocence was restored . . . Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated convictions, . . . for Colorado may not presume a person adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.").

B. The Legislature May Require Defendants to Prove Affirmative Defenses, But May Not Require Defendants to Disprove Elements of the Offense

This does not mean, however, that the State must prove *every* factual issue in a criminal proceeding or that it must do so beyond a reasonable doubt. The U.S. Supreme Court has distinguished (over vigorous dissents) between proof of elements of the crimes—which the government must prove beyond a reasonable doubt—and affirmative defenses, proof of which the government may constitutionally shift to the defendant in response to the government's proof. *Patterson v. New York*, 432 U.S. 197, 200, 97

S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Such affirmative defenses constitute "all . . . circumstances of justification, excuse or alleviation," *id.* at 202 (quoting 4 William Blackstone Commentaries, *201), or "a factor that *mitigates the degree of criminality or punishment*." *Patterson,* 432 U.S. at 209 (emphasis added). An affirmative defense does not necessarily deny the veracity of the alleged elements of the offense, but when considered in addition to the elements, either excuses, justifies, or mitigates what would otherwise be criminal behavior. Accordingly, if lack of knowledge is truly an affirmative defense, then it must be a fact that is able to co-exist with the facts that constitute the elements of the crime of unlawful possession—i.e., that a person can be convicted of unlawful possession and have no knowledge of that possession.

However, while the defendant may bear the burden of proving facts of mitigation, degree, justification, excuse, or alleviation, the State cannot shift to the defendant the burden of negating an element of the offense because that would relieve the government of its burden of proving all the elements of the crime beyond a reasonable doubt. *Martin v. Ohio*, 480 U.S. 228, 233-34, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).

The question then becomes, does the (purported) affirmative defense created in *Cleppe* require the defendant to negate an element of the crime (which would be unconstitutional) or does it constitute a factor that

mitigates the degree of criminality (the burden of which the State may constitutionally place on the defendant)? The next section discusses how *Cleppe*'s requirement that trial courts and juries consider knowledge created a new element of the crime of unlawful possession. And because this new element determines guilt or innocence, it cannot be the defendant's burden to prove it.

C. *Cleppe* Created A New Element of the Crime of Possession

The Legislature has the authority to define crimes. *Bradshaw*, 152 Wn.2d at 537. Specifically, "[t]he definition of the elements of a criminal offense is entrusted to the legislature." *Liparota v. U.S.*, 471 U.S. 419, 424, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985). The state also has the leeway "to recognize a factor that mitigates the degree of criminality or punishment" and may require the defendant prove the existence of a "mitigating circumstance." *Patterson*, 432 U.S. at 209. The problem here, of course, is that Section 4013 is silent as to knowledge and the existence of affirmative defenses. The question of knowledge was wholly a creation of this Court. *See A.M.*, 194 Wn.2d at 52 (Gordon McCloud, concurring) ("[T]he *Cleppe* court created an affirmative defense of unwitting possession out of whole cloth . . . [w]ithout citation to authority and contrary to legislative intent"). This Court classified knowledge as an affirmative defense and not an

element of the crime, but an analysis of how this "affirmative defense" operates reveals knowledge to be an element of the crime and not a mitigation factor.

Knowledge is an element of unlawful possession because proof of it does not act as a mitigating circumstance or a justification, excuse, or alleviation of possession—it acts as a complete negation of the crime, meaning that without knowledge, there is no conviction. *Cleppe* recognizes as much: "If the defendant can affirmatively establish his 'possession' was unwitting, then *he had no possession for which the law will convict*." *Cleppe*, 96 Wn.2d at 381 (emphasis added). The State likewise treats knowledge as a crucial determinant of guilt or innocence. *See* Suppl. Br. Resp't 8 ("the unwitting possession defense ameliorates the harshness of strict liability by permitting a defendant to excuse *the otherwise criminal conduct and avoid an unjust conviction* by proving by a preponderance of the evidence that he or she did not know the substance was in his or her possession") (emphasis added); *id.* at 9 ("The presence of the affirmative defense acts as a safety valve, which satisfies due process and permits an accused to *successfully defend against otherwise unjust charges*") (emphasis added).

If there can be no conviction without knowledge, then that is an element of the crime that the Constitution mandates the State bear.

Requiring the defendant to prove they did not know means that the law presumes a person guilty of knowing possession until he or she proves otherwise. This is more than just a violation of due process—it is a serious distortion of the machineries of our criminal justice system. Requiring a defendant to disprove an essential element of the crime creates an onerous burden on a defendant, who begins their journey in the criminal justice system presumed guilty by the ultimate factfinder. He or she must set about proving the government—possessing vastly more resources—has erred. This can involve calling witnesses, experts, conducting discovery, and attempting to find flaws in the State's evidence, often from the confines of a jail cell and usually with little or no money. It also requires the defendant to waive their right to remain silent and require the State to prove its case. *See* Suppl. Br. Resp't 12 ("Blake had the unique ability to establish that she did not know the methamphetamine was present in her jean pocket, because such information was in her sole possession.").

In sum, *Cleppe* recognized that without knowledge, a person cannot be convicted of unlawful possession. This makes knowledge an element of

the crime. The Due Process Clause therefore requires the State prove knowledge beyond a reasonable doubt.

III. This Court Should Find Section 4013 Violates Due Process, Overturn *Cleppe* and *Bradshaw*, and Permit the Legislature to Craft a Constitutional Unlawful Possession Statute

If this Court were to accept this analysis, what should it do? It is apparent that this Court should not try to rewrite the statute once again—doing so would constitute judicial legislation. The distortion of Washington's unlawful possession law in *Cleppe* and *Bradshaw* went far beyond what the Legislature intended or wrote and demonstrates the difficulties in judicial efforts to rewrite legislation to preserve its constitutionality. Instead, the most direct route is preferable. This Court should recognize that, as it is written, Section 4013 is unconstitutional because it makes criminals out of people who have no intent or desire to engage in illegal activity. This Court should also abandon its efforts to preserve this statute by rewriting it and recognize that *Cleppe* and *Bradshaw* simply replaced one constitutional problem with another.[10] This Court

[10] The State here argues that *stare decisis* requires this Court to preserve *Cleppe* and *Bradshaw*. Suppl. Br. Resp't 4-11. This argument fails for two reasons. First, this Court has not hesitated to overturn cases—even dozens at a time—when it believes such cases do not represent accurate interpretations of constitutional law. *See Yim v. City of Seattle*, 194 Wn.2d 682, 702, 451 P.3d 694 (2019) (overturning over sixty decisions dating back decades). Second, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . ., and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). This case concerns a judge-made rule that can, and has, resulted in convictions of those who did not know, and had no way

should therefore overturn those decisions and remove the non-statutory, judicially created, and poorly defined unwitting possession "affirmative defense." Finally, this Court should leave the issue to the Legislature to craft an unlawful possession statute that comports with constitutional requirements.[11]

CONCLUSION

For the foregoing reasons, this Court should hold that Section 4013 is unconstitutional, overturn *Cleppe* and *Bradshaw*, and remand Ms. Blake's case to the trial court for reconsideration based on these conclusions.

Respectfully submitted this 24th day of April, 2020.

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of knowing, that they were committing a crime. *Stare decisis* should play no role in this Court's consideration of Ms. Blake's case.

[11] Alternatively, this Court could also recognize that its interpretation of the statute in *Cleppe* was incorrect and simply recognize that the word "possess" contains an element of knowledge. *See* n.2 above.

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020 I filed the foregoing BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE through the Court's electronic filing system, which will cause a copy to be served on all parties of record.

s/ William R. Maurer
William R. Maurer (WSBA No 25451)

INSTITUTE FOR JUSTICE

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