No. 96873-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANNON BLAKE,

Petitioner,

BRIEF OF WACDL AND ACLU-WA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici* are addressed in the accompanying motion for leave to file an amicus brief.

ISSUE ADDRESSED BY *AMICI*

This Court has held that possession of a controlled substance under RCW 69.50.4013 is a strict liability crime, meaning the government can obtain a conviction without proving that a defendant knew he possessed a substance or knew that the substance was controlled. *Amici* agree with the petitioner that relieving the prosecution of the burden of proving *mens rea* violates due process.

ARGUMENTS AND AUTHORITY

Although this Court has held that the Washington legislature intended to make drug possession a strict liability crime, it has never addressed the question presented in this petition: whether defining the offense without *mens rea* violates due process.[1]

The United States Supreme Court has long made clear that the prosecution bears the burden of proving every element of a criminal

[1] *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981), and *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), were wrongly decided as a matter of statutory interpretation. The opinions should be overruled because they are "incorrect and harmful." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508, 511 (1970). *Amici* limit their argument to due process, however, in response to the Court's request.

offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). While state legislatures have flexibility to define the elements of criminal offenses, there are "constitutional limits beyond which the States may not go." *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 2327, 53 L. Ed. 2d 281 (1977). The state cannot define offenses with "freakish . . . elements" that are inconsistent with both "history" and the current practice of "other states." *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 2501, 115 L. Ed. 2d 555 (1991) (plurality op.). Likewise, the state cannot ease the burden on the prosecution by eliminating an "inherent element" of an offense and requiring the defendant to bear the burden of proving himself innocent. *Id.*

Washington's drug possession law violates the due process standards set forth by the Supreme Court. The statute contains a freakish definition of the elements. Eliminating *mens rea* from the offense of unlawful drug possession is inconsistent with the common law, Supreme Court guidance on public welfare offenses, and the current practice of other states. Requiring a defendant to prove unwitting possession—rather than requiring the prosecution to prove the inherent element of knowledge—unconstitutionally shifts the burden of proof. Due process

requires that RCW 69.50.4013 must be read to include an implied element of knowledge or be held unconstitutional.

I. Criminal offenses cannot be defined in a way that relieves the government of proving unlawful conduct

When the government seeks to convict someone, it must prove "beyond a reasonable doubt [] every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. at 364. This is a "fundamental principle" of our justice system. *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259, 1261 (1977). It is based on the "well-established principle that every person accused of a crime is constitutionally endowed with an overriding presumption of innocence, a presumption that extends to every element of the charged offense." *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129, 1135 (1996).

Procedures that transform offense elements into affirmative defenses or create a presumption of guilt that the defendant must rebut undermine these fundamental principles. In *Mullaney v. Wilbur*, the Supreme Court ruled that Maine's homicide statute violated due process. 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Maine law defined murder as any intentional killing of another human being, but then permitted the defendant to submit evidence to prove that his disturbed mental state made him guilty only of manslaughter. *Id.* at 691-92. The

Court held that this procedure undermined *Winship* and opened the door to legislatures "redefin[ing] the elements" of offenses to avoid the burden of proof. *See id.* at 698. The Court found such burden-shifting mechanisms to be "intolerable," and held that the government's attempts to circumvent *Winship*'s holding were mere semantic "formalism." *Id.* at 703, 699.[2]

The Supreme Court subsequently clarified that the principles articulated in *Winship* and *Mullaney* necessarily place outer boundaries on how legislatures define crimes. In *Patterson v. New York*, the Supreme Court stated that legislatures generally have flexibility to define crimes, but due process prohibits a State from defining criminal offenses in a manner that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 201–02 (citation omitted). When creating burden-shifting schemes in criminal law, "there are obviously constitutional limits beyond which the States may not go." *Id.* at 211.

In a fractured opinion fourteen years later, a plurality of the Supreme Court acknowledged that there is no "bright-line test" regarding

[2] Two years later, this Court relied on *Mullaney* to invalidate Washington's typical jury instruction that any person who intentionally killed another was presumed to be guilty of second degree murder. *Roberts*, 88 Wn.2d at 344. This Court also relied on *Mullaney* to strike down Washington's DUI statute on the grounds that it unconstitutionally burdened the defendant with proving whether he consumed alcohol before or after driving. *Crediford*, 130 Wn.2d at 759.

when a state may eliminate an element of an offense and shift the burden of proof to a defendant. *Schad*, 501 U.S. at 639 (1991) (plurality op.) (quotation marks omitted). But while the Court did not articulate a clear rule for determining when the definition of a criminal offense violates due process, it likewise did not back down from the principles articulated in *Mullaney* and *Patterson*. The *Schad* plurality stated that due process prohibits defining criminal offenses with a "freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions." *Id.* Due process also bars "the State [from] shift[ing] the burden of proof as to what is an *inherent element* of the offense." *Id.* (emphasis added).

A careful reading of this line of cases reveals the following general principles for deciding when a State's scheme for reallocating the burden of proof in a criminal prosecution goes too far.

First, a legislature does not have unfettered discretion to define the elements of criminal offenses. When deciding whether a legislature has violated due process by attempting to circumvent the burden of proof, the reviewing court should look to history and the laws of the other states. *See Schad*, 501 U.S. at 640. Statutes that eliminate an inherent element of the crime in a manner that is inconsistent with both the common law and

the consensus of other jurisdictions can offend deeply held principles of justice and thus violate due process. *Id.*; *Patterson*, 432 U.S. at 201-02.

Second, the state may not relieve itself of the burden of proof in a criminal case by requiring a defendant to disprove an express or inherent element of the offense. *See Mullaney*, 421 U.S. at 699; *Roberts*, 88 Wn.2d at 344. The Supreme Court's decision in *Winship* that the government must prove every element beyond a reasonable doubt was predicated on fundamental constitutional principles, not linguistic formalism. Any attempt to define a criminal offense in a manner that undermines the burden of proof and presumption of innocence should be reviewed with skepticism.

Finally, it is no answer to say that the statute could be wielded responsibly by a conscientious prosecutor. *See United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Particularly in the context of drug laws, which have been enforced in an arbitrary and racially discriminatory manner for decades, the promise of prosecutorial benevolence is illusory.[3]

[3] The risk of unfair incarceration is heightened for communities of color, which have disproportionately been impacted by disparate enforcement of our State's drug laws. *See, e.g See Preliminary Report on Race and Washington's Criminal Justice System*, 87

Applying this guidance to Washington's strict liability drug possession law demonstrates that stripping the offense of a *mens rea* requirement exceeds due process limits.

II. Imposing strict liability for the offense of simple possession of a controlled substance offends principles of justice

Washington's scheme for criminalizing drug possession is inconsistent with the due process principles articulated by the United States Supreme Court. A strict liability drug possession offense is "freakish," and making unwitting possession an affirmative defense is unconstitutional burden-shifting regarding an "inherent element" of the crime. Regardless of what the legislature intended when it drafted RCW 69.50.4013, it never had the power to eliminate the requirement that the government prove the defendant's *mens rea*.

A. Creating a strict liability felony drug possession crime is freakish and unconstitutionally eliminates the inherent element of *mens rea*

Labeling someone a felon for unknowing possession of a controlled substance is an aberration that "finds no analogue in history or in the criminal law of other jurisdictions." *Schad*, 501 U.S. at 639 (plurality op.). In fact, criminalizing unwitting possession of a drug "offend[s] the consci[ence]." *State v. Brown*, 389 So.2d 48, 51 (La. 1980).

Wash. L. Rev. 1, 17 (2012) ("The fact of racial and ethnic disproportionality in Washington's incarcerated population is indisputable.").

Mens rea is an inherent element of unlawful drug possession that the prosecution must prove beyond a reasonable doubt.

1. Interpreting the drug possession statute as a strict liability offense is inconsistent with the common law and Supreme Court jurisprudence regarding public welfare offenses

This Court's interpretation of the drug possession statute departs from the common law and Supreme Court jurisprudence regarding public welfare offenses. Due process prohibits our legislature from engaging in such a dramatic deviation from this precedent.

For centuries, the Anglo-American legal tradition held that crime could be "constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 251–52, 72 S. Ct. 240, 244, 96 L. Ed. 288 (1952). In the common law, "the requirement of some *mens rea* for a crime [was] firmly embedded." *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 1797, 128 L. Ed. 2d 608 (1994). The precept that every crime must involve a *mens rea* "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." *Morissette*, 342 U.S. at 250.

The Supreme Court has held that the legislature may create strict liability crimes for "public welfare offenses" that criminalize "neglect where the law requires care, or inaction where it imposes a duty," instead

of harm to "the state, the person, property, or public morals." *Id.* at 255. Offenses with no *mens rea* are petty offenses: "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Id.* at 256. Even though public welfare offenses are more common today, reading a statute to have no *mens rea* is highly "disfavored" and should only be permitted in "limited circumstances." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437, 98 S. Ct. 2864, 2873, 57 L. Ed. 2d 854 (1978); *see State v. Bash*, 130 Wn.2d 594, 606, 925 P.2d 978, 983 (1996) (same).

The United States Supreme Court has frequently applied these principles to federal statutes that criminalize possession of a controlled item but do not clearly define the offense's *mens rea*. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) (child pornography); *Staples*, 511 U.S. 600 (machinegun); *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L. Ed. 2d 434 (1985) (food stamps); *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 111228 L. Ed. 2d 356 (1971) (hand grenades). The Supreme Court has distinguished among the required *mens rea* in each of these statutes by examining whether a defendant has fair notice that his conduct is subject to regulation, whether the statute criminalizes a broad range of innocent conduct, and what the punishment for the offense may be.

First, the Court has held that the legislature can criminalize possession of a regulated item without *mens rea* when the defendant has ample notice that he is dealing with an item that the government is likely to regulate. Thus, "as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation." *Staples*, 511 U.S. at 607 (quotation marks omitted). For example, the *Freed* Court held that a someone who knowingly possessed a hand grenade would have ample notice that he should confer with an appropriate authority regarding its legal status. *Freed*, 401 U.S. at 609 ("One would hardly be surprised to learn that possession of hand grenades is not an innocent act."). To the contrary, the *Staples* Court opined that *mens rea* was critical to a statute prohibiting machinegun possession because few ordinary citizens would know that a tiny modification to a firing mechanism could transform their family's hunting rifle into a felonious machinegun. *Staples*, 511 U.S. at 615 ("[A]ny semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun.").

Next, the Court has held that courts should find *mens rea* when imposing strict liability would sweep entirely innocent conduct into the criminal justice system. Thus, it is fundamentally unfair to threaten an

individual with the stigma of criminal conviction and potential incarceration for conduct that is not inherently sinister, such as owning a gun with some worn-out parts, *Staples*, 511 U.S. at 608, using food stamps in a manner inconsistent with an obscure subsection of the Code of Federal Regulations, *Liparota*, 471 U.S. at 426, or buying a pornographic magazine from a seller that failed to appropriately check the age of all of its models, *X-Citement Video*, 513 U.S. at 73.

Finally, the Supreme Court has emphasized that the seriousness of the offense matters in deciding whether the government must prove *mens rea*. In *Staples*, the Supreme Court noted that the severity of the punishment is a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." 511 U.S. at 616. The *Staples* Court mused, without explicitly holding, that eliminating *mens rea* from a felony offense "is simply incompatible with the theory of the public welfare offense." *Id.* at 618. In any event, the possibility of years of incarceration dictates that *mens rea* is required, as public welfare offenses only have penalties that are "relatively small" and that do "no grave damage to an offender's reputation," *Morissette*, 342 U.S. at 256.

This Court's interpretation of Washington's drug possession statute as a strict liability offense is inconsistent with each of these three

principles. First, unlike a hand grenade, the physical appearance and nature of controlled substances does not put an ordinary person on notice that she might be possessing an illegal item. The drug possession statute criminalizes the possession of dozens of different substances, ranging from the popular sleeping pill "Ambien" to a sixty-year-old anti-depressant called "Pipradol." *See* RCW 69.50.101(h)-(g).[4]

There is nothing about the physical characteristics of a pill or a powder that would put an ordinary person on notice that they are likely to be illegal. Cornstarch, baby formula, dietary supplements, and countless other household goods have a similar consistency to cocaine.[5] Methamphetamine can look like kitty litter.[6] A prescription pill may resemble an over the counter medication. And when it comes to drugs with well-established medical purposes, the confusion may get even deeper—even after looking at a well-labeled bottle, a Washingtonian might not immediately distinguish between "Oxymetazoline" and "Oxymethebanol," or "Diphenoxylate" and "Diphenhydramine." Yet the

[4] The Drug Enforcement Agency maintains a searchable list of federally-controlled substances at the website: https://www.dea.gov/sites/default/files/drug_of_abuse.pdf
[5] "What actors really snort, shoot and smoke on set," *NY Post*, Oct. 23, 2013, *available at* https://nypost.com/2013/10/23/what-actors-really-snort-shoot-and-smoke-on-set/
[6] "Man arrested after deputies mistake kitty litter for meth," *Fox 8 News*, Jan. 9, 2017, *available at* https://myfox8.com/news/man-arrested-after-deputies-mistake-kitty-litter-for-meth/

difference between these drugs is the difference between innocent conduct and being marched off to jail as a convicted felon.[7]

The possibility of unjust prosecution is compounded by Washington's unusual caselaw permitting prosecution for possessing a trace amount a controlled substance. Washington courts have routinely upheld drug prosecutions for amounts so tiny that the drugs could not possibly be ingested. *Compare State v. Malone*, 72 Wn.App. 429, 439, 864 P.2d 990, 996 (1994) (individual can be prosecuted for possession "*any* amount" of a controlled substance, including residue) *with Harbison v. State*, 302 Ark. 315, 322–23, 790 S.W.2d 146, 151 (1990) ("[P]ossession of less than a useable amount of a controlled substance is not what legislators have in mind when they criminalize possession because it cannot contribute to future conduct at which the legislation is aimed."). Individuals in our state face the stigma of a felony conviction and incarceration even when the "illegal drugs" they are carrying are little more than microscopic bits of char unrecognizable as illicit even to a trained eye. *State v. Barton*, No. 35384-2-III, 2019 WL 1492825, at *1 (Wash. Ct. App. Apr. 2, 2019) (unpublished opinion) (sustaining a conviction for drug residue even though a well-trained crime lab

[7] Oxymetazoline is a common decongestant. Oxymethebanol is a controlled substance. Diphenoxylate is a controlled substance. Diphenhydramine is a ubiquitous antihistamine.

technician "would not have been able to tell that it contained a controlled substance" without using laboratory equipment).

As a result of the combined effect of Washington's caselaw regarding *mens rea* and drug residue, a person is guilty of a felony if he inherits a home from a deceased family member, and some morphine left over from hospice care is tucked away in a closet. A person is a criminal if she drives her spouse's car and does not realize that the pills in the glove compartment are prescription Ambien instead of over-the-counter Unisom. And a teenager is a delinquent if there are traces of cocaine on the $10 bill he gets in change after buying a soda. Criminalizing such a broad swath of innocent conduct flies in the face of the Supreme Court's guidance on when crimes may properly be stripped of the requirement of *mens rea*.

Finally, this Court should hold what the Supreme Court mused: defining an offense as a felony "is simply incompatible with the theory of the public welfare offense." *Staples*, 511 U.S. at 618; *see also State v. Ndikum*, 815 N.W.2d 816, 822 (Minn. 2012) (adopting that statement as a holding). The Supreme Court has noted the "infamy" of being labeled a felon, which "is as bad a word as you can give to man or thing." *Morissette*, 342 U.S. at 260.

Yet even if this Court is not willing to go so far, it should find that the punishment and stigma associated with being labeled a felon for

simple drug possession is disproportionate to an offense lacking *mens rea*. A convicted defendant faces up to five years in prison, RCW 69.50.4013, as well as liberty restrictions through mandatory community custody, RCW 9.94A.701(3)(c). He or she also faces collateral consequences including the loss of the right to vote,[8] the loss of the right to possess a firearm,[9] and the loss of access to critical anti-poverty programs such as food stamps[10] and federal student loans.[11] Imposing such penalties without any proof of *mens rea* is inconsistent with the history of imposing penalties that are "relatively small" for public welfare offenses.

2. *Washington law on drug possession is an aberration among the states*

The conclusion that RCW 69.50.4013 offends due process is reinforced by the fact that every other state imposes a *mens rea* requirement on the crime of simple drug possession. Most states and the federal government require by statute that a defendant's possession of a controlled substance to be "knowing" or "intentional."[12] Other states

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[8] RCW 29A.08.520
[9] RCW 9.41.040
[10] "In Some States, Drug Felons Still Face Lifetime Ban On SNAP Benefits," *NPR*, June 20, 2018, *available at* https://www.npr.org/sections/thesalt/2018/06/20/621391895/in-some-states-drug-felons-still-face-lifetime-ban-on-snap-benefits
[11] 20 U.S.C. § 1091(r).
[12] 21 U.S.C. § 844(a); Ariz. Rev. Stat. § 13-3408; Colo. Rev. Stat. § 18-18-403.5; D.C. Code § 48-904.01; Haw. Rev. Stat. § 712-1243; 720 Ill. Comp. Stat. 570/402; Ind. Code § 35-48-4-6; Iowa Code § 124.401; Ky. Rev. Stat. § 218A.1415; La. Stat. § 40:968; Me. Rev. Stat. tit. 17-A, § 1107-A; Mass. Gen. Laws ch. 94C, § 34; Mich. Comp. Laws § 333.7403; Miss. Code. § 41-29-139; Mo. Stat. § 579.015; Neb. Rev. Stat. § 28-416; Nev.

imply a *mens rea* element even though the statute contains no reference to a specific mental state.[13]

Two states brook minor exceptions to this general rule: First, Florida requires the government to prove that the defendant knew of the presence of the illicit substance, but does not require the government to prove that the defendant knew that the substance was illicit. The defendant may raise as an affirmative defense the fact that he did not know the substance was illicit.[14] North Dakota requires that a defendant possess a controlled substance "willfully," which involves a *mens rea* of intent, knowledge, or recklessness.[15]

Rev. Stat. § 453.336; N.H. Rev. Stat. § 318-B:26; N.J. Stat. § 2C:35-10; N.M. Stat. § 30-31-23; N.Y. Penal Law § 220.09; Ohio Rev. Code § 2925.11; Okla. Stat. tit. 63, § 2-402; Or. Rev. Stat. § 475.752; R.I. Gen. Laws § 21-28-4.01; S.C. Code § 44-53-370; S.D. Codified Laws § 22-42-5; Tenn. Code § 39-17-418; Tex. Health & Safety Code § 481.115; Utah Code § 58-37-8; Vt. Stat. tit. 18, § 4234; Va. Code § 18.2-250; W. Va. Code § 60A-4-401; Wyo. Stat. § 35-7-1031.

[13] *Walker v. State*, 356 So.2d 672 (Ala. 1977); *Bell v. State*, 519 P.2d 804, 809 n. 17 (Alaska 1974); *Loy v. State*, 88 Ark. App. 91, 101, 195 S.W.3d 370, 375 (2004); *People v. Rubacalba*, 6 Cal. 4th 62, 66, 859 P.2d 708, 711 (1993); *State v. Carbone*, 116 Conn. App. 801, 816, 977 A.2d 694, 704 (2009); *Ayers v. State*, 97 A.3d 1037, 1041 (Del. 2014); *Duvall v. State*, 289 Ga. 540, 542, 712 S.E.2d 850, 851 (2011); *State v. Armstrong*, 142 Idaho 62, 64, 122 P.3d 321, 323 (2005); *State v. Allen*, 52 Kan. App. 2d 729, 732, 372 P.3d 432, 434 (2016); *Neal v. State*, 191 Md. App. 297, 316, 991 A.2d 159, 170 (2010); *State v. Ali*, 775 N.W.2d 914, 918 (Minn. Ct. App. 2009); *State v. Clark*, 347 Mont. 354, 365, 198 P.3d 809, 818 (2008); *State v. Sinclair*, 191 N.C. App. 485, 492, 663 S.E.2d 866, 872 (2008); *Commonwealth v. Valette*, 531 Pa. 384, 388, 613 A.2d 548, 549 (1992); *State v. Poellinger*, 153 Wis. 2d 493, 508, 451 N.W.2d 752, 758 (1990).

[14] *State v. Adkins*, 96 So. 3d 412, 424, 37 Fla. L. Weekly S449 (Fla. 2012)

[15] N.D. Cent. Code § 19-03.1-23(7). North Dakota briefly followed this Court's decision in *Cleppe*, but its legislature amended the drug possession statute to clarify the *mens rea* element in 1989.

What is more, another state Supreme Court has taken up the issue in this case. The Louisiana legislature once attempted to make drug possession a strict liability crime by criminalizing "unknowing possession" of a controlled substance. The Louisiana Supreme Court did not even wait for the law to be enforced, but immediately took up a facial constitutional challenge and invalidated the statute. *State v. Brown*, 389 So. 2d 48, 51 (La. 1980). The *Brown* Court noted that *mens rea* is an "indispensable" element of such a criminal offense, and stated that the prospect of innocent people being convicted under the statute "offend[s] the conscious [sic]." *Id.* The Court decisively held: "The 'unknowing' possession of a dangerous drug cannot be made criminal." *Id.*

Washington is thus an aberration among states as to its drug possession law. It is the *only* state that relieves the prosecution of the burden of proving that the defendant knew he possessed a substance and that his possession was illicit. This reinforces the conclusion that Washington's definition of the offense is freakish and offends fundamental principles of justice.

B. The existence of the unwitting possession affirmative defense does not save the statute from violating due process

It is no answer to say that a defendant who truly had no knowledge that he possessed a controlled substance can advance his theory of

innocence through an affirmative defense. Requiring a defendant to prove an affirmative defense presumes that he is guilty of a criminal act. This Court has stated that an "affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so." *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1, 4-5 (2010). But a person who unknowingly possesses drugs isn't "guilty but excused"—he is innocent. A person who tells the police "I thought these pills were over-the-counter, not prescription" isn't saying "I'm guilty of a felony but I have an excuse"; he's saying, "I didn't do anything wrong!"

This argument is also precisely what this Court rejected in *State v. Crediford*. In that case, the plain text of Washington's driving under the influence law apparently criminalized being intoxicated within two hours of having driven a motor vehicle, regardless of whether the driver was drunk at the time of driving. 130 Wn.2d at 755. The statute permitted the defendant to raise the affirmative defense that he drank after driving, not before. *Id.* at 759. The *Crediford* Court found that, in order to save the statute from the "constitutional defect" of overbreadth, it should be read to contain an "implied element" that the defendant had alcohol in his system at the time of driving. *Id.* at 758. The Court then invalidated the statute for shifting the burden of proof on that issue to the defense, holding that because "a defendant [had] to disprove a necessary element of the offense,

thus effectively placing the burden on that defendant to prove his or her innocence, it is violative of the Due Process Clause of the United States Constitution." *Id.* at 759.

Likewise, the analysis above demonstrates that regardless of what the legislature intended, to pass constitutional muster RCW 69.50.4013 must contain an implied or inherent element of knowledge. Requiring a defendant to prove an affirmative defense that negates an inherent element of *mens rea* unconstitutionally shifts the burden of proof.

C. The promise to wield the statute judiciously is no defense

The State has previously claimed that it will exercise discretion so as not to drag the innocent through painful legal proceedings. *State v. A.M.*, 194 Wn.2d 33, 65, 448 P.3d 35, 51-52 (2019) (McCloud, J., concurring). This promise does not save the statute. *Stevens*, 559 U.S. at 480 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

What is more, even the most conscientious prosecutors are aware of the practical effects of filing felony drug charges. An accused might plead guilty in the face of weak evidence to avoid facing a felony drug charge for drug residue found in his car when he was arrested. A defendant facing both substantive charges and a drug possession charge at trial faces a Hobson's choice: Remain silent and put the prosecution to its

burden of proof regarding the underlying charge? Or testify to establish the affirmative defense of unwitting possession? Properly interpreted, RCW 69.50.4013 would put no defendant in that position.

CONCLUSION

Washington's drug possession law contains a freakish definition of the elements. It is an aberration in the history of public welfare offenses, and it is unique among the states. The statute criminalizes innocent conduct and offends fundamental principles of justice. This Court should hold that RCW 69.50.4013 violates due process unless it is interpreted to require proof that a defendant knew he possessed the substance and knew of its illicit nature.

Respectfully submitted this 24th day of April, 2020.

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