No. 96873-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANNON B. BLAKE, aka BOWMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY

BRIEF OF AMICUS WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

BURI FUNSTON MUMFORD & FURLONG

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INTRODUCTION

"[U]nder our constitutional system, our legislature has the plenary power to criminalize conduct regardless of whether the actor intended wrongdoing." State v. Yishmael, __ Wn.2d __, 456 P.3d 1172, 1176 (2020). For the third time in less than 20 years, this Court examines again whether the Legislature intended possession of a controlled substance to be a strict liability crime. State v. Bradshaw, 152 Wn.2d 528, 530, 98 P.3d 1190 (2004); State v. A.M., 194 Wn.2d 33, 35, 448 P.3d 35 (2019). It did. The Court also asks again whether Washington's possession statute, RCW 69.50.4013(2), violates due process under the federal and State constitutions. It does not.

This Court in State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981) reaffirmed a decades-old balance between the Legislature's desire to prohibit all unauthorized possession of controlled substances while preserving important exceptions as affirmative defenses. Despite criticism, the opinion – and its result – has worked effectively for nearly 30 years and has solid constitutional underpinnings. If this Court now attempts to dismantle this balance, it will undermine fundamental precedent while creating substantial and unpredictable consequences. Nothing has changed in Washington law or federal constitutional doctrine that justifies overruling Cleppe.

Amicus Washington Association of Prosecuting Attorneys respectfully requests this Court to reaffirm that the Legislature has authority to create strict liability offenses and preserve exceptions to liability as affirmative defenses.

I. IDENTITY AND INTEREST OF AMICUS WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS.

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. They are responsible by law for the prosecution of all felony cases in Washington, and for all gross misdemeanors and misdemeanors charged under State statutes. RCW 36.27.020(4). They therefore have an interest in the proper interpretation and enforcement of the Uniform Controlled Substances Act as well as the Legislature's constitutional authority to define crimes and affirmative defenses.

WAPA requests this Court to uphold as constitutional the elements of simple possession in RCW 69.50.4013(2) and the affirmative defenses in RCW 69.50.506(a). First, decades of federal and State precedent support the Legislature's decision to create strict liability crimes and appropriate affirmative defenses. Second, Washington's law, even if specific to the State, does not violate due process. And third, overruling decades of precedent and invalidating the Legislature's constitutional authority to

define crimes and defenses will have significant, unpredictable consequences.

II. THE COURT IN CLEPPE FOLLOWED DECADES OF PRECEDENT UPHOLDING THE ELEMENTS AND DEFENSES TO SIMPLE POSSESSION.

Petitioner Blake urges this Court to overrule State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). The Court's opinion in Cleppe rests on two premises. First, the Legislature intentionally excluded knowledge as an element of simple possession.

> [T]he legislature in responding to the problem of drug abuse, one of the major social evils of our time, adopted the Uniform Controlled Substances Act. The act, as introduced in the Senate, made "knowingly" and "intentionally" elements of the misdemeanor of simple possession of a controlled substance. As the legislature worked its will on the bill, the words "knowingly or intentionally" were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony. No change was made in subsection 401(a), as introduced.

State v. Cleppe, 96 Wn.2d 373, 380, 635 P.2d 435 (1981).

The Court reconfirmed this conclusion in State v. Bradshaw,

> The legislative history of the mere possession statute is clear. The legislature omitted the "knowingly or intentionally" language from the Uniform Controlled Substances Act. The Cleppe court relied on this legislative history when it refused to imply a mens rea element into the mere possession statute. The legislature has amended RCW 69.50.401 seven times since Cleppe and has not added a mens rea element. Given that the legislative history is so clear, we refuse to imply a mens rea element.

State v. Bradshaw, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004). No reasonable dispute should exist that in the 1971 Uniform Controlled Substances Act, as well as in its 1951 predecessor, the Legislature intentionally defined simple possession as a strict liability crime.

Second, the Court in Cleppe held that 1971 Act continued to recognize the established affirmative defense of unwitting possession.

> That unwitting possession has been allowed as an affirmative defense in simple possession cases may seem anomalous. If guilty knowledge or intent to possess are not elements of the crime, of what avail is it for the defendant to prove his possession was unwitting? Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. 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 380–81. In Bradshaw, this Court reconfirmed the legality of the defense.

> 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. Defendants then can prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime. It does not improperly shift the burden of proof.

Bradshaw, 152 Wn.2d at 538 (citations omitted).

Both rulings have a long history in Washington caselaw, and both have strong constitutional support. Without question, the Legislature has

constitutional authority to define the elements of a crime and allowable affirmative defenses.

> States enjoy wide latitude in defining the elements of criminal offenses, see, e.g., Martin v. Ohio, 480 U.S. 228, 232, 107 S.Ct. 1098, 1101, 94 L.Ed.2d 267 (1987); Patterson, 432 U.S., at 201–202, 97 S.Ct., at 2322–2323, particularly when determining "the extent to which moral culpability should be a prerequisite to conviction of a crime," Powell v. Texas, 392 U.S. 514, 545, 88 S.Ct. 2145, 2160, 20 L.Ed.2d 1254 (1968) (Black, J., concurring).

Montana v. Egelhoff, 518 U.S. 37, 58, 116 S. Ct. 2013, 2024–25, 135 L. Ed. 2d 361 (1996) (Ginsberg, J., concurring); State v. Yishmael, __ Wn.2d __, 456 P.3d 1172, 1181 (2020) ("legislative function to define the elements of a crime"); Wash. Const. Art. II sec. 1.

This authority includes, in appropriate cases, forbidding conduct that jeopardizes public safety – regardless of the defendant's knowledge or intent. These are public welfare offenses.

> Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Morissette v. United States, 342 U.S. 246, 253–54, 72 S. Ct. 240, 245, 96 L. Ed. 288 (1952).

Controlled substances -- whether illegal drugs like heroin or methamphetamine or prescription drugs like OxyContin – are controlled because they are dangerous. The unauthorized possession of these dangerous drugs poses a hazard to the public, regardless of what the possessor knows or intends.

> [The Narcotic Act's] manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.

United States v. Balint, 258 U.S. 250, 254, 42 S. Ct. 301, 303, 66 L. Ed. 604 (1922).

From 1951 to the present, Washington has not required the prosecution to prove intent for simple possession. In State v. Henker, the Court compared the 1951 possession statute with its 1923 counterpart:

> RCW 69.33.020 (cf. Laws of 1951, 2nd Ex.Sess., chapter 22, § 2), under which appellant was charged, reads of follows:
>
> 'It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter.'

> Whether intent or guilty knowledge is to be made an essential element of this crime is basically a matter to be determined by the legislature.
>
> The prior narcotics act, Laws of 1923, chapter 47, § 3, p. 134, provided:
>
> 'It shall be unlawful for any person to sell, furnish, or dispose of, or have in his possession *with intent to sell*, furnish, or dispose of any narcotic drug or drugs, except upon the written and signed prescription of a physician regularly licensed to practice medicine and surgery * * *.' (Emphasis supplied.)
>
> *Intent to sell* was a necessary element of the crime of possession under the above-quoted statute. Had the legislature intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute. The omission of the words *with intent* evidences a desire to make mere possession or control a crime.

State v. Henker, 50 Wn.2d 809, 811–12, 314 P.2d 645 (1957).

This Court then repeatedly confirmed that "guilty knowledge or intent is not an element of the crime of possession of narcotic." State v. Boggs, 57 Wn.2d 484, 486, 358 P.2d 124 (1961); State v. Morris, 70 Wn.2d 27, 34, 422 P.2d 27 (1966) ("state had the burden of proving beyond a reasonable doubt that the appellant, on or about the times fixed in the information, had possession of the marijuana cigarettes"); State v. Mantell, 71 Wn.2d 768, 770, 430 P.2d 980 (1967) ("mere possession is sufficient"); State v. Walcott, 72 Wn.2d 959, 968, 435 P.2d 994 (1967) ("mere proof of possession is sufficient"). The Court's opinion in Cleppe followed this precedent,

concluding that the 1971 Uniform Controlled Substances Act – like its 1951 predecessor – did not require proof of intent for simple possession.

Excluding intent from the elements of simple possession does not violate due process under the federal or State constitutions. "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." Lambert v. People of the State of California, 355 U.S. 225, 228, 78 S. Ct. 240, 242, 2 L. Ed. 2d 228 (1957); State v. Yishmael, 456 P.3d at 1176 (2020) ("our legislature has the plenary power to criminalize conduct regardless of whether the actor intended wrongdoing"). Whether other states follow or not, the Washington Legislature has constitutional authority to define simple possession as a strict liability crime. It has been so for nearly 70 years.

The affirmative defense of unwitting possession also has deep historical precedent and constitutional support. The 1923 Narcotics Act defined three related crimes of possession: "(1) To sell, furnish, or dispose of such drugs; (2) to have in possession such drugs with intent to sell, furnish, or dispose of them; (3) to have in possession such drugs, unless the same shall have been lawfully obtained." State v. Radford, 135 Wash. 120, 121, 236 P. 804 (1925). A separate section of the Act preserved exceptions to possession as affirmative defenses.

> Section 5 of the act (Rem. Comp. Stat. Supp. 1927, § 2509-5) reads as follows: 'In any prosecution for the violation of the provisions of this act, it shall not be necessary for the indictment, complaint or information to set forth any negative allegation, nor for the plaintiff to prove that the defendant does not come within any of the exceptions herein contained; but such exceptions shall be considered as a matter of defense, and the burden shall be upon the defendant to show that he comes within such exceptions.'

State v. Helmer, 166 Wash. 602, 603–04, 8 P.2d 412 (1932).

This Court in Helmer first recognized affirmative defenses to possession of controlled substances.

> [T]here rested upon the prosecution the burden of proving beyond a reasonable doubt that Helmer had possession of the drug in King county on or about the date charged; but, if he desired to rest his defense upon his lawfully obtaining possession of the drug, the burden was upon him to so show, 'as a matter of defense,' this by the express language of the statute. True, he did not have that burden to the extent of proving beyond a reasonable doubt that he lawfully acquired possession of the drug; but he did have that burden to the extent of creating in the minds of the jury a reasonable doubt as to whether or not he had unlawfully acquired possession of the drug, if that be his defense rather than denial of possession of the drug.

State v. Helmer, 166 Wash. at 604.

These affirmative defenses remained in Washington law for the next 78 years. The essence of Section 5 of the 1923 Narcotics Act is now reflected in Washington's Uniform Controlled Substances Act.

> It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other

> proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

RCW 69.50.506(a). Based on similar language in the 1951 Act, the Court identified unwitting possession as one of the preserved, affirmative defenses.

> When possession was thus proved, it became a matter of defense, a burden resting on the appellant, to show to the satisfaction of the jury that his possession of the drug was either unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute.

State v. Morris, 70 Wn.2d 27, 34–35, 422 P.2d 27 (1966). It has been a recognized defense ever since. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994) ("defendant may, nevertheless, affirmatively assert that his possession of the drug was unwitting").

Like its authority to define elements, the Legislature has constitutional power to create or preserve affirmative defenses to criminal liability. As Justice Cardozo explained,

> [W]ithin limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Morrison v. People of State of California, 291 U.S. 82, 88–89, 54 S. Ct. 281, 284, 78 L. Ed. 664 (1934); Patterson v. New York, 432 U.S. 197, 207, 97 S. Ct. 2319, 2325, 53 L. Ed. 2d 281 (1977) (State not required to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment").

The affirmative defense of unwitting possession falls well within these constitutional boundaries. As this Court ruled in Bradshaw,

> 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. Defendants then can prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime.

Bradshaw, 152 Wn.2d at 538; Staley, 123 Wn.2d at 800 ("defendant is permitted to "explain" that the drugs were possessed either without knowledge of their existence or the nature of the substance").

This Court's decision in Cleppe was not novel, unprecedented, or grievously wrong. Instead, it followed 50 years of decided law. It is also founded on a fundamental constitutional truth: the Legislature has the authority to define the elements of crimes, establish affirmative defenses, and allocate burdens of proof.

III. DIFFERENT IS NOT "FREAKISH".

Petitioner Blake asks the Court to vacate 70 years of legislative authority as a violation of due process. She must satisfy a high burden.

> 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 as fundamental...The question is 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. An affirmative answer, though not unheard of, is rare.

Kahler v. Kansas, __ U.S. __, 140 S. Ct. 1021, 1027–28, __ L.Ed.2d __ (2020) (citations omitted).

In her Petition for Review, Ms. Blake's primary argument is that Washington's definition of simple possession is unique among the states.

> Washington's drug possession law is truly "freakish." Schad, 501 U.S. 640 (plurality). It is contrary to the practice of every other state. It is contrary to the tradition, as shown by the model act, of requiring the State prove a *mens rea* element in drug possession crimes. This is a strong indication that Washington's possession statute violates due process. Id.

(Petition for Review at 8). There are a number of problems with the argument.

First, it imposes a false uniformity on state criminal law. On March 23, 2020, the United States Supreme Court emphasized again the need for states to experiment with and adapt the standards for criminal responsibility.

> In refusing to impose a constitutional doctrine defining those standards, the Court invoked the many interlocking and overlapping concepts that the law uses to assess when a person should be held criminally accountable for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress—the Court counted them off—reflect both the evolving aims of the criminal law and the changing religious, moral, philosophical, and medical views of the nature of man. Or said a bit differently, crafting those doctrines involves balancing and rebalancing over time complex and oft-competing ideas about social policy and moral culpability—about the criminal law's practical effectiveness and its ethical foundations. That constantly shifting adjustment could not proceed in the face of rigid constitutional formulas.

Kahler, 140 S. Ct. at 1028 (citations and quotations omitted). The fact that Washington law differs from Oregon's or California's is a necessary consequence of different legislative choices and balances. It is not a violation of due process.

Second, the Legislature, not this Court, has constitutional authority to decide whether provisions of another state's criminal code are worth adopting. Ms. Blake's arguments about the fairness and advantages from adding intent as an element of simple possession are relevant for legislative action. They do not justify vacating legislative choices as fundamentally unfair or violative of due process.

Third, the United States Supreme Court and this Court have never required all criminal statutes to include mens rea. "Whether a mental element is an essential element of a crime is a matter to be determined by

the Legislature." State v. Bash, 130 Wn.2d 594, 604, 925 P.2d 978 (1996). In her Supplemental Brief, Ms. Blake argues that "a defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense element." (Petitioner's Supp. Brief at 6) (quoting Apprendi v. New Jersey, 530 U.S. 466, 493, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Yet she fails to explain why in this case, and no other, the Legislature violated the federal and State constitutions since 1951 by not requiring the State to prove intent.

Finally, Ms. Blake argues that the affirmative defense of unwitting possession violates the presumption of innocence. "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." (Petitioner's Supp. Brief at 8). Her argument fails to distinguish innocence from excuse. No dispute exists that Ms. Blake had a baggy of methamphetamine in her jacket. She possessed a controlled substance without a prescription.

What she alleges is an excuse to liability – since she did not know the baggy was there, she is not culpable. As noted above, the Uniform Controlled Substances Act prohibits the possession of dangerous drugs, period. The crime, and harm to society, is that destructive chemicals are circulating in public. The Legislature recognizes exceptions to this harm –

where a person has a prescription for the harmful substance or had no idea it was in his or her possession. But the threat to public welfare is the physical presence of the dangerous chemical, not a guilty mind.

IV. STRICT LIABILITY IS ESSENTIAL TO PREVENT CORPORATE WRONGDOING.

If it dismantles the Legislature's balance of elements and affirmative defenses here, the Court will jeopardize prosecuting important but difficult to prove public welfare offenses. The largest environmental and financial crimes – harming thousands at a time – do not involve lone perpetrators. Corporations commit them. To battle these crimes, prosecutors must be able to hold corporate officials accountable for the destructive acts occurring under their control. Proving the crime is possible. Proving a corporate vice president's mens rea is not.

As this Court explained in State v. Bash, public welfare or regulatory offenses involve,

> pure food and drugs, labeling, weights and measures, building, plumbing and electrical codes, fire protection, air and water pollution, sanitation, highway safety and numerous other areas. Many of the public welfare offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.

State v. Bash, 130 Wn.2d 594, 607, 925 P.2d 978, 983–84 (1996). If the Court rules, as Petitioner urges, that all strict liability crimes are unconstitutional, prosecution of these vital regulatory offenses becomes nearly impossible.

Even if the Court finds some factor to distinguish possession of a controlled substance from all other strict liability crimes, every prosecution of these public welfare offenses will have a cloud of uncertainty and the threat of appeal. This becomes especially likely for corporate executives with ample funds to fight all charges. An unintended consequence from overruling Cleppe is greater inequality between defendants charged with traditional crimes and those charged with regulatory ones.

Finally, this Court has wisely avoided deciding constitutional questions unless necessary. To overrule Cleppe, the Court must simultaneously invalidate the Legislature's constitutional authority to create strict liability crimes *and* adopt appropriate affirmative defenses. All because a majority of the Court believes the legislative choices are grievously wrong. The Legislature, not this Court, should decide whether it is time to readjust the burdens of proving simple possession.

CONCLUSION

The Washington Association of Prosecuting Attorneys respectfully request this Court to uphold the Legislature's constitutional authority to define crimes and defenses.

DATED this 24th day of April 2020.

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Amicus Brief of Washington Association of Prosecuting Attorneys** to:

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