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Division III  
State of Washington  
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SUPREME COURT  
STATE OF WASHINGTON  
4/15/2020  
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Supreme Court No. 98419-1  
(COA No. 36437-2-III)

THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CAMREN BUCHE,

Petitioner.

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

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PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Camren Buche, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

## B. COURT OF APPEALS DECISION

Mr. Buche seeks review of the Court of Appeals decision dated March 17, 2020, attached as an appendix.

## C. ISSUES PRESENTED FOR REVIEW<sup>1</sup>

1. The presumption of innocence is a principle fundamental to America's history and tradition. Criminal laws that eliminate traditional *mens rea* elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. Washington is *the only* state where possession of a controlled substance is a strict liability crime. Persons charged with this crime are presumed guilty unless they can prove "unwitting"

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<sup>1</sup> These issues are currently under review in *State v. Blake*, Supreme Court. No. 96873-0. Oral arguments have been heard but a decision has not yet issued.

possession. Does this presumption of guilt deprive defendants of their liberty without due process of law?

2. This Court has held that the possession of a controlled substance statute has no mental element and is a strict liability crime. But in interpreting the possession statute, this Court did not consider the foregoing constitutional issue, which seriously calls into question the constitutionality of the statute. Statutes are interpreted to avoid constitutional deficiencies. Should this Court overrule its holding that possession of a controlled substance is a strict liability crime without any *mens rea* element?

#### D. STATEMENT OF THE CASE

When the Stevens County police began an investigation into stolen cars, they became interested in Camren Buche, who was seen driving one of the stolen cars. RP 216, 219.

When Mr. Buche was arrested, a small empty plastic bag with residue was found inside his wallet after a second search of him by the police. RP 271. The residue tested positive for methamphetamines. RP 245. Mr. Buche did not

make a statement that he knew about there were controlled substances in his the empty plastic bag.

Among other charges, the government charged Mr. Buche with possession of a controlled substance. CP 60-61.

The court instructed the jury that to convict Mr. Buche of the drug charge, it was required to find:

- (1) That on or about February 14, 2018, the defendant possessed Methamphetamine; and
- (2) That the acts occurred in the State of Washington.

CP 44 (Instruction 12).

The jury was not instructed that knowledge was an essential element of the crime.

On appeal, Mr. Buche asked the Court of Appeals to reverse his conviction, because, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and article I, sections 3 and 22 of the Washington Constitution, the court erred by failing to instruct the jury the prosecution must prove Mr. Buche knew he possessed methamphetamine. CP 44 (Instruction number 12).

He also asked the Court of Appeals to hold that if it found unlawful possession to be a strict liability crime that it should find that the law violates due process guaranteed by the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution.

The Court of Appeals denied Mr. Buche's request for relief. App. 1.

#### E. ARGUMENT

This Court should grant review of this case to hold that unless unlawful possession is interpreted to include a mens rea element, the offense of felony possession violates due process.

**1. The presumption of innocence is fundamental and strict liability crimes are highly disfavored.**

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). It is fundamental that “wrongdoing must be conscious to be criminal.” *Morrisette v.*



*United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

For these reasons, even where a statute appears to not contain any mental element, this does not mean there is not any. *Elonis v. United States*, \_\_ U.S. \_\_, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to exclude a traditional mental element, the courts will imply one. *See, e.g., State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

Innocent conduct may otherwise be criminalized.

Notwithstanding these principles, this Court has held that drug possession is a strict liability crime with no mental element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981). The government need only prove the nature of the substance and the fact of possession. *Bradshaw*, 152 Wn.2d at 537-38. For the innocent to avoid conviction, they must prove, by a preponderance of the evidence, that their possession was

unwitting. *Id.* at 538. Instead of a presumption of innocence, there is a presumption of guilt.

**2. If possession of a controlled substance is interpreted to be a strict liability crime, the statute is unconstitutional.**

As argued in the Court of Appeals, this burden shifting scheme deprives persons of their liberty without due process of law. A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, \_\_ U.S. \_\_, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017). For this reason, “there are obviously constitutional limits beyond which the States may not go . . .” *Patterson*, 432 U.S. at 210.

History and tradition provide guidance on when the constitutional line is crossed:

Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

*Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality).

Washington appears to be the only state that makes drug possession a true strict liability crime.<sup>2</sup> *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); see *Bradshaw*, 152 Wn.2d at 534; *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988). Although Florida eliminated a mens rea requirement from its drug possession statute, this only eliminated the government's burden to prove that the defendant knew the nature of the substance. *Adkins*, 96 So. 3d at 415-16. It did not eliminate the requirement that the government prove defendants knew

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<sup>2</sup> Drug possession was a strict liability crime in North Dakota until the legislature changed the law to require a mental element. *State v. Bell*, 649 N.W.2d 243, 252 (2002).

they possessed the substance. *Id.* Unlike in Washington, prosecutors in Florida must at least prove that the defendant was aware of the presence of the substance.

That nearly every drug possession offense in this country has a mens rea requirement is not surprising. As acknowledged in *Bradshaw*, the Uniform Controlled Substances Act of 1970 has a “knowingly or intentionally” requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); *Bradshaw*, 152 Wn.2d at 534. This shows that the offense of possession of a controlled substance has traditionally required proof of knowledge.

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 government prove a mens rea element in drug possession crimes. This is a strong indication that Washington’s possession statute violates due process. *Id.*

When a person possesses a controlled substance without knowledge, there is nothing wrong about their conduct. For example, if a person rents or buys a car, and drugs are hidden inside, there is nothing blameworthy about the person's conduct. The same is true when the police find an empty bag, but are successful to demonstrate that drugs were once inside the bag.

**3. To avoid the foregoing constitutional deficiency, the drug possession statute should be read to contain a mental element.**

This Court construes criminal statutes to avoid constitutional deficiencies. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). Because interpreting the possession statute as a strict liability crime raises grave constitutional concerns about the validity of the statute, this Court should grant review and overrule its decisions holding that possession is a strict liability crime.

This Court interpreted the possession statute to have no mens rea in *Bradshaw* and *Cleppe*. This result is wrong.

In reaching that result, the *Cleppe* court relied on the fact the legislature appeared to have omitted a mental element from the statute. *Cleppe*, 96 Wn.2d at 379-80. This Court's analysis in *Cleppe* is not the right inquiry. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."); *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000) ("failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.").

As stated earlier, Washington is the only jurisdiction with strict liability for simple drug possession. It is a felony with a maximum punishment of five years imprisonment. RCW 69.50.4013(2); RCW 9A.20.021(1)(c).

It is also not a public welfare type offense where the lack of a mental element is generally permitted. For example, the United States Supreme Court upheld a narcotics law that did not require the defendant know the item he was selling

qualified as an unlawful narcotic within the meaning of the statute. See *United States v. Balint*, 258 U.S. 250, 254, 42 S. Ct. 301, 66 L. Ed. 604 (1922); *United States v. Staples*, 511 U.S. 600, 606, 132 S. Ct. 593, 181 L. Ed. 2d 435 (2011). This was a kind of public welfare offense where the activity is highly regulated. *Staples*, 511 U.S. at 606-07. Moreover, “[e]ven statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct.” *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 522, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994).

“By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, [the United States Supreme Court has] avoided construing criminal statutes to impose a rigorous form of strict liability.” *Staples*, 511 U.S. at 607 n.3. In contrast, Washington’s possession law as interpreted in *Bradshaw* and *Cleppe* does not require any

kind of knowledge by the defendant. Unlike the offense in *Balint*, it is a rigorous form of strict liability.

**4. This Court should grant review.**

Whether the drug possession statute violates due process presents a significant constitutional question worthy of this Court's review. RAP 13.4(b)(3). It is an issue that will continue to recur and is therefore a matter of public interest. RAP 13.4(b)(4). Similarly, whether the drug possession statute should be read to criminalize innocent behavior is an issue of substantial public interest. RAP 13.4(b)(4).

This Court should grant review.

**F. CONCLUSION**

Based on the preceding, Mr. Buche respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 13th day of April 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29335)  
Washington Appellate Project (91052)  
Attorneys for Appellant



APPENDIX

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Court of Appeals Opinion ..... APP 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 36437-2-III
Respondent,	)	
	)	
v.	)	
	)	
CAMREN JAY BUCHE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Camren Buche appeals from a conviction for possession of methamphetamine, challenging very well settled law. We affirm.

FACTS

Mr. Buche was arrested for possessing a stolen vehicle. He also had a baggie of methamphetamine residue in his wallet at the time of the arrest. The prosecutor filed charges of possession of a stolen vehicle and possession of a controlled substance. The matter proceeded to jury trial in the Stevens County Superior Court.

The jury was instructed, without objection, that the State needed to prove Mr. Buche “possessed methamphetamine.” Clerk’s Papers at 44. Mr. Buche argued to the

jury that the amount of residue was so small that it was irrational to conclude it was methamphetamine. The jury, nonetheless, convicted the defendant as charged.

The court imposed a first offender waiver of presumptive sentence. Mr. Buche then appealed to this court. A panel considered his case without hearing argument.

### ANALYSIS

The sole issue presented is a challenge to the elements instruction on the drug possession count, with Mr. Buche contending that a knowledge element must be added. This issue is controlled by well settled law.

Possession of a controlled substance is a felony offense. RCW 69.50.4013(1). Possession of drug residue in a pipe can be properly charged as possession of a controlled substance because no minimum amount of a controlled substance is required. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008).

The Washington Legislature did not include a knowledge element in the unlawful possession statute. Our court subsequently concluded that the omission was intentional and that a knowledge element should not be read into the statute.<sup>1</sup> *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981). Reviewing the issue a generation later, our court again concluded that *Cleppe* was correctly decided. *State v. Bradshaw*, 152 Wn.2d 528, 98

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<sup>1</sup> In order to ameliorate the harshness of strict liability, the court created a common law defense of unwitting possession. *State v. Cleppe*, 96 Wn.2d 373, 380-381, 635 P.2d 435 (1981).

No. 36437-2-III  
*State v. Buche*

P.3d 1190 (2004).<sup>2</sup> Those decisions are binding on this court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

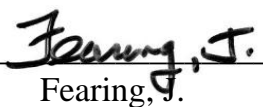
Acknowledging this likely outcome, Mr. Buche makes a brief argument that due process is offended by applying strict liability to drug possession offenses. He cites no relevant authority that justifies overturning longstanding legislative decisions to the contrary.


Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Kosmo, J.

WE CONCUR:

  
Fearing, J.

  
Pennell, C.J.

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<sup>2</sup> After *Bradshaw*, our legislature rejected an effort to amend the drug possession statute to require the State to prove knowing possession. See H.B. 1695, 61st Leg., Reg. Sess. (Wash. 2009).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

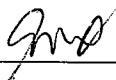
STATE OF WASHINGTON, )  
 )  
RESPONDENT, )  
 )  
v. ) COA NO. 36437-2-III  
 )  
CAMREN BUCHE, )  
 )  
PETITIONER. )

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# WASHINGTON APPELLATE PROJECT

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