No. 96873-0
Court of Appeals No. 35601-9-III

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANNON BLAKE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND RELEIEF REQUESTED

Petitioner, Shannon Blake, asks this Court to accept review of the opinion of the Court of Appeals in *State v. Blake*, 35601-9-III.

B. OPINION BELOW

"I'm not a drug addict. I'm not a bad person; I'm not the criminal I've been made out to be in this court." RP 119. Police searched the home where Shannon Blake was staying. Although Ms. Blake was never convicted of a crime connected to the homeowner's criminal activity, police arrested her.

Two days before this search, Ms. Blake received a pair of Goodwill jeans from her friend. Ms. Blake did not know there was a small baggy containing methamphetamine in the coin pocket of the jeans. Ms. Blake was wearing those jeans at the time of her arrest, and for the first time learned of the drugs when jail officers discovered the baggy during a search while booking her into jail. In the absence of any evidence contrary to her claimed lack of knowledge, the court found Ms. Blake had not proved unwitting possession.

C. ISSUES[1]

1. The presumption of innocence is a principle fundamental to

[1] The issues presented in this case are currently before the court in *State v. A.M.*, 96354-1.

America's history and tradition. "Freakish" 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. The accused is presumed guilty unless he or she can prove "unwitting" 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

"My boyfriend and I were homeless, winter was coming, and Mr. Westman offered us a cheap room to rent." RP 72. Jobless and in need of a place to stay, Ms. Blake and her boyfriend moved into Kenneth Westman's home in Spokane. RP 72–73.

About two weeks later, they were still in the process of moving when police arrived. RP 74. The officers executed a search warrant to recover evidence at Mr. Westman's home as part of a chop-shop investigation. RP 19. Since Ms. Blake was present, she was arrested for an unrelated charge of taking a motor vehicle without permission. RP 75; CP 11.

At the time of the arrest, Ms. Blake was wearing second-hand jeans she had received from her friend Lynn Millay two days earlier. *Id*. Ms. Millay "got them at the Goodwill outlet store thinking they would fit her but she was a little too chubby for them and thought they would be a good fit for [Ms. Blake]." RP 76. Ms. Blake modified and extended the bottom of the jeans so that they would fit. *Id.* The first day Ms. Blake wore the jeans was the day of her arrest. RP 86.

While booking her into jail, a corrections officer removed a baggy containing a small amount of a white substance form the coin pocket of the jeans. RP 33. A field test of the substance was positive for methamphetamine. RP 34. The arresting officer opined the baggy contained "[a] user amount or a single dosage." RP 49. The baggy was later tested by the Washington State Patrol Crime Lab where it was found to contain methamphetamine hydrochloride. RP 61.

The State charged Ms. Blake with unlawful possession of a controlled substance. CP 18. Ms. Blake waived her right to a jury trial on that charge. CP 19.

Ms. Blake explained at trial that she did not know there were drugs in the jeans and that she had "never seen [the] bag before." RP 81. She had only received the jeans from her friend a few days before. RP 76. The day of the arrest was the first day she wore the jeans, and she had never put her hands in the coin pocket of the jeans. RP 85. Ms. Blake stated emphatically she had never used methamphetamines. RP 76. Ms. Blake, forty-years-old, had never been arrested for a drug possession offense. RP 81.

Her boyfriend confirmed at trial that Ms. Millay had given Ms. Blake the jeans. RP 89. He also had observed Ms. Blake adding extensions to the bottom of the jeans to make them longer. RP 90.

The trial court made a finding that Ms. Blake and her boyfriend were not credible. CP 25–26. The court determined that Ms. Blake did not meet her burden of proving unwitting possession by a preponderance of evidence and found her guilty. CP 26.

The Court of Appeals Affirmed

E. ARGUMENT

Unless interpreted to not be a strict liability offense, the offense of felony possession of a controlled substance violates due process.

a. 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). Relatedly, it is fundamental that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). 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). This makes sense because otherwise innocent conduct may be criminalized.

Notwithstanding the foregoing 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, 635 P.2d 435 (1981). The State 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 bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. *Id.* at 538. In other words, instead of a presumption of innocence, there is a presumption of guilt.

b. If interpreted to have no mental element and to be a strict liability crime, the drug possession 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); *see Schad*, 501 U.S. 650 (Scalia, J. concurring) ("It is precisely the historical practices that *define* what is "due.") .

Washington appears to be the *only* state that makes drug possession a true strict liability crime.[2] *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 State'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 State prove defendants knew they possessed the substance. Id. Unlike in Washington, the State in Florida must at least prove that the defendant was aware of the presence of

[2] North Dakota had made drug possession a strict liability offense, but the legislature changed the law to require a mental element. *State v. Bell*, 649 N.W.2d 243, 252 (2002).

the substance.

That nearly every drug possession offense in this country has a *mens rea* requirement is unsurprising. 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 State prove a *mens rea* element in drug possession crimes. This is a strong indication that Washington's possession statute violates due process. *Id*.

A recent federal district court decision addressing the constitutionality of an Arizona law is instructive. *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017). There, the court held that Arizona's child molestation law violated a defendant's right to due process. *Id.* at 1162-65. Arizona had eliminated the requirement that the State prove sexual motivation, effectively criminalizing broad swaths of innocent conduct (such as changing a baby's diaper). *Id.* at 1155-56. Defendants could avoid conviction if they affirmatively proved, by a preponderance of the

evidence, that their touching lacked sexual motivation. *Id.* at 1156.

The federal court ruled this violated due process. The court recognized that due process limits states in placing burdens on defendants. *Id*. at 1157-58. The Arizona law unconstitutionally shifted the burden of proof to defendants to prove their innocence. *Id.* at 1158-59. The court recognized that proof of sexual intent had traditionally been part of the offense of child molestation. *Id.* at 1159-61. Arizona's law was "freakish." *Id.* at 1161-62.

The court recognized that "[s]hifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish," but that was not true for the Arizona offense. *Id.* at 1163. Formulized,

> If the 'affirmative' defense is to disprove a positive—and that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime.

Id. at 1164.

Similarly, 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 if a person borrows a backpack and, unknown to that person, there are drugs inside.

Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about the person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property. Like the child molestation statute at issue in *May*, Washington's possession statute is unconstitutional.

In rejecting Ms. Blake's argument, the Court of Appeals simply cited *State v. Schmeling*, 191 Wn. App. 795, 801-02, 365 P.3d 202 (2015). The *Schmeling* court rejected a similar argument in light of this Court's opinion in *Bradshaw*. *Id.* But *Bradshaw* did not address this issue. Rather, *Bradshaw* rejected a vagueness argument because petitioners offered little analysis in support of their argument. 152 Wn.2d at 539. Ms. Blake's argument did not concern vagueness and her argument was adequately briefed. *Bradshaw* was not controlling and the Court of Appeal erred in concluding that it controlled the issue. *In re Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014).[3]

c. 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

[3] "Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court." (internal quotation omitted).

deficiencies. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704, 706 (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. But this is not the appropriate analysis. *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.

d. 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

This Court should grant review.

Submitted this 21st day of February, 2018.

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

STATE OF WASHINGTON,	)	No. 35601-9-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
SHANNON B. BLAKE,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Shannon Blake appeals her conviction for unlawful possession of a controlled substance—methamphetamine. She argues the trial court violated her Sixth Amendment to the United States Constitution right to a jury trial when, at sentencing, it found she was chemically dependent and it increased her community custody sentence above the standard range. She also argues requiring her to prove unwitting possession to the charged offense violates due process. She further argues we should remand to have the trial court strike the $200 criminal filing fee and two community custody conditions. We agree that the $200 criminal filing fee must be struck, but otherwise affirm.

FACTS

The Spokane Police Department executed a search warrant for a criminal investigation unrelated to Ms. Blake's present charge. Ms. Blake was taken into custody and later searched at the Spokane County Jail. Jail staff located a small "baggie" containing methamphetamine in the coin pocket of her jeans.

Trial

The State charged Ms. Blake with unlawful possession of a controlled substance—methamphetamine. Ms. Blake waived her right to a jury trial, both orally and in writing.

At her bench trial, Ms. Blake testified she had no knowledge that the jeans she wore contained methamphetamine. She acknowledged the jeans did in fact contain methamphetamine and that the jeans belonged to her. Ms. Blake claimed the jeans were a gift from a friend and that she had received the jeans two days before she was arrested.

Ms. Blake's boyfriend also testified at trial and attempted to corroborate Ms. Blake's story. The trial court did not find the testimonies of Ms. Blake or her boyfriend credible. The court determined that Ms. Blake did not meet her burden of proving unwitting possession by a preponderance of the evidence and found her guilty.

Sentencing

At sentencing, the State urged the court to sentence Ms. Blake under the first time offender option, which would reduce the high end of her standard range sentence from 6 months to 90 days. The State also asked the trial court to make a finding that Ms. Blake is chemically dependent, which would permit the court to impose 12 months of community custody.

Ms. Blake did not object to the trial court sentencing her as a first time offender. Ms. Blake argued that she was not chemically dependent and asked the trial court to impose only six months of community custody.

The trial court found that Ms. Blake had a chemical dependency that contributed to her crime. The court then sentenced her to three days in jail, with credit for three days served. The court also imposed 12 months of community custody for treatment.

In addition, the court imposed community custody conditions. The conditions required Ms. Blake to remain within prescribed geographical boundaries as directed by her community corrections officer (CCO) and to obey all conditions of probation imposed by the Department of Corrections (DOC).

Ms. Blake appeals.

ANALYSIS

A. MS. BLAKE'S SIXTH AMENDMENT CLAIM

Ms. Blake argues the trial court violated her right to a jury trial under the Sixth Amendment to the United States Constitution when, at sentencing, it made the chemical dependency finding that allowed it to impose a community custody term above her standard range sentence.

It is unconstitutional under the Fourteenth Amendment's due process clause and the Sixth Amendment "'to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252-53, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (Stevens, J. concurring)). "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* The "statutory maximum" means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

A defendant may waive his or her right to have a jury decide facts that increase the maximum sentence beyond the statutory maximum. *State v. Trebilcock*, 184 Wn. App. 619, 632, 341 P.3d 1004 (2014). As explained below, we need not decide whether Ms. Blake's jury waiver extended to the trial court's chemical dependency finding at sentencing.

RCW 9.94A.650 provides in relevant part:

> (2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement . . . .
> (3) The court may impose up to six months of community custody unless treatment is so ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year.

Here, Ms. Blake agreed for the trial court to sentence her under the first time offender statute. Under the statute, the standard range community custody term for an offender ordered to undergo treatment is the treatment period, not to exceed one year. Here, Ms. Blake was ordered to undergo treatment. Her one-year community custody term, therefore, was within the standard range.

B. CRIMINAL FILING FEE

Ms. Blake argues the trial court's imposition of the $200 criminal filing fee must be struck due to a change in law.

RCW 36.18.020(2)(h) prohibits trial courts from imposing the $200 criminal filing fee against indigent defendants. This statute, effective June 7, 2018, applies prospectively to pending direct appeals. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). The trial court found Ms. Blake indigent for purposes of appeal. We, therefore, direct the trial court to strike the $200 criminal filing fee.

C. MS. BLAKE'S DUE PROCESS CLAIM

The crime of possession of a controlled substance does not require a mens rea element. *State v. Bradshaw*, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004); *see also State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). The affirmative defense of unwitting possession has been adopted by our courts to "ameliorate[ ] the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance." *Cleppe*, 96 Wn.2d at 380-81.

Ms. Blake argues that placing the burden on her to prove unwitting possession violates due process. This argument was addressed and rejected in *State v. Schmeling*, 191 Wn. App. 795, 365 P.3d 202 (2015). Ms. Blake requests that we not follow *Schmeling*, but fails to articulate specific reasons why *Schmeling* was wrongly decided. We reject Ms. Blake's request.

D. COMMUNITY CUSTODY CONDITIONS; VAGUENESS

Ms. Blake challenges two conditions: (1) that she remain within prescribed geographical boundaries as directed by her CCO, and (2) to obey all conditions imposed by the DOC. She contends that the community custody conditions are unconstitutionally vague because they do not specify proscribed conduct and they allow the CCO and DOC boundless discretion. The State responds that Ms. Blake's preenforcement challenge to community custody conditions is not ripe for review. We disagree.

A defendant may bring a preenforcement vagueness challenge to sentencing conditions if the challenge is sufficiently ripe. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). The Washington Supreme Court has adopted a three-pronged test to determine if a vagueness challenge on community custody conditions is ripe for review. *Id.* The claim is ripe if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Id.*

Ms. Blake's challenges are ripe for review. The legal question of whether the conditions are vague does not require further factual development. Next, the challenged action is final as Ms. Blake has been convicted and sentenced. Lastly, as with most vagueness challenges, the inquiry is primarily legal. *Id.* at 752.

In *Bahl*, the defendant challenged conditions that prohibited him from possessing or accessing pornographic materials as directed by the CCO and from frequenting establishments whose primary business pertains to sexually explicit or erotic material. *Id.* at 754, 758. There, the court held that the preenforcement challenges could be evaluated on the existing record. *Id.* at 752. Likewise, here, Ms. Blake's challenges can be evaluated on the present record and her challenges are, therefore, ripe for review.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires citizens to have fair warning of what conduct is prohibited by law. *Id.* at 752. A statute is unconstitutionally vague if it "'(1) . . . does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) . . . does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *Id.* at 752-53 (alterations in original) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

In the present case, the first challenged condition requires Ms. Blake to comply with the geographical boundaries set by the CCO. This prohibition is identical to the guidelines set forth by RCW 9.94A.704, which establish the rules for community custody. The statute provides: "If the offender is supervised by the [D]epartment [of Corrections],

the [D]epartment shall at a minimum instruct the offender to . . . [r]emain within prescribed geographical boundaries . . . ." RCW 9.94A.704(3)(b). Ms. Blake contends that this condition confers boundless discretion on the CCO. We disagree.[1] First, this condition informs an ordinary person that he or she will be subject to geographic limitations while under community custody. The challenged condition does not contain a vague or undefined term that would leave an ordinary person confused about what conduct is prohibited. In addition, conditions set by the CCO must be provided to the offender in writing and the offender has an opportunity for administrative review to challenge the lawfulness of the condition. RCW 9.94A.704(7)(a)-(b). This process prevents arbitrary enforcement of the community custody condition.

Next, the challenged condition that Ms. Blake obey all conditions by the DOC is not unconstitutionally vague. This condition mirrors RCW 9.94A.704(4): "The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws." The requirements that Ms.

[1] The due process vagueness challenge to similar conditions has been routinely rejected by the Court of Appeals in unpublished cases. *See, e.g.*, *State v. Vanderveer*, noted at 171 Wn. App. 1034, 2012 WL 5503563, at *1; *State v. Forgey*, noted at 166 Wn. App. 1047, 2012 WL 688232, at *8; *State v. Osier*, noted at 168 Wn. App. 1031, 2012 WL 2018201, at *2-*3.

Blake be provided notice and an opportunity for administrative review also apply to this condition.

We reject Ms. Blake's claim that the community custody conditions are unconstitutionally vague.

Affirmed, except strike $200 criminal filing fee.

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.

Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

No. 35601-9-III

KORSMO, J. (concurring) — Although I have signed the majority opinion, I write separately to briefly discuss the disquieting consequences of accepting Ms. Blake's argument concerning the chemical dependency finding. If she is correct that a chemical dependency finding actually is an aggravating factor subject to a jury fact-finding, then the prosecutor, rather than the sentencing judge, will control treatment options available to the defendant because those possibilities will be fixed by the charging decision. The charging authority also could be used to file chemical dependency allegations for the purpose of putting evidence of a defendant's possible drug usage in front of a jury in a situation where it otherwise would not be relevant. These scenarios benefit no one.

Exactly what constitutes a "fact" that increases an offender's potential punishment has been in flux since *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Ms. Blake rightly notes that any element-like findings must be alleged by the prosecutor and proved to a jury, although aggravating factors need not necessarily be alleged in the charging document itself. *State v. Siers*, 174 Wn.2d 269, 276-277, 274 P.3d 358 (2012).[1] While a criminal defendant can waive proof of an

[1] Our court once summarized the issue: a "sentence enhancement must not only be alleged, it also must be authorized by the jury in the form of a special verdict." *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913 (2010).

aggravating factor, neither the defendant nor the trial court has the ability to file charges, a power that rests solely with the executive authority.

Similarly, it has been recognized that courts have no criminal sentencing authority that has not been granted by the legislature. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007) (no authority for courts to adopt sentencing procedure necessary to comply with United States Supreme Court mandate); *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986) (legislature has plenary authority over setting punishments). If chemical dependency truly is an aggravating factor, then the court's authority to consider the possibility is left to the graces of the prosecutor, further limiting judicial authority at sentencing. Treating the chemical dependency finding as an aggravating factor also may negatively impact other sentencing alternatives that utilize greater than typical periods of community supervision.[2]

Turning the keys to rehabilitative treatment over to the prosecutor is an unusual argument for a defendant to make. I hope others do not follow in Ms. Blake's steps.

Korsmo, J.

[2] The legislature may need to reconsider whether it wants to continue treating supervision as a period of "punishment." RCW 9.94A.505(5).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 35601-9-III
	)	
SHANNON BLAKE,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF FEBRUARY, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JOHN DRISCOLL, JR. [jdriscoll@spokanecounty.org] 1115 W BROADWAY AVE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF FEBRUARY, 2019.

X_____

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WASHINGTON APPELLATE PROJECT

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