

No. 46765-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Phyllis Holman,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-00339-8

The Honorable Judge Michael Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court's unwitting possession instruction violated Ms. Holman's Fourteenth Amendment right to due process.
2. The court erred by giving instruction number 9.
3. The state's failure to disprove unwitting possession violated Ms. Holman's right to due process.

ISSUE 1: Due process prohibits a court from placing the burden on an accused person to prove a defense if that defense negates an element of the charged crime. Here, the court required Ms. Holman to prove unwitting possession even though that defense cannot coexist with the element requiring dominion and control to establish constructive possession. Did the court violate Ms. Holman's Fourteenth Amendment right to due process?

4. Prosecutorial misconduct deprived Ms. Holman of her Fourteenth Amendment right to a fair trial.
5. The prosecutor committed misconduct by "testifying" to "facts" that were not in evidence during closing argument.
6. The prosecutor's misconduct was flagrant and ill-intentioned.

ISSUE 2: A prosecutor commits misconduct by "testifying" to "facts" not properly admitted into evidence. Here, the prosecutor testified that Ms. Holman had not presented any evidence on a key issue at trial even though both Ms. Holman and her sister had testified to the allegedly omitted fact. Did prosecutorial misconduct deprive Ms. Holman of her Fourteenth Amendment right to a fair trial?

7. Ms. Holman was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel provided deficient performance by failing to object to prosecutorial misconduct in closing argument.
9. Ms. Holman was prejudiced by her attorney's deficient performance.

ISSUE 3: Failure to object to prosecutorial misconduct waives the issue for appeal unless the misconduct is flagrant and ill-

intentioned. Ms. Holman's attorney failed to protect his client from extensive prosecutorial misconduct in closing argument, to obtain a curative instruction, or to correct the record regarding the improper "facts" to which the prosecutor had "testified." Did defense counsel provide ineffective assistance under the Sixth and Fourteenth Amendments?

10. Ms. Holman's felony conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ISSUE 4: The Eighth Amendment prohibits imposition of felony sanctions for a particular crime when there is a national consensus against doing so and the severity of the punishment is incommensurate with the culpability of the offender and does not serve legitimate penological goals. There is a national consensus that simple possession of drugs should not be punished as a felony absent proof of a culpable mental state; furthermore, the felony sanction is more severe than warranted by the blameworthiness of the offender or any legitimate penological goal. Does RCW 69.50.4013 violate the Eighth Amendment when applied to simple possession in the absence of any culpable mental state?

11. RCW 69.50.4013 violates due process as applied because it permits felony conviction for possession absent a culpable mental state.

ISSUE 5: Due process prohibits imposition of criminal liability for acts that the defendant does not cause. Washington allows conviction for simple drug possession without proof of any culpable mental state, including negligence. Does RCW 69.50.4013 violate due process under the Fourteenth Amendment because it authorizes a felony conviction for acts the accused person did not cause?

ISSUE 6: Courts have the authority to recognize non-statutory elements where a criminal statute is unconstitutional. RCW 69.50.4013 is unconstitutional as applied to possession of drug residue. Should the Court of Appeals exercise its authority to recognize a non-statutory element requiring proof of a culpable mental state, in order to save RCW 69.50.4013?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Phyllis Holman lived in Longview with her teen daughter. She is 53 years old and had no criminal history. RP 100-101, 164. Her daughter had a large number of friends that she liked to have at her house. Because she was aware that some of her daughter's friends had used drugs, and because some items in her home had gone missing, Ms. Holman developed a system. RP 102-103, 110. She had all of her daughter's visitors put their handbags and backpacks on chairs by the front door when they arrived. This was so that there was no container in which to hide stolen items, and to reduce the chances one could bring drugs into other rooms in the house. RP 86-87, 102-104. Ms. Holman kept her bag in the same location, to show that rules were for everyone and she too would follow them. RP 90, 103.

On March 15, 2014, Ms. Holman brought her sister Pamela Jackson to her home. RP 83-85, 91. When they got there, Ms. Holman's daughter had a lot of friends over, at least ten teenage girls. RP 84-85, 92, 101-102. Ms. Holman was hoping for some quiet, and she told her daughter to have them gone within a short time period. RP 104.

The sister stayed in the living room during the short period of time they were at the house. She sat among the girls and read her book. At one

point, she noticed one of the girls reach toward where all the bags were kept. She couldn't see what the girl did or if she had anything in her hand, and so she thought nothing of it. RP 88-90, 93-96, 98-99. Ms. Holman's tote was gold, as were a couple of the teens' bags. It did not have a zipper closure, but just a snap at the top. RP 108-110.

After a bit, Ms. Holman and her sister drove to a nearby convenience store. Ms. Holman was suspected of attempting to pass counterfeit money, and was asked to wait there until police arrived. She agreed. RP 41, 73.

Police asked Ms. Holman if they could look in her purse. She agreed. RP 60. Inside was found a very small baggy with 0.1 gram of methamphetamine, as well as a piece of straw. RP 60-62, 67, 74-76. No drugs or paraphernalia were found on her person. RP 78.

The state charged Phyllis Holman with possession of methamphetamine. CP 1.

Ms. Holman testified that the methamphetamine found in her purse was not hers and that she was not aware it was present. RP 100. Both Ms. Holman and her sister told the jury that Ms. Holman's bag had been among the pile of bags of the visiting girls. RP 90-91, 102. There was no evidence offered to the contrary.

The court instructed the jury using the standard instruction on unwitting possession, including that the burden of proof lay on the defense. CP 16.

The prosecutor told the jury during closing argument that the defense had failed to present evidence about Mr. Holman's tote. RP 133-4. The state claimed that no evidence indicated where the bag was or that it was closed. RP 133-134. There was no defense objection to this argument.

The jury returned a verdict of guilty. CP 20. The court sentenced Ms. Holman as a first-time offender to credit for time served and standard obligations. CP 22-32. This timely appeal followed. CP 33-44.

ARGUMENT

I. DUE PROCESS REQUIRES THE STATE TO DISPROVE UNWITTING POSSESSION BECAUSE IT NEGATES THE ELEMENT OF POSSESSION IN CONSTRUCTIVE POSSESSION CASES.

A. Unwitting possession negates the element of constructive possession because an unwitting possessor cannot exercise "dominion and control" over contraband.

The state did not present any evidence that Ms. Holman was aware or should have been aware of the drugs in her purse. Indeed, Ms. Holman presented evidence that several teenage drug users had been in her house earlier that day. RP 83-112. Ms. Holman was not a drug user, but her purse had been in a pile with the purses belonging to all of the teenagers.

RP 103. At least one of the youths reached toward the mass of purses – several of which resembled Ms. Holman’s – while at the house. RP 86-91.

The evidence was sufficient to raise a reasonable doubt as to whether Ms. Holman actually exercised “dominion and control” over the drugs. Still, the court required Ms. Holman to disprove that element by a preponderance of the evidence. The court violated Ms. Holman’s right to due process by shifting the burden onto her to negate an element of the offense.

Due process requires the state to prove beyond a reasonable doubt every fact necessary to constitute a charged crime. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.¹ As a corollary, the state cannot require the accused to disprove any element of the offense. *Id.*

The legislature may require the accused to prove an affirmative defense. *Id.* at 762. A true affirmative defense is one which admits a criminal act but “pleads an excuse for doing so.” *Id.* The legislature may not place the burden on the defense to establish facts negating an element of the crime. *Id.* at 762-65. In such a situation, the accused need only present evidence sufficient to raise a reasonable doubt as to the element.

¹ Constitutional issues are reviewed de novo. *Dellen Wood Products, Inc. v. Washington State Dep’t of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 review denied, 180 Wn.2d 1023, 328 P.3d 902 (2014). Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3)

Id. at 766. The analysis focuses on “whether the completed crime and the defense can coexist.” *Id.* at 765.

Here, the court violated Ms. Holman’s right to due process by requiring her to prove that her possession of the drugs was unwitting. *Id.* at 762-65.

Possession can be either actual or constructive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Actual possession requires proof that the accused had the contraband in his/her “actual physical custody.” *Id.* Constructive possession requires proof of “dominion and control” over a substance. *Id.*

Here, the state did not demonstrate that Ms. Holman had the baggie in her actual physical custody. *See RP generally*. Rather, it was in a purse in her car when the police stopped her. RP 59. Accordingly, the state was required to prove that she exercised dominion and control over the drugs in order to demonstrate constructive possession. *Id.*

Unwitting possession negates constructive possession because a lack of knowledge cannot coexist with dominion and control over a controlled substance. *W.R.*, 181 Wn.2d at 765. A person cannot exercise dominion or control over an item that s/he does not know exists.²

² Simple possession does not have a *mens rea* element. *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004). But, in constructive possession cases, the state must prove that the accused exercised “dominion and control” over the contraband at issue. *Cote*, 123 Wn. App.

Once Ms. Holman presented some evidence of unwitting possession, due process required the state to disprove it beyond a reasonable doubt in order to establish dominion and control. *Id.* The court's violated Ms. Holman's constitutional rights by placing the burden on her to disprove knowledge of the drugs. *Id.*

This error requires reversal unless the state can demonstrate that no reasonable factfinder would have been swayed by an instruction properly placing the burden of proof on the state. *Id.* at 1140-41.

Here, the state did not present any evidence that Ms. Holman was aware of the drugs in her purse. *See RP generally.* There was no testimony refuting Ms. Holman's claim that she had never seen the baggie before. Ms. Holman presented a credible explanation for how strange drugs could have appeared in her purse. Her story was sufficient to raise a reasonable doubt as to whether she actually constructively possessed the baggie. Because her sister did not definitively see the youth place the drugs in Ms. Holman's purse, however, the jury may have concluded that

at 549. This court need not imply a *mens rea* element in order to find that the unwitting possession defense violates due process. Because a lack of knowledge cannot coexist with the concept of "dominion and control," however, the accused need only raise some evidence the facts negating the element and the burden should then shift to the state to disprove the defense beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 766.

Indeed, the *W.R.* court did not add an element of lack of consent to the crime of rape. *Id.* Rather, the holding relies on the fact that consent works to negate the existing element of forcible compulsion. *Id.* A reviewing court need not read an additional element into an offense in order for an affirmative defense to violate due process by shifting the burden of proof.

her testimony was not enough to prove unwitting possession by a preponderance of the evidence even if they believed the testimony.

If instructed that the state had the burden of disproving unwitting possession, a reasonable factfinder could have found that that burden had not been met. *Id.* Accordingly, this constitutional error requires reversal of Ms. Holman's conviction. *Id.*

The court's instructions violated Ms. Holman's right to due process by requiring her to disprove constructive possession by a preponderance of the evidence. *W.R.*, 181 Wn.2d at 765. Ms. Holman's conviction must be reversed. *Id.*

B. Ms. Holman did not invite the due process violation by proposing an unwitting possession instruction at trial.

An appellant may not raise an issue that s/he "set up" at trial. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). Accordingly, an accused person may not generally propose a jury instruction and then claim instructional error on appeal by arguing that the instruction incorrectly conveyed the law to the jury. *See e.g. Id.*; *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Here, Ms. Holman did not invite the due process violation by proposing a jury instruction on unwitting possession. Indeed, her only other option was acquiesce to the state's proposed instructions, which left

the jury with the impression that the evidence of her obliviousness to the drugs in her purse had no legal significance at all.

Ms. Holman does not claim instructional error. She does not challenge the wording of the instruction or argue that it inaccurately conveyed the current law of unwitting possession.

Rather, she claims that, in light of *W.R.*, the very idea of an unwitting possession defense violates due process. This case does not raise instructional error. The invited error doctrine does not apply.

II. MS. HOLMAN WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR INJECTED “FACTS” NOT IN EVIDENCE INTO CLOSING REGARDING THE CRITICAL ISSUE AT TRIAL AND HER DEFENSE ATTORNEY FAILED TO OBJECT OR TO CORRECT THE ERROR FOR THE JURY.

A. The prosecutor committed flagrant and ill-intentioned misconduct by “testifying” to “facts” that were not in evidence regarding the primary issue at trial – Ms. Holman’s evidence that she was not aware of the drugs that ended up in her purse.

Ms. Holman presented evidence that numerous teenage drug users had been in her home on the day of her arrest. RP 102. According to Ms. Holman’s rules, all of the girls had to keep their purses in the same place near the door, to prevent theft and drug use in the home. RP 102-103. Ms. Holman kept her purse in the same area. RP 103. It looked similar to the purses that several of the girls had brought to her house. RP 104. At

one point, Ms. Holman's sister saw one of the youths reach toward mass of purses. RP 86-89.

The only real factual issue at trial was whether this evidence was sufficient to prove by a preponderance of the evidence that Ms. Holman was not aware of the drugs that ended up in her purse.

Rather than rely on the testimony of the state's witnesses, however, the prosecutor distorted the defense evidence in closing argument in an attempt to bolster her case.

The prosecutor said that Ms. Holman had not presented any evidence of where her own purse was, despite testimony from both Ms. Holman and her sister that her bag was near the door with all of the girls' purses. RP 86-87, 103,133.

The prosecutor committed flagrant and ill-intentioned misconduct by misrepresenting the evidence in closing argument. Because the prosecutor's misstatements went directly to the primary factual issue at trial, there is a substantial likelihood that the misconduct affected the outcome of Ms. Holman's case.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its

prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor commits misconduct by urging a jury to consider “facts” that have not been admitted into evidence. *Glasmann*, 175 Wn. 2d at 705; *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

Both Ms. Holman and her sister testified that Ms. Holman’s bag had been next to the bags belonging to the teenage girls. RP 90, 103. At least three of the bags belonging to the youths resembled Ms. Holman’s purse. RP 104. Still, the prosecutor claimed that Ms. Holman had not presented any evidence on the issue:

Now, there’s no testimony of where the Defendant’s bag was. We’ve got the couch here, we have no idea in this space where her bag was. There was no evidence about that. Was her bag here? And the teenager over here flopped her arm down and put something in there? We have no idea. We have no idea whether the other three gold bags were even close to the Defendant’s bag. There’s no evidence about that either.
RP 133.

The prosecutor's argument was improper. Rather than arguing that Ms. Holman's evidence was insufficient to prove unwitting possession, the prosecutor chose to claim that Ms. Holman's evidence did not exist at all. Such a distortion of the record is equivalent to arguing "facts" that have not been admitted into evidence and constitutes misconduct.

Glasmann, 175 Wn. 2d at 705; *Pierce*, 169 Wn. App. at 553.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Here, the prosecutor's misconduct was directly relevant to the only real issue for the jury – whether Ms. Holman had established unwitting possession. The prosecutor told the jury that a key piece of Ms. Holman's evidence simply did not exist. Given the "fact-finding facilities presumably available"³ to the prosecutor's office, the jury may well have believed the prosecutor's claim in spite of the testimony from Ms. Holman and her sister. The jury likely believed that the prosecutor had more access to evidence and a better grasp of the facts of the case than they did. Jury members were unlikely to trust their own memories of the brief

³ See Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

testimony over the prosecutor's confident declaration that such statements were never made. There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Ms. Holman's trial. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Pierce*, 169 Wn. App. at 552. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, the prosecutor had access to long-standing case law prohibiting the injection of "facts" not in evidence into closing argument. *See e.g. Id.; Pierce*, 169 Wn. App. at 553. Once the jurors had been encouraged to doubt their memories of what the defense witnesses had said, the bell of the additional "evidence" would also have been difficult to un-ring with a curative instruction. The prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by distorting the evidence in closing argument. *Glasmann*,

175 Wn. 2d at 705; *Pierce*, 169 Wn. App. at 553. Ms. Holman's conviction must be reversed. *Id.*

B. Ms. Holman's defense attorney provided ineffective assistance by failing to object to prosecutorial misconduct regarding the key question for the jury.

As outlined above, the prosecutor misrepresented the evidence in closing argument regarding the key question for the jury – whether to believe Ms. Holman's unwitting possession defense. RP 133. Still, defense counsel did not object. RP 133. Ms. Holman's attorney did not request a curative instruction and did not even attempt to cure the misunderstanding in his own closing argument. RP 136-147.

If the issue of the prosecutor's misconduct is not preserved for appeal, Ms. Holman received ineffective assistance of counsel.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the

accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*⁴

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

In most cases, failure to object to prosecutorial misconduct waives the issue for appeal.⁵ *Glasmann*, 175 Wn.2d at 704. Failure to object to prosecutorial misconduct is generally unreasonable. Misconduct that bolsters the prosecution's case can be particularly prejudicial. *Hodge v. Hurley*, 426 F.3d 368, 387 (6th Cir. 2005).

Here, the prosecutor claimed that there was no evidence supporting a key aspect of Ms. Holman's unwitting possession defense – that her purse was in a position in which one of the teenage drug users in her home could have placed a small baggie inside it either accidentally or on purpose. Absent that evidence, there was no way the jury could have found the defense proved by a preponderance of the evidence.

⁴ Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

⁵ Exceptions exist for misconduct that is flagrant and ill-intentioned or that creates a manifest error affecting a constitutional right.

Defense counsel should have objected. *Hendrickson*, 138 Wn. App. at 833. There is a reasonable probability that his failure to do so affected the outcome of Ms. Holman’s trial. *Kyllo*, 166 Wn.2d at 862.

Counsel’s failure to object constituted deficient performance and prejudiced Ms. Holman. *Kyllo*, 166 Wn.2d at 862. Accordingly, Ms. Holman’s conviction must be reversed. *Id.*

III. RCW 69.50.4013 IS UNCONSTITUTIONAL AS APPLIED BECAUSE IT PUNISHES SIMPLE POSSESSION AS A FELONY WITHOUT ANY PROOF OF A CULPABLE MENTAL STATE – AN UNDULY HARSH RESULT WHICH DOES NOT COMPLY WITH NATIONAL CONSENSUS AND “EVOLVING STANDARDS OF DECENCY.”

In numerous jurisdictions, the prosecution would have been required to prove that Ms. Holman had some kind of culpable mental state in order to convict her for felony drug possession. In Washington state, however, Ms. Holman was culpable of a felony whether she knew the tiny baggie was in her purse or not. Indeed, it was Ms. Holman’s burden to disprove that she was aware of the 0.1 grams of meth.

Washington’s practice of criminalizing simple drug possession as a felony even absent any evidence of a culpable mental state is against national consensus and “evolving standards of decency.” It also leads to unduly harsh results. Accordingly, the lack of a *mens rea* element for felony drug possession leads to violations of both due process and the Eighth Amendment.

This court must either infer a *mens rea* element into the felony possession statute or strike down the statute as unconstitutional.

A. RCW 69.50.4013 violates the Eighth Amendment because it imposes felony sanctions for simple possession without proof of a culpable mental state.

1. The Eighth Amendment prohibits punishment conflicting with the evolving standards of decency that mark the progress of a maturing society.

The Eighth Amendment categorically prohibits certain punishments. *Graham v. Florida*, 560 U.S. 48, 59-61, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *as modified* (July 6, 2010). Traditionally, this approach applied only in death penalty cases. *Id.*, at 60. The Supreme Court has expanded the categorical approach to cases that do not involve the death penalty. *Id.*, at 61.

Indeed, the Eighth Amendment prohibits not only punishments that are “barbaric,” but also those that are “excessive in relation to the crime committed.” *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

To implement the Eighth Amendment, courts must look to “the evolving standards of decency that mark the progress of a maturing society.” *Graham*, 560 U.S. at 58. The *Graham* court adopted a two-step framework for the categorical approach.

First, a reviewing court considers objective indicia of society’s standards—in the form of legislation and sentencing data— “to determine

whether there is a national consensus against the sentencing practice.” *Id.*, at 61. Second, the court considers ““standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose’ ...[to] determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Id.*, (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525, *opinion modified on denial of reh'g*, 129 S.Ct. 1 (2008)).

In *Graham*, the court analyzed sentencing data and found it significant that “only 11 jurisdictions nationwide” imposed the challenged sentence (in that case, life without parole for juvenile nonhomicide offenders). *Id.*, at 64. The court characterized the practice as “exceedingly rare.” *Id.*, at 67.

The reasoning set forth in *Graham* requires invalidation of RCW 69.50.4013 as applied to simple drug possession, when that crime is committed without any culpable mental state.

2. There is a strong national consensus that simple possession of drugs should not be punished as a felony absent proof of some culpable mental state.

The consequences of a felony conviction are much greater than those imposed for a gross misdemeanor. A class C felony may be punished by up to

five years in prison and a fine of up to \$10,000.⁶ RCW 9A.20.021.

Furthermore, a convicted felon loses certain civil rights, such as the right to vote, to sit on a jury, and to possess a gun, in addition to suffering “grave damage to his [or her] reputation.” *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985).

There is a clear national consensus that mere simple drug possession should not be punished as a felony absent a *mens rea* element. *See, e.g., Louisiana v. Joseph*, 32 So.3d 244 (2010) (statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession statute requires knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (same); *State v. Moore*, 352 S.W.3d 392, 400 (Mo. Ct. App. 2011) (state must prove knowing possession); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (felony possession requires knowledge); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (possession requires knowledge); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (evidence sufficient for possession conviction, where circumstantial evidence establishes

⁶ This compares to a fine of \$5,000 and confinement of up to 364 days for most gross misdemeanors. RCW 9A.20.021.

knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (noting that prosecution must prove knowledge); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) (statute requires knowledge to prove possession); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (state must prove knowledge in possession case); *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988) (statute requires knowing possession); N.D. Cent. Code Ann. § 19-03.1-23; N.D. Cent. Code. § 12.1-02-02; *State v. Christian*, 2011 ND 56, 795 N.W.2d 702, 705 (2011); (statute requires willful possession).

This national consensus is even stronger than in *Graham*. Thus, the analysis moves to the second phase. *Graham*, 560 U.S. at 61. The court examines three factors in applying the second part of the *Graham* test: (1) “the culpability of the offenders at issue in light of their crimes and characteristics,” (2) “the severity of the punishment,” and “(3) whether the challenged sentencing practice serves legitimate penological goals.” *Graham*, 560 U.S. at 67 (citations omitted).

These three factors support the national consensus outlined above. First, persons who unknowingly possess drugs are relatively blameless. Second, a felony conviction, the associated punishments, and the additional consequences to reputation and civil rights are unduly harsh. Third, there are

no legitimate penological goals for imposing felony liability on those who unknowingly possess drugs.

Four commonly recognized penological interests are retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 72. None of these four goals are served here. A person who unwittingly possesses drugs cannot be deterred from doing so in the future. If the statute's goal is to make people more careful, even a low-level mental state such as criminal negligence would serve that purpose; it is unnecessary to punish those whose mental state is wholly innocent.

Nor does it make sense to speak of retribution or incapacitation for a person who unwittingly possessed drugs. Where possession is unwitting, the "offender" is neither deserving of punishment nor prevented (by imposition of felony sanctions) from causing future harm.

Finally, a person who unwittingly possessed drugs cannot be rehabilitated. Rehabilitation presupposes a volitional act that can be treated in some manner. A person who did not even act negligently with respect to the fact of possession (or the nature of the substance) will not respond to any form of treatment, because there is no ill to be addressed.

Under *Graham*, "the sentencing practice under consideration is cruel and unusual." *Id.*, at 74. The Eighth Amendment categorically prohibits

punishing as a felony the possession of drug residue, without some proof of a culpable mental state. *Id.*

- B. RCW 69.50.4013 violates due process as applied to possession of drugs absent proof of some culpable mental state.

The Fourteenth Amendment guarantees an accused person due process of law. U.S. Const. Amend. XIV. The legislature may create crimes with no *mens rea*; however, due process “admits only a narrow category of strict liability crimes, generally limited to regulatory measures where penalties are relatively small.” *United States v. Macias*, 740 F.3d 96, 105 (2d Cir. 2014) (Raggi, J., concurring). There are constitutional limits on the kind of penalties that can be imposed for strict liability crimes: “[s]evere fines and jail time... warrant a state of mind requirement” for conviction. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n. 4 (10th Cir. 2010).⁷

A statute imposing strict liability “does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch.” *Wulff*, 758 F.2d at 1125. If it were otherwise, “a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his [or her] reputation,” a result that “the Constitution does not allow.” *Id.*; see also *Louisiana v. Brown*, 389 So. 2d 48,

⁷ This is in keeping with the Supreme Court’s prohibition on statutes that criminalize status crimes and acts which the defendant does not cause. *Apollo*, 611 F.3d at 228 (citing *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) and *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

51 (La. 1980) (invalidating as unconstitutional “the portion of the statute making it illegal “unknowingly” to possess a Schedule IV substance).

The legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are “not inconsistent with the Constitution and statutes of this state...” RCW 9A.04.060. Washington courts have the power to recognize non-statutory elements of an offense.⁸ *See, e.g., State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (intent to steal is an essential nonstatutory element of robbery); *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004) (identity of controlled substance is an essential element when it affects the penalty); *State v. Johnson*, 119 Wn.2d 143, 145, 829 P.2d 1078 (1992) (Conspiracy to deliver includes common-law element of “involvement of a third person outside the agreement.”) Courts also have the power to add other facts required for conviction, when such facts are necessary to ensure the constitutionality of the statute. *See, e.g., State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013), *as amended* (Feb. 8, 2013) (First Amendment requires state to prove a “true threat” for harassment conviction, but “true threat” is not an element of the offense.)

⁸ In fact, the judiciary even has the power to define entire crimes. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge). Similarly, the judiciary has the power to recognize affirmative defenses to ameliorate the harshness of criminal statutes. *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession).

Possession of a controlled substance is a strict liability offense. *State v. Denny*, 173 Wn. App. 805, 809, 294 P.3d 862 (2013). Current law allows conviction for unwitting possession unless the accused proves lack of knowledge by a preponderance of the evidence. RCW 69.50.4013.

Washington's possession law violates due process. *Macias*, 740 F.3d 96. RCW 69.50.4013 imposes liability even when the accused does not know she or he is in possession of a controlled substance.

The court should either invalidate the statute or employ its inherent and statutory authority to recognize a *mens rea* element for possession of a controlled substance. *Goodman*, 150 Wn.2d 774; *Cleppe*, 96 Wn.2d 373; *Chavez*, 163 Wn.2d 262. A common law element requiring proof of a culpable mental state is not inconsistent with Washington's possession statute. RCW 69.50.4013.

The obligation to recognize a *mens rea* element does not conflict with *Cleppe* and its progeny. *Cleppe* concerned an issue of statutory interpretation; it did not address the requirements of the due process clause. *Cleppe*, 96 Wn.2d at 377-381. Furthermore, *Cleppe* and subsequent cases have been concerned only with proof of intent or guilty knowledge. *Id.* There do not appear to be any cases addressing lesser mental states such as negligence or recklessness.

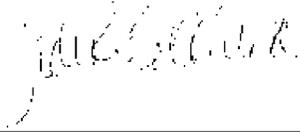
If the court recognizes a non-statutory element requiring proof of some culpable mental state, Ms. Holman's possession conviction would be based on insufficient evidence, in violation of her right to due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court should either recognize such an element or invalidate RCW 69.50.4013 as applied. In either case, the court must reverse Ms. Holman's possession conviction and dismiss the charge with prejudice. *Id.*

CONCLUSION

The trial court violated Ms. Holman's right to due process by requiring her to prove facts negating an element of the offense. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by distorting the evidence in closing. Ms. Holman's attorney provided ineffective assistance of counsel by failing to object to the prosecutor's misconduct. Washington's felony drug possession statute violates due process and the Eighth Amendment because it contravenes national consensus and leads to unduly harsh results by punishing simple possession as a felony even absent any evidence of a culpable mental state. Ms. Holman's conviction must be reversed.

Respectfully submitted on March 31, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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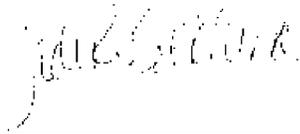
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 31, 2015.



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