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Division II
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NO. 53376-6-II

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY PALMER,

Appellant.

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

BRIEF OF THE APPELLANT

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A. INTRODUCTION

When Jeffrey Palmer was arrested while discharging himself from a hospital against medical advice, he remained in medical crisis. Instead of providing him with services to help ensure his safety, the emergency room security guard pointed to a telephone he could use and the bus stop. Within three to five minutes of contacting Mr. Palmer, the guard placed him in handcuffs and called the police. Mr. Palmer remained peaceful throughout this encounter.

Before Mr. Palmer was booked into the Clark County jail, the police found marijuana and methamphetamine. Mr. Palmer admitted to the marijuana but did not know there was any methamphetamine in the marijuana dispensary container he had on him.

Despite being instructed that to convict Mr. Palmer of possession of a controlled substance by a prisoner or jail inmate, the jury found him guilty of possession of a controlled substance by a prisoner or jail inmate. Mr. Palmer was also found guilty of possession of a controlled substance, even

though the government did not prove Mr. Palmer knew he was in possession of an illegal controlled substance. These convictions were wrongfully obtained. Reversal is required.

B. ASSIGNMENTS OF ERROR

1. The court erred when it failed to instruct the jury that proof of knowledge is an essential element of the crime of possession of a controlled substance.

2. The government failed to present sufficient evidence Mr. Palmer knew he was in possession of a controlled substance, an essential element of the crime of possession of a controlled substance.

3. The government failed to present sufficient evidence that Mr. Palmer was confined in a county or local correctional institution when marijuana was found on his body, as required to prove possession of a controlled substance a prisoner or jail inmate and as instructed to the jury.

4. The trial court erred when it ordered Mr. Palmer to pay interest on his legal financial obligations, in violation of RCW 10.82.090.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Unless the legislature expressly states otherwise, courts always read a mens rea element where the statute is silent regarding one. Despite this cannon of legislative interpretation, the government is not required to prove knowledge when prosecuting for possession of a controlled substance, as the statute has been interpreted as a strict liability offense. Instead, the defense is required to prove the possession was unwitting. To prevent this improper shifting of the burden of proof to the defense that offends due process and in order to ensure the integrity of the presumption of innocence, must this Court require proof of knowledge, an element lacking in this case?

2. To convict Mr. Palmer of possession of a controlled substance by an inmate of a jail or local correctional facility, the prosecution must establish Mr. Palmer was an inmate of a jail or local correctional facility when he was found to be in possession of contraband. Instead, the evidence only established he possessed the marijuana that formed the basis

for this charge before he was booked into the jail. Because the prosecution failed to establish this essential element, is the dismissal of this charge required?

3. Interest may not be imposed for non-restitution legal financial obligations. Where the trial court imposes restitution for non-restitution legal financial obligations, the remedy is to strike the order of interest. Must the order imposing interest on non-restitution legal financial obligations be stricken because it was entered in error?

D. STATEMENT OF THE CASE

Jeffrey Palmer was visiting Vancouver for a family member's funeral. RP 249. Mr. Palmer suffers from sickle cell disease and went to the hospital when he fell into crisis. RP 250.¹ He needed a transfusion because his red blood count was not stable. *Id.*

Mr. Palmer was admitted to the hospital. He was given an intravenous transfusion, which included pain killers. RP

¹ WebMD, *What is Sickle Cell Disease*, available at <https://www.webmd.com/a-to-z-guides/what-is-sickle-cell-disease>.

251. Mr. Palmer began to worry about his family, who did not know where he was. *Id.* He did not have a reliable way to contact them, as he did not live in the area and his cell phone needed recharging. RP 252. Because the call to his family was long distance, the hospital would not provide him with phone access. *Id.*

Mr. Palmer asked to leave the hospital so he could make a call to his brother before his phone's battery ran out completely. RP 252. In order to do make the call, Mr. Palmer had to agree to be discharged. *Id.* Mr. Palmer remained in very bad condition but knew the only way to contact his family was to remove the IV and leave his room. RP 253. He left the hospital against medical advice. RP 271.

After putting on his clothes, Mr. Palmer left his room. RP 253. He encountered the hospital's security guard on the way to the lobby. RP 158, 253.

The security guard remained with Mr. Palmer until the security guard decided to arrest Mr. Palmer for trespass, a charge Mr. Palmer was ultimately acquitted of. RP 254, CP

65. Mr. Palmer asked to use the telephone and was shown a courtesy phone. RP 158. Mr. Palmer was then told he could only use it to make local phone calls. RP 269. Mr. Palmer thought about calling a cab but did not. RP 160. The guard did not try to arrange transportation for Mr. Palmer, instead pointing to taxi company cards attached to the wall by the phone. RP 159. At this point, the security guard told Mr. Palmer he would have to leave the hospital. RP 269. The guard showed Mr. Palmer where the bus stop was. RP 160. No other services were provided to Mr. Palmer.

Not being from Vancouver and still in medical crisis, Mr. Palmer was confused about what to do. RP 254. It was early in the morning, he was heavily medicated, did not know where he was, and did not know where his family was. *Id.* Mr. Palmer did not think it would be in his best interest to just walk away from the hospital on foot. *Id.*

In addition to sickle cell disease, Mr. Palmer suffers from pica, which is a mental disorder that can cause people to

ingest foreign objects that can cause them harm. RP 255.² He had swallowed many items in the past and at the time of his arrest, had a paper clip in his stomach. RP 211. He had recently swallowed a razor blade, although it was gone by his arrest. RP 255.

While Mr. Palmer remained in crisis, the guard became concerned as Mr. Palmer continued to “hem and haw” about what to do next. RP 160. Mr. Palmer tried to walk back into the lobby but was told, “It’s time to leave. You have no more business here.” RP 161. The guard did not indicate he ever determined whether Mr. Palmer wanted to check back into the hospital, despite having been asked by medical staff to remain in the hospital. RP 171, 270.

After three to five minutes with Mr. Palmer, the security guard decided he would arrest Mr. Palmer for trespass. RP 161-62. Mr. Palmer was in a public area of the hospital when this decision was made. *Id.* The guard placed

² WebMd, *Mental Health and Pica*, available at <https://www.webmd.com/mental-health/mental-health-pica#1>.

Mr. Palmer in handcuffs and called law enforcement. RP 162.

Mr. Palmer waited for the police to arrive and did not cause any other disturbances. *Id.*

When the officer arrived, he saw Mr. Palmer standing by the emergency room door in custody. RP 175. The officer took custody of Mr. Palmer. RP 176. When Mr. Palmer was waiting to be booked into the jail, he asked the officer if he could use the bathroom. RP 257. The officer was filling out a “Prebook” form. RP 182. The officer told Mr. Palmer he would have to wait until the officer completed his paperwork. RP 257. Mr. Palmer explained to the officer the combination of his sickle cell disease and the operations he had to remove items from his body he swallowed because of his pica gave him a very sensitive bladder and the need to urinate frequently. RP 258.

Mr. Palmer was finally taken to the bathroom when he told the officer he was likely to wet himself. RP 258. Mr. Palmer said he was warned about contraband on his person. RP 261. He was strip-searched. RP 185. After the search,

marijuana was discovered on him, in his groin area and on his calf. RP 186, 258. The officer found another container intended for marijuana but containing methamphetamine. RP 191.

Mr. Palmer did not know he was in possession of the methamphetamine the officer found. RP 257.

The officer returned Mr. Palmer to the police car while the officer completed his booking paperwork. RP 262. Before the officer could book him, Mr. Palmer told the officer about the ingested razor. RP 198. Rather than book Mr. Palmer into the jail, the officer returned him to the hospital for x-rays. RP 198-99. Mr. Palmer was not booked into jail for another three hours. RP 198.

Mr. Palmer was charged with two felonies: possession of a controlled substance for the methamphetamine found in the marijuana container and possession of a controlled substance by a prisoner or jail inmate for the marijuana. CP 5-6. He was also charged with trespass at the hospital and obstruction for delaying the officer in his duties. *Id.* He was

found guilty of both of the felonies, not guilty of the trespass, and guilty of the obstruction charge. CP 63-66.

Mr. Palmer was sentenced to 21 months of incarceration. CP 70. The court also ordered Mr. Palmer to pay \$500 in legal financial obligations. 72. The judgment states that this legal financial obligation shall bear interest until paid in full. CP 73.

E. ARGUMENT

While the government charged Mr. Palmer with possession of a controlled substance and possession of a controlled substance by a prisoner or jail inmate, it failed to prove essential elements of both of these crimes. The government failed to establish Mr. Palmer knew he was in possession of a controlled substance, as required by RCW 69.50.4013(1). The governmental also failed to establish Mr. Palmer was confined in a county or local correctional institute, as required by RCW 9.94.041(2); *see also* CP 47 (Jury Instruction No. 12).

Due process requires the government to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold required to garner a conviction. *Winship*, 397 U.S. at 364.

While reasonable inferences are construed in the prosecution’s favor, they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). Evidence is insufficient to support a verdict where “mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). A “modicum” of evidence does not meet this standard. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing *Jackson*, 443 U.S. at 320).

When the government fails to present sufficient evidence, the remedy is reversal and remand for judgment of dismissal with prejudice. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review denied*, 187 Wn.2d 1 (2017). Because the government failed to present sufficient evidence of either possession of a controlled substance or possession of a controlled substance by a prisoner or jail inmate, these charges must be dismissed.

- 1. The government failed to establish Mr. Palmer knew he was in possession of methamphetamine, as required by RCW 69.50.4013(1).**

When Mr. Palmer was arrested, the police found him to be in possession of a small canister designed to hold marijuana. RP 197. Inside this container, the police found methamphetamine. *Id.* Mr. Palmer did not deny he was in possession of marijuana, but his uncontested testimony established he did not know there was methamphetamine inside this container. RP 257.

The jury was not instructed that the government must prove knowledge beyond a reasonable doubt to establish

possession of a controlled substance. CP 51 (Jury Instruction No. 16). Instead, they were instructed Mr. Palmer had the burden of proving his possession was unwitting. CP 49 (Jury Instruction No. 14). This was in error.

This Court should now address the ongoing criminalization of innocent conduct that occurs because of the failure to require the prosecution to establish knowledge when a person is charged with possession of a controlled substance. *State v. A.M.*, ___ Wn.2d ___, 448 P.3d 35, 42 (2019) (Gordon McCloud, J., concurring). This Court should hold that proof of possession of a controlled substance requires the government to prove Mr. Palmer knew he was in possession of a controlled substance. Because the government failed to establish this essential element, reversal is required.

a. Courts read a mens rea element into a criminal statute unless the legislature expressly states its intent to create a strict liability crime.

The government cannot deprive persons of liberty without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. A state's criminal procedures, including an

allocation of the burden of proof and persuasion, 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).

The requirement that the prosecution prove every element of a crime beyond a reasonable doubt is also fundamental to due process. *Winship*, 397 U.S. at 364. The beyond a reasonable doubt “standard provides concrete substance for the presumption of innocence.” *Id.* at 363.

These due process principles are “concerned with substance,” not “formalism.” *Mullaney v. Wilbur*, 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Were it otherwise, states could evade fundamental constitutional principles through labels. For this reason, in defining the elements of crimes and allocating the burdens of proof and persuasion, “there are obviously constitutional limits beyond which the States may not go.” *Patterson*, 432 U.S. at 210; *see*

Apprendi v. New Jersey, 530 U.S. 466, 467, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Consistent with these principles, 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). This “contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Id.* at 250. A “defendant’s intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense ‘element.’” *Apprendi*, 530 U.S. at 493. And although legislatures have broad authority to define crimes and some strict liability crimes may be permitted, “due process places some limits on its exercise.” *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957).

Because the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence, courts apply “a longstanding presumption, traceable to the common law,” that every statutory offense contains a mens rea element. *Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191, 2195, 204 L. Ed. 2d 594 (2019) (quoting *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) and citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)); *Morissette*, 342 U.S. at 256-58, 72 S.Ct. 240).

Courts “apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.” *Rehaif*, 139 S. Ct. at 2195 (citing *Staples*, 511 U.S. at 606) (possessing firearms); *see also Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 2009-11, 192 L. Ed. 2d 1 (2015) (making threats); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 522, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994) (selling drug paraphernalia); *United States v. Int’l Minerals*

& Chem. Corp., 402 U.S. 558, 559-60, 91 S. Ct. 1697, 29 L. Ed. 2d 178 (1971) (shipping hazardous materials); *Morissette*, 342 U.S. at 263-64, 72 S. Ct. 240 (converting federal property to one's own use); *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000) (possessing firearms); *State v. Martin*, 73 Wn.2d 616, 624-25, 440 P.2d 429 (1968) (leaving the scene of a vehicle collision).

“The cases in which [the United States Supreme Court has] emphasized scienter's importance in separating wrongful from innocent acts are legion.” *Rehaif*, 139 S. Ct. at 2196-97 (citing cases).

b. As interpreted, drug possession is a strict liability crime that requires the innocent to prove unwitting possession.

The presumption in favor of mens rea becomes stronger as the offense's penalties become harsher. *Rehaif*, 139 S. Ct. at 2197; *Anderson*, 141 Wn.2d at 364. The common law's demand for a mens rea is even strong enough to displace a statute's “most natural grammatical reading.” *X-Citement Video*, 513 U.S. at 68-69.

Under Washington law, possession of a controlled substance is a felony offense punishable by up to five years in prison and a fine of up to ten thousand dollars. RCW 69.50.4013(1), (2)1; RCW 9A.20.021(1)(c). Notwithstanding these serious consequences, this Court has held the offense is a strict liability crime. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). The prosecution 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 their possession was unwitting. *Bradshaw*, 152 Wn.2d at 538. In other words, instead of a presumption of innocence, there is a presumption of guilt. At a minimum, the constitutionality of this scheme is doubtful. By allocating the burden of disproving knowledge to Mr. Palmer, the drug possession statute upends these fundamental values.

This shift is strong evidence Washington “has shifted the burden of proof as to what is an inherent element of the offense.” *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality). This is why legal thinkers from across the ideological spectrum support the presumption in favor of mens rea. *See* John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, 18 *Federalist Soc’y Rev.* 40, 43 (2017). By not requiring the prosecution to prove knowledge, Washington’s drug possession law has a “freakish definition of the elements” unlike “the criminal law of other jurisdictions.” *Schad*, 501 U.S. at 640.

That Washington permits defendants to avoid guilt only if they prove “unwitting” possession further shows that knowledge is an “inherent” element of the offense of drug possession. If what the law was truly concerned with is mere possession regardless of knowledge, it makes no sense to have an unwitting possession defense. *See Cleppe*, 96 Wn.2d at 380 (recognizing the defense of unwitting possession “may seem

anomalous”). Instead, unwitting possession is the key issue. Stated more colorfully, unwitting possession is the “tail which wags the dog of the substantive offense” of drug possession. *Apprendi*, 530 U.S.at 495 (internal quotation omitted).

Washington does have a history of interpreting its drug possession laws to not require guilty knowledge. In 1951, Washington adopted the Uniform Narcotic Drug Act, the predecessor to the Uniform Controlled Substances Act. Laws of 1951, 2nd Ex. Sess., chapter 22.³

Because the language of the provision outlawing drug possession omitted the words “intent to sell,” which existed in the previous unlawful possession statute, Washington’s Supreme Court reasoned the legislature had not “intended to retain guilty knowledge or intent as an element of the crime of possession.” *State v. Henker*, 50 Wn.2d 809, 812, 314 P.2d 645 (1957). Unwitting possession was construed to be an

³ Washington is the only state that makes drug possession a true strict liability crime. *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); *Bradshaw*, 152 Wn.2d at 534; *State v. Bell*, 649 N.W.2d 243, 252 (2002); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988); Unif. Controlled Substances Act 1970 § 401(c).

affirmative defense. *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966).

Setting aside whether the Court correctly interpreted the drug possession statutes in these cases, this way of defining drug possession does not constitute “a long history.” *Schad*, 501 U.S.at 640 (plurality). And in any event, history is not dispositive and does not save this statute. *Id.* at 642-43; *see, e.g., State v. Roberts*, 88 Wn.2d 337, 341-43, 562 P.2d 1259 (1977) (longstanding statutory presumption that any homicide constituted second-degree murder held to violate due process).

It might also be argued that defendants are better positioned to explain what they know. But this does not justify shifting the burden of proof to them. *Mullaney*, 421 U.S. at 702; *Tot v. United States*, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943). “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” *Winship*, 397 U.S. at 364.

As this case illustrates, shifting the burden to Mr. Palmer to disprove knowledge creates an unacceptable risk of condemning the innocent. Despite Mr. Palmer's testimony that he did not know there was methamphetamine in the marijuana container, the jury found Mr. Palmer had not met his burden to prove unwitting possession. CP 64. Faced with contrary testimony from police witnesses, Mr. Palmer's attempt to exonerate himself by proving he did not know the drugs found in the container were illegal becomes insurmountable.

By not requiring the government to prove knowledge, the likelihood the innocent will be convicted is high. 18 *Federalist Soc'y Rev.* at 43. This is a violation of the basic principles of innocence and fundamental fairness. Due process demands more.

c. The drug possession statute must be interpreted to require proof of knowledge.

In Washington, courts must "supplement all penal statutes of this state" with "[t]he provisions of the common law relating to the commission of crime and the punishment

thereof” “insofar as not inconsistent with the Constitution and statutes of this state.” RCW 9A.04.060. Washington courts have held compliance with this directive permits the courts to rely on the common law to determine the elements of crimes. *See State v. Chavez*, 163 Wn.2d 262, 273-74, 180 P.3d 1250 (2008). Indeed, “the judiciary would be acting contrary to the legislature’s legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common law definitions to fill in legislative blanks in statutory crimes.” *State v. David*, 134 Wn. App. 470, 481, 141 P.3d 646 (2006).

Washington courts must therefore follow the long-standing common law practice of reading mens rea into criminal offenses, absent express legislative intent to the contrary. Doing so is “not inconsistent with the Constitution and statutes of this state.” RCW 9A.04.060. Rather, as the United States Supreme Court has indicated, following that rule avoids a confrontation with the constitution. *Staples*, 511

U.S. at 616-19; *Smith v. California*, 361 U.S. 147, 150, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959) (citing *Lambert*, 355 U.S. 225).

Without mens rea, the constitutionality of the drug possession statute is also doubtful. The constitutional-doubt canon instructs that statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Interpreting the drug possession statute to require proof of knowledge avoids the grave constitutional issue regarding the statute's validity. Consistent with the constitutional-doubt canon of statutory construction, this Court should interpret the drug possession statute to require knowledge.

In concluding drug possession is a strict liability crime, *Cleppe* and *Bradshaw* overlooked this canon of construction and did not consider the due process argument presented in

this case.⁴ Thus, these decisions do not control and stare decisis does not apply:

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. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted).

A reasonable reading of the drug possession statute is that it requires proof of knowledge. That the legislature omitted explicit language setting out a mens rea is not dispositive and contravenes the general rule that all criminal statutes are presumed to have one. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); *Anderson*, 141 Wn.2d at 361. Further, that

⁴ *In Bradshaw*, the Court stated that the defendant's constitutional arguments were insufficiently briefed. 152 Wn.2d at 539.

the legislature has not amended the drug possession statute since *Cleppe* and *Bradshaw* is not dispositive. *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232 (2016) (“evidence of legislative acquiescence is not conclusive, but is merely one factor to consider”).

And while the statute does not make mention of a mindset that must accompany possession, neither does it expressly state the government does not need to prove a state of mind. Thus, applying the common law’s presumption in favor of mens rea, as the legislature has directed, the statute should be read to require a showing of a guilty mind.

In *State v. Boyer*, the Supreme Court interpreted the delivery of a controlled substance statute to require intent. 91 Wn.2d 342, 344, 588 P.2d 1141 (1979). Reading knowledge into the offense, the Court recognized that without it, “even a postal carrier would be guilty of the crime were he innocently to deliver a package which in fact contained a forbidden narcotic.” *Id.* The Court held that “absent express legislative language to the contrary, we find in the context of this

statute, its history and language, that guilty knowledge is intrinsic to the definition of the crime itself.” *Id.*

Cleppe did not, however, follow *Boyer*, the common law presumption in favor of mens rea, or the legislature’s directive to apply the common law. 96 Wn.2d at 378-80. Rather, it determined the legislative intent to find no mens rea for possession of a controlled substance was clear. *Id.* at 380.

But this interpretation is at odds with legislative intent and this Court’s usual methods of statutory interpretation. First, the court departed from the accepted methods of statutory interpretation as analyzed above. It also ignored the rule of lenity which requires ambiguity in criminal statutes to be resolved in favor of lenity. *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971). This principle is founded on the policy that every person charged with a crime should be given fair warning of what is illegal and it is the legislature that should generally define criminal activity. *Id.* at 348. Thus, courts only resort to legislative history when

a statute is ambiguous. *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). Further, all ambiguities are resolved in favor of the defendant. *State v. Weatherwax*, 188 Wn.2d 139, 153-56, 392 P.3d 1054 (2017).

Had the *Cleppe* court followed the appropriate methodology in statutory interpretation, it would have read mens rea into criminal possession of a controlled substance from the start. Likewise, when the *Bradshaw* court endorsed *Cleppe*, it also looked wrongly to legislative history to guide its decision. *Bradshaw*, 152 Wn.2d at 532-33. This Court should now conclude to the contrary and hold that the government must prove knowledge in order to establish the essential elements of possession of a controlled substance.

d. Reversal of Mr. Palmer's conviction for possession of a controlled substance is required.

As the Louisiana Supreme Court recognized, a statute like Washington's sweeps in entirely innocent conduct. *State v. Brown*, 389 So. 2d 48, 51 (La. 1980). A person might pick up the wrong bag at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse. Or a

child might carry an adult's backpack, not knowing it contains the adult's illegal drugs. All this conduct is innocent; none of it is blameworthy.

Likewise, Mr. Palmer was swept up in criminal misconduct he did not intend. Mr. Palmer testified he did not know the marijuana container contained methamphetamine was uncontroverted. RP 257. Mr. Palmer was in a health crisis. RP 250. He was arrested for a crime he was ultimately acquitted of, because a security guard no longer wanted Mr. Palmer in a hospital that did not want to discharge him. RP 271. The record does not establish beyond a reasonable doubt the result of Mr. Palmer's trial would have been the same if the prosecution had been required to prove knowledge.

The trial court erred by failing to require the prosecution to prove beyond a reasonable doubt Mr. Palmer knowingly possessed the drugs. *See State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996) (court's interpretation of a statute is deemed to be what the statute has meant since its

enactment). Had the jury been instructed the government was obligated to prove Mr. Palmer knew he possessed methamphetamine, it would have found him not guilty of this offense. Instead, Mr. Palmer was required to prove his possession was unwitting. This is insufficient for due process. Reversal is required.

- 2. The government failed to establish Mr. Palmer was confined in a county or local correctional institution when marijuana was found on him, as required by RCW 9.94.041(2).**

Despite not being confined to the county jail when marijuana was found on Mr. Palmer, he was charged with possession of a controlled substance by a prisoner or jail inmate. CP 5. In order to convict Mr. Palmer of this crime, the government was obligated to prove he was confined in a county or local correctional facility. RCW 9.94.041(2); CP 42. Because the government failed to prove this essential element, dismissal is required.

a. Proof that Mr. Palmer was confined in a county or local correctional institute is an essential element of the crime of possession of a controlled substance by a prisoner or jail inmate.

Before Mr. Palmer was booked into the Clark County jail, the arresting officer spent time in his car with Mr. Palmer while the officer was filling out paperwork. RP 182. During this time, Mr. Palmer complained of having to use the bathroom. *Id.* The officer arranged with a deputy from the jail to allow Mr. Palmer to use the restroom before he was booked into jail. RP 183.

While Mr. Palmer was in the bathroom, the officers became suspicious of whether he was actually relieving himself. RP 184. The officers became concerned about the movements he was making around his groin. *Id.* The officers decided to conduct a strip search. RP 185. Ultimately, the officers searched Mr. Palmer, discovering marijuana in his groin area and near his calf. *Id.* Mr. Palmer did not deny he possessed the marijuana.

When this search occurred, Mr. Palmer was not a prisoner in a jail or a local correctional institution. He was not

booked into jail for several hours, as the arresting officer returned to the hospital in order to determine whether Mr. Palmer had ingested a razor blade. RP 197-98. It was not until after it was determined Mr. Palmer did not have a razor blade inside his body that he was booked into custody, making him an inmate of the Clark County jail. RP 203.

Possession of a controlled substance by a prisoner or jail inmate only applies to persons confined in an institute or local facility. RCW 9.94.041(2). To prove this crime, the jury was instructed to find Mr. Palmer “was confined in a county or local correctional institution.” CP 47 (Jury Instruction No. 12). This statute does not apply to those who have only been arrested like Mr. Palmer but not yet booked into the jail. RCW 9.94.041(2). The legislature created this crime to prevent persons from bringing contraband into jails, and not to create the absurd result that anyone who refuses to voluntarily confess to possessing controlled substances before being searched at a jail could be charged with an additional crime.

The result becomes more absurd when considering other prohibited items. In addition to controlled substances, marijuana, and alcohol, the statute also prohibits the possession of cell phones and other electronic communication devices. RCW 9.94.041(2). Certainly, most, if not all, persons who are booked into jails come into the jails with their cell phones. It is only after they have been booked into jail that the phones become contraband. *Id.* Indeed, if the first element of the crime were to have no meaning, any person, no matter how innocent, who brought a cell phone into a jail could be found guilty of this crime. This would include people who appear for fingerprinting or other non-confinement purposes. This is not what the legislature intended.

In interpreting a statute, this Court's primary duty is to discern and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point is always "the statute's plain language and ordinary meaning." *Id.* (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). If the

statute's meaning is plain on its face, then this Court must give effect to that meaning as an expression of what the legislature intended. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). In interpreting a statute, this Court also looks to avoid unlikely, absurd, or strained consequences. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987); *Mortell v. State*, 118 Wn. App. 846, 851, 78 P.3d 197 (2003).

The first phrase in the statute, “every person confined in a county or local correctional institution” is an independent element required to prove this offense. RCW 9.94.041(2). This element distinguishes persons about to be booked into jail like Mr. Palmer from those who are already in custody or those who are in jail for purposes other than to be incarcerated. *Id.* Once this element is established, the government must prove the additional elements: that the defendant was in possession of unauthorized contraband in the institution, while being conveyed to or from the institution, while under the custody of institution personnel, or while on any premises under the control of the institution. *Id.*

This analysis is consistent with the instructions given to the jury. The jurors were told that to convict Mr. Palmer of this crime, they must find he was “was confined in a county or local correctional institution.” CP 47 (Jury Instruction No. 12). Even if the statute would generally be read more broadly, here the law of the case doctrine requires a reading of the statute consistent with the jury’s instructions. *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017). Because the jury was instructed to find this element in order to convict Mr. Palmer of this crime, the elements of the “to convict” instruction define the elements of this crime. *Id.* at 760 (citing *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). The prosecution cannot now say the jury was improperly instructed on this element, which the government did not prove. *Id.*

Possession of a controlled substance by a prisoner or inmate was intended to apply to persons confined in a county or local correctional institution. CP 47 (Jury Instruction No. 12); RCW 9.94.041(2). At no time prior to the discovery of

marijuana on his body was Mr. Palmer booked into the county jail or otherwise transferred into the custody of the institution. To the contrary, Mr. Palmer remained in the sheriff's custody for three more hours, as he was taken back to the hospital to determine whether he could be booked. RP 203. It was only after it was determined he could be booked that he returned to the Clark County jail. *Id.* By this point, Mr. Palmer was no longer in possession of any of the marijuana the arresting officer discovered.

b. Because the government failed to prove an essential element of possession of a controlled substance by a prisoner or jail inmate, reversal is required.

Mr. Palmer was not confined in a county or local correctional institution, as required by RCW 9.94.041(2). Unlawful possession of a controlled substance by a prisoner or jail inmate, as charged, required the government to prove Mr. Palmer was confined in a county or local correctional institution. CP 47 (Jury Instruction No. 12). Mr. Palmer was not in custody when the police found the marijuana. The government failed to prove this essential element. Mr. Palmer

asks this Court to hold that the government failed to present sufficient evidence of possession of a controlled substance by a prisoner or jail or inmate and order this charge dismissed.

Hummel, 196 Wn. App. at 359.

3. The requirement that Mr. Palmer's legal financial obligations shall bear interest until paid in full is not authorized by statute and must be stricken.

When the court imposed its legal financial obligations, it ordered interest would accrue on the legal financial obligations until they were paid in full. CP 31. Because interest no longer accrues on non-restitution legal financial obligations, this was in error. *State v. Ingram*, ___ Wn.2d ___, 447 P.3d 192, 202 (2019).

RCW 10.82.090 was amended by the legislature to prohibit the accrual of interest on non-restitution legal financial obligations in 2018. The statute states that:

(1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations....

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction as follows:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018;

...

RCW 10.82.090 (emphasis added); *see* Laws of 2018, ch. 269, § 1(1), (2) (effective June 7, 2018).

At Mr. Palmer's sentencing hearing, the court entered a judgment and sentence containing boilerplate language stating "[t]he financial obligations imposed shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments." CP 73.

Accrual of interest on non-restitution legal financial obligations is prohibited after the statutes effective date of June 7, 2018. RCW 10.82.090(1). Because the judgment and sentence was entered after this date, the court erred in ordering interest on Mr. Palmer's legal financial obligations. This Court should strike the order imposing interest on the legal financial obligations. *Ingram*, 447 P.3d at 202.

F. CONCLUSION

This Court should hold knowledge is an essential element of possession of a controlled substance. Because the government failed to prove this essential element, reversal of Mr. Palmer's conviction for this charge is required.

The Court should also hold the government failed to prove Mr. Palmer was an inmate of a jail or local correctional institute when found to possess marijuana. Dismissal of the charge of possession of a controlled substance by a prisoner or inmate of a jail or local correctional institution is required.

Because it is not authorized by statute, interest on Mr. Palmer's legal financial obligations must also be stricken.

DATED this 14th day of November 2019.

Respectfully submitted,

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

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