

No. 33139-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS RAY MCBRIDE,

Appellant.

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

The Honorable David Frazier

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

An officer was on patrol when he recognized the defendant, Thomas Ray McBride, driving a vehicle. Upon further investigation the officer discovered Mr. McBride's driver's license was suspended and pulled Mr. McBride over. In a search incident to arrest, the officer discovered methamphetamine residue in a blue container on Mr. McBride's person. A jury later found Mr. McBride guilty of possession of a controlled substance pursuant to RCW 69.50.4013.

Mr. McBride asserts that his conviction should be reversed and dismissed with prejudice, because RCW 69.50.4013 is unconstitutional as applied for two reasons: (1) his conviction for methamphetamine residue violates the Eighth Amendment's prohibition against cruel and unusual punishment by imposing felony sanctions on possession of drug residue without proof of a culpable mental state, and/or (2) the conviction violates his due process rights under the Fourteenth Amendment because the statute fails to require proof of a culpable mental state for this felony conviction.

Mr. McBride also asserts that his conviction should be reversed, because he was denied his right to effective assistance of counsel. The arresting officer testified at trial that he knew Mr. McBride because he had previously dealt with McBride in his line of work. Defense counsel did

not object to this prior bad act testimony and, thus, Mr. McBride was denied his right to effective assistance of counsel.

Finally, the community custody condition that Mr. McBride not use or possess marijuana was not authorized by the Sentencing Reform Act (SRA) and should be stricken from the judgment and sentence.

### **B. ASSIGNMENTS OF ERROR**

1. The court erred by convicting Mr. McBride of possession of a controlled substance, where the conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment.

2. The court erred by convicting Mr. McBride of possession of a controlled substance, because RCW 69.50.4013 violates due process as applied by permitting conviction for possession of unmeasurable amounts of a controlled substance without proof of a culpable mental state.

3. Defense counsel was ineffective for failing to object to an officer's prior bad act testimony.

4. The trial court erred by imposing the community custody condition that the defendant not use or possess marijuana.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether RCW 69.50.4013 is unconstitutional as applied because (a) it violates the Eighth Amendment by imposing felony sanctions on possession of drug residue without proof of a culpable mental state, and/or (b) it violates due process as applied to possession of drug residue absent proof of some culpable mental state.

Issue 2: Whether Mr. McBride was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to an officer's testimony about Mr. McBride's prior bad acts.

Issue 3: Whether the community custody condition that the defendant not possess or consume marijuana must be stricken as it is not authorized under the Sentencing Reform Act (SRA).

#### **D. STATEMENT OF THE CASE**

On December 9, 2013, an officer was on patrol a few miles north of Colfax, Washington, when he recognized the defendant, Thomas Ray McBride, driving a vehicle. (RP 71–72). Upon further investigation the officer discovered Mr. McBride's driver's license was suspended. (RP 73). The officer pulled Mr. McBride over and placed him under arrest for driving with a suspended license. (RP 74–75).

The officer discovered a blue container on Mr. McBride's person during a search incident to arrest. (RP 75–77). The container contained a white residue, which later tested positive as methamphetamine. (RP 78, 104, 106–107).

At the ensuing jury trial, the arresting officer testified he had known Mr. McBride for 15 years. (RP 72). When asked why he knew Mr. McBride, the officer responded: "I've dealt with him in my line of work." (RP 72). Defense counsel did not object to this testimony. (*Id.*).

Also at trial, the lab technician testified the methamphetamine in the blue container was not a “weighable amount” and could only be described as “residue in the container.” (RP 107).

During deliberations, the jury asked the court the following question: “Does the law distinguish between residue and a measurable quantity of a controlled substance?” (CP 54; RP 129).

The jury found Mr. McBride guilty as charged of possession of a controlled substance (methamphetamine). (CP 5–6, 56; RP 130).

At sentencing, the trial court imposed the community custody condition that Mr. McBride “not possess or consume marijuana....” (CP 61). The trial court did not make any findings that Mr. McBride was chemically dependent. (CP 58–64; RP 21–28).

Mr. McBride timely appealed. (CP 69).

## **E. ARGUMENT**

**Issue 1: Whether RCW 69.50.4013 is unconstitutional as applied because (a) it violates the Eighth Amendment by imposing felony sanctions on possession of drug residue without proof of a culpable mental state, and/or (b) it violates due process as applied to possession of drug residue absent proof of some culpable mental state.**

Mr. McBride was denied his constitutional rights under the Eighth Amendment and/or the due process clause, because RCW 69.50.4013 allowed his felony conviction for possession of methamphetamine residue without requiring proof of a culpable mental state. This Court reviews

constitutional violations *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014).

**a. RCW 69.50.4013 violates the Eighth Amendment because it imposes felony sanctions on possession of drug residue without proof of a culpable mental state.**

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). To implement the Eighth Amendment, courts must look to “the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 58 (citations and quotations omitted).

In *Graham*, the Court applied a two-step categorical approach to determine whether a constitutional violation occurs when dealing with a “particular type of sentence as it applies to an entire class of offenders. . . .” *Id.* at 61–62.

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.* (citation and quotations omitted).

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 possession of drug residue, when that crime is committed without any culpable mental state.

**1. There is a strong national consensus that possession of drug residue should not be punished as a felony absent proof of some culpable mental state.**

Generally, there is a national consensus that possession of drug residue should not be punished as a felony absent a *mens rea* element. *See, e.g., Costes v. Arkansas*, 287 S.W.3d 639, 642 (2008) (possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708, 710 (1993) (“usable-quantity rule” requires proof that substance is in a form and quantity that can be used); *Louisiana v. Joseph*, 32 So.3d 244, 248 (2010) (to convict a defendant of possession

of cocaine it must be proven defendant knowingly possessed it); *Finn v. Kentucky*, 313 S.W.3d 89, 91–92 (2010) (possession of residue sufficient because prosecution established defendant’s knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204, 1207 (2010) (insufficient evidence because State did not prove knowledge); *Missouri v. Taylor*, 216 S.W.3d 187, 193 (2007) (residue sufficient for conviction if defendant’s knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue is sufficient if knowledge is established); *Head v. Oklahoma*, 146 P.3d 1141, 1144 (2006) (defendant’s statement established knowing possession of residue); *Hawaii v. Hironaka*, 53 P.3d 806, 814 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624, 625–626 (2001) (immeasurable residue sufficient for conviction where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279, 1280 (2000) (law requires proof that defendant “knowingly or purposely” possessed a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (noting prosecution must prove knowledge); *Lord v. Florida*, 616 So.2d 1065 (1993) (trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) (“When the quantity of a substance possessed is so small that is cannot be quantitatively measured, the State must produce evidence that the defendant knew the substance in

his possession was a controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317, 319 (1992) (prosecution need not prove a “measurable amount” of controlled substance so long as knowledge is established).

In the second part of the *Graham* test, the court examines three factors: (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 examined above. First, people who unknowingly possess drug residue can be wrongly convicted.

Second, a felony conviction and its collateral consequences are unduly harsh. 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. RCW 9A.20.021. This contrasts with a fine of up to \$5,000 and confinement of up to 364 days for most gross misdemeanors. *Id.* A convicted felon also loses certain civil rights, such as the right to vote, sit on a jury, and possess a gun, and also suffers “grave damage to his [or her] reputation.” *United States v. Wulff*, 758 F.2d 1121, 1125 (6<sup>th</sup> Cir. 1985).

Third, there are no legitimate penological goals for imposing felony liability on those who unknowingly possess drug residue. Some commonly recognized penological interests are retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71–72. None of these four goals are served here. A person who unknowingly possesses drug residue 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 unknowingly possessed drug residue of an unmeasurable quantity. Where possession is unwitting, the alleged offender is neither deserving of punishment nor prevented—by imposition of felony sanctions—from causing future harm.

Additionally, a person who unknowingly possessed drug residue 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 will not respond to any form of treatment because there is no ill to be addressed.

Finally, it is noteworthy that the jury in this case also questioned whether the law recognized a difference between a measurable and non-

measurable quantity of drugs. (CP 54; RP 129). This question illustrates a societal concern over whether a conviction can stand based solely on possession of drug residue without a culpable mental state.

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.* Mr. McBride’s conviction should be reversed as no culpable mental state was proven in this case.

**2. RCW 69.50.4013 violates the Eighth Amendment because it imposes felony sanctions on possession of drug residue without proof of 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) (citation omitted). 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 (10<sup>th</sup> Cir. 2010).

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, 51 (1980) (invalidating as unconstitutional “the portion of the statute making it illegal to “unknowingly” 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. *See, e.g., State v. Kjorsviki*, 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, 785–786, 83 P.3d 410 (2004) (identity of controlled substance is an essential element when it affects the penalty). 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, 628–629, 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).

Possession of a controlled substance is a strict liability offense. *State v. Denny*, 173 Wn. App. 805, 810, 294 P.3d 862 (2013). Current law allows conviction for unwitting possession of amounts so small as to be imperceptible to the naked eye. RCW 69.50.4013; *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008) (“there is no minimum amount of drug which must be possessed in order to sustain a conviction”).

Washington’s possession law violates due process. *See Macias*, 740 F.3d 96. RCW 69.50.4013 imposes liability even when the accused cannot know she or he is in possession of a controlled substance without the aid of sensitive equipment. Notably, “[i]t has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of currency circulating in the area.” *Lord v. Florida*, 616 So.2d 1065, 1066 (1993).

Therefore, a person who visits Washington from Florida would likely be guilty of cocaine possession upon arrival. Because of this, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. This is a violation of due process.

The court should either invalidate RCW 69.50.4013 or employ its inherent and statutory authority to recognize a *mens rea* element for possession of a controlled substance.<sup>1</sup> See *Kjorsviki*, 117 Wn.2d at 98 (intent to steal is an essential nonstatutory element of robbery); *Goodman*, 150 Wn.2d 774 (identity of controlled substance is an essential element when it affects the penalty).

A common law element requiring proof of a culpable mental state is not inconsistent with Washington's possession statute. RCW 69.50.4013.

If the court recognizes a non-statutory element requiring proof of some culpable mental state, Mr. McBride's possession conviction would lack sufficient evidence, in violation of his right to due process. See *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court should either recognize the *mens rea* element or invalidate RCW 69.50.4013 as applied.

In either case, the court should reverse Mr. McBride's possession of residue conviction and dismiss the charge with prejudice.

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<sup>1</sup> The Supreme Court has rejected a "usable quantity" test, but has never upheld a conviction based on possession of mere residue. See *State v. Larkins*, 79 Wn.2d 392, 395, 486 P.2d 95 (1971) (affirming conviction based on "a measurable amount" of Demerol).

**Issue 2: Whether Mr. McBride was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to an officer’s testimony about Mr. McBride’s prior bad acts.**

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

- (1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that “‘counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S. at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

“The burden of demonstrating a proper purpose for admitting evidence of a person’s prior bad acts is on the proponent of the evidence.” *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). In order to admit evidence under ER 404(b), the trial court must follow four steps:

‘(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.’

*State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). “This analysis must be conducted on the record.” *Id.* at 175 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

“Evidence of prior bad acts is presumptively inadmissible.” *State*

*v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). “In doubtful cases, the evidence should be excluded.” *Thang*, 145 Wn.2d at 642 (citing *Smith*, 106 Wn.2d at 776).

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained . . . that the result of the trial would have been different if the evidence had not been admitted[,]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). “[S]trategy must be based on reasoned decisionmaking[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, the prosecutor asked an officer how he knew Mr. McBride. (RP 72–73). The officer responded: “I’ve dealt with him in my line of work.” (RP 72–73). Defense counsel’s failure to object to this prior bad act testimony by the officer fell below prevailing professional norms. *See Sexsmith*, 138 Wn. App. at 509. An objection to the testimony under ER 404(b) would have been sustained. The only purpose for this evidence was to show Mr. McBride’s past propensity for criminal activity, to show he acted in conformity with violating the law. *See* ER 404(b).

In addition, the prior bad act testimony by the officer was more prejudicial than probative. *See Foxhoven*, 161 Wn.2d at 174 (quoting *Thang*, 145 Wn.2d at 642) (ER 404(b) analysis requires the trial court to “weigh the probative value against the prejudicial effect.”). The officer’s testimony suggests prior acts of criminal activity by Mr. McBride. Mr. McBride’s prior criminal acts were more prejudicial than probative.

Defense counsel’s failure to object was not tactical. The prior bad act testimony by the officer shows Mr. McBride’s propensity for criminal activity, and the key issue in this case was whether Mr. McBride possessed methamphetamine.

Had defense counsel objected to the prior bad act testimony by the officer, the result of the trial would have been different. *See Sexsmith*, 138 Wn. App. at 509. This prior bad act testimony showed Mr. McBride’s propensity for committing crimes and could have swayed the jury to determine that Mr. McBride was guilty of at least some crime.

Defense counsel’s failure to object to the testimony of the officer about prior bad acts by Mr. McBride constituted ineffective assistance of counsel. *Sexsmith*, 138 Wn. App. at 509. Mr. McBride’s conviction should be reversed.

**Issue 3: Whether the community custody condition that the defendant not possess or consume marijuana must be stricken as it is not authorized under the Sentencing Reform Act (SRA).**

As a threshold matter, defendants can object to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). “Unauthorized conditions of a sentence may be challenged for the first time on appeal.” *State v. Wilson*, 176 Wn. App. 147, 151, 307 P.3d 823 (2013), *review denied*, 179 Wn.2d 1012 (2014) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

The trial court may impose a community custody condition only if it is authorized by statute. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013) (citation omitted). Pursuant to RCW 9.94A.703, in pertinent part, the court may order an offender to “[p]articipate in crime-related treatment or counseling services;” “[r]efrain from consuming alcohol;” or “[c]omply with any crime-related prohibitions.” Former RCW 9.94A.703(3)(c), (e), (f) (2009).<sup>2</sup> “Crime-related prohibition” means:

an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted....

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<sup>2</sup> This statute, which was effective at the time of Mr. McBride’s sentencing, has been amended by 2015 Wash. Legis. Serv. Ch. 81 (S.B. 5104), effective 7/24/2015. The revisions will permit a court to include a prohibition on use or possession of controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense. RCW 9.94A.505 and RCW 9.94A.607(1) (eff. 7/24/2015). Even if the amendments had been effective at the time of Mr. McBride’s sentencing, which they were not, the court here did not find that the defendant had a chemical dependency that contributed to the offense. *See* CP 61.

RCW 9.94A.030(10).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

In *State v. Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related.<sup>3</sup> 118 Wn. App. at 207-08. The court further found that “alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” *Id.* at 208.

Here, Mr. McBride may challenge any offensive community custody conditions for the first time on appeal. *See, e.g., Wilson*, 176 Wn. App. at 151.

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<sup>3</sup> *Jones* predates the legislation that allows community custody prohibitions on consumption of alcohol. RCW 9.94A.703(3)(e).

In this case, the court erred by imposing the following condition of community custody:

The court orders that during the period of supervision the defendant shall... not possess or consume marijuana....

(CP 61).

This community condition prohibiting Mr. McBride from using or possessing marijuana is not related to the crime of conviction. There was no evidence that marijuana contributed to Mr. McBride's conviction for possession of methamphetamine. There was some discussion that Mr. McBride had a history for manufacturing or delivering marijuana (RP 21), but there is no indication that even this drug contributed to the convicted offense. Significantly, the court did not find that Mr. McBride had any chemical dependency that contributed to the offense. (CP 58–64; RP 21–28); *C.f.*, RCW 9.94A.505 and RCW 9.94A.607(1) (eff. 7/24/2015) (permitting prohibitions on use or possession of controlled substances where any chemical dependency contributed to the offense) (emphasis added).

There was no evidence that the defendant's possession or consumption of marijuana products contributed to the charged and convicted offense. Thus, the community custody condition prohibiting Mr. McBride from possessing or using marijuana during community custody was not crime-related or authorized by law and must be stricken.

## **F. CONCLUSION**

Mr. McBride's constitutional rights were violated under the Eighth Amendment and/or the due process clause of the Fourteenth Amendment. For these reasons, Mr. McBride requests that his drug conviction be reversed and the case dismissed with prejudice.

Mr. McBride was denied effective assistance of counsel due to improper admission of prior bad acts evidence against him, and he requests this case be reversed.

At a minimum, Mr. McBride requests the case be remanded for resentencing to strike the community custody prohibition involving marijuana.

Respectfully submitted this 30<sup>th</sup> day of November, 2015.



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Of Counsel

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 33139-3-III  
vs. )  
THOMAS RAY MCBRIDE )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Kristina M. Nichols, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 30, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Thomas Ray McBride  
302 N 3RD ST  
PO BOX 312  
OAKESDALE WA 99158

Having obtained prior permission from the Whitman County Prosecutor's Office, I also served the Respondent State of Washington at AmandaP@co.whitman.wa.us and DanL@co.whitman.wa.us using Division III's e-service feature.

Dated this 30<sup>th</sup> day of November, 2015.

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