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Court of Appeals
Division III
State of Washington

No. 34056-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Wendell Muse,

Appellant.

Benton County Superior Court Cause No. 15-1-00802-5

The Honorable Judge Robert Swisher

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Muse's felony conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ISSUE 1: There is a national consensus that simple possession of drug residue should not be punished as a felony absent proof of a culpable mental state, and that the felony sanction is more severe than warranted. Does RCW 69.50.4013 violate the Eighth Amendment when applied to simple possession of drug residue in the absence of any culpable mental state?

2. RCW 69.50.4013 violates due process as applied because it permits felony conviction for possession of imperceptible amounts of drug residue absent a culpable mental state.

ISSUE 2: Due process prohibits imposition of criminal liability for acts that the defendant does not cause. Does RCW 69.50.4013 violate due process in residue cases because it authorizes a felony conviction for acts the accused person did not cause?

ISSUE 3: Courts have the authority to recognize non-statutory elements where a criminal statute is unconstitutional. Should the Court of Appeals exercise this authority and recognize a non-statutory element requiring proof of a culpable mental state in cases involving simple possession of drug residue?

3. The trial court erred by giving Instruction No. 3.
4. The trial court's reasonable doubt instruction violated Mr. Muse's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
5. The trial court's reasonable doubt instruction violated Mr. Muse's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§21 and 22.
6. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
7. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 4: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "belief in the

truth of the charge,” did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Muse’s constitutional right to a jury trial?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 5: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Muse is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Wendell Muse was worried about his girlfriend's drug use. RP¹
18. He took her pipe and put it in his pocket so she couldn't use it. RP 10,
18. He got a call that his apartment was burning. RP 15. He took a bus
home and watched as he lost all of his possessions. When police asked
him for his identification, they found a warrant and arrested him. RP 3-8,
16. They found his girlfriend's methamphetamine pipe in his pocket and
charged him. RP 17; CP 1.

Mr. Muse claimed unwitting possession, since he was not aware
that there was any methamphetamine in the pipe. RP 22-23, 54. There
was, but it was only residue. RP 32. In fact, as the jury deliberated, they
asked the court to comment on what amount is required for a possession
offense. RP 57; CP 22.

The court instructed the jury about reasonable doubt. Instruction
No. 3 included the standard language:

A reasonable doubt is one for which a reason exists and may arise
from the evidence or lack of evidence. It is such a doubt as would
exist in the mind of a reasonable person after fully, fairly and
carefully considering all of the evidence or lack of evidence. If,
from such consideration, you have an abiding belief in the truth of
the charge, you are satisfied beyond a reasonable doubt.
CP 11.

¹ The only transcript cited in this brief is from trial on January 19, 2016.

In the end, the jury convicted Mr. Muse. CP 23. After sentencing, Mr. Muse filed this timely appeal. CP 24-35.

ARGUMENT

I. RCW 69.50.4013 IS UNCONSTITUTIONAL WHEN APPLIED TO SIMPLE POSSESSION OF DRUG RESIDUE, BECAUSE IT CREATES FELONY LIABILITY WITHOUT PROOF OF ANY CULPABLE MENTAL STATE.

Mr. Muse was convicted of simple possession of drug residue. RP 32. In numerous jurisdictions, the prosecution would have been required to prove a culpable mental state. However, in Washington, felony liability attaches to simple possession of drug residue even where the accused person had no idea that residue was present. *See State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). Instead, it falls to the defendant to prove ignorance of the miniscule amounts of contraband present in residue cases. *Id.*, at 380-381.

Washington's practice of imposing felony sanctions for simple possession of drug residue even absent evidence of any culpable mental state is inconsistent with a clear national consensus and evolving standards of decency. It also leads to unduly harsh results.

The lack of a *mens rea* element for felony drug possession in residue cases violates due process and the Eighth Amendment. This court must either recognize a non-statutory *mens rea* element or strike down the statute as unconstitutional.

- 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.
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.

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

(2008), *as modified* (Oct. 1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945, 129 S. Ct. 1, 171 L. Ed. 2d 932 (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 possession of drug residue, when that crime is committed without any culpable mental state.

2. 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.

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 \$10,000.² RCW 9A.20.021. Furthermore, a convicted felon loses certain civil rights, such as the 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 possession of drug residue should not be punished as a felony absent a *mens rea* element. *See*,

² This compares to a fine of \$5,000 and confinement of up to 364 days for most gross misdemeanors. RCW 9A.20.021.

e.g., *Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (D. Conn. 2001) *modified*, 434 F. Supp. 2d 107 (D. Conn. 2006) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *People v. Rubacalba*, 6 Cal. 4th 62, 859 P.2d 708, 23 Cal. Rptr. 2d 628 (1993) (requiring proof of “usable quantity” and knowing possession); *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 of residue sufficient because prosecution established defendant’s knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of “awareness” and “conscious intent to possess”); *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant’s knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a “miniscule” amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient

where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting “usable quantity” rule, but noting that prosecution must prove knowledge); *Lord v. State*, 616 So.2d 1065 (Fla. Dist. Ct. App. 1993) (mere presence of 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 it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a “measurable amount” of controlled substance, so long as knowledge is established); *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988) (knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony); *State v. Christian*, 795 N.W.2d 702, 705 (2011) (willful possession of residue—which includes intentional, knowing, or reckless possession—is a felony).³

³ See N.D.C.C. § 19-03.1-23(7); N.D.C.C. § 12.1-02-02.

This national consensus is considerably stronger than in *Graham*. *Graham*, 560 U.S. at 64 Thus, the analysis moves to the second phase. *Id.*, 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 drug residue 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 drug residue.

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.⁴ A person who unwittingly 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

⁴Furthermore, any penological goals are adequately served by RCW 69.50.412(1), which criminalizes (*inter alia*) the use of drug paraphernalia to store or ingest a controlled substance. Indeed, most residue cases—including this one—could be prosecuted under RCW 69.50.412(1). Violation of the statute is a misdemeanor.

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 drug residue. 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 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 (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 drug residue 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).⁵

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 (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.⁶ See, e.g., *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812

⁵ 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*, 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)).

⁶ 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

(Continued)

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.)

Possession of a controlled substance is a strict liability offense. *State v. Denny*, 173 Wn. App. 805, 808-809, 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) (“[T]here is no minimum amount of drug which must be possessed in order to sustain a conviction.”). Because of this, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. Thus, a person who

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).

visits Washington from Florida would likely be guilty of cocaine possession upon arrival.⁷ *See, e.g., Lord*, 616 So.2d at 1066 (“It 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 the currency circulating in the area.”)

Washington’s possession law violates due process. *Wulff*, 758 F.2d at 1125; *Brown*, 389 So.2d at 51. 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. *See, Lord*, 616 So.2d at 1066.

The court should either invalidate the statute or employ its inherent and statutory common law authority to recognize a *mens rea* element for possession of a controlled substance.⁸ *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

⁷Such a person might assert the affirmative defense of unwitting possession. *Cleppe*, 96 Wn.2d at 381.

⁸The 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.)

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, Mr. Muse's possession conviction would be based on insufficient evidence, given the state's failure to prove negligent, reckless, knowing, or intentional possession. A conviction based on insufficient evidence violates due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The remedy is dismissal with prejudice. *Id.*

The court should either recognize such an element or invalidate RCW 69.50.4013 as applied. In either case, the court must reverse Mr. Muse's possession conviction and dismiss the charge with prejudice. *Id.*

C. Division III should not follow Division II's decision in *Schmeling*.

Division II has erroneously rejected arguments similar to those raised here. *State v. Schmeling*, 191 Wn. App. 795, 365 P.3d 202 (2015).

Division III should not follow *Schmeling*.

1. This court should analyze Mr. Muse's case using the categorical approach outlined in *Graham*.

The *Schmeling* court held that the categorical approach does not apply to adult drug offenders. *Id.*, at 800 (citing *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014)).⁹ According to the *Schmeling* court, the Supreme Court rejected the categorical approach for adult offenders in non-capital cases. *Id.*, at 800 (citing *Witherspoon*).

Division II's reliance on *Witherspoon* is misplaced. The *Witherspoon* court did not even discuss the applicability of the categorical approach. Instead, the court held that *Graham* did not *require* reversal of an adult defendant's life sentence. *Witherspoon*, 180 Wn.2d at 890. The word "categorical" does not appear anywhere in the opinion. *Id.*

Furthermore, other jurisdictions have applied *Graham*'s categorical approach to offenses committed by adults who were not sentenced to death. *See People v. Brown*, 967 N.E.2d 1004, 1019 (Ill. App. Ct. 2012); *State v. Oliver*, 812 N.W.2d 636, 641-647 (Iowa 2012); *State v. Mossman*, 294 Kan. 901, 927-930, 281 P.3d 153, 170 (2012); *United States v. Williams*, 636 F.3d 1229, 1233-34 (9th Cir. 2011).

⁹ The *Schmeling* court also analyzed the defendant's case under traditional Eighth Amendment proportionality analysis. *Id.*, at 798-99. The court did so even though the appellant had neither raised nor briefed the issue. *See* Brief of Appellant Schmeling, available at <http://www.courts.wa.gov/content/Briefs/A02/462184-Appellant's%20Brief.pdf> (last accessed 7/8/16).

This court should not follow Division II's decision in *Schmeling*. Instead, the court should apply *Graham*'s categorical approach. As outlined above, RCW 69.50.4013 violates the Eighth amendment under the categorical approach because it does not require proof of a culpable mental state, and allows conviction for possession of drug residue even when the accused person is not at fault.

Mr. Muse's conviction must be reversed.

2. *Schmeling*'s due process analysis is inadequate.

In *Schmeling*, the court failed to articulate a framework for analyzing due process challenges to strict liability crimes. *Schmeling*, 191 Wn.App. 801-02. Instead, *Schmeling* noted that the Supreme Court has not "express[ed] any concerns... that allowing a conviction for the possession of a controlled substance without showing intent or knowledge somehow was improper." *Id.*, at 802 (citing *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004); *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994); and *Cleppe, supra*).

But the Supreme Court did not decide a due process challenge in any of the cited cases.¹⁰ Because the due process issue was not properly

¹⁰ In *Bradshaw*, the court declined to address the appellants' due process challenge because they failed to adequately brief their arguments. *Bradshaw*, 152 Wn.2d at 539.

before the court in *Bradshaw*, *Staley*, or *Cleppe*, its silence is hardly surprising and cannot be considered controlling.

For the reasons outlined above, RCW 69.50.4013 violates due process when applied to possession of residue. *Wulff*, 758 F.2d at 1125. The court must either invalidate the statute or recognize a non-statutory element. Mr. Muse’s conviction must be reversed and his case dismissed with prejudice. *Id.*

II. THE COURT’S “REASONABLE DOUBT” INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH” IN VIOLATION OF MR. MUSE’S RIGHT TO DUE PROCESS AND TO A JURY TRIAL.

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn.App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 11.

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a

“belief in the truth of the charge,” the court confused the critical role of the jury. CP 11. This violated Mr. Muse constitutional right to a jury trial. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. It also violated his right to due process. U.S. Const. Amend. XIV; Wash. Const. art. I, §3.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 11. Jurors were obligated to follow the instruction.

Divisions I and II have rejected a challenge to this language. *State v. Kinzle*, 181 Wn.App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn.App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014); *State v. Jenson*, No. 47647-9-II, --- Wn.App. ---, --- P.3d --- (2016).

Division III should not follow these decisions.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I’s position.¹¹

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.¹² *Id.*

The *Fedorov* and *Jenson* courts also relied on *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.*, at 656.¹³ The *Pirtle* court was not asked to rule on the constitutionality of the “truth of the charge” provision.

Neither *Bennett* nor *Pirtle* should control this case. Division III should not follow Divisions I and II.

¹¹ Although the *Jenson* court adopted *Fedorov*’s reasoning, it did not cite to *Bennett* in its summary of *Fedorov*. *Jenson*, --- Wn.App at ____.

¹² The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

¹³ The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

Improper instruction on the reasonable doubt standard is structural error.¹⁴ *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Muse his constitutional right to a jury trial.

Mr. Muse’s conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in

¹⁴ RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).¹⁵

Division III has not yet addressed the *Sinclair* approach to appellate costs. Rather than burdening the appellant with the task of preemptively addressing the issue, Division III should give the state the option of requesting appellate costs in its response brief. If the state does not request costs, appellant will have no need to address appellate costs in a reply brief. Alternatively, Division III could solve the problem identified in *Sinclair* by waiving the requirements of RAP 14.2, and granting the clerk and commissioner discretion to deny appellate costs in cases of indigency. *See* RAP 1.2(c).

Nonetheless, since Division III has not yet addressed *Sinclair*'s procedure, appellant presents argument consistent with that procedure.

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Muse indigent. CP 36. There is no reason to believe that status will change. The *Blazina* court indicated that

¹⁵ Division III does not appear to have addressed the *Sinclair* approach to appellate costs.

courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

Instead of treating drug addiction as a public health issue, our state has elected to pursue a war on drugs that creates felony liability for those found to possess drug residue, even absent proof of any culpable mental state. This violates the Eighth Amendment’s prohibition on cruel and unusual punishment and the Fourteenth Amendment’s due process clause. Mr. Muse’s conviction must be reversed and the case dismissed with prejudice. If the charge is not dismissed, it must be remanded for a new trial, with instructions to require proof of a culpable mental state as a nonstatutory element of the offense.

In addition, the conviction must be reversed because the trial court’s reasonable doubt instruction improperly focused jurors on “the truth of the charge” rather than the reasonableness of their doubts. The case must be remanded for a new trial.

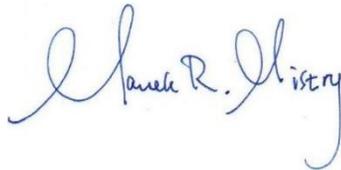
If the state substantially prevails, the Court of Appeals should decline to assess any appellate costs requested.

Respectfully submitted on July 12, 2016,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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Pasco, WA 99301

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, 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 July 12, 2016.



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