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State of Washington  
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No. 36803-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS CURTIS JR.,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## **A. INTRODUCTION**

Following Thomas Curtis' arrest for allegedly trespassing, the arresting officer searched Mr. Curtis. No drugs were found on him. At the jail, in an area where another officer was processing another arrestee, the officer again searched Mr. Curtis. After Mr. Curtis' pants were removed and Mr. Curtis was placed in another area, the officer claimed to find a small container attached to the pants. Inside was a small amount of drugs. Although part of the interaction at the jail was video recorded, the discovery of the drugs was not recorded. After a trial solely on charges of drug possession, Mr. Curtis was convicted as charged.

The convictions should be reversed for two reasons. First, in violation of Mr. Curtis' right to a public trial, the court conducted challenges for cause and dismissed one juror at an off-the-record sidebar that was not memorialized. Second, the court failed to instruct the jury that to convict Mr. Curtis, the jurors must find he knowingly possessed the substances. If drug possession has no knowledge element and is a strict liability crime, it is unconstitutional. If not reversed, remand is required to strike or reform unconstitutional conditions of community custody and remedy errors related to the imposition of legal financial obligations.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of the guarantee of a public trial, as provided by article I, sections 10 and 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court erred by conducting challenges for cause and dismissing juror 14 at an off-the-record sidebar that was not memorialized.

2. In violation of the Sixth and Fourteenth Amendments to the United States Constitution, and article I, sections 3 and 22 of the Washington Constitution, the court erred by failing to instruct the jury that the prosecution must prove Mr. Curtis knew he possessed the controlled substances. CP 18-19 (instructions 7 and 8).

3. If unlawful possession is a strict liability crime without a knowledge element, the law violates due process under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution. The court erred by entering the judgment and sentence.

4. The right to freedom of association is guaranteed under article I, section 5 of the Washington Constitution and the First and Fourteenth Amendments to the United States Constitution. Due process, as provided by the due process guarantees under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States

Constitution, prohibits vague laws. In violation of these constitutional protections, the court erred by ordering, as a condition of community custody, that Mr. Curtis “shall not associate with persons known to have a felony criminal background or known to use controlled substances without the prior approval of the Department of Corrections.” CP 30.

5. The court erred in ordering that Mr. Curtis pay supervision fees and the costs of drug screens as terms of community custody.

6. The court erred in ordering that non-restitution legal financial obligations accrue interest.

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

1. The right to a public trial attaches to jury selection, including challenges for cause. If conducted in a manner that is inaccessible to spectators and not memorialized, the right to a public trial is violated. The court conducted challenges for cause at an off-the-record sidebar that was not memorialized. One of the jurors was dismissed at this sidebar for cause, but this fact and the reasons for dismissal were kept secret and not announced in court. Did the court violate Mr. Curtis’ right to a public trial?

2. The possession of a controlled substance statute does not expressly require proof that the possession was knowing. Statutes must be construed to avoid constitutional deficiencies. If construed to be a strict

liability crime without a knowledge element, the statute is likely unconstitutional. Consistent with the constitutional-doubt canon, must the possession statute be read to require proof of knowledge?

3. The jury must be instructed on all elements of an offense.

Properly construed, knowledge is an element of the crime of possession of a controlled substance. Did the court err by failing to instruct the jury that knowledge is an element of possession of a controlled substance?

4. The presumption of innocence is a principle fundamental to America's history and tradition. Criminal laws that eliminate inherent elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. All states except Washington require the prosecution to prove that possession of a controlled substance is knowing. In Washington, an innocent person in possession of drugs must prove their possession was "unwitting." Is it unconstitutional to make possession of a controlled substance a strict liability crime and to presume guilt unless the defendant can prove unwitting possession?

5. There is a constitutional right to freedom of association.

Conditions of community custody that broadly restrict this right without reasonable necessity are unconstitutionally overbroad. As a condition of community custody, the court ordered Mr. Curtis not to associate with persons who have "a felony criminal background." Is this condition

overbroad in that it unnecessarily forbids association with millions of people, including “felons” who have reformed?

6. As a condition of community custody, the court ordered Mr. Curtis not to associate with persons who “use controlled substances.” Is this condition overbroad in that it forbids association with people who legally use controlled substances with a prescription?

7. Conditions of community custody violate due process if they are unconstitutionally vague. A condition is unconstitutionally vague if is insufficiently definite so that ordinary people cannot understand it or if it permits arbitrary enforcement. Is the language, “felony criminal background” unconstitutionally vague in that its scope is indefinite and permits arbitrary enforcement?

8. Is the term forbidding association with persons who “use controlled substances” vague because it is unclear if it applies to persons who legally use controlled substances with a prescription?

9. The condition forbids association with persons “known” to have a felony criminal background or to use controlled substances. It fails to specify whether Mr. Curtis himself must know, as opposed to others. Is the condition unconstitutionally vague?

10. As part of community custody, a trial court may waive the requirement that the defendant pay supervision fees. Before imposing

discretionary fees, the court must analyze the defendant's ability to pay. The court found Mr. Curtis was indigent and waived mandatory legal financial obligations, but nonetheless ordered him to pay supervision fees. Did the court err?

11. Interest does not accrue on non-restitution legal financial obligations. The judgment and sentence states that interest accrues on all legal financial obligations. Must this provision be stricken?

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

Thomas Curtis, Jr. was outside his father's residence in the front yard with his dog. RP 145, 275. His father lived at the residence with at least one other man. RP 275. Due to a disagreement with the man who lived with his father, Mr. Curtis had been trespassed from the house. RP 275. Mr. Curtis believed that he had only been trespassed from the house itself, not the property around the house. RP 275.

Officer Caleb Aumell was on patrol when he saw Mr. Curtis in the yard. RP 145, 275. He stopped his vehicle and arrested Mr. Curtis for trespassing. RP 145, 277-78. Mr. Curtis protested that the homeowner and his father were there and that they would verify he was only forbidden from being inside the house. RP 277. Officer Aumell adhered to his decision and searched Mr. Curtis incident to arrest, including Mr. Curtis' backpack. RP 146, 278. Officer Aumell found what he believed was drug

paraphernalia in Mr. Curtis' backpack. RP 147-53. He did not find drugs. RP 172-73. Officer Aumell transported Mr. Curtis to the jail. RP 155.

At the booking area, Officer Aumell again searched Mr. Curtis. RP 266-67. Officer Aumell required Mr. Curtis to "download" his property and his "extra" clothing. RP 155, 159, 175. This included the jeans Mr. Curtis was wearing. RP 160. While Officer Aumell was processing Mr. Curtis, another officer came into the same area and processed another arrestee at the same time. RP 164, 267. Following the search and "download," Mr. Curtis was placed into the intermediate room leading into the jail. RP 270. Shortly thereafter, Officer Aumell claimed that he discovered a small container, about two and a half inches in height and about half an inch wide, attached to the inner waistband of the jeans he had removed from Mr. Curtis. RP 161, 177. Inside were two small baggies, one containing methamphetamine and the other heroin. RP 162-63, 197-98.

The prosecution charged Mr. Curtis with two counts of possession of a controlled substance. CP 6-7. The prosecution did not charge Mr. Curtis with trespassing or for possession of drug paraphernalia. CP 6-7.

Mr. Curtis sought surveillance footage from the jail. RP 230-32. The defense investigator obtained four videos that captured part of what had occurred at the booking area. RP 232. Officer Aumell testified that the

booking process with Mr. Curtis took about 20 to 30 minutes. RP 164.

Each video, however, was a little under two minutes. RP 240. Because the camera may have been motion activated, the footage did not capture the entire event and the four files were not continuous. RP 292-95; Ex. 9.

Officer Aumell's claimed discovery of the drugs is not contained in the footage. Ex. 9.

Mr. Curtis testified at trial that he did not have any drugs on him. RP 283. He admitted to being a drug user, but he did not carry drugs on him. RP 283-84. He understood that drug possession was a felony and did not want to go to prison. RP 279. When he obtained drugs, he consumed them. RP 287.

During jury selection, the court conducted a sidebar to address challenges for cause. RP 101-02, 115. The sidebar was off the record and not memorialized.

Mr. Curtis was convicted as charged. CP 27-28. The court sentenced Mr. Curtis to 14 months imprisonment and one year of community custody. CP 30. As a condition of community custody, the court prohibited Mr. Curtis from associating with anyone "known to have a felony criminal background" or "known to use controlled substances" unless he obtained prior approval from the Department of Corrections. CP

30. At Mr. Curtis' request, the court excluded Mr. Curtis' father, who had a criminal history, from the prohibition. CP 30.

## E. ARGUMENT

**1. In violation of Mr. Curtis' constitutional right to a public trial, the court conducted challenges for cause and excused at least one juror at an off-the-record sidebar without memorializing the sidebar. The violation requires reversal.**

*a. Criminal defendants have a constitutional right to a public trial.*

Criminal defendants have the right to a public trial under the state and federal constitutions. State v. Whitlock, 188 Wn.2d 511, 519, 396 P.3d 310 (2017); U.S. Const. amends. VI, XIV; Const. art. I, §§ 10, 22. A claimed violation of the right to a public trial is properly raised for the first time on appeal. State v. Karas, 6 Wn. App. 2d 610, 617, 431 P.3d 1006 (2018). Review is de novo. Id.

The court makes three inquiries in analyzing a claimed violation of a defendant's right to a public trial. Id. First, whether the public trial right is implicated by the proceeding or occurrence alleged to constitute the closure. Id. at 617. Second, if the public trial right is implicated, whether there was a closure that was not de minimus. Id. at 617-18. And third, whether the closure was justified. Id.

*b. During jury selection, the court heard challenges for cause at an off-the-record sidebar, and did not memorialize the side-bar. The record indicates the court struck juror 14 off the record without ever announcing this in open court.*

Jury selection began in the morning. RP 19. Before selection started, the court told the parties that challenges for cause could be addressed with the jury present so long as it was “noninflammatory” and not “sensitive.” RP 15. Otherwise, these would be addressed at a sidebar. RP 15. The court further explained that the court would permit the parties to request that jurors be excused for cause if a juror expressed a reason why they could not serve. RP 15.

During voir dire, the court excused juror 8 without objection because it hurt for her to sit or stand. RP 29-30. Following questioning by defense counsel of the potential jurors, the court recessed. RP 96. During the recess, defense counsel stated he had “three for cause [challenges] we’d like to argue.” RP 96. Defense counsel then challenged juror number 3. RP 99. The prosecutor opposed the request and stated voir dire should be completed before resolving the challenge. RP 99. Defense counsel then challenged juror 14, stating his objection to this juror was “obvious.” RP 100.

Juror 14 had disclosed he was “a recovering alcoholic/addict.” RP 56. He stated he was “extremely uncomfortable being here” and that

hearing about the situation made him “want to use.” RP 57. He stated that it took him close to 40 years to stop using and that drug use took him to a “horrible place.” RP 63-64. After opining that marijuana had been a gateway drug for him, he expressed frustration with marijuana being legal under state law because it remained illegal under federal law. RP 63, 87-88.

The prosecutor stated he did not have a “strong objection” to excusing juror 14, but was “uncomfortable” doing so absent a more specific reason by the defense for striking the juror. RP 100. The court stated it was concerned that the case could have “significant mental health consequences” for juror 14 if he was selected. RP 100. In response, the prosecutor stated he had “no objection on that ground.” RP 100-01.

Still, rather than rule on the challenges for cause or dismiss juror 14, the court stated it would continue with voir dire and “wait until after peremptories.” RP 101. The prosecutor reminded the court that challenges for cause had to be done before peremptories. RP 101-02. The court stated they would take a break after voir dire before peremptories so that challenges for cause could occur, and they would meet at a sidebar to determine if there were still challenges for cause:

THE COURT: So we’ll have to take a break after voir dire before peremptories.

MR. O'BRIEN: If they're going to raise that issue, if they want to challenge anybody for cause.

MR. CHRISTIANSON: Yeah.

THE COURT: What I'll do is I'll just do a sidebar making sure that that is what you intend to do.

MR. CHRISTIANSON: Okay.

THE COURT: And then if you do, then we'll take a break and we'll ask the jury to leave.

RP 102. Before resuming, the court did not hear from the defense which juror was the third juror that the defense wished to challenge for cause.

Following the break, the parties finished voir dire. RP 104-115.

After defense counsel ended his questioning, the court summoned the parties to a sidebar, which was not transcribed and was not summarized afterward for the record:

THE COURT: Okay. Well, again, thank you so much for your honesty and your willingness to answer all these questions.

And actually before we move forward, if we could just have a sidebar, Counsel.

(A SIDEBAR WAS HELD WITH COUNSEL.)

RP 115. Following the sidebar, the court determined that none of the jurors wanted to share anything with the attorneys outside the presence of the other jurors. RP 116-17. The court then immediately proceeded with peremptory challenges. RP 117. Peremptory challenges were conducted on

paper, but the results were memorialized by the court reporter in the transcript and on a sheet filed in the clerk's office. RP 116-17; Supp. CP \_\_\_ (sub. no. 33). The jurors struck by peremptories were jurors 2, 3, 6, 7, 9, 11, 18, 20, 21, 22, and 24. RP 116-17; Supp. CP \_\_\_ (sub. nos. 33, 35).

Out of the 12 remaining jurors in the box of 13 jurors<sup>1</sup> who were stricken by peremptories were jurors 2, 3, 6, 7, and 9, and 11. RP 117-19; Supp. CP \_\_\_ (sub. nos. 33, 35). *Skipping juror 14*, the court had jurors 15, 16, 17, 19, 23, 25 and 26 fill the remaining 7 seats. RP 119-20; Supp. CP \_\_\_ (sub. no 35).

The court thanked the jurors who were not selected. RP 120-21. Juror 14 expressed his thanks to the Court in return, stating twice, "Thank you, your Honor." RP 121.

Although the transcript does not state that juror 14 had been dismissed or struck for cause, the jury selection sheet indicates he was stricken—apparently at the sidebar before peremptories, which would explain why he was passed over and not seated as a juror in the box:

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<sup>1</sup> The parties had agreed to have one alternative juror for a total of 13 jurors. RP 7. Juror 8 was not in the box at the time because she had been dismissed earlier due to her physical inability to sit or stand. RP 29-30.

- |   |   |                             |
|---|---|-----------------------------|
| 1. DAVIS, CHRISTOPHER BLAKE                           | 16. HORTON, MARIA TERESA CASANO               | 31. SCHELL, KARA            |
| <del>2. RADKE, PHYLLIS M</del> <i>Resignation</i>     | 17. STEVENS, JOYCE B                          | 32. DEVERIN, CHARLES MARK   |
| <del>3. PARRISH, TRISTAN DAYLE</del> <i>Winnipeg</i>  | <del>18. STURM, JANICE CHERYL</del> <i>DP</i> | 33. ROBARDS, WHILMA         |
| 4. KIRBY, ELIZABETH <i>Wenatchee</i>                  | 19. FRANK, REBECCA LYNN                       | 34. BOZARTH, JULIE          |
| 5. COCKRUM, CAROLYN <i>Chelan</i>                     | <del>20. SALMON, SHEILA A</del> <i>SP</i>     | 35. HILGEMANN, SHIRLEY ANN  |
| <del>6. SIMMONS, MICHAEL DUANE</del> <i>Wick</i>      | 21. MOLINE, BYRON ALAN <i>DP</i>              | 36. SCHONBERG, BONNIE J     |
| <del>7. YOUNG, SUSAN M</del> <i>Chelan</i>            | <del>22. WOJCIKOWSKI, SIOANE</del> <i>SP</i>  | 37. POLLEY, KATHRYN K       |
| <del>8. BYE-ALLEN, SHANNON MARIE</del> <i>Spokane</i> | 23. BAGLEY, BLAKE <i>DP</i>                   | 38. BRUGGEMAN, EARL MICHAEL |
| <del>9. MATHEWS, KATHRYN ANN</del>                    | <del>24. WHIFLAM, ROBERT B</del> <i>SP</i>    | 39.                         |
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| 15. BEESON, ROBERT J <i>Chelan</i>                    | 30. MENDEZ, HANNAH BETH                       | 45.                         |

Supp. CP. \_\_\_ (sub. no. 35).<sup>2</sup> Still, juror 14 was apparently not told about the decision to strike him from the jury pool.

*c. Conducting challenges for cause and striking juror 14 at an off-the-record sidebar that was not memorialized violated Mr. Curtis' right to a public trial.*

The court's decision to conduct a portion of jury selection at an off-the-record sidebar, and not memorialize it, violated Mr. Curtis's right to a public trial.

Starting with the first step of the public trial analysis, it is well established that jury selection implicates the public trial right. State v. Love, 183 Wn.2d 598, 605-06, 354 P.3d 841 (2015) (“we reaffirm that the right attaches to jury selection, including for cause and peremptory challenges”); State v. Anderson, 194 Wn. App. 547, 551 n.1, 377 P.3d 278

<sup>2</sup> Either the copy received by counsel or the copy in the clerk's office appears to have part of the left margin not fully copied.

(2016). Thus, conducting challenges for cause and striking a juror for cause at a sidebar implicates the public trial right.

Second, a court closure occurred that was not de minimus. A court closure occurs not only when the courtroom is closed to spectators, but also when a portion of a trial is “held someplace ‘inaccessible’ to spectators.” Love, 183 Wn.2d at 606 (quoting State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). Here, there may have been challenges for cause conducted at the sidebar. At the least, it appears that the court struck juror 14 for cause, although no one told him and he was simply passed over when filling in the jury box following peremptory challenges. The sidebar was not recorded and it was not memorialized in the record at a later point.

This distinguishes this case from our Supreme Court’s decision in Love. There, peremptory challenges were conducted silently on paper in open court. Love, 183 Wn.2d at 602-03. Key to the Court’s conclusion that this did not constitute a court closure was that it occurred in open court *and* there was a record made about what had happened. Id. at 607. In contrast, here there was not a record made of the sidebar where challenges for cause were addressed and juror 14 was stricken. There is no transcript of what was said and the court did not summarize what was said. Cf.

Anderson, 194 Wn. App. at 552 (no closure because court summarized on the record in open court what occurred at sidebar).

To be sure, after great scrutiny, it is possible to discern that juror 14 was likely struck at the sidebar. But it remains unclear if other challenges for cause occurred. Defense counsel had indicated earlier that he had three challenges for cause. Whether he decided to abandon them after further voir dire is unclear. Moreover, even if what happened is discernable by scrutinizing other portions of the record, this does not mean that a court closure has not occurred. As explained by Judge Thomas Bjorgen:

there must be some limit to the extent to which a closure of one phase may be saved by the ability to extract the same information from other, open phases. Without such limits, we would face the reductio ad absurdum of allowing any phase of trial to be effectively silenced as long as an observer could attend the entire trial or spend hours combing the record in an attempt to guess what was said at the silenced phase by inference from some other part of trial. The public's right to an open trial is not the same as the right to read the record of the trial at some later date. Nor is the exercise of that right contingent on attending the whole trial in an attempt to infer what might have been said at a closed phase from what was said at an open one.

State v. Effinger, 194 Wn. App. 554, 568-69, 375 P.3d 701 (2016)

(Bjorgen, J., dissenting).

Accordingly, Mr. Curtis has established that a closure occurred.

See id. at 555-56. It concerned a fundamental portion of jury selection, it

was not reported in open court, the length of the sidebar is unclear, and one juror appears to have been stricken for cause during the sidebar. Therefore, it is more than a de minimus closure. See Karas, 6 Wn. App. 2d at 626-27 (determining closure was more than de minimus because closed proceeding where length of hearing on motion in limine was unknown, evidence discussed was important, no record of the argument was made, and court only provided cursory summary of arguments in chambers).

Third, the closure was not justified because the court did not conduct a Bone-Club<sup>3</sup> analysis. Whitlock, 188 Wn.2d at 520.

*d. The violation of Mr. Curtis' public trial right is structural error requiring reversal.*

A violation of the right to a public trial is structural error, requiring reversal without a showing of prejudice. Whitlock, 188 Wn.2d at 524; see Karas, 6 Wn. App. 2d at 627. Accordingly, Mr. Curtis's convictions should be reversed.

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<sup>3</sup> State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

**2. Properly construed, the crime of possession of a controlled substance requires proof the defendant *knowingly* possessed the substance. The court’s failure to properly instruct the jury on this requirement requires reversal.**

*a. The jury must be clearly instructed on all the elements of the offense.*

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). To overcome this presumption, due process and the right to a jury trial require that the prosecution prove every element of an offense to the jury. Apprendi v. New Jersey, 530 U.S. 466, 499, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, §§ 3, 22; U.S. Const. amend. VI, XIV. An error in failing to properly instruct the jury on every element of the offense is manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Clark-El, 196 Wn. App. 614, 619, 384 P.3d 627 (2016).

*b. Criminal statutes presumptively require proof of a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.*

Underlying the presumption of innocence is the fundamental principle central to Anglo-American law that “wrongdoing must be conscious to be criminal.” Morrisette v. United States, 342 U.S. 246, 252,

72 S. Ct. 240, 96 L. Ed. 288 (1952). “[T]he understanding that an injury is criminal only if inflicted knowingly ‘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.’” Rehaif v. United States, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2191, 2196, \_\_\_ L. Ed. 2d. \_\_\_ (2019) (quoting Morrisette, 342 U.S. at 250); accord State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

For these reasons, there is “a longstanding presumption, traceable to the common law,” that criminal statutes require proof of a “culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’” Rehaif, 139 S. Ct. at 2195 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)); accord State v. A.M., \_\_\_ Wn.2d \_\_\_, 448 P.3d 35, 42-43 (2019) (Gordon-McCloud, J., concurring). Thus, courts presume a mental element or “scienter” is required, even where the text is silent or when it results in an ungrammatical reading. Rehaif, 139 S. Ct. at 2197; Anderson, 141 Wn.2d at 367 (courts are “loath . . . to conclude that the Legislature intended to jettison the normal requirement that mens rea be proved”).

*c. The court erred by failing to instruct the jury that the prosecution must prove that Mr. Curtis knew he possessed the substances.*

In this case, the trial court did not instruct the jury that the State bore the burden of proving that Mr. Curtis *knew* he possessed a controlled substance. CP 18-19 (instructions 7 and 8). Rather, to convict Mr. Curtis, the jury was instructed that it simply needed to find that Mr. Curtis possessed a controlled substance, methamphetamine (count one) and heroin (count two). CP 85. This was error.

To be sure, our Supreme Court has interpreted drug possession to be a strict liability crime with no mental element. State v. Bradshaw, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). Those who innocently possess drugs can avoid a conviction if they prove “unwitting possession.” Bradshaw, 152 Wn.2d at 537-38. In other words, there is a presumption of guilt rather than a presumption of innocence.

As two justices on the Washington Supreme have recently recognized, our Supreme Court’s interpretation of the drug possession statute is “grievously wrong.” A.M., 448 P.3d at 42 (Gordon-McCloud J., concurring).<sup>4</sup> In reaching the conclusion that drug possession is a strict

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<sup>4</sup> In A.M., the Washington Supreme Court granted review and heard argument on the issues of the elements of the drug possession statute

liability crime, our Supreme Court relied on the fact the legislature appeared to have omitted a mental element from the statute. Bradshaw, 152 Wn.2d at 534-35; Cleppe, 96 Wn.2d at 379-80. But this method of interpretation “dramatically departed from statute, common law, and traditional methods of interpretation.” A.M., 448 P.3d at 42 (Gordon-McCloud J., concurring). The Court departed from the usual rules of statutory interpretation and emphasized legislative history instead. Id. at 44-46.

Moreover, Cleppe and Bradshaw overlooked the canon of construction 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); accord Gomez v. United States, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (“settled policy [of United States Supreme Court] to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) (“A statute should be interpreted in a way that

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and its constitutionality. State v. A.M., \_\_\_ Wn.2d \_\_\_, 448 P.3d 35 (2019). Seven justices declined to address this issue because the Court ruled in the petitioner’s favor on other grounds. Id. at 37.

avoids placing its constitutionality in doubt.”). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” Nelson v. Colorado, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017); accord Coffin, 156 U.S. at 453. For this reason, in allocating the burden of proof, “there are obviously constitutional limits beyond which the States may not go.” Patterson, 432 U.S. at 210.

History and tradition indicate the constitutional line is crossed when “an inherent element” is shifted or when the elements of the crime are “freakish”:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); see Schad, 501 U.S. 650 (Scalia, J. concurring) (“It is precisely the historical practices that *define* what is ‘due.’”).

If interpreted to have no mental element, there are grave doubts about the validity of the possession statute. It creates a felony offense punishable by up to five years in prison and a fine of up to ten thousand dollars. RCW 69.50.4013(2); RCW 9A.20.021(1)(c). It is out of line with the Uniform Controlled Substances Act and every other jurisdiction, all of which require the prosecution to prove knowledge. 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). Thus, Washington’s drug possession law is “freakish” in that it eliminates the “inherent” mental element of knowledge. Schad, 501 U.S. 640 (plurality). While a defendant may plead the judicially created affirmative defense of unwitting possession, the burden is on the defendant to prove lack of knowledge. See A.M., 448 P.3d at 45 (Gordon-McCloud J., concurring). This shifting of the burden of proof is constitutionally dubious. See Patterson, 432 U.S. at 210.

Indeed, the two-justice concurrence in A.M. would have held the drug possession statute unconstitutional. A.M., 448 P.3d at 50-53 (Gordon-McCloud J., concurring). This Court need not go this far because the statute can be read to require knowledge, thereby avoiding the constitutional question. Bradshaw and Cleppe do not foreclose this result because those cases did not consider the constitutional doubt canon of statutory construction or the arguments that strict liability for drug possession is unconstitutional. “An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory.” State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405 (2017) (internal quotation omitted), affirmed, 190 Wn.2d 548, 415 P.3d 1179 (2018). Relatedly,

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).

In A.M., the concurrence assumed that the drug possession statute could not be properly read to include a knowledge element based on a

theory of legislative acquiescence. A.M., 448 P.3d at 46-48 (Gordon-McCloud J., concurring). The concurrence reasoned the legislature could have changed the law and its failure to do so meant the statute had to be read as a strict liability crime; although the concurrence expressed doubts whether it was constitutionally permissible to use this canon of construction in this manner. Id.

The concurrence gave too much weight to this canon construction. “[E]vidence of legislative acquiescence is not conclusive, but is merely one factor to consider.” Fast v. Kennewick Pub. Hosp. Dist., 187 Wn.2d 27, 39, 384 P.3d 232 (2016). As the United States Supreme Court has recognized, “congressional inaction lacks persuasive significance in most circumstances.” Star Athletica, L.L.C. v. Varsity Brands, Inc., \_\_\_ U.S. \_\_\_, 137 S. Ct. 1002, 1015, 197 L. Ed. 2d 354 (2017) (cleaned up); see generally William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 94 (1988) (“[L]egislative inaction rarely tells us much about relevant legislative intent.”). Colorfully put, “the search for significance in the silence of Congress is too often the pursuit of a mirage.” Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229 (1942).

In sum, a proper reading the drug possession statute requires the prosecution to prove knowledge. This Court should hold the trial court

erred by failing to properly instruct the jury that the prosecution bore the burden of proving beyond a reasonable doubt that Mr. Curtis *knowingly* possessed the controlled substances.

*d. The prosecution cannot meet its burden to prove the error harmless beyond a reasonable doubt.*

An instructional error that relieves the prosecution of its burden of proof, such as through the omission or misstatement of an element, is subject to the constitutional harmless error test. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The court must be able to conclude beyond a reasonable doubt that the error did not contribute to the verdict. Neder, 527 U.S. at 15; Brown, 147 Wn.2d at 341. In other words, the court must be able to conclude beyond a reasonable doubt that the verdict would have been the same without the error. Neder, 527 U.S. at 19; Brown, 147 Wn.2d at 341. If the missing element is supported by uncontroverted evidence, this standard may be satisfied. Neder, 527 U.S. at 18; Brown, 147 Wn.2d at 341.

The prosecution cannot meet its burden to prove the error harmless. There is not uncontroverted evidence that Mr. Curtis knew he possessed the substances. He affirmatively testified that he did not know that he possessed the substances, stating he did have any drugs on him

when arrested. RP 283. He testified he had never seen the baggies found to have contained the substances before. RP 286. Because Mr. Curtis contested the omitted element of knowledge and presented evidence sufficient to support a determination that he lacked knowledge, the error cannot be deemed harmless. Neder, 527 U.S. at 19 (“where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—[the court] should not find the error harmless”). Both convictions should be reversed.

**3. The condition restricting Mr. Curtis’ association with “persons known to have a felony criminal background or known to use controlled substances” is both unconstitutionally overbroad and vague. Remand is necessary to strike or reform the condition.**

*a. Conditions of community custody must not be so broad as to violate an offender’s constitutional right to freedom of association. Due process further requires that conditions not be unconstitutionally vague.*

Both the state and federal constitutions provide a constitutional right to freedom of speech. U.S. Const. amends. I, XIV; Const. art. I, § 5; State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). Included within the right of to freedom of speech is the freedom of association. Dawson v. Delaware, 503 U.S. 159, 163, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992); State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). The state and federal constitutions also prohibit vague laws. U.S. Const. amend. XIV; Const. art. I, § 3; State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

These constitutional rights or prohibitions restrict what conditions may be placed on persons on community custody. For example, “conditions may be imposed that restrict free speech rights if reasonably necessary, but they must be sensitively imposed.” Bahl, 164 Wn.2d at 757. Conditions implicating free speech rights “must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. Relatedly, conditions must also not be impermissibly vague or be so overbroad that it unnecessarily restricts constitutionally protected activity. Id. at 754; State v. Riles, 135 Wn.2d 326, 346-47, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Unlike laws enacted by the legislature, there is no presumption of validity in favor of conditions of community custody. State v. Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). An illegal sentence may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744.

*b. The condition restricting Mr. Curtis’ association with others is unconstitutionally overbroad.*

In imposing conditions of community custody, a statute authorizes courts to order the person to “[r]efrain from direct or indirect contact with . . . a specified class of individual.” RCW 9.94A.703(3)(b). As a condition of community custody, the court ordered that Mr. Curtis “shall not

associate with persons known to have a felony criminal background or known to use controlled substances without the prior approval of the Department of Corrections.” CP 30 (emphasis added). At Mr. Curtis’ request, the court exempted Mr. Curtis’ father, who had a previous felony. CP 30; RP 410.

This condition is both unnecessarily overbroad and impermissibly vague. Starting with overbreadth, the condition restricts association with people with “a felony criminal background.” This language is sweeping. Setting aside whether merely being prosecuted for a felony is sufficient, it plainly prohibits association with anyone who has been convicted of a felony, no matter how old the person’s offense, the type of felony, or the circumstances. Many people who have had a felony go on to live productive and crime free lives. Some are even members of the Washington State bar association. See Matter of Simmons, 190 Wn.2d 374, 398, 414 P.3d 1111 (2018); Tarra Simmons, Transcending the Stigma of A Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations, 128 Yale L.J. Forum 759, 767 (2019). Moreover, the population Mr. Curtis is prohibited from associating with is significant. A 2010 study estimated that about eight percent of the population in the

United States have had a felony.<sup>5</sup> That Mr. Curtis has been convicted of possessing controlled substances does not mean he should be barred from associating with these millions of people. The restriction on Mr. Curtis's freedom of association is not reasonably necessary to accomplish the essential needs of the state and the public order. This portion of the condition is overbroad and should be stricken. See Riles, 135 Wn.2d at 350 (condition forbidding contact with children overbroad where defendant's crime was not against a child); State v. Ancira, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001) (order forbidding defendant from contacting his own children for five years was unreasonable).

The condition forbidding association with people who "use controlled substances" is also overbroad. As written, the condition forbids association not merely with people who illegally use controlled substances, but includes those who legally use controlled substances with a prescription. See Valencia, 169 Wn.2d at 794 (plain language of condition forbidding possession of "paraphernalia" could not be read to be limited to "drug paraphernalia"); cf. In re Pers. Restraint of Brettell, 6 Wn. App. 2d 161, 169, 430 P.3d 677 (2018) (condition forbade association with users or sellers of *illegal* drugs). Restricting Mr. Curtis from

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<sup>5</sup> <https://news.uga.edu/total-us-population-with-felony-convictions/>.

associating with people who legally use controlled substances for a medical purpose is not reasonably necessary. It should be stricken or be reformed.

*c. The condition restricting Mr. Curtis' association with others is unconstitutionally vague.*

The condition is unconstitutionally vague. A condition is unconstitutionally vague if it is insufficiently definite so that ordinary people can understand or if it permits arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. The standard is stricter where First Amendment interests are involved, as here. Id. at 754.

The language, “felony criminal background,” is indefinite and subject to arbitrary enforcement. It is unclear whether people who have had their convictions vacated still qualify as having a “felony criminal background.” See RCW 9.94A.640. Arbitrary enforcement may arise because some corrections officers may say yes, and others may say no. They may arbitrarily provide or deny permission to associate with persons they deem to have a felony criminal background. Similarly, the language, “use controlled substances,” is vague because (if not plainly overbroad) it is unclear if it applies to those who legally use controlled substances with a prescription. See Valencia, 169 Wn.2d at 794-95; State v. Peters, No. 31755-2-III, 2019 WL 4419800, at \*10 (Wash. Ct. App. Sept. 17, 2019)

(condition prohibited offender from associating with known sellers of prescribed drugs was problematic because it prohibited association with a pharmacist).

While both conditions require the association be with persons “known” to have the requisite background or history, it fails to specify that this must be “known” by Mr. Curtis. Rather it may be read to apply as being “known” by the community or a department of corrections officer. Unless the condition states “known by Mr. Curtis,” it is indefinite and subject to arbitrary enforcement.

To be sure, this Court has rejected similar arguments that the language “known” makes a condition vague unless it specifies this means the offender’s knowledge. Brettell, 6 Wn. App. 2d at 169-70; State v. Houck, 9 Wn. App. 2d 636, 643-45, 446 P.3d 646 (2019); State v. Peters, 31755-2-III, 2019 WL 4419800, at \*10 (Wash. Ct. App. Sept. 17, 2019). This Court reasoned that the “known” language is properly construed to only refer to the offender’s knowledge and that persons of ordinary intelligence would understand this. Brettell, 6 Wn. App. 2d at 169-70; Houck, 9 Wn. App. 2d at 645.

This reasoning is inconsistent with our Supreme Court decision in Valencia. There, the Court disagreed with this Court’s reading of the term “paraphernalia,” reasoning it was not synonymous with the term “drug

paraphernalia.” Valencia, 169 Wn.2d at 794. The Court also reasoned the Court of Appeals had incorrectly read an intent requirement into the condition when the language did not so state. Id. In other words, even if a mental element could be presumed to be included, the condition must set out the mental element explicitly to provide notice and avoid arbitrary enforcement. Likewise, construing the word “known” to refer to Mr. Curtis’ knowledge does nothing to eliminate the ambiguity in the condition as written. The Court should hold the language is unconstitutionally vague.

*d. The condition should be stricken or reformed.*

Because the condition is unconstitutionally overbroad and vague, the condition should be stricken or reformed. If reformed, Mr. Curtis suggests the following language: Mr. Curtis shall not knowingly associate with persons involved in the unlawful use, sale, and/or possession of controlled substances. See Peters, 2019 WL 4419800 at \*10 (suggesting similar language). The language forbidding contact with persons with a felony criminal history should be stricken in its entirety rather than reformed.

**4. Remand is necessary to remedy errors related to imposition of supervision fees and interest on legal financial obligations.**

*a. Remand is necessary to strike the requirement that Mr. Curtis pay supervision fees.*

Mr. Curtis is indigent. CP 30. Based on this indigency, the court only imposed mandatory legal financial obligations. CP 31. Still, as a condition of community custody, the judgment and sentence orders Mr. Curtis to “pay supervision fees as determined by [the Department of Corrections].” CP 30. Another condition requires that Mr. Curtis submit to drug screens, such as random urinalysis, “at the defendant’s own expense.” CP 30.

These conditions were imposed in error. The relevant statute provides that supervision fees are discretionary: “Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.”). RCW 9.94A.703(2)(d) (emphasis added). Because they are discretionary, supervision fees are subject to an ability to pay inquiry. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Consistent with the trial court’s intent to waive discretionary costs, this Court should strike the requirements that Mr.

Curtis pay supervision fees and the costs of drug screens. See State v. Ramirez, 191 Wn.2d 732, 742-46, 426 P.3d 714 (2018).<sup>6</sup>

*b. Remand is necessary to strike the interest accrual provision in the judgment and sentence.*

The judgment and sentence provides that legal financial obligations shall bear interest. CP 46. Financial obligations excluding restitution do not accrue interest. RCW 3.50.100(4)(b); Ramirez, 191 Wn.2d at 747. Accordingly, this Court should order the trial court to strike the interest accrual provision. See Ramirez, 191 Wn.2d at 749-50.

## **F. CONCLUSION**

Integral to a public trial is jury selection. By addressing challenges for cause at an off-the-record sidebar that was not memorialized, the court made inaccessible to the public a key part of the proceeding. This Court should hold this was a court closure and reverse Mr. Curtis' convictions. The convictions should also be reversed because the jury was not instructed that it had to find that Mr. Curtis *knowingly* possessed the drugs. Unless the drug possession statute is read to require proof of knowledge, it

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<sup>6</sup> Consistent with Lundstrom, the Court has ordered supervision stricken in several unpublished cases. State v. Lilly, No. 78709-8-I, 2019 WL 6134572, at \*1 (Wash. Ct. App. Nov. 18, 2019) (unpublished); State v. Etpison, No. 80103-1, 2019 WL 4415209, at \*6 (Wash. Ct. App. Sept. 16, 2019) (unpublished); State v. Reamer, No. 78447-1-I, 2019 WL 3416868, at \*5 (Wash. Ct. App. July 29, 2019); State v. Taylor, No. 51291-2-II, 2019 WL 2599184, at \*4 (Wash. Ct. App. June 25, 2019). These non-precedential cases are cited as persuasive authority. GR 14.1.

is unconstitutional. If the convictions are not reversed, the unconstitutional condition of community custody restricting Mr. Curtis' association with others should be stricken or reformed. The errors related to imposition of legal financial obligations should also be remedied.

DATED this 26th day of November 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Richard W. Lechich".

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Richard W. Lechich – WSBA #43296  
Washington Appellate Project – #91052  
Attorney for Appellant

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

STATE OF WASHINGTON, )

Respondent, )

THOMAS CURTIS, JR., )

Appellant. )

NO. 36803-3-III

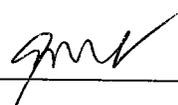
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF NOVEMBER, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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|---|--|
| <input checked="" type="checkbox"/> DOUGLAS SHAE, DPA<br>[douglas.shae@co.chelan.wa.us]<br>[prosecuting.attorney@co.chelan.wa.us]<br>CHELAN COUNTY PROSECUTOR'S OFFICE<br>PO BOX 2596<br>WENATCHEE, WA 98807-2596 | <input type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input checked="" type="checkbox"/> E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> THOMAS CURTIS, JR.<br>(ADDRESS OF RECORD)<br>ON FILE WITH OUR OFFICE)   | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____                |

SIGNED IN SEATTLE, WASHINGTON THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2019.

X \_\_\_\_\_



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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36803-3  
**Appellate Court Case Title:** State of Washington v. Thomas Dale Curtis, Jr.  
**Superior Court Case Number:** 19-1-00059-8

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