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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VIANNEY VASQUEZ,
Petitioner.

MEMORANDUM OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, NORTHWEST IMMIGRANT RIGHTS PROJECT, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of the four organizations joining to urge the Court to accept review are described in the Motion for Leave to Participate as Amicus Curiae submitted simultaneously with this memorandum.

STATEMENT OF THE CASE

As Mr. Vasquez's petition for review makes clear, a store security guard took two false identification documents out of Mr. Vasquez's wallet. There was no evidence that Mr. Vasquez had ever used the documents for any purpose; indeed in closing argument the prosecution admitted it had presented no evidence "of anything that he used." Petition for Review at 14-15. Nevertheless, in a published opinion, the Court of Appeals ruled Mr. Vasquez's "unexplained" possession of the documents was "substantial evidence" sufficient to convict him of the felony of forgery. *State v. Vasquez*, 166 Wn. App. 50, 52-53, 269 P.3d 370, 371 (2012).

REASONS WHY REVIEW SHOULD BE ACCEPTED

I. THE COURT OF APPEALS' OPINION CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT EVERY ELEMENT OF THE CRIME DEFINED BY THE LEGISLATURE BE PROVEN BEYOND A REASONABLE DOUBT

Review is justified in this case because "the decision of the Court

of Appeals is in conflict with a decision of the Supreme Court," RAP 13.4(b)(1), and "a significant question of law under the Constitution ... is involved." RAP 13.4(b)(3). The proper standard for reviewing the sufficiency of the evidence in a criminal prosecution is a quintessentially constitutional question. In *Vasquez*, the Court of Appeals not only utilized the constitutionally invalid "substantial evidence" standard but also interpreted the felony forgery statute in a way that eliminates the statutorily-required element of specific intent to defraud. This Court's guidance on those issues is needed. RAP 13.4(b)(4).

A. The "substantial evidence" test the Court of Appeals used conflicts with the "beyond a reasonable doubt" standard required by due process

In evaluating the constitutional validity of a criminal conviction, a reviewing court must determine whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); U.S. Const. Am. 14; Const. Art. I, § 3. Before *Jackson*, this Court employed a "substantial evidence" test for reviewing the sufficiency of the evidence. *See, e.g.*, *State v. Randecker*, 79 Wn. 2d 512, 517-18, 487 P.2d 1295, 1299 (1971). However, as this Court's ruling in *State v. Green*, 94 Wn. 2d 216, 222, 616 P.2d 628, 632 (1980)

recognized, the substantial evidence test violates "*Jackson*'s 'reasonable doubt' rule" and the "more rigorous" *Jackson* test must be applied.

Here, in its analysis affirming Mr. Vasquez's forgery conviction, the Court of Appeals reverted to the "substantial evidence" test. Perhaps contributing to the Court of Appeals' error, the State's response brief cited *Randecker* and other cases preceding *Green* and argued, "[i]f substantial evidence has been presented ... the court is without discretion to take the case from the jury." (Br. of Resp. at 3 (citations omitted)) The Court of Appeals similarly articulated the question as, "is the evidence of intent to defraud substantial[?]," without reference to the beyond a reasonable doubt requirement and without citing *Green*. *See Vasquez*, 166 Wn. App. at 52. While the *Vasquez* Court correctly recognized that intent may be inferred from "surrounding facts and circumstances," it found specific intent to defraud "as a matter of logical probability" without specifying what facts and circumstances supported the inference where there was no evidence at all that the documents had ever been used. Since it concluded that only "substantial evidence" is needed to support a conviction, the Court of Appeals relied on prima facie tests, inferred specific intent as a matter of general probability without supporting evidence, and used a rhetorical question as a substitute for proof of supporting facts or circumstances. This Court's guidance on the appropriate standard is

warranted. *See also State v. Slighte,* 157 Wn. App. 618, 626, 238 P.3d 83, 87 (2010) ("To affirm a defendant's conviction . . . we must be satisfied only that substantial evidence supports the conviction.")

B. The Court of Appeals' standard for proving specific intent, especially in forgery cases, has been lowered below the constitutional floor

Besides applying the incorrect standard, the Court of Appeals' opinion effectively relieves the prosecution of its burden to prove beyond a reasonable doubt the intent to injure or defraud element of the forgery statute required by RCW 9A.60.020(1). The term "defraud," has been defined as "'to deprive of some right, interest, or property by deceit,'" *United States v. Yermian*, 468 U.S. 63, 73 n.12, 104 S. Ct. 2936, 2942 n.12, 97 L. Ed. 2d 292 (1982) (emphasis added) (quoting *United States v. Godwin*, 566 F.2d 975, 976 (5th Cir. 1978)). The term "injure" has been defined as "'to inflict material damage or loss.'" *State v. Simmons*, 113 Wn. App. 29, 32, 51 P.3d 828, 830 (2002)(quoting Webster's Third New International Dictionary 1164 (1969)). Therefore, conviction of forgery requires proof beyond a reasonable doubt of the actual intent to deprive someone else of a right, interest or property, or to inflict material loss of a right, interest, or property on another. As Mr. Vasquez's conviction on scant evidence illustrates, the Court of Appeals' ruling allows convictions for forgery without proof of this essential element.

"Although intent may not be inferred from conduct that is patently equivocal, it may be inferred from conduct that plainly indicates such intent as a matter of logical probability." *State v. Bergeron*, 105 Wn. 2d 1, 20, 711 P.2d 1000, 1011 (1985). Seizing on this "logical probability" language, the Court of Appeals concluded intent could be inferred from (1) the "value" of fake immigration cards in an entirely different case where different defendants displayed the cards to police to falsely represent their right to legally be in the country, (2) Mr. Vasquez's unexplained possession of them ("why else would he have it"), and (3) his admission of having worked in the area before (with no evidence that Mr. Vasquez's documents were ever used in connection with any previous employment). *Vasquez*, 166 Wn. App. at 53. Instead of any evidence of facts or circumstances supporting the inference, the Court of Appeals stated "unexplained possession of a forged instrument makes out a prima facie case of guilt against the possessor." *Id.* at 53.

But the question that must be answered under the *Jackson-Green* test is whether Mr. Vasquez's conduct gives rise to an inference of specific intent to defraud so logically powerful that a rational juror may find guilt beyond a reasonable doubt. Having the documents in his wallet without any evidence of use for any purpose does not satisfy *Bergeron*. Finding a "logical probability" of intent to defraud from the mere

possession of the documents would reduce the prosecution's burden of proving intent to the "more probable than not" burden of proof from the civil arena. That is precisely the effect of the Court of Appeals' ruling here, which upholds the conviction based on a chain of inferences, with speculation mounting at each step, none of which are tied to proof of actual facts and circumstances involving Mr. Vasquez's conduct and none of which "plainly" support the conclusion that he intended to deprive anyone else of anything or inflict material damage or loss on anyone. Mr. Vasquez's isolated comment that he had previously worked does not remotely establish proof beyond a reasonable doubt of intent to injure or defraud. It is sheer speculation to assume that he used them before or would in the future, and even then the element of intent to deprive someone else is missing. As this Court in *Bergeron* held, 105 Wn. 2d at 20, "equivocal" evidence is not enough to infer intent beyond a reasonable doubt. Since the Court of Appeals reduced the burden of proof for felony forgery below the constitutional floor, review should be granted.

C. The decision below conflicts with decisions from other states interpreting the intent element of forgery crimes

The opinions of other states' courts further demonstrate that the Court of Appeals' decision is legally flawed. *See, e.g.*, *Velasquez v. State*, 276 Ga. App. 527, 530-31, 623 S.E.2d 721, 724 (2005) (discussed in

Petition for Review at 8-9). In *People v. Bailey*, 13 N.Y.3d. 67, 69, 886 N.Y.S.2d 666 (N.Y. 2009), defendant was arrested after officers observed him entering several fast food restaurants and attempting to pick-pocket customers. After a search, officers recovered three counterfeit bills from defendant's pocket; defendant said "You got me for the counterfeit money, but I didn't have my hand near the purse." *Id.* As in this case, the trial court inferred intent to defraud from possession, stating "why would Bailey . . . carry currency in his pocket that he knew to be bogus unless his plan was to pass it off to an unsuspecting storekeeper, newsvendor, or fast food worker?" *Id.* at 72. The Court of Appeals reversed, concluding:

> [D]rawing the inference of defendant's intent from his knowledge that the bills were counterfeit improperly shifts the burden of proof with respect to intent from the People to the defendant. Stated another way, by ruling that the evidence was sufficient to sustain defendant's conviction of possession of a forged instrument, the lower courts have effectively stripped the element of intent from the statute and criminalized knowing possession.

Id. at 71–72; *see also Matter of Serna*, 20 I. & N. Dec. 579 (1992) (holding that a federal statute criminalizing possession of a false immigration document was not a crime involving moral turpitude because "knowledge that the immigration document was altered ... is not necessarily equated with the intention to use the document to defraud the United States Government.") These decisions from other jurisdictions suggest that the Court of Appeals unconstitutionally relieved the

prosecution of its burden to prove every element of RCW 9A.60.020.

II. THE HARSH CONSEQUENCES OF THE COURT OF APPEALS' RULING WILL IMPACT THOUSANDS, JUSTIFYING REVIEW

This Court should also grant Mr. Vasquez's petition because it "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court of Appeals' holding in *Vazquez* will have very broad impact, because the lower court's unconstitutional interpretation of the statutory elements significantly expands liability for felony forgery and subjects those convicted to a range of post-conviction consequences.

Under the Court of Appeals' interpretation, persons otherwise liable for only misdemeanor possession of a false instrument may now be subject to the full range of consequences flowing from a conviction for felony forgery. An 18 year old who obtains but does not use a driver's license stating that he is 21 could be convicted of forgery because pursuant to the lower court's reasoning the "only value" of the document would be to obtain alcohol he is not permitted to purchase. As a result, he would suffer the substantial consequences of felony conviction. A person convicted of felony forgery (as opposed to misdemeanor possession of a false instrument) will lose his right to bear arms, RCW 9.41.047, to serve on a jury until his right has been restored, RCW 2.36.070(5), and to vote

while under supervision by the Department of Corrections, RCW 29A.08.520. In addition, persons convicted of felonies face significant obstacles to employment and housing. *See, e.g.*, *Parker v. Ellis*, 362 U.S. 574, 593-94, 80 S.Ct 909, 920, 4 L.Ed.2d 963 (1960) (Warren, C.J., Black, Douglas & Brennan, JJ., dissenting) ("Conviction of a felony imposes a status upon a person which . . . seriously affects his reputation and economic opportunities."); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753 (2011).

The potential consequences of the Court of Appeals' ruling on the immigration status of non-citizens (including those lawfully admitted to the United States) are also far reaching. *See Padilla v. Kentucky*, --- U.S. ----, 130 S. Ct. 1473, 1481,176 L.Ed. 2d 284 (2010) ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century."). Given that Washington State's forgery statute, RCW 9A.60.020, contains a *mens rea* element of "intent to injure or defraud," it qualifies as a crime involving moral turpitude under the Immigration and Nationality Act ("Act"). *See Jordan v. De George,* 341 U.S. 223, 227, 71 S. Ct. 703, 95 L.Ed. 886 (1951). Under the Act, a person who has committed a crime involving moral turpitude ("CIMT") is inadmissible under § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), and thus

ineligible to seek lawful status through a family or employment petition, unless they qualify for a restrictive waiver under § 212(h), 8 U.S.C. § 1182(h). Otherwise eligible persons will lose these benefits based upon the Court of Appeals' holding, even though it is much broader than the federal definition of what constitutes fraud. *See, e.g., Tijani v. Holder*, 628 F.3d 1071, 1075-76 (9th Cir. 2010).

A person convicted of felony forgery faces more severe consequences than a person convicted of misdemeanor possession of a false document. Felony forgery is more culpable under Washington law because the statute requires proof of an additional element: intent to defraud. The severe consequences of a felony conviction must attach only to those proven through constitutionally sufficient evidence to have formed such intent.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Vasquez's petition for review pursuant to RAP 13.4(b)(1), (2), and (4).

DATED this 4th day of June 2012.

Respectfully submitted,

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