

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
7/11/2019 11:27 AM  
BY SUSAN L. CARLSON  
CLERK

NO. 96775-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

NAZIYR YISHMAEL,

Petitioner.

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JENNIFER H. ATCHISON  
Senior Deputy Prosecuting Attorney

JENNIFER P. JOSEPH  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
1. THE USE OF GR 24 IN THE JURY INSTRUCTIONS TO DEFINE "PRACTICE OF LAW" DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.....	4
2. UNLAWFUL PRACTICE OF LAW IS A STRICT LIABILITY OFFENSE.....	11
D. <u>CONCLUSION</u> .....	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Morrisette v. United States, 342 U.S. 246,  
72 S. Ct. 240, 96 L. Ed. 288 (1952) ..... 13

Washington State:

Carrick v. Locke, 125 Wn.2d 129,  
882 P.2d 173 (1994) ..... 5, 6

Diversified Inv. Partnership v. Department of Soc. &  
Health Servs., 113 Wn.2d 19, 775 P.2d 947 (1989) ..... 9, 10

In re Juvenile Director, 87 Wn.2d 232,  
552 P.2d 163 (1976) ..... 5

Short v. Demopolis, 103 Wn.2d 52,  
691 P.2d 163 (1984) ..... 6, 7

Spokane County v. State, 136 Wn.2d 663,  
966 P.2d 314 (1998) ..... 9

State v. Agustin, 1 Wn. App. 2d 911,  
407 P.3d 1155 (2018) ..... 3

State v. Anderson, 141 Wn.2d 357,  
5 P.3d 1247 (2000) ..... 12, 18

State v. Bash, 130 Wn.2d 594,  
925 P.2d 978 (1996) ..... 11, 12, 14, 17, 19

State v. Burch, 197 Wn. App. 382,  
389 P.3d 685 (2016), rev. denied,  
188 Wn.2d 1006, 393 P.3d 356 (2017) ..... 12, 15

State v. Cook, 84 Wn.2d 342,  
525 P.2d 761 (1974) ..... 7

<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	4
<u>State v. Hunt</u> , 75 Wn. App. 795, 880 P.2d 96, <u>rev. denied</u> , 125 Wn.2d 1009 (1994).....	10
<u>State v. Janda</u> , 174 Wn. App. 229, 298 P.3d 751 (2012).....	7
<u>State v. Lee</u> , 87 Wn.2d 932, 558 P.2d 236 (1977).....	10
<u>State v. Lewis</u> , 115 Wn.2d 294, 797 P.2d 1141 (1990).....	9
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	9
<u>State v. Mertens</u> , 148 Wn.2d 820, 64 P.3d 633 (2003).....	18
<u>State v. Moreno</u> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	6
<u>State v. Pinkham</u> , 2 Wn. App. 2d 411, 403 P.3d 1103 (2018).....	14
<u>State v. Ramos</u> , 149 Wn. App. 266, 202 P.3d 383 (2009).....	8
<u>State v. Rice</u> , 174 Wn.2d 884, 279 P.3d 849 (2012).....	3, 5
<u>State v. Rivas</u> , 126 Wn.2d 443, 896 P.2d 57 (1995).....	11
<u>State v. Tracer</u> , 155 Wn. App. 171, 229 P.3d 847 (2010), <u>rev. in part on other grounds by</u> 173 Wn.2d 708, 272 P.3d 199 (2012).....	3
<u>State v. Wadsworth</u> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	5, 8, 9

<u>State v. Yishmael</u> , 6 Wn. App. 2d 203, 430 P.3d 279 (2018).....	1, 2, 3, 18
<u>Washington State Bar Ass'n v. State</u> , 125 Wn.2d 901, 890 P.2d 1047 (1995).....	10
<u>Zylstra v. Piva</u> , 85 Wn.2d 743, 539 P.2d 823 (1975).....	5

### Constitutional Provisions

#### Washington State:

CONST. arts. II, II, IV.....	5
------------------------------	---

### Statutes

#### Washington State:

RCW 2.48.180.....	2, 3, 4, 8, 9, 15
RCW 9A.20.021 .....	15

### Rules and Regulations

#### Washington State:

GR 24.....	1, 2, 3, 4, 7, 8, 11, 14, 15, 18
RAP 2.5.....	3

### Other Authorities

1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 3.8 (1986) .....	12
1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 5.5(c) (3d ed.) .....	17

2 Karl Tegland, Wash. Prac.: Rules Practice GR 24  
(8th ed.) (Drafters' Cmt.).....7, 14, 18

In the Matter of Suggested Amendments to GR 24—Definition of  
Practice of Law, Supreme Court Order No. 25700-A-1256  
(April 4, 2019) ..... 19

**A. ISSUES PRESENTED**

1. Does it violate the separation of powers doctrine to use GR 24's definition of the practice of law in a criminal prosecution for unlawful practice of law?

2. Is unlawful practice of law a strict liability offense?

**B. STATEMENT OF THE CASE**

The State relies on its brief at the Court of Appeals for a recitation of the facts of this case. The facts are also undisputed.

In short, Yishmael, who is not a lawyer and has never been a member of the Washington State Bar, marketed a program promoting the use of adverse possession to obtain ownership of houses. The Court of Appeals accurately described the essence of the conduct at issue: "In exchange for a fee, Yishmael provided members with advice on adverse possession law, lists of houses in foreclosure, forms to use to make claims of abandonment by the owners, and other services." State v. Yishmael, 6 Wn. App. 2d 203, 208, 430 P.3d 279 (2018).

Yishmael was charged with the unlawful practice of law, several counts of theft, attempted theft and conspiracy to commit

theft.<sup>1</sup> CP 1-27. The jury acquitted Yishmael of theft and convicted him of the unlawful practice of law. RP 1011-12. The trial court imposed a suspended sentence. CP 564. Yishmael timely appealed his conviction. CP 592.

**C. ARGUMENT**

In a published decision, the Court of Appeals rejected Yishmael's arguments, holding that the statute defining the crime of the unlawful practice of law (RCW 2.48.180) is not void for vagueness, the jury instruction defining the practice of law was not an improper judicial comment on the evidence, the practice of law by a nonlawyer is a strict liability offense, and the evidence sufficiently supported the conviction. Yishmael, 6 Wn. App. 2d at 208.

Yishmael also claimed, for the first time on appeal, that "the use of GR 24 to define the practice of law for purposes of criminal liability violates the separation of powers doctrine." Br. of App. at p. 11. The Court of Appeals declined to reach the merits of this claim, concluding that the assignment of error was too imprecise to

---

<sup>1</sup> The conspiracy charges were dismissed prior to trial. RP 57.

review and that Yishmael failed to establish that his claim was susceptible to appellate review under RAP 2.5(a). Id. at 214-15.

In his Petition for Review, Yishmael reasserts all of his alleged errors from below, but alters slightly his assignment of error regarding the separation of powers to now assert that the trial court's use of GR 24 to define the practice of law for the jury violated the separation of powers doctrine. Yishmael argues that this amounts to an unconstitutional delegation to the judiciary of the legislature's authority to define crimes. Pet. for Rev. at 9-11.<sup>2</sup> The State does not have any additional arguments to supplement those made before the Court of Appeals as to Yishmael's claims that RCW 2.48.180 is unconstitutionally vague, that the use of GR 24's definition of the practice of law was a comment on the evidence, and that the State presented insufficient evidence to support his conviction. Consequently, the State relies on the arguments presented below as well as the reasoning set forth by the Court of Appeals in correctly rejecting these claims of error. Yishmael, 6

---

<sup>2</sup> The State does not challenge Yishmael's implied assertion that the alleged error was manifest under RAP 2.5(a) because "[a]n appellant may raise a claimed violation of constitutional separation of powers for the first time on appeal," even if the appellant is a private party. State v. Agustin, 1 Wn. App. 2d 911, 916, 407 P.3d 1155 (2018) (citing State v. Rice, 174 Wn.2d 884, 906, 279 P.3d 849 (2012) and State v. Tracer, 155 Wn. App. 171, 229 P.3d 847 (2010), rev. in part on other grounds by 173 Wn.2d 708, 272 P.3d 199 (2012)).

Wn. App. 2d 203. The State respectfully asks this Court to likewise reject Yishmael's claims and affirm his conviction.

**1. THE USE OF GR 24 IN THE JURY INSTRUCTIONS TO DEFINE "PRACTICE OF LAW" DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.**

Yishmael contends, for the first time on appeal, that the use of this Court's promulgated rule to define an element of a criminal offense in the jury instructions is a violation of the separation of powers doctrine and an unlawful delegation of legislative authority to the judiciary. This argument should be rejected because it is this Court that has sole authority to define the practice of law, which it did by adopting GR 24. The legislature delegated nothing; rather, the legislature properly provided sanctions for conduct that is inherently unlawful.

As the party asserting that the legislature's enactment of RCW 2.48.180 violates the separation of powers doctrine, Yishmael "bears a heavy burden, for we presume that legislative enactments are constitutional." State v. Gresham, 173 Wn.2d 405, 428, 269 P.3d 207 (2012). Yishmael's burden is to establish beyond a

reasonable doubt that the statute is unconstitutional. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

Under Washington's constitution, governmental authority is divided into three branches: legislative, executive, and judicial. State v. Rice, 174 Wn.2d 884, 900-01, 279 P.3d 849 (2012); WASH. CONST. arts. II, II, IV. The separation of powers doctrine "serves mainly to ensure that the fundamental functions of each branch remain inviolate." Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The doctrine "was never intended to create, and certainly never did create, utterly exclusive spheres of competence" within each branch. Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Instead, the three branches "must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government." Id. Such "[h]armonious cooperation between the three branches is fundamental to our system of government." Id. Accordingly, the separation of powers doctrine is "grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." Carrick, 125 Wn.2d at 135 (citing In re Juvenile Director, 87 Wn.2d 232, 240, 552 P.2d 163 (1976)).

The test for determining whether a separation of powers violation has occurred whether the activity of one branch threatens the independence or integrity, or invades the “fundamental functions” of another. State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting Carrick, 125 Wn.2d at 135). This test reflects both concern for the independence of each branch and the fact that some overlap is inevitable. Id. “In adjudging the potential damage to one branch of government by the alleged incursion of another, it is helpful to examine both the history of the practice challenged as well as that branch’s tolerance of analogous practices,” because “a long history of cooperation between the branches in any given instance tends to militate against finding any separation of powers violation.” Carrick, 125 Wn.2d at 136.

At issue here is whether the overlap between the judiciary’s authority to define and regulate the practice of law and the legislature’s authority to define the criminal offense of the unlawful practice of law is more properly considered “harmonious cooperation” between the branches, or an invasion of the fundamental functions of the legislative branch by the judiciary.

This Court has exclusive authority to define and regulate the practice of law. Short v. Demopolis, 103 Wn.2d 52, 62, 691 P.2d

163 (1984); State v. Cook, 84 Wn.2d 342, 345, 525 P.2d 761 (1974); State v. Janda, 174 Wn. App. 229, 235, 298 P.3d 751 (2012). This Court exercised this authority by adopting GR 24 to define the “practice of law.” Janda, 174 Wn. App. at 235; GR 24. The purpose of adopting and publishing the rule was to “protect the public from untrained and unregulated persons who hold themselves out as able to offer advice and counsel in matters customarily performed by lawyers that affect individuals’ legal rights, property, and life.” 2 Karl Tegland, Wash. Prac.: Rules Practice GR 24 (8th ed.) (Drafters’ Cmt.). Although the phrase had been rather broadly defined in case law, the drafters commented that a “more specific definition ... may enable the enactment of consumer protection legislation; it may aid in securing funding for legal services; it may assist the criminal prosecution of unlawful practitioners; and it will eliminate uncertainty for persons working in law-related areas about the propriety of their conduct.” Id.

As Professor David Boerner, who was one of the drafters of the rule, testified, GR 24 is essentially a codification of existing case law. RP 489-90. It generally defines practice of law as “the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which

require the knowledge and skill of a person trained in the law,” including but not limited to “[g]iving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration” and the “[s]election, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).” GR 24. The rule also sets out certain exceptions and exclusions, including for the “[s]ale of legal forms in any format.” Id.

Although the judiciary has the authority to define the practice of law, it must be the legislature which criminalizes the unlawful practice of law. State v. Ramos, 149 Wn. App. 266, 271, 202 P.3d 383 (2009) (citing Wadsworth, 139 Wn.2d at 734). The legislature has done this by setting forth the elements, defenses to, and applicable punishments in RCW 2.48.180. The elements of the crime, as relevant here, are (1) that the defendant is a “nonlawyer” as defined in the statute, and (2) the defendant “practices law.” RCW 2.48.180(1)(b), (2)(a). The statute provides an affirmative defense that “at the time of the offense, the conduct alleged was authorized” by other rules or statutes. RCW 2.48.180(7). The statute also provides that a single violation of the statute constitutes

a gross misdemeanor, and each subsequent violation is a class C felony. RCW 2.48.180(3)(a), (b).

In the instant case, Yishmael argues that by failing to further define “practice of law,” the legislature improperly delegated to the judiciary the authority to define an element of the crime. But “[t]he Legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics.” Wadsworth, 139 Wn.2d at 743. For example, the legislature enacted a statute making it a crime to knowingly possess or control a weapon in designated “weapons-free areas,” but left to local judicial authority the decision about which areas of a courthouse to designate as “weapons-free.” Id. at 734, 738. After noting several other areas in which the legislature appropriately deferred specifics to the branch better suited to articulate them, this Court rejected a separation of powers challenge.<sup>3</sup> Id. at 736-39, 743.

---

<sup>3</sup> See Spokane County v. State, 136 Wn.2d 663, 670-72, 966 P.2d 314 (1998) (act is not an unconstitutional violation of separation of powers because courts retain final judicial review of resolutions issued by the Public Employment Relations Commission); State v. Manussier, 129 Wn.2d 652, 667-69, 921 P.2d 473 (1996) (Initiative 593, the “three strikes law,” is a constitutional delegation of the Legislature’s authority to alter the sentencing process); State v. Lewis, 115 Wn.2d 294, 304-07, 797 P.2d 1141 (1990) (Sentencing Reform Act giving prosecutors discretion in charging decisions does not usurp legislative power to set sentencing ranges and does not violate the separation of powers); Diversified Inv. Partnership v. Department of Soc. & Health Servs., 113 Wn.2d 19, 25, 775

Here, the legislature defined the crime of unlawful practice of law in general terms, leaving specifics of what constitutes the practice of law to the branch responsible for defining that term. There was no intrusion by the judiciary into the legislature's core functions. The unlawful practice of law statute is an example of harmonious cooperation between the branches where their spheres of authority overlap. The legislature exercised its constitutional authority to define the crime in general terms, leaving the judiciary to exercise its constitutional authority to define the practice of law. Indeed, any effort by the legislature to provide a contrary definition would itself violate the separation of powers doctrine. Washington State Bar Ass'n v. State, 125 Wn.2d 901, 906-09, 890 P.2d 1047 (1995); see also State v. Hunt, 75 Wn. App. 795, 805, 880 P.2d 96, rev. denied, 125 Wn.2d 1009 (1994) (If the legislature purported to allow lay persons to practice law, it would have impermissibly usurped the power of the courts and violated the separation of powers doctrine (internal citation omitted)). Because Yishmael fails

---

P.2d 947 (1989) (Legislature may delegate administrative power if it defines generally what is to be done, which administrative body is to accomplish specified purposes, and what procedural safeguards are in effect to control arbitrary administrative action); State v. Lee, 87 Wn.2d 932, 933, 558 P.2d 236 (1977) (habitual criminal statute is a constitutional delegation of legislative authority to determine appropriate punishment for criminal violations).

to demonstrate beyond a reasonable doubt that the use of the applicable section of GR 24 in jury instruction 20 represents an unlawful delegation of legislative authority or otherwise offends the separation of powers doctrine, his argument should be rejected.

**2. UNLAWFUL PRACTICE OF LAW IS A STRICT LIABILITY OFFENSE.**

Yishmael contends that “knowledge” is an implied essential element of the offense of unlawful practice of law, and the trial court erred by refusing to so instruct the jury. There are compelling policy reasons for treating the unlawful practice of law as a strict liability offense. Yishmael’s argument should be rejected.

The legislature is empowered to define crimes and is entitled to enact strict liability offenses. State v. Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). Where a statute does not specify any mental element, courts look to statutory language and history to ascertain legislative intent. State v. Bash, 130 Wn.2d 594, 605, 925 P.2d 978 (1996). Where, as here, neither the statutory language nor legislative history clarifies the matter, a reviewing court balances several considerations in reaching its assessment of legislative intent:

(1) a statute's silence on a mental element is not dispositive of legislative intent; the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) and the harshness of the penalty. Other considerations include: (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

Bash, 130 Wn.2d at 605-06, 610 (quoting 1 Wayne R. LaFare & Austin W. Scott, Substantive Criminal Law § 3.8, at 341 (1986)).

To find legislative intent to impose strict liability, it is not necessary that all Bash factors are aligned. State v. Burch, 197 Wn. App. 382, 399, 389 P.3d 685 (2016), rev. denied, 188 Wn.2d 1006, 393 P.3d 356 (2017).

Balancing the Bash factors in this case leads to the conclusion that unlawful practice of law is a strict liability offense. First, the absence of a mental element, coupled with the affirmative defense of authorized by the statute is an indication that the legislature intended strict liability. Cf. State v. Anderson, 141 Wn.2d 357, 362-63, 5 P.3d 1247 (2000) (legislature's failure to

provide affirmative defense of unwitting conduct indicates its intent to make knowledge an element of offense). Second, unlawful practice of law is a public welfare offense. Public welfare offenses differ from traditional crimes in several ways. Morrisette v. United States, 342 U.S. 246, 255-56, 72 S. Ct. 240, 96 L. Ed. 288 (1952). While most traditional crimes prohibit aggressions or invasions, public welfare offenses usually proscribe acts of “neglect when the law requires care, or inaction when it imposes a duty.” Id. While traditional crimes are likely to result in direct injury to a specific victim, many public welfare offenses simply create the danger or probability of injury. Id. at 256. Public welfare offenses are regarded as offenses against the government’s authority. Id. “In this respect, whatever the intent of the violator, the injury is the same,” so legislation applicable to such offenses typically contains no intent element. Id.

The unlawful practice of law is a public welfare offense because it represents the failure to obtain a law license when the law requires that action. It creates a probability of danger: injury to people and entities from poor or unethical performance of legal functions by non-lawyers who lack extensive and current legal education, are not required to follow standards of ethical behavior

as set forth in the Rules of Professional Conduct, and are not subject to discipline by the Bar. 2 Karl Tegland, Wash. Prac.: Rules Practice GR 24 (8th ed.) (Drafters' Cmt). In terms of harm to the public, it makes no difference whether one dispensing faulty legal advice and drafting faulty legal documents knows that his conduct constitutes the practice of law-any injuries flowing from his incompetence are in no way mitigated by the fact that he did not intend to practice law. See State v. Pinkham, 2 Wn. App. 2d 411, 418, 403 P.3d 1103 ( 2018) (concluding statute prohibiting loaded firearms in vehicles is a strict liability offense in part because the potential harm from the accidental discharge of weapon in a vehicle is not mitigated by the fact that it was not intended). This factor favors strict liability.

The third Bash factor is whether a strict liability reading of the statute would encompass entirely innocent conduct. Yishmael asserts that such a reading would criminalize “basic teaching of constitutional rights in school classrooms” and “legal forms and computer programs that are sold.” Pet. for Rev. at 7. That is too broad a reading of the statute and GR 24. First, GR 24 contains an exception to the definition of practice of law for “sale of legal forms in any format.” Second, GR 24, and the cases it codified, establish

that advising others about their legal rights and responsibilities constitutes the practice of law only when done “for fees or other consideration.” GR 24(a)(1). In other words, when an unlicensed person attempts or in fact obtains something of value in exchange for “legal” advice and/or documents, he or she is engaging in the unlawful practice of law. The statute does not criminalize, for example, the free seminars in which Yishmael gave basic information on adverse possession. It was only when Yishmael charged clients for advice and documents pertaining to their ostensible legal rights and responsibilities that he ran afoul of the law. This factor favors strict liability.

Fourth, the penalty for unlawful practice of law is measured. While a second conviction is a class C felony, which is punishable by up to five years in prison and/or a \$10,000 fine, a first violation is only a gross misdemeanor, punishable by up to 364 days in jail and/or up to \$5,000 fine. RCW 2.48.180(3)(a); 9A.20.021. See, e.g., State v. Burch, 197 Wn. App. 382, 399, 389 P.3d 685 (2016), rev. denied, 188 Wn.2d 1006 (2017) (holding that vehicular homicide and vehicular assault are strict liability offenses when committed by a driver under the influence of alcohol or drugs because although the punishment is severe, the potential risk of

harm is great and the likelihood of punishing innocent conduct is low). In this case, Yishmael received a suspended sentence and no fine. CP 564-66. Yishmael faces no felony unless he commits this crime again, at which time he certainly cannot claim ignorance. This factor favors strict liability.

The fifth factor is the seriousness of the harm to the public. Yishmael does not address this element, neither in his opening briefing at the Court of Appeals, nor in his Petition for Review, arguing instead that the availability of civil and injunctive remedies weighs in favor of requiring knowledge. Br. of App. at 47-48; Pet. for Rev. at 6-9. But as the facts of this case demonstrate, the unlawful practice of law can cause very serious harm not just to the public welfare, but also to specific individuals. Several of Yishmael's clients were arrested and jailed when they followed his advice, putting their jobs and families in peril. Crystopher Smith was in jail for several days, nearly lost his job, and struggled to explain the situation to his children. RP 631, 658. Carrie Bouwkamp explained that, as a result of following Yishmael's advice, her family became homeless and lost everything they owned. CP 590. Angela Simmons had the terrifying experience of police officers—guns drawn—entering what she believed to be her

home based on what Yishmael advised her. RP 404. The harm suffered by Yishmael's clients is very, very real. And where, as here, the potential harm to the public is great, the legislature more likely intended to impose strict liability. Bash, 130 Wn.2d at 609-10.

Sixth, the person engaged in the practice of law is in the best position to ascertain whether he is in fact a lawyer entitled and competent to do so. Indeed, Yishmael testified that he read the unlawful practice of law statute and that he did not consider himself to be practicing law. RP 863. As such, he was on notice that the prongs applicable to nonlawyers contained no knowledge element. See LaFave and Scott, 1 Subst. Crim. L. § 5.5(c) (3d ed.) (noting that strict liability offenses may be effective deterrents because “a person engaged in a certain kind of activity would be more careful precisely because he knew that this kind of activity was governed by a strict liability statute”). This factor favors strict liability.

The seventh factor is whether making the offense a strict liability offense relieves the prosecution of difficulty and time—consuming proof of fault. Yishmael argues that it is not too much of a burden to require the State to prove that a person knew they were engaged in the practice of law. Pet. for Rev. at 9. However, as the Court of Appeals properly concluded: “In the face of Yishmael’s

testimony that he subjectively interpreted the statute as not being a bar to his conduct, it would have been difficult for the State to prove that he practiced law knowingly.” Yishmael, 6 Wn. App. 2d at 219. See State v. Mertens, 148 Wn.2d 820, 830, 64 P.3d 633 (2003) (commercial fishing without a license is a strict liability crime; if proof of intent were required, a defendant could easily evade conviction by claiming noncommercial intent, thereby circumventing personal daily limits and potentially placing undue pressure on natural resources). This factor weighs in favor of strict liability.

The final factor pertains to the number of prosecutions that might be expected. The fewer prosecutions expected, the more likely some mental element is required. Anderson, 141 Wn.2d at 365. While it is reasonable to infer from the dearth of appellate opinions that there have been few prosecutions for unlawful practice of law, this may not always be the case. As the drafters of GR 24 pointed out, there is a “growing presence of legal services by non-lawyers.” 2 Karl Teglund, Wash. Prac.: Rules Practice GR 24 (8th ed.) (Drafters’ Cmt)<sup>4</sup>. To the extent that these efforts are

---

<sup>4</sup> It is notable that the Washington State Bar Association’s Practice of Law Board recently proposed amendments to GR 24, which were approved by this Court for public comment. The proposed amendments to subsection (b) would “amend the definition of ‘the practice of law’ to explicitly authorize information and document preparation services under clear limitations with registration of such provider

not sanctioned by the profession, courts, or legislature, there may be an increase in criminal prosecution of unlawful practice of law at some point in the future. Even so, unlawful practice of law is unlikely to be frequently prosecuted. This factor weighs against strict liability.

On the whole, the Bash factors weigh in favor of strict liability. This Court should conclude that the trial court did not err by refusing to instruct the jury that knowledge is an essential element of unlawful practice of law.

---

entities with the [Washington State Bar Association.]” In the Matter of Suggested Amendments to GR 24—Definition of Practice of Law, Supreme Court Order No. 25700-A-1256 (April 4, 2019). Moreover, online service providers who offer blank document templates and legal operative language to consumers would be required to have said documents reviewed by an attorney licensed in Washington in order to be exempt from the definition of the practice of law definition. Id. The purpose of the amendments is to protect consumers from incompetent, unfair and deceptive online self-representation legal service providers. Id. These comments by the Practice of Law Board further confirm that there is both the need to protect the public from deceptive and negligent persons and entities that engage in the practice of law without being bound by the Rules of Professional Conduct or other ethical standards applicable to attorneys, and without the requirement of formal legal training.

**D. CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm Yishmael's conviction.

DATED this 11<sup>th</sup> day of July, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Jennifer H Atchison  
JENNIFER H. ATCHISON, #33263  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

**July 11, 2019 - 11:27 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96775-0  
**Appellate Court Case Title:** State of Washington v. Naziyr Yishmael  
**Superior Court Case Number:** 16-1-02705-5

**The following documents have been uploaded:**

- 967750\_Briefs\_20190711112614SC390781\_7379.pdf  
This File Contains:  
Briefs - Respondents Supplemental  
*The Original File Name was 96775-0 - Supplemental Brief of Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- jennifer.joseph@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- travis@washapp.org
- wapofficemail@washapp.org

**Comments:**

---

Sender Name: Wynne Brame - Email: wynne.brame@kingcounty.gov

**Filing on Behalf of:** Jennifer H.S. Atchison - Email: jennifer.atchison@kingcounty.gov (Alternate Email: )

Address:  
King County Prosecutor's Office - Appellate Unit  
W554 King County Courthouse, 516 Third Avenue  
Seattle, WA, 98104  
Phone: (206) 477-9497

**Note: The Filing Id is 20190711112614SC390781**