

No. 96775-0

NO. 76802-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NAZIYR YISHMAEL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Naziyr Yishmael did not unlawfully practice law. As a former realtor, he used his knowledge to help people attempt to adversely possess homes that he believed had been abandoned. The facts, which are not in dispute, established that he led educational workshops on homesteading and adverse possession. Persons who were interested in the program agreed to pay Mr. Yishmael a fee, in exchange for which he provided listings, forms, and further support.

To prove Mr. Yishmael guilty of the unlawful practice of law, the government relied on GR 24 to define the term “practice of law.” This reliance violates the separation of powers doctrine. In RCW 2.48.180, the term “practice of law” is unconstitutionally vague.

If this Court finds the definition of “practice of law” to be constitutional, it should find the evidence that Mr. Yishmael committed the crime of unlawful practice of law insufficient. This Court should also hold the trial court improperly commented on the evidence. The trial court further failed to instruct the jury on the essential elements of this crime, including the element of knowledge, and refused to accept Mr. Yishmael’s proposed instructions, preventing Mr. Yishmael from presenting a complete defense to the charge.

B. ASSIGNMENTS OF ERROR

1. The use of GR 24 to define an element of the crime of unlawful practice of law is an improper delegation of legislative authority to the judiciary and violates the separation of power doctrine.

2. RCW 2.48.180 is unconstitutionally vague because it fails to define the term “practice of law.”

3. The government presented insufficient evidence at trial to establish Mr. Yishmael unlawfully practiced law.

4. The trial court improperly commented on the evidence by endorsing the expert witness’s definition of practice of law in instruction number 20.

5. The trial court commented on the evidence by including the following language in the definition of practice of law found in instruction number 20:

This includes giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration. This includes the selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

6. The trial court erred in overruling Mr. Yishmael’s objection to instruction number 20.

7. The trial court failed to instruct the jury on the essential element of knowledge.

8. The trial court's failure to instruct the jury on Mr. Yishmael's requested instructions prevented him from presenting a defense.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The separation of powers doctrine is implicit in Washington's constitution and arises from the very division of Washington's government into three branches. This division is necessary to check against corruption, abuse of power, and other injustices. The legislature is the only branch with the power to define crimes and sentences. When this power is delegated to another branch, the separation of powers doctrine is violated. The term "practice of law" is not defined in RCW 2.48.180. Instead, the judiciary has been delegated with defining this term. The definition contained within GR 24 has been unconstitutionally incorporated into the elements of RCW 2.48.180. Must Mr. Yishmael's conviction be reversed because of this unconstitutional delegation of legislative authority to the judiciary?

2. The Fourteenth Amendment of the United States Constitution and Article 1, section 22 of the Washington Constitution

demand that the provisions of a crime be defined in specific language. The term “practice of law” as defined in RCW 2.48.180 does not lend itself to an easy definition. An average person cannot generally determine what practice of law means and therefore determine what conduct is criminal. As such, RCW 2.48.180 is unconstitutionally vague. Must Mr. Yishmael’s conviction be reversed because RCW 2.48.180 fails to define “practice of law,” a term too vague for the average person to understand and fairly apply in the context of a criminal conviction?

3. The Fourteenth Amendment requires the government to prove every element of a crime charged beyond a reasonable doubt. The evidence is insufficient where it is based on mere speculation, rather than reasonable inference. The evidence did not establish Mr. Yishmael engaged in the practice of law. Must Mr. Yishmael’s conviction be reversed for insufficient evidence?

4. Article IV, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. The court’s feelings on an element of the crime need not be expressly conveyed but may be merely implied. Where the government is unable to demonstrate a lack of prejudice to the defendant, reversal is required. In

the court's jury instructions, the court defined the term "practice of law" as it had been defined by the prosecution's expert witness, endorsing this witness's testimony. This endorsement of the prosecution's evidence constitutes a comment on the evidence. Must this Court reverse Mr. Yishmael's conviction because of the trial court's comment on the evidence in the jury instructions?

5. A jury instruction comments on the evidence when it tells the jury what type of conduct satisfies the legal sufficiency for a crime. By instructing the jury on examples of conduct that constituted the unlawful practice of law within the definition of practice of law, the court commented on the evidence. Must the Court reverse Mr. Yishmael's conviction for this improper comment on the evidence?

6. Strict liability offenses are generally disfavored. Where the statute is not clear as to whether the legislature intended to create a strict liability offense, the court must interpret the legislature's intent. The factors that courts examine to determine whether the legislature intended to create a strict liability offense do not suggest that the legislature intended for the unlawful practice of law to be a strict liability offense. Must this Court reverse Mr. Yishmael's conviction

because the court did not instruct the jury that unlawful practice of law requires knowledge?

7. The Sixth and Fourteenth Amendments guarantee all persons accused of crimes of the right to a fair opportunity to defend themselves. A defendant is deprived of this right where the court fails to provide instruction to the jury necessary for the defendant to present a defense. Must this Court reverse Mr. Yishmael's conviction for unlawful practice of law because of the trial court's failure to properly instruct the jury on the elements of knowledge and practice of law?

D. STATEMENT OF THE CASE

Before the recession of 2009, Mr. Yishmael had been a realtor. RP 822. When the recession hit, many of the people who Mr. Yishmael had helped find houses found themselves unable to continue to stay in their homes. RP 822. Mr. Yishmael created an organization designed to help people keep their homes. RP 822.

In the course of this work, Mr. Yishmael began to see an increased number of abandoned homes. RP 823. He created an association to help people who could not afford to stay in their homes to take adverse possession of these abandoned homes. RP 823. Mr. Yishmael gave lectures on adverse possession, including the risks and

rewards of moving into an abandoned property. RP 826, 833, 836. At no time did Mr. Yishmael represent that he practiced law or had the ability to represent the people he worked with. RP 324, 395, 597, 618. Even the government's expert on legal practice could find no evidence Mr. Yishmael ever held himself out to be a lawyer. RP 488.

Mr. Yishmael began to work with a number of people, including Carrie Bouwkamp, Angela Simmons, and Crystopher Smith. RP 321, 512, 608. Each of them paid Mr. Yishmael for his information, which included lists of homes that he believed had been abandoned. RP 326, 514, 614. After being provided with lists of potentially abandoned homes, each of these people filed notices with King County record keeper of their intent to occupy the homes. RP 334, 528, 672. They then entered the homes, changed the locks, and began to reside in them. RP 338, 353, 539-40, 570. Each of these people cared for the home and invested in the home's upkeep. RP 356, 574, 685. They placed notices on the homes, including no-trespass signs. RP 541, 628. Ms. Simmons knew Mr. Yishmael was not a lawyer. RP 395.

Ms. Bouwkamp met Mr. Yishmael in 2011. RP 511. She knew Mr. Yishmael was not a lawyer. RP 597. Ms. Bouwkamp attempted to move into three homes, ultimately taking possession of 4404 S. 176th

Street in SeaTac. CP 6. A Des Moines police officer contacted Ms. Bouwkamp on January 1, 2014. CP 6, RP 574. She informed the officer she had claimed the property through adverse possession in 2013. RP 575. A notice to that effect had been filed with the county recorder office. RP 576 (Ex. 1-4). On August 14, 2014, Ms. Bouwkamp was confronted by Sergeant Cathy Savage, to whom she also explained how she had taken possession of the home. CP 6, RP 430. Ms. Bouwkamp was arrested when she did not move out of the home. RP 443. The charges against her were later dismissed. RP 578.

Mr. Smith had been living with his girlfriend, Helen Gaines, when he first met Mr. Yishmael. RP 601. Ms. Gaines had moved into a home in an attempt to gain adverse possession, with Mr. Yishmael's assistance. RP 601. When Mr. Smith's relationship with Ms. Gaines ended, he tried to adversely possess two properties, ultimately moving into an abandoned property located at 1458 S.W. Dash Point Road. CP 19, RP 611. Mr. Smith used a list of properties provided by Mr. Yishmael to help determine which properties had been abandoned. CP 19, RP 611. Mr. Smith also posted notice of his intent with the records office on July 16, 2014, maintained the home, and placed notices on the property stating he believed he had possession of the home. RP 676. He

was also arrested by Sergeant Savage. RP 439. Charges were later dismissed against him as well. RP 680.

Ms. Simmons met Mr. Yishmael in 2013 at her church. RP 321. She attempted to adversely possess two homes, ultimately moving into 24017 113th Pl. S.E. in Kent. RP 22. She agreed to join Mr. Smith's program, understanding that he would provide her with information and forms. RP 327. Mr. Yishmael provided Ms. Simmons with a list of homes he believed had been abandoned. RP 328. Like the others, Ms. Simmons filed a notice of her intention, took possession of the home, paid the liens, and then attempted to maintain the home. RP 331. She learned of an auction that would be held on the home. RP 345. Ms. Simmons moved out of the home after about three weeks, believing that she would not be able to maintain possession of the property. 359.

Mr. Yishmael never represented that he was an attorney to anyone. RP 324, 597, 618. He told the people he worked with in the program he could not represent them in court. RP 326. He had stated that he did not like the ethics of legal practice, after having taken some law school courses. RP 325. Each of the people who had moved into an adverse home had paid Mr. Yishmael some money, up to \$7,000. RP 326, 514, 849.

After meeting with Ms. Bouwkamp, Mr. Smith, and Ms. Simmons, the government charged Mr. Yishmael with a number of offenses, including the unlawful practice of law and several counts of felony theft. CP 1-27.

The prosecutor called former Seattle University School of Law Professor David Boerner to explain to the jury what the term “practice of law” meant. RP 99. The prosecution also called the professor to testify about what specific actions of Mr. Yishmael constituted unlawful practice of law. RP 99-100.

RCW 2.48.180 does not define the term “practice of law.” Professor Boerner’s testimony therefore focused on GR 24. During the course of his testimony, Professor Boerner read from the rule, which was then submitted to the jury. RP 481-83. The government also entered GR 24 into evidence and submitted to the jury. RP 480. Mr. Yishmael objected to this procedure. RP 480.

In the court’s closing instructions, the definition of practice of law endorsed by Professor Boerner was read to the jury. RP 894, CP 552 (Jury Instruction 20). Mr. Yishmael objected to this definition as an improper comment on the evidence by the court. RP 886.

After the trial, Mr. Yishmael was convicted of unlawful practice of law, but was acquitted of the other charges. RP 1012.

E. ARGUMENT

1. The use of GR 24 to define practice of law for purposes of criminal liability violates the separation of powers doctrine.

RCW 2.24.180 makes the unlawful practice of law a crime. The term “practice of law” is not defined in the statute. Instead, the definition of this term has been delegated to the judiciary, through the court’s rule-making procedures. *See* GR 24; *State v. Janda*, 174 Wn. App. 229, 234, 298 P.3d 751 (2012). The use of rule-making procedures to define the elements of RCW 2.48.180 is an unconstitutional delegation of legislative power to the judiciary, violating the separation of powers doctrine.

a. The legislature may not delegate its authority to define the elements of a crime to the judiciary.

Separation of power is “one of the cardinal and fundamental principles of the American constitutional system” and a cornerstone of Washington’s governmental form. *Wash. State Motorcycle Dealers Ass’n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). The doctrine is implicit in our state constitution and arises from “the very division of our government into different branches.” *Carrick v. Locke*, 125 Wn.2d

129, 135, 882 P.2d 173 (1994). Governmental authority is divided into three branches: legislative, executive, and judicial. Const. art. II (legislative authority), III (executive authority), IV (judicial authority). “Each branch of government wields only the power it is given.” *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The division of power into three separate branches is necessary to “ensure liberty by defusing and limiting power.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). This constitutional division of government protects individuals against centralized authority and abuse of power. *Guillen v. Pierce County*, 144 Wn.2d 696, 731, 31 P.3d 628 (2001). Although the branches of government are not “hermetically sealed,” the fundamental functions of each branch are “inviolable.” *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012) (citing *Hale*, 165 Wn.2d at 503-04).

The division of governmental authority into separate branches is especially important in criminal justice, as the substantial liberty interests at stake require numerous checks against corruption, abuses of power, and other injustices. *Rice*, 174 Wn.2d at 901. Separation of powers ensures that individuals are charged and punished only after a confluence of agreement among multiple governmental authorities,

rather than upon the impulses of one central agency. *Id.* Legislative authority must be exercised to define crimes and sentences, executive power must be applied to collect evidence and seek an adjudication of guilt in a particular case, and judicial power must be exercised to confirm guilt and to impose an appropriate sentence. *Id.* (referencing *State v. Case*, 88 Wash. 664, 668, 153 P. 1070 (1915)).

The authority to define crimes and set punishment rests firmly with the legislature. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). The legislature has the sole responsibility for defining the elements of a crime. *State v. Evans*, 154 Wn.2d 438, 447 n.2, 114 P.3d 627 (2005). The legislature cannot constitutionally delegate its legislative authority to the other branches of government. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 234, 11 P.3d 762 (2001) (citing *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998)).

The judiciary has no legislative power, other than to make rules relative to pleading, practice, and procedure. *State v. Pavelich*, 153 Wash. 379, 381, 279 P. 1102 (1929); *see also State v. Gresham*, 173 Wn.2d 405, 428–29, 269 P.3d 207 (2012). Only the legislature has the power to determine when conduct should be punished. *Id.*

b. The determination by the judiciary of what qualifies as unlawful practice of law violates the separation of powers doctrine.

The trial court adopted the GR 24 definition of practice of law when it instructed the jury on the elements of unlawful practice of law. RP 894, CP 552 (Jury Instruction 20). The trial court's use of this definition violated the separation of powers doctrine. As such, Mr. Yishmael is entitled to reversal. *State v. Ramos*, 149 Wn. App. 266, 276, 202 P.3d 383 (2009).

While RCW 2.48.180 defines many terms, "practice of law" is not one of them. RP 489. Defining this term has been delegated to the judiciary, which relies on GR 24 to determine when a violation of the statute has occurred. *See State v. Janda*, 174 Wn. App. at 234. This reliance is a violation of the separation of powers doctrine. *Gresham*, 173 Wn.2d at 431.

The judiciary created GR 24 in 2001 through its rulemaking authority. Karl Teglund, *Definition Of The Practice Of Law*, 2 Wash. Prac., Rules Practice GR 24 (8th ed.). The Supreme Court adopted the rule so it could better control who could perform lawyer-like functions, including non-lawyers. *Id.* A committee of retired judges, WSBA board

members, and other practicing attorneys drafted the rule. *Id.* GR 24 was never presented to the legislature and it is not a law.

The authority to define the role of an attorney does not give the Court the ability to define the elements of a crime. *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 907, 890 P.2d 1047 (1995) (basic function of the judiciary is to regulate the practice of law). Mr. Yishmael was not being sanctioned by the court or restrained by the bar association. *See, e.g., Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 52, 586 P.2d 870 (1978). He was prosecuted by the government, through its executive authority, for the commission of a crime. CP 152-56. The power to define this crime is beyond the authority of the judiciary. Reliance on GR 24 to define this “practice of law” violates the separation of powers doctrine. *Gresham*, 173 Wn.2d at 431.

Courts have the power to regulate the practice of law. *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163 (1984). This does not give the courts to the ability to define the elements of a crime, even the unlawful practice of law. While it is clear that the courts have the power to define admit, enroll, discipline, and disbar attorneys, this power does not give the court the ability to define the elements of an

offense. *Id.* (defining the power of the court to regulate the practice of law). By doing so, the court unconstitutionally encroaches on the power that is solely vested in the legislature. *Evans*, 154 Wn.2d 438, 447 n.2.

This Court found a violation of the separation of powers doctrine when the legislature improperly delegated the authority to classify sex offenders to the county sheriffs. *Ramos*, 149 Wn. App. at 269. Failure to register as a sex offender required the sheriff, a member of the executive branch, to determine the risk level of an offender. *Id.* at 271-72. In reversing Mr. Ramos' conviction, this Court found there was an improper delegation of authority to the executive. *Id.* at 276.

The Supreme Court also found a violation of the separation of powers doctrine when the legislature usurped the power of the judiciary in its rulemaking authority. *Gresham*, 173 Wn.2d at 413. *Gresham* recognizes that the court has the power to prescribe rules for procedure and practice. *Id.* at 428. *Gresham* also makes clear the distinct roles the legislature and the judiciary play. *Id.* at 431. The definition of a crime and its punishment are substantive matters. *Id.* As such, the term must be defined by the legislature. *Id.*

The trial court relied on GR 24 to define practice of law. This constitutes an improper delegation of legislative authority to the

judiciary. *Ramos*, 149 Wn.2d at 276. The remedy for this improper delegation is a remand to the trial court with instructions to dismiss. *Id.* at 269. This Court should remand Mr. Yishmael's conviction, with instructions to dismiss.

2. RCW 2.48.180 is unconstitutionally vague because it fails to define the term "practice of law."

"Practice of law" as contained in RCW 2.48.180 is an unconstitutionally vague term. Washington courts have long recognized that the term "practice of law" does not lend itself to an easy definition. *Great Western*, 91 Wn.2d at 54. The term is not defined in RCW 2.48.180 or anywhere else by the legislature. Because this term is impermissibly vague, Mr. Yishmael asks this Court to reverse his conviction.

a. A statute is unconstitutionally vague when an average person cannot determine which persons are regulated, what conduct is prohibited, or what punishment should be imposed.

The void for vagueness doctrine is rooted in the Fourteenth Amendments guarantee of due process. U.S. Const. amend. 14; *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). Article I, section 22 of the Washington Constitution also

grants an accused, in a criminal prosecution, the right “to demand the nature and cause of the accusation against him.” These constitutional provisions demand that a crime be defined in specific language, so that a citizen may know what conduct the legislature intends to “proscribe, prevent, and punish.” *State v. Harrington*, 181 Wn. App. 805, 822, 333 P.3d 410 (2014) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

A statute is void for vagueness and unenforceable if it is too vague for the average citizen to understand. *Douglass*, 115 Wn.2d at 178. A statute is unconstitutionally vague when an average person cannot generally determine which persons are regulated, what conduct is prohibited, or what punishment is imposed. *Watson*, 160 Wn.2d at 6; *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). To be constitutional, a law must state explicitly what it mandates, and what is enforceable. *State v. Richmond*, 102 Wn.2d 242, 248, 683 P.2d 1093 (1984). Potentially vague terms must be defined. *Id.* The dividing line between what is lawful and unlawful cannot be left to conjecture. *United States v. Capital Traction Co.*, 34 App. D.C. 592, 598 (1910).

The constitutionality of a statute is an issue of law reviewed de novo. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d

1280 (2005) (citing *Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997)). Unless the statute involves a First Amendment challenge, vagueness is evaluated by examining the statute as applied under the particular facts of the case. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Statutes are presumed to be valid, but this presumption is overcome where it is established beyond a reasonable doubt that the statute is unconstitutionally vague. *Watson*, 160 Wn.2d at 11.

b. RCW 2.48.180 fails to define “practice of law,” a term too vague for the average citizen to understand.

RCW 2.48.180(3)(a) declares unlawful practice of law to be a crime. As charged here, the statute proscribes that the unlawful practice of law occurs when non-lawyers practice law or hold themselves out as entitled to practice law. RCW 2.48.180(2), CP 154. As addressed above, this statute does not define “practice of law.” *See* RCW 2.48.130(1). “Practice of law” is a vague term without an easily understandable meaning.

The Supreme Court recognized the difficulty in understanding what “practice of law” means in *State v. Chamberlain*, stating:

While we lack an authoritative definition of practicing law, we may say here that, so far as this jurisdiction is concerned, it means doing or practicing that which an

attorney or counselor at law is authorized to do and practice.

State v. Chamberlain, 132 Wash. 520, 524, 232 P. 337 (1925); *see also Great Western*, 91 Wn.2d at 54 (“practice of law” does not lend itself easily to a precise definition).

The Supreme Court adopted GR 24 in 2001, acknowledging the difficulty in defining the term practice of law. Teglund, 2 Wash. Prac., Rules Practice GR 24. GR 24 defines practice of law for purposes of enjoinder and for civil remedies but does not define when a person may be prosecuted under RCW 2.48.180. Unlike the court rules, RCW 2.48.180 has not been modified to incorporate this definition or any other clear definition. *See above*, Sec. 1.

Mr. Yishmael moved to dismiss the charge of unlawful practice of law. CP 523. Even with the benefit of GR 24, the prosecution conceded the difficulty in defining this term. RP 100. Because this term is vague, it was necessary for the prosecution to call former Seattle University School of Law Professor David Boerner to explain what practice of law means. RP 474. In its offer of proof, the prosecution stated it was necessary to have the professor testify to the definition of practice of law to explain whether the documents Mr. Yishmael provided to others constituted the practice of law. RP 100.

The testimony of the professor was required because the definition of “practice of law” was not easily understandable to the average person. RP 100. Professor Boerner was not, however, able to define practice of law, except to refer to the text of GR 24, which was introduced during his testimony. RP 480.¹ The rule was entered into evidence and the professor read much of it into evidence. RP 481-83. The professor acknowledged that RCW 2.48.180 does not define the term practice of law and that he was relying on the definition provided in GR 24. RP 489.

As was clear from the prosecution’s need for Professor Boerner’s testimony, “practice of law” is a term of art that is beyond the understanding of the average citizen. *Watson*, 160 Wn.2d at 6. After GR 24 had been admitted into evidence, Professor Boerner told the jury what GR 24 said, explaining to the jury what GR 24 prohibited. RP 481. The professor then told the jury that in his opinion, Mr. Yishmael’s actions constituted the practice of law because it fell within the description of practice of law provided in GR 24. RP 485.

¹ Professor Boerner had been a member of the committee responsible for drafting GR 24. RP 476.

This Court has once before examined whether the definition of practice of law is a vague term. *State v. Hunt*, 75 Wn. App. 795, 805, 880 P.2d 96 (1994). While *Hunt* did not find the definition to be vague, it relied on cases that involve disciplinary proceedings and civil matters. *Id.* at 802 (citing *In re Droker and Mulholland*, 59 Wn.2d 707, 719, 370 P.2d 242 (1962); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 586, 675 P.2d 193 (1983); *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 446–47, 635 P.2d 730 (1981); *Great Western*, 91 Wn.2d at 54; *Hecomovich v. Nielsen*, 10 Wn. App. 563, 571, 518 P.2d 1081, *review denied*, 83 Wn.2d 1012 (1974). *Hunt* fails to distinguish between the definition provided in GR 24 and the absence of a definition in RCW 2.48.180.

In addition, the *Hunt* Court did not examine whether Mr. Hunt's First Amendment rights were violated under this statute. *Hunt*, 75 Wn. App. at 810. Mr. Yishmael also challenged the statute as a violation of his First Amendment rights. CP 525. It is undisputed that Mr. Yishmael taught people what adverse possession meant and how they could adversely possess a home. In this respect, he acted much like a school teacher or newspaper reporter. CP 525. Because Mr. Yishmael's actions implicate the First Amendment, *Hunt's* analysis does not apply.

Hunt, 75 Wn. App. at 810; *see also Coria*, 120 Wn.2d at 163 (when First Amendment violations are alleged, the scope of the inquiry is not merely on the facts as applied).

This Court should distinguish RCW 2.48.180 from the cases that have examined a person's liability under GR 24. Mr. Yishmael does not argue that GR 24 fails to provide a sufficient definition of what the practice of law constitutes for purposes of civil liability. Instead, Mr. Yishmael asks this Court to find that the failure to define this vague term in RCW 2.48.180 makes the statute constitutionally defective. In examining and applying RCW 2.48.180 outside the scope of civil liability, this Court should find that the definition of unlawful practice of law is vague and order reversal of Mr. Yishmael's conviction and dismiss the charge.

3. The government failed to establish the essential elements of unlawful practice of law.

Should this Court hold that the use of GR 24 to define practice of law does not violate the separation of powers doctrine and that practice of law as contained in RCW 2.48.180 is not vague, it should reverse because there was insufficient evidence to establish that Mr. Yishmael unlawfully practiced law.

The government is required to establish all elements of a charged offense beyond a reasonable doubt and the failure to do so requires dismissal of that charge. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The evidence heard at trial was insufficient to establish Mr. Yishmael unlawfully engaged in the unlawful practice of law. As such, this charge should be dismissed.

a. The government must prove every element of a crime charged beyond a reasonable doubt.

The Due Process Clause of the Fourteenth Amendment requires the government to prove every element of the crime charged beyond a reasonable doubt. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *Winship*, 397 U.S. at 364). Proof beyond a reasonable doubt of all essential elements of a crime is an “indispensable” threshold of evidence the government must establish to garner a conviction. *Winship*, 397 U.S. at 364.

While reasonable inferences are construed in favor of the prosecution, they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The evidence is insufficient to support a

verdict where “mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The remedy is reversal and remand for judgment of dismissal with prejudice. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review denied*, 187 Wn.2d 1 (2017).

b. Mr. Yishmael was not engaged in the practice of law and did not represent to any persons that he was authorized to practice law.

The facts of this case are not in dispute. Before the recession of 2009, Mr. Yishmael had been a realtor. RP 822. After the recession, he worked with clients to keep their homes. RP 822. He also began to provide information to people about adverse possession and homesteading. RP 826, 833, 836. Mr. Yishmael created a program designed to help people find abandoned homes to adversely possess. RP 326, 526, 608. He provided those he was working with documents to file with the government in an attempt to make their possession valid. RP 326, 526, 608. He told everyone he worked with he could not represent them in court because he was not a lawyer. RP 597.

No one ever thought Mr. Yishmael was a lawyer. RP 324, 395, 488, 618. There was no evidence Mr. Yishmael had ever held himself out to be one. RP 488. At most, Mr. Yishmael told some of the

witnesses he had attended law school but had left because he did not like the ethics of law practice. RP 324-25. In his testimony, Mr. Yishmael said he had not attended law school but had taken courses in the law. RP 863-64.

Unlawful practice of law can be proved by proving any of the following:

- (a) A nonlawyer practices law, or holds himself or herself out as entitled to practice law;
- (b) A legal provider holds an investment or ownership interest in a business primarily engaged in the practice of law, knowing that a nonlawyer holds an investment or ownership interest in the business;
- (c) A nonlawyer knowingly holds an investment or ownership interest in a business primarily engaged in the practice of law;
- (d) A legal provider works for a business that is primarily engaged in the practice of law, knowing that a nonlawyer holds an investment or ownership interest in the business; or
- (e) A nonlawyer shares legal fees with a legal provider.

RCW 2.48.180(2).

Mr. Yishmael was charged under RCW 2.48.180(2)(a), as practicing law, or holding himself out as entitled to practice law. CP 154. The information contained multiple additional elements not relevant for this analysis. CP 154.

When Ms. Simmons testified, she said she had met Mr. Yishmael through her church. RP 321. She said that he had helped someone obtain a house through adverse possession. RP 321. She attended a meeting where Mr. Yishmael explained the program to her. RP 323. Mr. Yishmael told her about a program where he would help her adversely possess a home, where after seven years, a person could obtain a home, provided they demonstrated they had obtained the home and maintained it during that period. RP 323.

Ms. Simmons knew Mr. Yishmael was not a lawyer. RP 324. Ms. Simmons did her own research on the law of adverse possession. RP 327. She agreed to pay Mr. Yishmael to be part of his association. RP 326. In exchange for this fee, Mr. Yishmael agreed to provide documentation and proof of Ms. Simmons' intent to adversely possess a property. RP 326. Although Ms. Simmons stated Mr. Yishmael would come to court with her if there were problems, he never stated he would represent her. RP 326. Ms. Simmons knew Mr. Yishmael was not a lawyer. RP 395. He was clear with Ms. Simmons that he could not represent her in court. RP 395.

After joining the program, Mr. Yishmael provided Ms. Simmons with a list of properties that were in foreclosure. RP 328.

When Ms. Simmons found a house, Mr. Yishmael said he would tell her what a letter should say that informs the owner of the property that she was taking possession of the abandoned property. RP 330. She then got a notice to paste to the door to show she believed the property was vacant. RP 331. They also drew up a letter for the local police to inform them that she intended to move into the property. RP 331. She additionally filed a notice with the King County Recorder's Office of her intent to possess the property. RP 334. Finally, Mr. Yishmael told Ms. Simmons to place a no trespassing sign on the property. RP 332.

Ms. Simmons did not move into the first property she attempted to possess after she was informed it was not abandoned. RP 345. She then consulted an attorney who explained to her that adverse possession was a lawful way to possess a property. RP 401. She attempted to claim a second abandoned property a few weeks later. RP 348. She followed the same steps as with the first property. RP 349-50, 353-54. After taking possession of the second property, Ms. Simmons invested \$2,000-2,500 to repair the home. RP 356. Ms. Simmons lived there for about three weeks before she was contacted by a property manager who informed her the property was not abandoned. RP 359.

Ms. Bouwkamp's daughter was best friends with Mr. Yishmael's daughter. RP 511. When she was facing eviction, she spoke with Mr. Yishmael's wife about her problems. RP 512. She attended a class Mr. Yishmael gave on the program he was running and agreed to join his association. RP 514. The purpose of the program was to help people find homes. RP 526.

Mr. Yishmael provided Ms. Bouwkamp with a list of homes he believed may have been abandoned. RP 525. She moved into two separate homes. RP 526. Mr. Yishmael provided Ms. Bouwkamp with all of the necessary paperwork to file to provide notice of her intent to adversely possess the properties. RP 528. She left the first home when the owners came to the property and informed her it was not abandoned. RP 532. Ms. Bouwkamp took possession of a second home, changing the locks, posting no trespassing signs and filing documents in the public record of her intent to possess the property. RP 540-41. She lived at the second home for a year and two months. RP 542. Ms. Bouwkamp knew Mr. Yishmael was not a lawyer. RP 597.

Mr. Smith met Mr. Yishmael through his girlfriend, who had been a member of Mr. Yishmael's program. RP 601. He also entered into a program with Mr. Yishmael in an attempt to adversely possess a

home. RP 608. Like the others, Mr. Yishmael provided Mr. Smith with a list of homes believed to be abandoned. RP 614. Mr. Smith knew Mr. Yishmael was not a lawyer and would not be able to go to court with him if asked. RP 618.

Two law school professors testified at the trial. Professor Boerner testified for the government. He testified as to what constitutes the practice of law under GR 24. RP 481-83. He stated it was his opinion that drafting documents for a fee constituted the practice of law. RP 485. Professor Boerner also testified he could find no evidence Mr. Yishmael held himself out to be a lawyer. RP 488.

Mr. Yishmael called Professor Gregory Silverman, who is a property law professor at Seattle University School of Law. RP 701. Professor Silverman spoke generally on the law of adverse possession. He stated Mr. Yishmael correctly explained the law of adverse possession in the presentation materials he had provided. RP 796. On cross-examination, the government established that many of the steps Mr. Yishmael had told people they should take to adversely possess a home were not necessary. RP 783, 784, 786, 787, 790. There was no testimony from him that only an attorney could explain adverse possession. Importantly, the evidence also established that the forms

Mr. Yishmael provided were not standard legal documents and were not required to establish adverse possession. RP 772. In fact, very few of the steps Mr. Yishmael told persons they should take to adversely possess a home were required by law, including filing the documents Mr. Yishmael provided to the persons attempting to adversely possess the homes. RP 773.

Mr. Yishmael also testified. He did not deny that he had helped people try to adversely possess abandoned homes. He said that he held seminars on what adverse possession meant. RP 823. He told people about the risks of adverse possession. RP 833. He then helped them find and possess homes that had been abandoned. RP 846.

Mr. Yishmael made clear he was not an attorney. RP 841. He told all of the people that he worked with that they should seek out and get advice from an attorney. RP 841. He had no intent to deceive anyone he worked with. RP 844. He did not represent himself to be an attorney. RP 841.

c. The government presented insufficient evidence Mr. Yishmael unlawfully practiced law.

Mr. Yishmael agreed to help people find abandoned homes and attempt to adversely possess them for a fee. This is not practicing law. It is insufficient to establish guilt under RCW 2.48.180. As such, the

government failed to prove the essential elements of this offense and order it to be dismissed. *Hummel*, 196 Wn. App. at 359; *State v. Vasquez*, 178 Wn.2d 1, 18, 309 P.3d 318 (2013).

There is no dispute that Mr. Yishmael explained adverse possession to the people he helped find homes. But explaining a legal principle is not the same as practicing law. There are many entities that explain legal principles that do not provide legal advice. These include Washington Law Help, which describes itself as a source for “Legal help for Washingtonians who cannot afford a lawyer.”² In addition, Cornell Law School created the Legal Information Institute to provide legal information, including the definition of adverse possession to non-lawyers.³ Describing legal terms is not the same as practicing law and does not violate RCW 2.48.180. If it were, any person describing a legal principle to another would be guilty of this offense.

Just as the information Mr. Yishmael provided is not sufficient to establish that he was unlawfully practicing law, neither are the forms he provided. Legal forms are largely available for purchase, online and

² *Legal help for Washingtonians who cannot afford a lawyer*, Wash. Law Help (last visited Oct. 23, 2017), <https://www.washingtonlawhelp.org/>.

³ *Adverse Possession*, Legal Information Institute (last visited Oct. 23, 2017) https://www.law.cornell.edu/wex/adverse_possession.

locally. Like Mr. Yishmael, some of these firms provide templates that allow people to generate legal forms with personalized information.⁴ And while Professor Boerner described legal practice as providing forms for a fee, this is contrary to the business model of these firms, including institutions like Thomson Reuters, all of whom charge fees for this very service.⁵ Such forms can be created easily on the computer for a fee or for free.⁶ The forms Mr. Yishmael provided were not in fact necessary to establish adverse possession and had no legal effect. RP 773. This is not in dispute, as it was established during the cross-examination of Professor Silverman and relied on by the prosecution in closing arguments. RP 773, 961, 990. Providing forms that can be filled out is not practicing law and is an insufficient basis to convict Mr. Yishmael.

Additionally, providing information on houses that might be abandoned is not practicing law. What Mr. Yishmael did was no different from a realtor, except that the listing he provided was not homes for purchase. And like Mr. Yishmael, many established

⁴ *Legal Documents, Forms, and Templates – Full List*, Legaltemplates (last visited Oct. 23, 2017), <https://legaltemplates.net/legal-documents-forms/>

⁵ *Contracts, forms and documents*, Thomson Reuters (last visited Oct. 23, 2017), <http://legalsolutions.thomsonreuters.com/law-products/solutions/legal-forms>

⁶ *Protect the people you love*, Willing.com (last visited Oct. 23, 2017), <https://willing.com/Washington>.

companies provide information on abandoned homes in Washington, including Zillow⁷ and Realtor.com.⁸

There are many cases that interpret GR 24, but few that interpret RCW 2.48.180. The only published case interpreting the statute appears to be *State v. Janda*, where this Court upheld Mr. Janda's conviction. 174 Wn. App. at 238. Unlike Mr. Yishmael, Mr. Janda had spent years providing estate planning services, apparently representing himself to be an attorney. *Id.* at 231. Mr. Janda was warned by the state attorney general that his business constituted the unauthorized practice of law and a violation of the Consumer Protection Act. *Id.* Even when he agreed to cease and desist his practice, he did not. *Id.* Mr. Janda created legally binding documents including health care directives, wills, and living trusts. *Id.* He also prepared documents necessary to settle estates. *Id.* And unlike Mr. Yishmael, the victims of his unlawful practice did not learn that he was not an attorney until after he had provided these services. *Id.* While Mr. Janda challenged the sufficiency of the evidence charged against him, he did so under the theory that RCW

⁷ *Washington Foreclosures*, Zillow (last visited Oct. 23, 2017), <https://www.zillow.com/wa/foreclosures/>

⁸ *Seattle, WA Real Estate & Homes for Sale*, Realtor.com (last visited Oct. 23, 2017), https://www.realtor.com/realestateandhomes-search/Seattle_WA

2.48.180 only applied to persons who had once been licensed to practice law. *Id.* at 233-34. This Court denied Mr. Janda relief under this provision, finding this language to be unambiguous. *Id.* at 234-35.

Mr. Yishmael did not engage in the same practices as Mr. Janda. Mr. Yishmael did not hold himself out to be an attorney, an essential element of RCW 2.48.180(2)(a). He provided forms but did not fill them out. RP 434. These forms he provided did not create legally binding obligations and were not, in fact, even necessary for a person to claim adverse possession. RP 772. Mr. Yishmael was always clear he would not be able to represent any of the people he helped in court because he was not a lawyer. RP 324, 395, 597, 618.

Mr. Yishmael was not practicing law as defined by RCW 2.48.180(2)(a). Unlawful practice, as charged, required the government to prove Mr. Yishmael was a non-lawyer practicing law, or that he held himself out as entitled to practice law. *Id.* The government failed to prove this essential element. Mr. Yishmael asks this Court to hold that the government failed to present sufficient evidence of this offense and to order this matter dismissed. *Hummel*, 196 Wn. App. at 359.

4. The trial court improperly commented on the evidence in its jury instructions on practice of law.

Article IV, section 16 of the Washington Constitution prohibits judges from commenting on the evidence adduced at a trial. Where the prosecution is unable to demonstrate that no prejudice resulted from the comment, reversal is required. *State v. Lane*, 125 Wn.2d 825, 838–39, 889 P.2d 929 (1995). By adopting an expert witness’s definition of unlawful practice of law in the jury instructions, the court commented on the evidence. CP 552 (Instruction No. 20). Should this Court find there to be sufficient evidence of unlawful practice of law, Mr. Yishmael asks this Court to order reversal based on the trial court’s improper comment on the evidence.

a. The Washington Constitution forbids comments on the evidence by the trial judge.

Article IV, section 16 of the Washington Constitution does not allow judges to “charge juries with respect to matters of fact, nor comment thereon.” Instead, they “shall declare the law.” *Id.* A jury instruction may do no more than accurately state the law. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). A jury instruction is an improper comment on the evidence when it does not state the law but instead essentially resolves a contested factual issue. *State v. Brush*,

183 Wn.2d 550, 557, 353 P.3d 213 (2015). The court's personal feelings on an element of the crime need not be expressly conveyed; it is sufficient that they are merely implied. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (citing *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970)). Improper jury instructions are reviewed de novo, within the context of the jury instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

b. The court's endorsement of Professor Boerner's definition of unlawful practice of law was a comment on the evidence.

The trial court's definition of the term "practice of law" was a comment on the evidence. When Professor Boerner testified, he told the jury that GR 24 defined the practice of law. RP 99. The rule was then entered into evidence, over Mr. Yishmael's objection. RP 100. When the court then relied on GR 24 to instruct the jury on the definition of practice of law, it endorsed Professor Boerner's testimony. RP 894, CP 550-53. This was an unconstitutional comment on the evidence.

At trial, the prosecution called Professor Boerner to offer his opinion on what constituted unlawful practice of law and to specifically address how Mr. Yishmael's conduct constituted an unlawful practice

of law. RP 99-100. During the course of Professor Boerner's testimony, the government introduced into evidence GR 24. Mr. Yishmael objected to the entry of the rule into evidence. RP 473.

At the conclusion of the evidence, the prosecution proposed a jury instruction intended to define practice of law as it is defined in GR 24. RP 890. The defense objected to this instruction and proposed alternative language. RP 887, CP 513. The court determined it would instruct the jury on the definition of law contained in GR 24, determining it was not a comment on evidence. RP 894.

GR 24 defines the practice of law, in relevant part, as follows:

The practice of law is 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.

GR 24.

The rule also includes examples of what the practice of law means, including giving advice or counsel to others as to their legal rights; selection, drafting, or completion of legal documents, or agreements; representation of another entity or person in a court or adjudicative proceeding; or negotiation of legal rights or responsibilities on behalf of another entity or person. GR 24.

When the court made the decision to instruct the jury on the definition of practice of law contained in GR 24, the court endorsed Professor Boerner's definition. RP 894. The court instructed the jury that "practice of law" meant:

[T]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which requires the knowledge and skill of a person trained in law. This includes giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration. This includes the selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

CP 552 (Jury Instruction 20).

This definition is not contained in RCW 2.48.180(2)(a). Instead, it was the definition provided by Professor Boerner. RP 99-100. In endorsing the same language that Professor Boerner used to explain his opinion on the definition of the practice of law, the court improperly commented on a disputed or unsettled question of fact, essentially resolving a factual issue. *Brush*, 183 Wn.2d at 557. At the very least, the court implied that this element of the offense had been met and threw its weight behind the opinions offered by the prosecution's witness. *Levy*, 156 Wn.2d at 721. As such, Instruction 20 is an unauthorized comment on the evidence.

c. *A court's instruction on what evidence constitutes a legally sufficient conviction is a comment on the evidence.*

In *Brush*, Washington's Supreme Court explained that "legal definitions should not be fashioned out of courts' findings regarding legal sufficiency." *State v. Sinrud*, ___ Wn. App ___, ___ P.3d ___, 75052-6-I, 2017 WL 4366267, at *3 (Wash. Ct. App. Oct. 2, 2017) (citing *Brush*, 183 Wn.2d at 558). This is because such findings are merely "whether the specific facts in that case were legally sufficient for the court to uphold" the jury's finding. *Brush*, 183 Wn.2d at 558.

When this Court reviews the sufficiency of the evidence, it views the evidence in the light most favorable to the government, asking whether a rational jury could have found guilt beyond a reasonable doubt. *Green*, 94 Wn.2d at 221. By contrast, a jury must find guilt beyond a reasonable doubt. *See id.* This Court has therefore held that fashioning a jury instruction based on an appellate court's sufficiency holding effectively replaces the jury standard with the lesser appellate standard. *Sinrud*, ___ Wn. App. at ___, 2017 WL 4366267, at *3. This is error. *Id.* (citing *Brush*, 183 Wn.2d at 558).

The trial court included language that effectively replaced the jury standard with the lesser appellate standard in its instruction on

practice of law. The trial court's instruction on practice of law included the following language:

This includes giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration. This includes the selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

CP 552 (Jury Instruction 20). Mr. Yishmael objected to the use of this instruction, instead requesting the court instruct the jury with regard to the elements of RCW 2.48.180. CP 512-514.

The analysis, in this case, is analogous to *Brush*. Like the language in *Brush*, which implied the aggravator was met if the abuse occurred over a period longer than a few weeks, the language here implies that giving advice or counsel to others for a fee or other consideration constitutes unlawful practice of law. CP 552. But sufficiency issues are "highly fact-specific." *State v. Brown*, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). The instruction here essentially told the jury that Mr. Yishmael's conduct constituted practice of law. This is a determination for the jury and not the court. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) ("it is the duty of the fact finder, not the appellate court, to weigh the evidence.").

The instruction here conflicts with the *Brush* court's warning that jury instructions should not be based on case law analyzing whether specific evidence in a particular case was sufficient to satisfy the government's burden of proof. *Brush*, 183 Wn.2d at 558. The language at issue does exactly that. Applying *Brush*, this Court should hold that the trial court's instruction commented on the evidence. *See also Sinrud*, ___ Wn. App at ___, 2017 WL 4366267, at *3.

d. The government is unable to demonstrate that no prejudice resulted from the trial court's comment on the evidence.

Where a judicial comment violates article IV, section 16, this Court must determine whether prejudice resulted from the violation. *Levy*, 156 Wn.2d at 723. Judicial comments are presumed to be prejudicial. *Id.* at 725. The burden is on the prosecution to demonstrate that no prejudice could have resulted from the improper instruction. *Id.*; *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968); *State v. Bogner*, 62 Wn.2d 247, 251, 254, 382 P.2d 254 (1963) (burden is not on the defendant to show prejudice); *In re Det. of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999); *State v. Manderville*, 37 Wash. 365, 371, 79 P. 977 (1905)).

Mr. Yishmael was prejudiced by the improper comments. There was no factual dispute as to what Mr. Yishmael had done, but only whether it constituted a crime. Mr. Yishmael did not deny he had told others about adverse possession, provided paperwork for them to fill out to help them establish that they were complying with the definition of adverse possession, or help them find abandoned properties to move into. The only question was whether Mr. Yishmael practiced law when he provided this assistance. The court instructed the jury that he did.

The definition the court gave the jury also includes conduct not contemplated by RCW 2.48.180. The criminal statute limits criminality to when a person practices law or holds himself or herself out as entitled to practice law. RCWA 2.48.180(2). The general rule includes a far greater scope of responsibility. GR 24. Without this broader definition, it is likely Mr. Yishmael would not have been convicted of unlawful practice of law.

In *Levy*, the Supreme Court found the court's comment on the evidence harmless because it did not relieve the jury of determining all of the elements of the offense. *Levy*, 156 Wn.2d at 727. In contrast, the trial court here relieved the jury of the burden of finding Mr. Yishmael had unlawfully practiced law by adopting Professor Boerner's

definition of unlawful practice of law. CP 552 (Jury Instruction 20).

This comment on the evidence prejudiced Mr. Yishmael and requires reversal of his conviction for unlawful practice of law.

5. The trial court failed to instruct the jury on the essential element of knowledge required to prove Mr. Yishmael unlawfully practiced law.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It 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.

Morissette v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

Strict liability crimes are generally disfavored. *State v. Anderson*, 141 Wn.2d 357, 361-63, 5 P.3d 1247 (2000). To determine whether the legislature intended unlawful practice of law to be a strict liability offense, this Court must interpret whether the legislature intended to create a strict liability offense when it enacted RCW 2.48.180. *State v. Bash*, 130 Wn.2d 594, 604-05, 925 P.2d 978 (1996). This is a de novo review. *State v. Wilson*, 170 Wn.2d 682, 687, 244 P.3d 950 (2010).

When determining whether a crime was intended to be a strict liability offense where it is not clear from the statute, this Court first

reviews the language of the statute and the legislative history. *Bash*, 130 Wn.2d at 605. Neither the statute nor the legislative history demonstrate the legislature's intent to create a strict liability offense. *See* RCW 2.48.180; Washington Senate Bill Report, 2001 Reg. Sess. H.B. 1579.

At trial, Mr. Yishmael asked that the jury be instructed on the element of knowledge. CP 512. The trial court denied this request. RP 871-72. Mr. Yishmael now asks this Court to hold that knowledge is an essential element of the crime charged and that the failure to instruct on this essential element requires reversal of Mr. Yishmael's conviction. *Anderson*, 141 Wn.2d at 367.

There do not appear to be any opinions that have examined whether unlawful practice of law requires knowledge. When the statute is not clear, the court will examine the factors outlined in *Bash*, which weigh upon legislative intent. *Anderson*, 141 Wn.2d at 363. The statute must be construed in light of the background rules of the common law, and its conventional mens rea element. *Id.*, at 363 (citing *Bash*, 130 Wn.2d at 605-06). This Court then looks to whether the crime can be characterized as a "public welfare offense," the extent to which a strict liability reading of the statute would encompass seemingly entirely

innocent conduct, the harshness of the penalty, the seriousness of the harm to the public, the ease or difficulty of the defendant ascertaining the true facts, whether 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 the number of prosecutions to be expected. *Id.* All of these factors must be read in light of the principle that strict liability offenses are generally disfavored. *Bash*, 130 Wn.2d at 606.

The statutory language and legislative history do not demonstrate an intent to create a strict liability offense, nor do the background rules of the common law. As the *Anderson* Court did, this Court should be mindful that a statute will not be deemed a strict liability statute where such construction would criminalize a broad range of innocent behavior. 141 Wn.2d at 363.

By creating a strict liability offense, a broad range of behavior could be criminalized, including basic teaching of constitutional rights

in school classrooms.⁹ Legal forms and computer programs that are sold could create criminal liability.¹⁰

In addition, this offense carries serious consequences.

Subsequent convictions for this offense are class C felonies, which carry serious and lifelong consequences. Sara Berson, *Beyond the Sentence – Understanding Collateral Consequences*, National Institute of Justice, NIJ Journal No. 272 (originally posted May 2013);¹¹ *see also National Inventory of Collateral Consequences of Conviction, Justice Center, The Council of State Governments.*¹² The fact that this crime carries with it the potential for five years of imprisonment is clearly a factor that weighs in favor of holding that this is not a strict liability offense. *Anderson*, 141 Wn.2d at 364-65 (citing RCW 9A.20.021).

The seriousness of the harm also weighs in favor of requiring knowledge. *Anderson*, 141 Wn.2d at 365. Especially in light of the ability of the Court to enjoin parties from practicing law without a

⁹ *The Constitution in the Classroom*, American Constitution Society (last visited Oct. 23, 2017) <https://www.acslaw.org/conclass>; *Teaching the Constitution*, KCTS9 (last visited Oct. 23, 2017), <https://kcts9.pbslearningmedia.org/collection/teaching-the-constitution>.

¹⁰ *Contracts, forms and documents*, Thomson Reuters, *Protect the people you love*, Willing.com.

¹¹ Last visited Oct. 23, 2017, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>.

¹² Last visited Oct. 23, 2017, <https://niccc.csgjusticecenter.org/>

license and to impose civil penalties for such conduct, this Court should presume that more is required to make the conduct unlawful. GR 24. Requiring knowledge distinguishes this offense from the penalties prohibited under GR 24.

The other factors that should be examined by this Court also do not suggest this is a strict liability offense. The fewer expected prosecutions, the more likely intent is required. *Anderson*, 141 Wn.2d at 365 (citing 1 Wayne R. Lafave & Austin W. Scott, Criminal Law § 3.8, at 44 (2d ed.1986)). Given the few cases that have ever been reviewed on unlawful practice of law, it should be assumed very few people are prosecuted for this offense. Likewise, proving that a person knew they were engaged in the unlawful practice of law does not create a heavy burden on the government. *Anderson*, 141 Wn.2d at 366.

After considering all the factors, this Court should find that knowledge is an essential element of the crime charged. Nor should this Court find the absence of this essential element to be harmless. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889, 895 (2002). There were no factual disputes in this case. The only issue for the jury to decide was whether Mr. Yishmael's conduct constituted the unlawful practice of

law. CP 552 (Jury Instruction 20). The failure to instruct on this essential element cannot be considered harmless and requires reversal.

6. The trial court's failure to provide Mr. Yishmael's requested instructions on practice of law and knowledge denied Mr. Yishmael of his right to present a defense.

The right of an accused to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). A defendant's right to be heard in his defense is basic in our system of jurisprudence. *Jones*, 168 Wn.2d at 723. Defendants are entitled to a jury instruction supporting their theory of the case if there is substantial evidence in the record supporting it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). Sixth Amendment violations, including the right to present a defense, are reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

Mr. Yishmael requested a number of jury instructions that differed from those offered by the prosecution. Relevant to his Sixth Amendment right to present a defense on the unlawful practice of law were the instructions on unlawful practice of law, the definition of practice of law, and knowledge. CP 512-514. By preventing Mr.

Yishmael from arguing his case according to these instructions, the court effectively barred him from presenting a defense. See *State v. Yokel*, 196 Wn. App. 424, 433, 383 P.3d 619 (2016). This violation of Mr. Yishmael’s Sixth Amendment right requires a new trial. *Id.*

F. CONCLUSION

Mr. Yishmael asks this Court to hold that the delegation of power to the judiciary to define unlawful practice of law violates the separation of powers doctrine. Mr. Yishmael also asks this Court to hold that the term “practice of law” is unconstitutionally vague.

In the alternative, Mr. Yishmael asks this Court to hold that the government presented insufficient evidence of unlawful practice of law. Mr. Yishmael also asks this Court to hold that the trial court improperly commented on the evidence in the jury instructions, failed to instruct the jury on the essential element of knowledge, and prevented Mr. Yishmael from presenting a defense.

DATED this 24 day of October 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 76802-6-I
v.)	
)	
NAZIYR YISHMAEL,)	
)	
Appellant.)	

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