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Division I
State of Washington
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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 REPLY BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

Naziyr Yishmael did not unlawfully practice law. He explained principles of adverse possession and charged a fee to help people find abandoned properties. This is not the practice of law.

Unlawful practice of law was defined by GR 24, over Mr. Yishmael's objection. This violated the doctrine of separation of powers, which limits judicial power to creating rules for practice and procedure and prohibits courts from defining criminal acts or punishment. RCW 2.48.180 does not define the practice of law, a term that required expert analysis in court, and is unconstitutionally vague. In addition, the government failed to present sufficient evidence Mr. Yishmael unlawfully practiced law. The court improperly commented on the evidence by endorsing GR 24's examples of how a person can unlawfully practice law. This Court should also hold the prosecutor is required to prove a mental state. Finally, Mr. Yishmael's right to present a defense was restricted when the trial court refused to instruct the jury on practice of law as defined in RCW 2.48.180 and on the element of knowledge. These violations require reversal of Mr. Yishmael's convictions.

1. The use of judicial rulemaking authority to define the elements of unlawful practice of law violates the separation of power doctrine.

The government begins its analysis of the separation of powers doctrine by citing to *State v. Gresham*, but fails to acknowledge the key principle of that case, which is that the judiciary’s power is limited to proscribing rules for procedure and practice. Brief of the Respondent at 6. Substantive matters must be defined by the legislature and are beyond the scope of judicial authority. 173 Wn.2d 405, 428–29, 269 P.3d 207 (2012). 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)).

Relying on rulemaking authority and GR 24 to define “practice of law” is an improper delegation of legislative authority. 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); *Gresham*, 173 Wn.2d at 428–29. And yet, the definition of “practice of law” has clearly been delegated to the judiciary, through the court’s rule-making procedures. *State v. Janda*, 174 Wn. App. 229, 234, 298 P.3d 751 (2012); *see also* GR 24. This violates the separation of powers doctrine.

The argument that GR 24 only codifies existing case law does not cure this problem. Brief of Respondent at 10. Instead, Washington’s jurisprudence has been clear: 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. *State v. Case*, 88 Wash. 664, 668, 153 P. 1070 (1915). The very creation of GR 24 belies its infirmity as a tool to define criminal responsibility. The rule was created through the judiciary’s rulemaking authority. Karl Teglund, *Definition of the Practice of Law*, 2 Wash. Prac., Rules Practice GR 24 (8th ed.). The rule was crafted by retired judges, WSBA board members, and other practicing attorneys who drafted the rule, before being adopted by the

Supreme Court. *Id.* GR 24 was never presented to the legislature and it is not a law.

The prosecution argues that because the legislature defined practice of law in general terms, delegating the specifics of what constitutes practice of law to the judiciary is not a violation of the separation of powers doctrine. Brief of Respondent at 6. But this is exactly what the separation of powers doctrine forbids. *Gresham*, 173 Wn.2d at 431. Courts have to power to prescribe rules for procedure and practice but may not define crimes and punishment, which are substantive matters. *Id.* at 428, 431. Because “practice of law” is used to define a crime, and not for purposes of practice and procedure, it must be defined by the legislature. *Id.* at 431.

Likewise, the government’s argument that practicing law without a license is “conduct that is inherently unlawful” is unpersuasive. Brief of the Respondent at 6. What qualifies as practice of law is not clear. *State v. Chamberlain*, 132 Wash. 520, 524, 232 P. 337 (1925). The reason for GR 24 was to provide clarity for the profession. Teglund. What it means to practice law is so complicated it required both sides to call experts. RP 99, 701. Like all crimes, it is

incumbent on the legislature to define the elements, relying on neither inherent unlawfulness nor another branch of government.

There is a fundamental difference between regulating the legal profession and defining the elements of a crime. There is nothing wrong with relying on GR 24 to determine civil responsibility for practicing law without a license. But that was not how GR 24 was used here. Mr. Yishmael was exposed to criminal liability. When that is the case, only the legislature that has the power to define the elements of the offense. *State v. Ramos*, 149 Wn. App. 266, 276, 202 P.3d 383 (2009). Because that did not happen here, reversal is required. *Id.*

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

By relying on GR 24, the prosecution argues that “practice of law” is not vague. Brief of the Respondent at 16. And while the government’s expert argued at trial that GR 24 merely codified existing case law, neither Mr. Boehner nor the respondent actually cite the cases he relied on to made this assertion. *Id.* This Court should reject the government’s argument and instead hold that, for criminal liability, the term “practice of law” is unconstitutionally vague.

The government relies on Gr 24 to argue “practice of law” is properly defined, but this Court should not. GR 24 defines “practice of

law” for regulatory purposes. This is not the same as defining it for criminal liability. If it were, this Court would be guided by the above argument on separation of powers, as explained in *Gresham*. 173 Wn.2d at 428–29. The government cannot have it both ways. If GR 24 defines the practice of law, it violates the separation of power; if it does not, it cannot be used to define an otherwise unconstitutionally vague term.

“Practice of law” is not an easily defined term. Washington’s courts have struggled with a definition when trying to define criminal liability, stating “practice of law” it means “doing or practicing that which an attorney or counselor at law is authorized to do and practice”. *Chamberlain*, 132 Wash. at 524. Even civilly, our courts have recognized that “practice of law” does not lend itself easily to a precise definition. *Washington State Bar Ass’n v. Great W. Union Fed. Sav. & Loan Ass’n*, 91 Wn.2d 48, 54, 586 P.2d 870 (1978). And even with GR 24, the trial prosecutor conceded the difficulty in defining this term, by asking the court to allow an expert to testify at trial. RP 747. The testimony made clear that “practice of law” is a vague term. Law Professor Boerner had to explain to the jury what GR 24 prohibited. RP

481. He then analyzed Mr. Yishmael's conduct for the jury, arguing that it fell within the GR 24's definition. RP 485.

And while the prosecutor argues that this Court must rely on *State v. Hunt* to find the statute constitutional, there are compelling reasons to distinguish *Hunt*. 75 Wn. App. 795, 805, 880 P.2d 96, *rev. denied*, 125 Wn.2d 1009 (1994); *see also* Brief of Respondent at 13. *Hunt* relies on cases involving disciplinary proceedings and civil proceedings. *Id.* at 802. Additionally, the *Hunt* Court did not examine whether Mr. Hunt had a First Amendment right to act. Here, Mr. Yishmael's actions implicated the First Amendment. CP 525. As such, *Hunt* does not apply. 75 Wn. App. at 810; *see also State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (when First Amendment violations are alleged, the scope of the inquiry is not merely on the facts as applied).

Were the bar seeking civil sanctions against Mr. Yishmael, the definition contained in GR 24 would be sufficient. But because this is a criminal action, the definition of "practice of law" must satisfy the constitutional protections of the Fourteenth amendment and article one, section 22. For criminal purposes, the definition of practice of law is unconstitutionally vague.

3. There was insufficient evidence to support Mr. Yishmael's conviction for unlawful practice of law because his conduct does not fall within the conduct made unlawful by RCW 2.48.180.

Relying on Professor Boerner's opinion, the government asserts that it provided sufficient evidence Mr. Yishmael engaged in the unlawful practice of law. *Id.* at 30. This Court should hold otherwise and find the government presented insufficient evidence that Mr. Yishmael was engaged in the practice of law.

The testimony made clear that Mr. Yishmael never held himself out to be a lawyer. RP 618. None of the witnesses who testified ever thought he was a lawyer. RP 324, 395, 488, 618. Professor Boerner also testified he could find no evidence Mr. Yishmael held himself out to be a lawyer. RP 488.

And while Professor Boerner argued Mr. Yishmael's conduct fell within the definition of practice of law found in GR 24, it does not fall within practice described in RCW 2.48.180. In examining RCW 2.48.180(2), it is apparent that Mr. Yishmael's conduct could not be described by any of the prohibited acts.

The government's simple analysis of what constitutes practicing law casts a wide net. Brief of the Respondent at 30. What Mr. Yishmael did is what many non-lawyer do, either in conversations at the dinner

table or in more formal settings. Every day, school teachers, television commentators, and countless other professions explain legal rights to others. Companies have created business models to provide forms for others, as have non-profit organizations seeking to educate non-lawyers about their legal rights.

At a minimum, there must be some evidence that suggests that Mr. Yishmael acted as a lawyer and held himself out as one. See RCW 2.48.180(2). All of the ways in which a person can be found to practice law, as laid out in the statute, require either that the person holds themselves out to be a lawyer or as someone who has a business interest in law. *Id.* None of those definitions apply to Mr. Yishmael. And as addressed in Mr. Yishmael's opening brief, the only published case to address this appears to be *Janda*. 174 Wn. App. at 238. In *Janda*, there was clear evidence that the defendant attempted to practice law, holding himself out as an attorney and creating legally binding documents. *Id.* at 231. Mr. Yishmael did not in any way represent himself as an attorney or create any documents that had legally binding effect. RP 434, 772. He was always transparent that he was not a lawyer and could not help people in court because he could not practice law. RP 324, 395, 597, 618. None of the witnesses thought differently.

Mr. Yishmael was not practicing law as defined by RCW 2.48.180(2)(a). The government argues meeting the definition of GR 24 is sufficient. Brief of Respondent at 29. It is not. This Court must find Mr. Yishmael's conduct violated the elements of the statute and not the general rule. 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, even if, as the government argues, it met the definition of practice of law as contained in GR 24. Mr. Yishmael asks this Court to hold that the government failed to present sufficient evidence of violating RCW 2.48.180 and order this matter dismissed. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592, *review denied*, 187 Wn.2d 1 (2017).

4. The court improperly commented on the law when it endorsed GR 24 as testified to by the government's expert as the definition of practice of law.

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). The government argues otherwise, asserting that GR 24 is an accurate statement of law and nothing

suggests the trial court commented on the evidence by reading this rule to the jury. Brief of the Respondent at 26.

As soon as the government sought to introduce GR 24 into evidence, Mr. Yishmael objected. RP 100. At the conclusion of the evidence, the government sought to have practice of law defined as described by Professor Boerner and consistent with GR 24. RP 890.

Unlike the jury instruction, none of the examples of what it means to practice law are found in RCW 2.48.180. Instead, the definition provided to the jury was the same as that provided to them by the prosecutor's expert witness. *See* CP 552 (Jury Instruction 20), 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. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). 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. *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)).

Like other cases this Court has analyzed, the instruction in this matter essentially told the jury that Mr. Yishmael's conduct constituted unlawful practice of law. *State v. Sinrud*, 200 Wn. App. 643, 651, 403 P.3d 96 (2017); *see also State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). Instead, it is the duty of the fact finder, and not the court, to determine guilt. *Goodman*, 150 Wn.2d at 783. By instructing the jury that specific evidence, as described Professor Boerner, was sufficient to satisfy the government's burden of proof, the court improperly commented on the evidence. *Brush*, 183 Wn.2d at 558. The remedy for this error is reversal. *Sinrud*, 200 Wn. App. at 652.

5. Unlawful practice of law is not a strict liability offense: a person must intend to practice law without a license in order to be guilty of unlawful practice of law.

The evidence established Mr. Yishmael had no intention of acting as an attorney. The government asserts that unlawful practice of law is a strict liability offense. Brief of Respondent at 19. This Court should reject this argument and hold that unlawful practice of law requires the mens rea of knowledge.

The government conducts an analysis of the factors a court will look at to determine whether a statute was intended to impose strict liability, finding all but the last factor to favor strict liability. Brief of

Respondent at 26. Mr. Yishmael agrees that because the statute is silent, this Court should consider the factors defined in *State v. Bash* to determine whether this Court should find this is an unusual circumstance where there is no mens rea required to commit the offense. 130 Wn.2d 594, 604-05, 925 P.2d 978 (1996). Because this analysis was already conducted in Mr. Yishmael's opening brief it will not be reexamined here. *See* Opening Brief of Appellant at 44.

In determining whether unlawful practice of law is a strict liability offense, this Court should recognize what the prosecutor did not, which is that strict liability offenses are generally disfavored. *State v. Anderson*, 141 Wn.2d 357, 361-63, 5 P.3d 1247 (2000); *Bash*, 130 Wn.2d at 606. Like *Anderson*, this Court should be mindful that a statute will not be deemed a strict liability statute where it would criminalize a broad range of innocent behavior. 141 Wn.2d at 363. And while the prosecutor argues otherwise, creating a strict liability offense will criminalize a broad range of innocent behavior. In addition to school teachers instructing students on the law, anytime a person explains legal rights to another they are in danger of practicing law.

This may affect people trying to buy a house,¹ signing liability waivers before you play sports,² or having your privacy rights explained to you before you speak to your primary care physician.³ The law never intended for this innocent conduct to be criminalized. Like Mr. Yishmael, many of these people are paid for their work, including the school teacher, bank teller, and medical office receptionist. None of them, including Mr. Yishmael, are guilty of unlawful practice of law. Reversal is therefore required.

6. Mr. Yishmael requested the jury be instructed in accordance with the law; the court's failure to provide the jury with his requested instructions deprived Mr. Yishmael of his right to present a defense.

Mr. Yishmael requested instructions on practice of law consistent with RCW 2.48.180 and he proposed knowledge as an essential element of unlawful practice of law. The prosecutor argues that it was not error to deny Mr. Yishmael his right to have instructions that would enable him to present his defense. Brief of Respondent at

¹ *Should You Hire a Real Estate Agent or Lawyer to Buy a House?*, NOLO <https://www.nolo.com/legal-encyclopedia/hire-real-estate-agent-or-lawyer-29527.html>.

² Stephanie Rabiner, *Should You Sign a School Sports Waiver?* Findlaw (2012) <http://blogs.findlaw.com/injured/2012/04/should-you-sign-a-school-sports-waiver.html>.

³ *Your Rights Under HIPAA*, <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>.

31. Instead, he argued that the prosecutor's requested instruction on GR 24 allowed Mr. Yishmael to properly argue his case. In addition, the government argues, consistent with the argument that knowledge is not an element of the crime charged, that no such instruction was required.

Brief of Respondent at 32.

This Court should hold that Mr. Yishmael's right to present a defense was violated by the failure to instruct the jury with regard to his requested instructions. 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.*

B. CONCLUSION

For all of the errors raised in Mr. Yishmael's opening brief, he asks this Court to reverse his conviction.

DATED this 28th day of March, 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**

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)	
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)	NO. 76802-6-I
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)	
NAZIYR YISHMAEL,)	
)	
Appellant.)	

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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