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NO. 96775-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NAZIYR YISHMAEL,

Appellant.

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

PETITIONER'S SUPPLEMENTAL BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION

Naziyr Yishmael did not intend to commit a crime when he informed people who joined his organization that adverse possession was a way to find stable housing. While Mr. Yishmael explained the rules of adverse possession and how to find abandoned homes, he was always clear he was not an attorney and could not provide legal advice.

Unlawful practice of law is not a strict liability offense. The Court of Appeals holding exposes countless persons who innocently and unintentionally provide advice in their daily work lives, including police officers, teachers, and anyone helps a customer fill out a legal form to liability. This was not the legislature's intent.

This Court should also hold that the use of GR 24 to define practice of law violates the separation of powers doctrine. This Court cannot define the elements of a crime through its rulemaking procedures, especially as this rule, like all others, is subject to modification without legislative oversight.

On its face, unlawful practice of law is a vague term that is not easily definable. Mr. Yishmael's trial demonstrated the average person does not easily understand the term, as the prosecution needed an expert and a recitation of a court rule to explain the term to the jury.

This Court should find that the failure of the legislature to define this term makes it unconstitutionally vague.

Likewise, by endorsing the expert's opinion at trial, this Court should hold the trial court improperly commented on the evidence.

B. ISSUES PRESENTED

1. Is unlawful practice of law a strict liability offense?
2. Is the separation of powers doctrine violated by permitting this Court to define "practice of law" for the purpose of criminal prosecution?
3. Is the term "practice of law" unconstitutionally vague?
4. Was the trial court's endorsement of the expert's definition of "practice of law" an improper comment on the evidence?

C. STATEMENT OF THE CASE

Many of the people Naziyr Yishmael helped find homes when he was a realtor found themselves unable to stay in their homes during the recession of 2009. RP 822. During this time, Mr. Yishmael saw an increasing number of abandoned homes. RP 823. In response to this, he created an organization to help people keep their homes. RP 822.

Mr. Yishmael used his organization to help people who could not afford to stay in their homes take adverse possession of these

abandoned homes. RP 823. Mr. Yishmael gave lectures on adverse possession and the steps he believed were needed to acquire a home through adverse possession. RP 826, 833, 836.

Always, Mr. Yishmael was clear he was not a lawyer and could not represent people in court. RP 324, 395, 597, 618. Mr. Yishmael never held himself out to be a lawyer. RP 488.

Mr. Yishmael worked with a number of people to help them find homes through adverse possession. RP 321, 512, 608. They paid Mr. Yishmael for his information, which included lists of abandoned homes. RP 326, 514, 614. They used his list to occupy abandoned homes, which they then filed notice with King County of their intent to occupy. RP 334, 528, 672. They entered the homes, changed the locks, and resided in them. RP 338, 353, 539-40, 570. They cared for the homes and spent money on them. RP 356, 574, 685. They placed notices on the homes, including no-trespass signs. RP 541, 628.

Mr. Yishmael helped many people find abandoned homes but never represented he was an attorney to anyone. RP 324, 597, 618. He told everyone he could not represent them in court. RP 326. They paid him for his information and help. RP 326, 514, 849.

Nonetheless, the government charged Mr. Yishmael with unlawful practice of law. CP 1-27.

At trial, the prosecutor called retired Seattle University School of Law Professor David Boerner to explain what “practice of law” meant. RP 99. The professor testified about what specific actions of Mr. Yishmael constituted “practice of law.” RP 99-100. Because RCW 2.48.180 does not define the term “practice of law,” the professor’s testimony focused on GR 24. The professor read the rule to the jury, which the court submitted to the jury as evidence. RP 481-83.

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

D. ARGUMENT

1. Unlawful practice of law is not a strict liability offense.

Unlawful practice of law is not a strict liability offense. “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). Holding that unlawful practice of law is a strict liability offense exposes innocent persons to criminal liability. This Court should hold that the prosecution was required to prove a mental element in order to find Mr. Yishmael guilty of this offense.

a. The law does not does not favor offenses that lack a mental element.

The law generally disfavors criminal offenses that lack a mental element. *State v. Bash*, 130 Wn.2d 594, 606, 925 P.2d 978 (1996); *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). It will read a mental state into a crime where it believes the legislature intended a mental state or where the common law requires one. *Bash*, 130 Wn.2d at 605-606. Review of this issue is de novo. *State v. Wilson*, 170 Wn.2d 682, 687, 244 P.3d 950 (2010).

Where legislative intent is not clear, this Court will examine eight factors. *Bash*, 130 Wn.2d at 605-606. 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. This Court must construe the statute 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 is a “public welfare offense,” the extent to which a strict liability reading of the statute encompasses 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 expected prosecutions. *Anderson*, 141 Wn.2d at 363. These factors must be read in light of the principle that strict liability offenses are disfavored. *Bash*, 130 Wn.2d at 606.

b. The legislative history and the common law do not demonstrate the legislature intended to make unlawful practice of law a strict liability offense.

First, this Court must determine whether the legislature intended for unlawful practice of law to be a strict liability offense by reviewing the language of the statute and the legislative history. *Bash*, 130 Wn.2d at 605. Neither of these sources indicate the legislature intended for unlawful practice of law to be a strict liability offense. *See* RCW 2.48.180; Washington Senate Bill Report, 2001 Reg. Sess. H.B. 1579.

- c. *The legal profession was not regulated solely for the public welfare, but also for the financial gain of persons who became licensed attorneys.*

The regulation of the legal profession did not start as a way to protect the public, but rather in response to the rapid growth of corporate work that overlapped with traditional legal work. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 7 (1981). In many states, the reliance on the judiciary to regulate the industry was born out of the fact that the bar associations did not have significant power in their legislatures. Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”--The Role of the Organized Bar in the Expansion of the Court’s Inherent Powers in the Early Twentieth Century*, 46 Cal. W. L. Rev. 65, 125 (2009). And while the commentary to GR 24 states the purpose of regulating the legal profession is to protect the public, this Court should be mindful that the original reasons for regulating the industry were different. See Karl Tegland, *GR24. Definition Of The Practice Of Law*, 2 Wash. Prac., *Rules Practice GR 24* (8th ed.).

d. Innocent conduct will be criminalized if this Court determines unlawful practice of law is a strict liability offense.

Even statutes intended to be public welfare offenses will not be treated as strict liability offenses if they criminalize a broad range of innocent behavior. *Bash*, 130 Wn.2d at 607–08 (citing *Staples v. United States*, 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)). Unlawful practice of law is such a statute, as a broad array of behavior is criminalized if a mental element is eliminated from the statute.

Even now, this Court is examining under its rule making authority whether online resources constitute unlawful practice of law. The WSBA Practice of Law Board has proposed amending GR 24, recognizing current legal software and online services available in Washington may violate current court rules. *See Practice of Law Board, GR 24 – Changes to GR 24 Definition of Practice of Law* (hereinafter *Changes to GR 24*).¹ There are many examples of these sites online, which may be unlawful, even though they have no intent to break the law. *See e.g. willing.com*,² *LegalZoom*,³ and *Thompson Reuters*.⁴

¹https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2712.

²<https://willing.com/>

³<https://www.legalzoom.com/>

⁴<https://legal.thomsonreuters.com/en/solutions/fast-track-drafting>

Many other people who are paid to provide to provide and explain forms to clients may also violate this statute, including bank tellers, receptionists, nurses, and police officers, all of whom explain legal principles to persons as part of their daily work.⁵ Making unlawful practice of law a strict liability offense would affect other innocent conduct as well. It could inculcate people when they explain your rights when buying a house,⁶ signing liability waivers,⁷ or having other privacy rights explained.⁸ Even those who are paid as educators or to provide “know your rights” talk may be unintentionally practicing law, if the statute does not require a mental element.⁹

And this problem is not solved by allowing for an affirmative defense, which places the burden of proof on the accused and which does not contemplate many of the above examples. GR 24(7). This

⁵ See, e.g., WSECU, *Privacy Notice* (January 2016), <https://wsecu.org/Documents/PDFS/Privacy%20Notice.pdf>; Children’s Hospital, *Notice of Privacy Practices* (January 10, 2018), <https://www.seattlechildrens.org/pdf/pi397.pdf>; Washington State Patrol, *Rules of the Road*, <http://www.wsp.wa.gov/driver/rules-of-the-road/>.

⁶ *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>.

⁷ 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>.

⁸ *Your Rights Under HIPAA*, <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>.

⁹ *The Constitution in the Classroom*, American Constitution Society, <https://www.acslaw.org/conclass>; *Teaching the Constitution*, KCTS9, <https://kcts9.pbslearningmedia.org/collection/teaching-the-constitution.>, *Know Your Rights*, CAIR Washington, <http://cairwa.org/know-your-rights>.

Court should not find this defense enough to justify making unlawful practice of law a strict liability offense.

e. Unlawful practice of law carries serious consequences, as both a misdemeanor and felony offense.

Unlawful practice of law carries serious consequences. Even a first conviction for unlawful practice of law is a crime and any subsequent conviction is a felony. RCW 2.48.180(3). And while the Court of Appeals suggested otherwise, there is no such thing as a low stakes criminal conviction. Misdemeanor convictions may not result in significant incarceration, but the long-term effects can be devastating. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J. (Aug. 18, 2014)¹⁰ Misdemeanor convictions prevent people from getting professional licenses, find jobs, and keep their housing. Jenny Roberts, *Informed Misdemeanor Sentencing*, Hofstra Law Review, Vol. 46, Iss. 1, 172-73 (2018). The consequences for a felony are even more severe. Sara Berson, *Beyond the Sentence – Understanding Collateral Consequences*, National Institute of Justice, NIJ Journal No. 272

¹⁰ <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

(originally posted May 2013).¹¹ This factor weighs in favor of requiring mens rea. *Anderson*, 141 Wn.2d at 364-65.

f. Because there are civil remedies to restrict the unauthorized practice of law, the seriousness of the harm is mitigated.

The seriousness of the harm also weighs in favor of requiring knowledge. *Anderson*, 141 Wn.2d at 365. Persons who engage in the unauthorized practice of law may be enjoined and fined \$5,000 civilly. RCW 2.48.180(8). This is a significant penalty and is sufficient to prevent unintentional practice of law. Especially in light of the ability of the Court to enforce civil penalties, this Court should presume more is required to make the conduct unlawful. GR 24. Requiring knowledge distinguishes this offense from the penalties prohibited under GR 24.

g. A person should not have to determine which court rule defines an element of a crime to avoid criminal liability.

While GR 24 is available to the public, there is no reference to the rule in RCW 2.48.180. Mr. Yishmael could not have been expected to determine GR 24 defines unlawful practice of law, where this does not occur anywhere else in the criminal code. This factor does not weigh in favor of strict liability.

¹¹ <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>. (last visited July 10, 2019).

h. Requiring the prosecution to prove a mental element does not place a great burden on the government.

This Court should be reluctant to conclude that requiring the government to prove a mental element places an undue burden on the prosecution of unlawful practice of law. *See Anderson*, 141 Wn.2d at 365. Acts that are illegal under this statute must be conducted in the open. It is impossible to commit the crime without witnesses. In addition, it is likely there would be legal documents and other physical evidence the prosecution could use to show intent. As in *Anderson*, this Court should be reject the argument that requiring a mental element creates an undue burden on the government. *Id.*

i. There are very few prosecutions for this offense, further reducing the burden on the government to prove a mental element.

The fewer prosecutions for an offense, 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 been reviewed on appeal, it should be assumed very few people are prosecuted for this offense. Likewise, proving 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.

j. *This Court should hold unlawful practice of law requires proof of a mental element.*

The fact that a statute does not specify a mental state does not mean none exists. *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). The “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.” *Morissette*, 342 U.S. at 250. This rule of construction reflects the basic principle that “wrongdoing must be conscious to be criminal.” *Id.*, at 252. Even if a statute has a mental state in some sections but omits it in others, this Court should still presume the legislature intended to include a mental state in the contested section. *Elonis*, 135 S. Ct. at 2009.

After considering all the factors that assist in determining whether the legislature intended to place the burden of proving a culpable mental state on the government, this Court should conclude that it did. The harshness of the penalty, the legislative history, and an absence of sufficient danger to the public mitigate in favor of finding that a mental element is required. Most importantly, innocent conduct may fall within the wide net cast by this statute. This Court should hold proof of a mental state is required in order to prove unlawful practice of law.

2. Using a court rule created by this Court to define “practice of law” violates the separation of powers doctrine.

- a. The trial court relied on GR 24, created by this Court through its rulemaking authority, to define “practice of law.”*

RCW 2.48.180 makes the unlawful practice of law a crime, but does not define what it means to practice law. In Mr. Yishmael’s case, the court relied on GR 24 to define the term. This process exceeded judicial authority and violates the separation of powers doctrine. *State v. Gresham*, 173 Wn.2d 405, 428–29, 269 P.3d 207 (2012) (judiciary has no legislative power, other than to make rules relative to pleading, practice, and procedure).

Separation of powers 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). It 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).

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 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 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. *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012). 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 legislature made unlawful practice of law illegal in 1933. Session Laws of 1933, c 94 § 14; RRS § 138-14 (1993). The judiciary did not create GR 24 until 200, when it used its rulemaking authority to create a general rule. Tegland, 2 Wash. Prac., *Rules Practice GR 24*.

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

This Court's authority to define the role of an attorney for the purpose of regulating the profession does not give it the ability to define the elements of a crime through its rulemaking authority. *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 907, 890 P.2d 1047 (1995). 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 through rulemaking 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.

b. Reliance on the court rule to prove Mr. Yishmael unlawfully practiced law was not harmless.

From the onset, the government relied on GR 24 to prove Mr. Yishmael guilty. Their primary witness on this issue was a law school professor who read the rule into evidence. RP 99, 481-83. The rule itself was then introduced at evidence and was read to the jury as part of the court's instruction. RP 480, CP 552 (Jury Instruction 20).

This error should be presumed prejudicial. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015) (Instructional error is presumed prejudicial unless it was given on behalf of the party in whose favor the verdict was returned). This Court should find the reliance on GR 24, where Mr. Yishmael consistently objected, prejudiced him. Even under a harmless error analysis, this Court should find there is a reasonable probability the court's errors materially affected the jury's verdict. *Gresham*, 173 Wn.2d at 433. This Court should reverse Mr. Yishmael's conviction.

3. Unlawful practice of law is unconstitutionally vague.

a. RCW 2.48.180 fails to define "practice of law", a term that does not lend itself to an easy definition.

"Practice of law" does not lend itself to an easy 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) (hereinafter *Great Western*). As an undefined term *in the criminal code*, this Court should hold RCW 2.48.180 is unconstitutionally vague. U.S. Const. amend. 14; Const. art. I, § 22.

The constitution demands 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 unconstitutionally vague when an average person cannot generally determine which persons are regulated, what conduct is prohibited, or what punishment is imposed. *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). Washington’s criminal statute does not define “practice of law.”

The only Washington decision on vagueness is *State v. Hunt*, where the Court of Appeals held “practice of law” was not vague. 75 Wn. App. 795, 805, 880 P.2d 96 (1994). But *Hunt* does not rely on criminal cases, instead looking to disciplinary proceedings and civil matters that relied on the court rule to make this determination. *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 (1974). Importantly, Mr. Yishmael does not argue GR 24 fails to provide sufficient definition for this Court’s purposes. Instead, the question is whether RCW 2.48.180 provides a sufficient definition for criminal purposes.

In the context of a criminal prosecution, this Court has long recognized that “practice of law” is a difficult term to define. *State v. Chamberlain*, 132 Wash. 520, 524, 232 P. 337 (1925); *see also Great Western*, 91 Wn.2d at 54. Even for regulatory purposes, this Court adopted GR 24 because the term was so difficult to define. Tegland, 2 Wash. Prac., *Rules Practice GR 24*. Even now, this Court is considering amending GR 24 because online services used to create legal forms may be unintentionally violating Washington’s practice of law rule. *See Changes to GR 24*. It cannot be expected that the average person would understand what this term means, especially where it is only defined through this Court’s rulemaking authority.

For criminal purposes, RCW 2.48.180 is too vague for the average citizen to understand. Douglass, 115 Wn.2d at 178. No one at Mr. Yishmael's trial seemed to disagree that "practice of law" was difficult to define. The expert acknowledged the statute does not define "practice of law" and he relied instead on the court rule. RP 489. The prosecution then had the court rule read and entered into evidence. RP 100, 474, 480. Even then, the court used the rule in its closing instructions to define the term "practice of law." CP 552 (Jury Instruction 20). Put simply, this term is vague.

b. Mr. Yishmael suffered prejudice.

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, § 22. As argued above, it is an unconstitutional delegation of power for the legislature to have given authority to define this term to this Court. Without GR 24, the definition of "practice of law" is unconstitutionally vague. Because this rule was central to the prosecution's proof Mr. Yishmael was engaged in the unlawful practice

of law, this Court cannot be confident this error did not affect the verdict. This Court should reverse Mr. Yishmael's conviction.

4. The trial court commented on the evidence when it affirmed the expert's definition of "practice of law" in its closing instructions.

a. The trial court improperly endorsed the government's definition of "practice of law" when it included its definition of the term in its closing instructions.

Washington's constitution prohibits judges from commenting on the evidence at trial. Const. art. IV, § 16. When the court adopted the government's definition of "practice of law" it resolved a contested factual issue, improperly commenting on the law. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). By doing this, the trial court clearly indicated to the jury that the evidence presented at trial was sufficient to support the government's theory. *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980).

At the conclusion of the evidence, the prosecution proposed a jury instruction that defined "practice of law" as it is defined in GR 24. RP 890. Over defense objections, 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 887, 894, CP 552 (Instruction 20).

This definition is not contained in RCW 2.48.180(2)(a). Instead, it was the definition provided by the expert. RP 99-100. In endorsing the same language the expert 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, *Painter*, 27 Wn. App. at 714. At the very least, the court implied that the prosecution had met this element 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).

This instruction also conflicts with this 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; *see also State v. Sinrud*, 200 Wn. App. 643, 652, 403 P.3d 96 (2017). The instruction here essentially told the jury Mr. Yishmael’s conduct constituted practice of law. *Painter*, 27 Wn. App. at 714. 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.”).

b. The court's comment on the evidence prejudiced Mr. Yishmael.

Where a judicial comment violates article IV, § 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 no prejudice could have resulted from the improper instruction. *Id.*

Mr. Yishmael was prejudiced by the improper comments. There was no factual dispute about what Mr. Yishmael did, but only whether it constituted a crime. Mr. Yishmael did not deny he told others about adverse possession, provided paperwork for them to fill out, or help them find abandoned properties. The only question was whether Mr. Yishmael practiced law when he provided his assistance. The court instructed the jury that he did. This was an improper comment on the evidence requiring a new trial.

E. CONCLUSION

Mr. Yishmael asks this Court to hold that unlawful practice of law is not a strict liability offense. This Court should also hold that using GR 24 to define “practice of law” violates the separation of powers doctrine. Further, the statute created by the legislature is unconstitutionally vague. And by endorsing the government’s

definition of “practice of law” in its closing the instructions, the trial court improperly commented on the evidence. Reversal of Mr. Yishmael’s conviction is required.

DATED this 11th day of July 2019.

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 SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 96775-0
 v.)
)
 NAZIYR YISHMAEL,)
)
 Petitioner.)

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Fax (206) 587-2710

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