SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Petitioner, v. DARREL SCOTT FRANCIS, Respondent.	)	Arizona Supreme Court Case No. CR-17-0062-PR Arizona Court of Appeals Case No. 1 CA-CR 16-0051 Navajo County Superior Court Case No. CR2012-00087 Case No. CR2012-00700

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

There are few concepts so foundational to our system of criminal justice than the principle that the commission of a crime requires both a prohibited act and a culpable mental state. As early as the eighteenth century, Blackstone noted that criminal conduct required both "a vicious will" and "an unlawful act consequent upon such vicious will." 4 Blackstone's Commentaries on the Laws of England 21. More recently, Justice Jackson wrote that:

> 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 (1952).

In *State v. Francis*, 241 Ariz. 449, 388 P.3d 843 (App. 2017), the court of appeals recognized that not only did this "universal and persistent belief in the freedom of human will" require the State to prove that Francis *knowingly* possessed contraband, but that the Arizona statute clearly required it. The State now urges this Court to adopt the holding of a deeply flawed dissenting opinion that confuses the issues and attempts to distinguish clear Arizona case law by applying out-of-state authority interpreting an entirely different statute. This Court should decline the State's invitation to reject centuries of Anglo-American jurisprudence and rewrite clear Arizona statutory law, and should instead affirm the holding of the court of appeals.

INTEREST OF AMICUS CURIAE

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

BACKGROUND

On October 1, 2014, Darrel Scott Francis was booked into the Navajo County Jail Annex in Show Low. [Record Transcript ("R.T."), 12/2/2015, at 111:13-18.] When he was booked, all of his possessions, including his clothing, a pair of boots, and a cell phone, were taken from him. [*Id.* at 112:15-21; 114:1-4.]

On October 2, while Francis was still at the Show Low Annex, he asked to call his attorney. [*Id.* at 118:18-20.] The detention officer who was working at the time tried to find the phone number for Francis' attorney, but was unable to locate a working number. [*Id.* at 118:21-24.] When Francis told the detention officer that he had saved his attorney's phone number on his cell phone, the detention officer

opened up the cell phone, found the number, wrote it down, and then the phone died. [*Id.* at 118:24-119:4.]

While the detention officer was retrieving his attorney's number, Francis sat, restrained, on one side of a window with a small opening at the bottom for passing paperwork from one side to the other. [*Id.* at 122:7-12; 123:11-16.] Francis' property was located on the *other* side of the partition. [*Id.* at 119:8-25; 121:6-21.] The detention officer does not remember what happened to the phone after it died, but when Francis arrived at the main jail in Holbrook, he was holding the dead cell phone in his hand. [*Id.* at 132:21-23; R.T., 12/3/2015, at 13:6-17.]

Francis was charged with two counts of promoting prison contraband. *Francis*, 241 Ariz. at 450 ¶ 3, 388 P.3d at 844. In preliminary motions, his attorney argued that the State must prove that Francis knew the item possessed was contraband. [R.T., 10/27/2015, at 49:9-19.] The trial court rejected that argument, and held that the offense "only requires that he knowingly took contraband into the facility, or that he had it while he was being transported." [*Id.* at 52:2-6.] At trial, Francis' attorney argued that the cell phone was given to Francis by a detention officer who inadvertently slipped the cell phone into Francis' boots, which he had to wear during his trip from the Annex to the main jail facility, and that because of this, Francis had no reason to believe that possession of the cell phone was prohibited. [R.T., 12/2/2015, at 109:8-22.] Nonetheless, because the jury was not

instructed that Francis had to know that the cell phone was contraband, Francis was convicted by a jury on both counts and timely appealed. *Francis*, 241 Ariz. at 450 ¶ 1, 388 P.3d at 844.

In a 2-1 decision, the court of appeals reversed the conviction. *Id.* The majority reasoned that the mental state in the promotion of prison contraband statute applied to every element of the offense, and that the State thus had to prove "that the defendant knew the object was contraband." *Id.* at 453 ¶ 16, 388 P.3d at 847. The dissenting opinion would have affirmed on the basis that "proof of knowledge does not require any knowledge of the unlawfulness of the act or omission." *Id.* at 455 ¶ 25, 388 P.3d at 849 (Thompson, J., dissenting) (internal quotation marks omitted).

ARGUMENT

I. THE STATUTE UNAMBIGUOUSLY REQUIRES PROOF THAT THE DEFENDANT KNOWINGLY COMMITTED ALL ELEMENTS OF THE OFFENSE

This is a simple case of statutory construction involving the interplay between two criminal statutes. First, A.R.S. § 13-202(A) establishes that when a criminal statute requires a culpable mental state, "the prescribed mental state *shall apply to each such element* unless a contrary legislative purpose plainly appears." (emphasis added). Second, A.R.S. § 13-2505(A)(3) establishes that the culpable mental state required is *knowingly* and further establishes that the possession of

contraband is an element of the offense. By reading § 13-202(A) and § 13-2505(A)(3) together, the clear conclusion is that the State must prove that the item possessed was contraband and that the defendant knew this to be so.

As this Court has frequently noted, "[w]hen the plain text of a statute is clear and unambiguous, it controls unless an absurdity or constitutional violation results." *Sell v. Gama*, 231 Ariz. 323, 327 ¶ 16, 295 P.3d 421, 425 (2013) (internal quotations omitted). Furthermore, criminal statutes must "give fair warning of the conduct proscribed" and their interpretation must "promote justice." *State v. Holle*, 240 Ariz. 300, 302 ¶ 10, 379 P.3d 197, 199 (2016).

Arizona law establishes four culpable mental states: intentionally, knowingly, recklessly, and with criminal negligence. A.R.S. § 13-105(10). When a statute defining an offense establishes the culpable mental state required to prove the commission of that offense without distinguishing among the elements of the offense, "the prescribed mental state *shall apply to each such element* unless a contrary legislative purpose plainly appears." § 13-202(A) (emphasis added).

A person commits the offense of promoting prison contraband:

> By knowingly making, obtaining or possessing contraband while being confined in a correctional facility or while being lawfully transported or moved incident to correctional facility confinement.

§ 13-2505(A)(3). [1] Thus, the elements of promoting prison contraband are: (1) possessing; (2) contraband; (3) in a correctional facility or while being moved incident to confinement in a correctional facility.

This Court has held that, for the crime of possession, the act of possessing the item and the identity of the item possessed are separate elements that must be proved separately. *See State v. Cota*, 191 Ariz. 380, 382 ¶ 8, 956 P.2d 507, 509 (1998) ("Possession . . . requires only that the defendant exercise control over the drug, have knowledge of the drug's presence, and know that the substance is in fact marijuana."). This is consistent with how other states have interpreted their substantially similar prison contraband statutes. *See, e.g., People v. Villapando*, 984 P.2d 51, 55 (Colo. 1999) ("the elements of the crime of possession of contraband in the first degree are that: (1) a person; (2) confined in a detention facility; (3) knowingly obtains or has in his possession; (4) contraband as listed in section 18-8-203(1)(a) or alcohol.").

Applying § 13-202(A) to the elements of the Arizona offense, it is clear that, since it is an element of the offense that the item possessed is contraband, the State

[1] § 13-2505(A)(1) provides that one may commit the offense by "knowingly taking contraband into a correctional facility or the grounds of a correctional facility" and subsection (2) provides that one may commit the offense by "knowingly conveying contraband to any person confined in a correctional facility." However, there was no evidence at trial that Francis conveyed anything to anyone in a correctional facility, and there was evidence presented that he was both "confined in a correctional facility" and "moved incident to correctional facility confinement," so he appears to have been convicted under subsection (3) of the statute.

must prove that the defendant knew that the item was contraband. Indeed, the court of appeals recognized as much thirty years ago. In *State v. Bloomer*, 156 Ariz. 276, 279, 751 P.2d 592, 595 (App. 1987) the court of appeals held that the State had to prove that the defendant "while confined in a correctional facility, possessed a substance which was contraband, that he knowingly possessed the substance, *and that he knew it was contraband*" (emphasis added).

In its brief before the court of appeals, the State argued that these statements from *Bloomer* were dicta, and thus not binding.[2] The court of appeals nonetheless adopted the reasoning of *Bloomer* in its opinion. *Francis*, 241 Ariz. at 454 ¶ 19, 388 P.3d at 848. The State re-urges this point in its supplemental brief. But it is wrong. In *Bloomer*, the issue was whether the defendant, who knew that he possessed an illegal substance, though was mistaken about the exact *type* of illegal substance, was nonetheless culpable for his wrongful conduct. 156 Ariz. at 278, 751 P.2d at 594. By laying out exactly what knowledge was required for a culpable mental state, the court's statement that the defendant "had to know it was

[2] Opinions of the court of appeals are merely *persuasive*, and not *binding*, upon other panels of the court of appeals. *See, e.g. White v. Greater Arizona Bicycling Ass'n*, 216 Ariz. 133, 137–38, 163 P.3d 1083, 1087–88 (App. 2007) (overruled on other grounds by *Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, 273 P.3d 645 (2012)). Nonetheless, a department of the court of appeals should follow opinions of its coordinate departments "unless . . . convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable." *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983).

contraband" was essential to the holding, and therefore was not dicta. *Alejandro v. Harrison*, 223 Ariz. 21, 25, 219 P.3d 231, 235 (App. 2009) (judicial statement is dicta, and thus nonbinding, only if "unnecessary to its decision.")

While this Court is not bound by *Bloomer*, neither should it lightly overturn thirty-year-old precedent. *See Ry-Tan Const., Inc. v. Wash. Elem. Sch. Dist. No. 6*, 210 Ariz. 419, 424 ¶ 28, 111 P.3d 1019, 1024 (2005) ("[P]eople should know what their rights are as set out by judicial precedent and having relied on such rights in conducting their affairs should not have them done away with by judicial fiat.") (quoting *White v. Bateman*, 89 Ariz. 110, 113, 358 P.2d 712, 713-14 (1961)). Furthermore, the legislature has not modified the statute since *Bloomer*, and this Court generally presumes "that the legislature was aware of existing case law and when it retains the language upon which the decision was based, it approves that interpretation." *Smith v. Lewis*, 157 Ariz. 510, 515, 759 P.2d 1314, 1319 (1988).

The dissent points to a California case, *People v. Romero*, 64 Cal.Rptr.2d 16 (1997), and the State to a federal case, *United States v. Holmes*, 607 F.3d 332 (3d Cir. 2010), to argue that the Arizona statute does not require knowledge that the item possessed is contraband. But neither the California nor the federal statute have an analogue of § 13-202(A), specifically applying a culpable mental state to *each element* of the offense. The court of appeals already distinguished the California case. *See Francis*, 241 Ariz. at 454 ¶ 21, 388 P.3d at 848. The federal

statute, moreover, does not even include a culpable mental state. *Holmes*, 607 F.3d at 335 ("The text of § 1791(a)(2) includes no scienter requirement."). These cases should not guide this Court in its interpretation of the Arizona statute.

Furthermore, the State's contention that the federal authorities support its position is also not entirely correct. Although *Holmes* appears to support the State's position, a more recent decision of the Supreme Court supports Francis'. In *McFadden v. United States*, 135 S.Ct. 2298, 2306 (2015), the Supreme Court held that the United States could demonstrate the "knowing" mental state in a prosecution under the Controlled Substances Act "either by knowledge that a substance is listed [in the Act], or by knowledge of the physical characteristics that give rise to that treatment."

The statute at issue in *McFadden* made it "unlawful for any person knowingly or intentionally . . . to possess . . . a controlled substance." 135 S.Ct. at 2303 (quoting 21 U.S.C. § 841(a)(1)). A separate statute defined the term "controlled substance" by reference to a schedule of listed drugs, 21 U.S.C. § 802(6), and another statute defined "controlled substance analogue" – which the statute treated as a controlled substance – as a substance which possesses certain features. 21 U.S.C. § 802(32)(A). Applying the "knowing" mental state to the "possession" element, the Court concluded that the element could be proven in one of two ways. First, the United States could prove that "a defendant knew that the

substance with which he was dealing is some controlled substance—that is, one *actually listed* on the federal drug schedules . . . regardless of whether he knew the particular identity of the substance." *McFadden*, 135 S. Ct. at 2305 (emphasis added). But because the statute at issue also provided that a substance with certain characteristics, the Court held that the State could also prove knowledge if "a defendant . . . possesses a substance with knowledge of those features." *Id.*

Under the Arizona statute at issue here, contraband is

> any dangerous drug, narcotic drug, marijuana, intoxicating liquor of any kind, deadly weapon, dangerous instrument, explosive, wireless communication device, multimedia storage device or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility or a juvenile secure care facility as defined in § 41-2801, or of any person within a correctional or juvenile secure care facility.

A.R.S. § 13-2501(1). The statute thus defines contraband in two ways – by referencing a list of items that include "dangerous drug[s]" and "wireless communications device[s]," but also by describing certain characteristics, namely "[an] article whose use or possession would endanger the safety, security or preservation of order in a correctional facility." *Id.*

If this Court adopted the reasoning of *McFadden*, it could find that the culpable mental state for the possession elements exists where a defendant *either* knows that the item he possesses is listed in the contraband statute *or* knows that it is an item "whose use or possession would endanger the safety, security or

preservation of order" in the correctional facility. The latter method would not require substantive knowledge of the statute, and so the State's argument that requiring it to prove knowledge that an item is contraband amounts to a "mistake of law" defense is unfounded.

II. REQUIRING THE STATE TO PROVE THAT A DEFENDANT KNOWS WHAT HE POSSESSES IS CONTRABAND DOES NOT CREATE AN "IGNORANCE OF LAW" DEFENSE

The State also contends that the court of appeals' decision disregards the general principle that ignorance does not excuse a person of criminal responsibility by requiring it to prove that Francis knew the cell phone he possessed was contraband. But, as the majority explained, the issue "is not whether Francis knew what he was doing was unlawful; it is whether the requisite culpable mental state of 'knowingly' applies not only to 'making, obtaining or possessing' an object while in custody; but also to the fact that the object falls within the statutory definition of contraband." *Francis*, 241 Ariz. at 452, ¶ 11, 388 P.3d at 846 (quoting § 13-2505(A)(3)). In answering the question in the affirmative, the Court did not conclude that the State must prove Francis knew his actions were unlawful; it concluded that the State must prove he knew the item he possessed was contraband within the meaning of the statute. *See id*. at 453 ¶ 16, 388 P.3d at 846.

Arizona ordinarily does not permit a defendant to assert a mistake of law defense. *See* A.R.S. § 13-204(B); *see also State v. Morse*, 127 Ariz. 25, 31, 617

P.2d 1141, 1147 (1980). A pure mistake of law claim occurs, for example, when all of the elements of a crime are present, but the defendant contends his mistaken belief that his actions were lawful should excuse his conduct. However, a defendant's lack of knowledge is relevant if it tends to disprove the applicable criminal intent as it pertains to an element of the charged offense. *See Morse*, 127 Ariz. at 31, 617 P.2d at 1147 (suggesting that where the knowledge defendant claims he lacked is among the types of knowledge that constitutes an element of a specific intent offense, the State must prove that knowledge to establish that particular element); *see also People v. Urziceanu*, 33 Cal.Rptr.3d 859, 878 (Cal. Ct. App. 2005) (knowledge that a criminal offense exists is required to prove conspiracy to commit that offense); *State v. Wickliff*, 875 A.2d 1009, 1013-14 (N.J. Super. Ct. App. Div. 2005) (noting New Jersey's mistake of law statute does not apply to errors over whether actions are criminal). Here, Francis did not offer his lack of knowledge that the cell phone was contraband to excuse proven unlawful conduct, but rather as evidence that he lacked the culpable mental state to have committed the offense.

Statutes that require proof that a defendant knew his actions were unlawful do not create a mistake of law defense—they impose a heightened mental state requirement. The court of appeals' interpretation of § 13-2505 was merely a proper application of statutory construction to this statute. It simply established

that the statutory language of § 13-2505 requires proof of an additional element in order for a defendant to be convicted of promoting prison contraband. Other Arizona criminal offenses require proof that a defendant knew his conduct was unlawful in order to prove guilt. *See, e.g.*, A.R.S. § 13-1803(A)(2) (a person commits unlawful use of means of transportation if, without intent to permanently deprive, the person is knowingly transported in a vehicle he knows or has reason to know is unlawfully possessed by another); *State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985) (criminal trespass statute requires that defendant be knowingly aware of unlawfulness of his actions). Those statutes have been interpreted as requiring proof that defendant knew his actions were unlawful and have not been invalidated as impermissibly "excusing mistakes of law." The fact that a statute requires as an element of the offense proof of awareness or knowledge that conduct is unauthorized does not create a mistake of law defense.

There is additional support for this position in the federal context. The Supreme Court has explained that a statute does not create a mistake of law exception by requiring a defendant to know his conduct was unauthorized by law if that statute contains a "legal element." *Liparota v. United States*, 471 U.S. 419, 425, n.9 (1985) (requiring government to prove defendant knew his actions were unlawful does not create mistake of law defense where definition of offense contains a legal element); *see also McFadden*, 135 S. Ct. at 2308 (noting that while

ignorance of law is typically no defense to criminal prosecution, a person's lack of knowledge regarding a legal element in definition of offense can be valid defense) (Roberts, C.J., concurring in part and concurring in the judgment); *Morissette*, 342 U.S. 246 (holding that lack of knowledge that one was converting property was a defense to knowingly converting federal property). The *Liparota* Court illustrated this concept as follows:

> In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the "use, transfer, acquisition," etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It is, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized.

471 U.S. at 425 n.9. Similar logic can be applied to Arizona's promoting prison contraband statute because it also contains a legal element. Though it is not a defense to promoting prison contraband that a defendant does not know that possessing contraband while being in a correctional facility is unlawful, it *is* a defense to the charge that he did not know the item he possessed was contraband. The former defense would be an impermissible mistake of law defense, while the latter simply negates an essential element of the crime.

The State's argument that the majority's interpretation "permits a mistake-of-law defense" is premised on the incorrect assumption that § 13-2505 does not require proof that a person knew an item he possessed was contraband. It argues that "[t]he fact that Appellant allegedly did not know it was illegal to take his cell phone into prison is irrelevant because it is a 'mistake of law'—a challenge to the legal effect of the facts known to Appellant at the time." But, as noted above, proper application of statutory construction belies the State's position.

A further review of the statute illustrates why the State should have to prove a defendant knew that what he possessed was contraband. § 13-2505(D) enumerates instances when it is lawful for an inmate to possess items that would ordinarily be considered contraband. For instance, a defendant does not promote prison contraband by possessing or carrying "any tool, instrument or implement used by him at the direction or with the permission of prison officials," even if that item would otherwise be contraband. § 13-2505(D)(1). Nor is it a crime for an inmate to possess contraband that is "authorized by the correctional facilities policies and used at the direction or with the permission of prison officials." § 13-2505(D)(3). The fact that inmates may possess contraband under some circumstances, but not others, makes clear that the issue of whether an item is contraband is not always so cut and dry. For example, an inmate may be aware that an item he possesses is ordinarily considered contraband but reasonably

believe that he was authorized or granted permission from prison officials to possess it. In such instance, the inmate's lack of knowledge regarding whether the item he possesses is contraband would not be due to ignorance of the law, but to the factual circumstances surrounding that possession. Requiring the State to prove a defendant knew the item he possessed was contraband does not condone ignorance of the law; it protects reasonable and innocent conduct from being criminalized under the statute when it is clear a person lacks the required criminal intent.

Francis has never contended he should be entitled to present a mistake of law defense. Instead, his argument all along has been that the State was required to prove he knew the cell phone was contraband to establish an essential element of the offense. Proper statutory construction supports his position and the State's mistake of law argument, which is premised on a misapplication of that principle to the applicable law, does nothing to invalidate his position.

III. THE KNOWLEDGE ELEMENT IS REQUIRED TO APPROPRIATELY NARROW THE STATUTE'S BROAD SCOPE

The prison-contraband statute prohibits jail and prison inmates from possessing a broad range of items. For many of these items—drugs, alcohol, weapons—common sense would dictate that they are off-limits for inmates. *E.g.* *State v. Hines*, 232 Ariz. 607, 611, ¶ 13, 307 P.3d 1034, 1038 (App. 2013) (explaining that drugs, alcohol, and weapons by their very nature "would endanger

the safety, security or preservation of order in a correctional facility"). But here, the contraband in question was a cellular phone that had been taken from him when he was booked into the Annex and then, he argued, returned to him while still in the Annex. Under these circumstances, Francis's use of his own cellular phone could be consistent with orderly operation of the jail because he was using the phone under the supervision of jail staff in order to communicate with his lawyer.

Requiring proof of knowledge is especially important given the otherwise broad scope of § 13-2505. Without requiring knowledge that an item possessed is contraband, the statute could criminalize wholly passive or innocent conduct. *See Staples v. United States*, 511 U.S. 600, 610 (1994) (*mens rea* requirement should be implied where the failure to do so would criminalize innocent conduct). For instance, without the knowledge component, a jail or prison visitor who innocently left a cell phone or computer locked in his or her car while it was parked in the facility's secure parking lot could technically violate § 13-2505(A)(1) by knowingly taking contraband into the grounds of a correctional facility. *See* § 13-2505(A)(1) (a "person" commits promoting prison contraband by "knowingly taking contraband into . . . the grounds of a correctional facility).

The State's contention that requiring it to prove knowledge "would be difficult" given that everyday items could be contraband also highlights the fact

that what constitutes contraband is not clearly defined and that a defendant's confusion in that regard could be both reasonable and factually-based. The fact that some contraband is not always readily apparent provides even more support for the majority's conclusion that § 13-2505 requires the State to prove a defendant's knowledge. *Cf. People v. Carillo*, 751 N.E.2d 1243, 1244-45, 1250 (Ill. App. 2001) (defining contraband to include intrinsically innocent items required statute to be construed more narrowly to avoid serious question of constitutionality). And, in any event, the State's concern is unfounded. In the vast majority of cases it will not be difficult to prove a defendant knew an item was contraband. Knowledge can be inferred, for example, if an inmate attempts to conceal an item, *see Mays v. State*, 76 A.3d 778, 780 (Del. 2013), or admits knowing the item was contraband, *see Bloomer*, 156 Ariz. at 279, 751 P.2d at 595.

IV. FRANCIS SHOULD HAVE BEEN PERMITTED OTHER DEFENSES BASED ON HIS LACK OF KNOWLEDGE

This case additionally raises the potential for two affirmative defenses, entrapment by estoppel and public authority.[3] "Although ignorance of the law is generally no defense, entrapment-by-estoppel is an affirmative defense that provides a narrow exception to this rule." *United States v. Votrobek*, 847 F.3d

[3] To the extent that this Court decides that this issue is not properly before it, AACJ requests that the Court clarify in its opinion that relief has not been denied on this ground. *See, e.g., State v. Salazar-Mercado*, 234 Ariz. 590, 594 ¶ 17 n.2, 325 P.3d 996, 1000 (2014).

1335, 1344 (11th Cir. 2017) (quoting *United States v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998)). This defense requires government officials to induce the defendant to engage in criminal acts by relying on the reasonable belief that his actions would be lawful by reason of the government's seeming authorization. *See United States v. Mergen*, 764 F.3d 199, 205 (2d Cir. 2014); *see also United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) ("Entrapment by estoppel is the unintentional entrapment by an official who mistakenly misleads a person into a violation of the law.") (citation omitted). And the public authority defense requires that "a government official make[] some statement or performs some act and the defendant relies on it, possibly mistakenly, and commits an offense by relying on the government official." *United States v. Burt*, 410 F.3d 1100, 1104 n.2 (9th Cir. 2005) (quoting *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994)).

Under either of these defenses, Francis could argue that he relied on the jail staff's implicit authorization to possess the cell phone in order to contact his lawyer and that they would collect the phone from him when he was no longer authorized to possess it—just as they had done when he first arrived at the jail. These defenses would be available even if the Court holds that the knowledge requirement does not apply to the fact that the phone is otherwise legally classified as contraband. *See Batterjee*, 361 F.3d at 1216 (noting that the entrapment-by-estoppel defense "derives from the Due Process Clause of the Constitution, which

prohibits convictions based on misleading actions by government officials") (citations omitted). So even if the court should reverse the court of appeals' decision here, it should nevertheless clarify that these affirmative defenses are available in cases like this one where the defendant may be relying on the assurances of jail or prison staff when possessing items that are otherwise legally defined to be contraband.

CONCLUSION

This Court should affirm the holding of the court of appeals, requiring the State to prove that a defendant knew that the item he possessed was contraband in order to obtain a conviction pursuant to A.R.S. § 13-2505(A).

RESPECTFULLY SUBMITTED this 29th day of September, 2017.

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