S.C.C. File No. 38540

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

B E T W E E N:

CHAYCEN MICHAEL ZORA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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PART I – OVERVIEW

1. This appeal concerns the applicable *mens rea* for the offence of breach of recognizance under s. 145(3) of the *Criminal Code*, R.S.C., 1985 c. C-46. Specifically, the Court must decide whether the *mens rea* for this offence should be subjective or objective. This determination will have a profound impact on the fairness and functionality of the criminal justice system. The Independent Criminal Defence Advocacy Society ("CDAS") argues that considering the broad scope of criminalized conduct in this context, the experience of marginalized groups, and the criminal justice system's finite resources, a subjective *mens rea* standard should be imposed.

PART II – STATEMENT OF POSITION

2. A brief summary of CDAS's position is as follows:

There are strong policy reasons for rejecting an objective *mens rea* requirement for s. 145(3):

a. An objective *mens rea* would punish individuals who should not be criminalized given their lack of moral blameworthiness;

b. An objective *mens rea* would disproportionately impact marginalized populations;

c. An objective *mens rea* would potentially contribute to false guilty pleas; and

d. An objective *mens rea* would increase demand on the criminal justice system's already limited resources.

3. For these reasons, CDAS submits that a subjective *mens rea* standard should be imposed for breach of recognizance under s. 145(3) of the *Code.*

PART III – STATEMENT OF ARGUMENT

I. There are Sound Policy Reasons for Rejecting an Objective *Mens Rea*

a. An Objective *Mens Rea* Requirement would Punish Individuals Who Should Not be Criminalized

4. The presumption of subjective fault is a foundational principle of our criminal justice system.[1] This principle stands for "an important value in our criminal law, that the morally innocent should not be punished."[2] In the words of Dickson J., "there is a generally held revulsion against punishment of the morally innocent."[3] In *R. v. Pappajohn*, the Court elaborated further on this concept as follows:

> There rests now, at the foundation of our system of criminal justice, the precept that a man cannot be adjudged guilty and subjected to punishment, unless the commission of the crime was voluntarily directed by a willing mind… Parliament can, of course, by express words, create criminal offences for which a guilty intention is not an essential ingredient. Equally, *mens rea* is not requisite in a wide category of statutory offences which are concerned with public welfare, health and safety. Subject to these exceptions, *mens rea*, consisting of some positive states of mind, such as evil intention, or knowledge of the wrongfulness of the act, or reckless disregard of consequences, must be proved by the prosecution.[4]

5. Accordingly, the presumption of subjective fault should not be displaced in the absence of clear legislative intent to create an objective standard.[5]

6. The *mens rea* requirement creates an important distinction between criminal and civil wrongdoing, particularly where a subjective standard is used. Not every departure from the civil norm is criminalized.[6] The principal objective of the criminal law is "the public identification of wrongdoing *qua* wrongdoing which violates public order and is so blameworthy that it deserves

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[1] *R. v. Pappajohn* [1980] 2 S.C.R. 120 at pp. 138-139 ["*Pappajohn*"].

[2] *R. v. A.D.H.,* 2013 SCC 28, [2013] 2 S.C.R. 269, para. 27 ["*A.D.H.*"].

[3] *The Queen v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299 at 1310.

[4] *Pappajohn* at 138.

[5] *A.D.H.,* para. 27, 29.

[6] *R. v. Beatty,* 2008 SCC 5, [2008] 1 S.C.R. 49, para. 34 ["*Beatty*"].

penal sanction".[7] As stated by McLachlin C.J. in *R. v. Boulanger*, "… the public [is] entitled to know where the line lies that distinguishes administrative fault from criminal culpability".[8]

7. In the context of s. 145(3), imposing an objective *mens rea* would expand the scope of criminalized conduct, thus redefining the boundaries between criminal, civil and administrative liability. While certain bail conditions regulate dangerous conduct, s. 145(3) captures conduct that oftentimes would not be inherently harmful in the absence of the recognizance. For example, failing to carry court papers or failing to answer the door are not inherently dangerous acts.

8. Moreover, when such acts can only satisfy an objective *mens rea* standard, the moral blameworthiness of the accused is low, if not absent altogether. As an example, an individual with a cognitive impairment may not be aware he is within 100 meters of a restricted area, whereas a reasonable person could make such a calculation. When taken together, these individuals typically exhibit a lower level of culpability, but will nonetheless be burdened with criminal liability and a criminal record.

9. Part of the reason why an objective *mens rea* fails to protect against overcriminalization is because of the ineffectiveness of the "marked departure" standard in this context. Where an objective *mens rea* is constitutionally permissible, proof of a <u>marked departure</u> from the standard of care is typically required to establish criminal liability.[9] As stated by this Court in *R. v. Beatty*, "it is only where there is a marked departure from the norm that objectively dangerous conduct demonstrates <u>sufficient blameworthiness</u> to support a finding of penal liability" [emphasis added].[10]

10. Unlike the offence of dangerous driving, s. 145(3) does not lend itself to applying a "marked departure" standard. Breach of bail is typically a binary determination based on the text of the recognizance, rather than a qualitative analysis of dangerous conduct in all the circumstances. This difficulty is reflected in the jurisprudence; some courts have failed to apply

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[7] *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, para. 23.

[8] *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49, para. 47.

[9] *Beatty*, para. 36.

[10] *Beatty*, para. 36.

the "marked departure" standard set out in *R. v. Beatty*, instead treating s. 145 as akin to a strict liability offence.[11] Ultimately, the protective mechanism of the "marked departure" standard does not effectively shield those with low moral blameworthiness from criminal sanction under s. 145(3).

b. An Objective *Mens Rea* Requirement would Disproportionately Impact Marginalized Populations

11. Members of CDAS serve a high volume of clients in British Columbia. A large proportion of these individuals experience significant challenges, often on intersecting grounds. Individuals charged under s. 145(3) frequently face substance abuse issues, homelessness, mental/physical health problems, and cognitive impairments.

12. This subset of accused persons would be disproportionately impacted by an objective *mens rea* requirement. An objective *mens rea* for offences applies the standard of a reasonable person, which does not incorporate individualized characteristics such as mental disabilities, age, inexperience, education, or culture.[12] Marginalized populations are less likely to have the capacity to measure up to the standard of a reasonable person, as it does not account for the unique challenges that they face when compared with the average accused.

13. Exacerbating these concerns, a charge or conviction under s. 145(3) typically makes it more difficult to secure bail in the future. Previous convictions under s. 145(3) often result in the imposition of more stringent bail conditions or pre-trial detention. As recognized by Justice Trotter, "prior bail failures, whether they involve non-attendance in court or failing to abide by other conditions, may be fatal on the primary ground".[13] In addition, merely being *charged* under s. 145(3) creates a reverse onus under s. 515(6)(c) that the accused should be detained pending trial. Where increasingly strict bail conditions are imposed, those with limited capacity are even more likely to breach these new conditions than the average offender. An objective *mens rea*

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[11] *R. v. Leftley*, 2003 BCPC 198 para. 7 ["*Leftley*"]; *R. v. Kratochvil*, 2016 BCPC 348 ["*Kratochvil*"], para. 13; *R. v. Flores-Rivas*, 2008 BCSC 1595, para. 16 ["*Flores-Rivas*"].

[12] See *R. v. Creighton*, [1993] 3 S.C.R. 3, 105 DLR (4th) 632 at 71 (McLachlin J.).

[13] Gary T. Trotter, *The Law of Bail in Canada*, 3d ed. (Toronto: Carswell, updated 2019) s. 3.2(iv) ["Trotter"].

standard thus exacerbates the "revolving door" function of pre-trial detention, which impinges most prominently on the liberty of marginalized populations.[14]

14. These disproportionate impacts must be considered in conjunction with the overrepresentation of these individuals in the criminal justice system. For example, the prison population is comprised of a disproportionate number of people who have mental health challenges and substance abuse issues.[15] An objective standard would aggravate, rather than alleviate, these concerns.

15. In the case at bar, arguments have been raised that those with cognitive deficiencies would be held to a standard that they cannot meet. In response to these concerns, the majority of the Court of Appeal for British Columbia observed that "the bail judge would account for [cognitive deficiencies] in assessing the particular form of release".[16] According to the majority, the ladder principle can make necessary accommodations by, for example, "requiring a surety to supervise the accused to ensure compliance with the conditions of release".[17] There are at least three problems with this reasoning.

16. First, as a practical matter, many marginalized individuals are unable to secure a surety.

17. Second, an accused who cannot live up to a reasonable standard should not be subject to additional restrictions on liberty to account for the deficiencies of an objective standard. Imposing the oversight of a "reasonable person" to prevent those with low moral blameworthiness from being convicted simply masks the shortcomings of an objective *mens rea* requirement with an

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[14] See generally Canadian Civil Liberties Association and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention", by Abby Deshman and Nicole Myers, (2014) (online: https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf) ["Set Up To Fail"].

[15] See for e.g. Set Up To Fail at 72-74; MacPhail, Alison, Simon Verdun Jones, *Mental Illness and The Criminal Justice System*, Paper Prepared for Re-Inventing Criminal Justice: The Fifth National Symposium, (Montreal: January, 2013) (online: https://icclr.org/wp-content/uploads/2019/06/Mental-Illness-and-the-Criminal-Justice-System-Final-VS.pdf?x99641) at 2.

[16] *R. v. Zora*, 2019 BCCA 9, 370 C.C.C. (3d) 111, para. 62 ["Court of Appeal Decision"].

[17] Court of Appeal Decision, para. 62.

extrinsic safeguard that may not be available for many disadvantaged persons.

18. Third, this position ignores the fact that many marginalized people are released on conditions by the police in the first instance. The police are ill-equipped to conduct the contemplated balancing exercise, and have historically been prone to imposing unnecessary conditions on accused persons.[18]

19. Ultimately, the solution presented by the majority of the Court of Appeal would disproportionately impact the liberty interests of certain marginalized populations. In addition, as noted above, an objective *mens rea* requirement would ensure that those incapable of meeting the standard of a reasonable person will be increasingly and disproportionately subjected to it.

c. An Objective *Mens Rea* Requirement would result in Uncertainty and the Potential for False Guilty Pleas

20. On its face, the language of s. 145(3) does not signal an objective *mens rea* element. The Supreme Court of Canada has long endorsed a statutory interpretation that provides clarity and certainty for its citizens. As stated by Lamer CJ in *R. v. McIntosh*:

> The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law. [Emphasis added][19]

21. Imposing an objective *mens rea* standard for s. 145(3) would undermine these long-standing principles.

22. In addition, the uncertainty created by an objective standard must be considered in context.

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[18] K. Beatty, A. Solecki and K. Morton Bourgon, "Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study" (Ottawa: Research and Statistics Division, Justice Canada, 2013) (online: http://publications.gc.ca/collections/collection_2018/jus/J4-65-2013-eng.pdf) at 4, 10-11, 14-15, 20-21, 23.

[19] *R. v. McIntosh,* [1995] 1 S.C.R. 686 at 705.

Individuals charged solely under s. 145(3) sometimes do not qualify for legal aid, despite the fact that they cannot afford a lawyer. As a result, many self-represented litigants will be tasked with defending themselves on an objective standard. This articulation of the mental element may prove difficult for a layperson to understand. In such circumstances, self-represented litigants are more likely to be uncertain or mistaken about the legal ramifications of the acts with which they are charged. This can contribute to uninformed or wrongful pleas of guilt.[20]

23. The jurisprudence reflects the unique difficulties of applying an objective *mens rea* to s. 145(3). As noted above, s. 145(3) does not lend itself well to the "marked departure" standard. In *R. v. Ludlow*, Hall J.A. suggested in *obiter* that s. 145 would withstand constitutional scrutiny provided the accused can refute liability by "establish[ing] a defence of due diligence".[21] Some courts have since treated s. 145 as akin to a strict liability offence,[22] rather than applying a "marked departure" standard as required by this Court.[23] Indeed, in the case at bar, the trial judge analogized s. 145(3) to an offence of strict liability.[24] To add to this confusion, some courts have referenced *Ludlow* to support a standard of *subjective* intent for s. 145.[25] In sum, judges have struggled to articulate and apply an objective test to s. 145(3). It will only be more difficult for self-represented accused to comprehend such a standard.

24. Finally, it has been recognized that administration of justice of offences already pose an undue risk of false guilty pleas given the circumstances under which they are generally litigated. Accused persons, detained after a bail hearing following an allegation of breach, are incentivized to plea guilty to avoid lengthy pre-trial custody that will surpass any sentence that could be imposed if found guilty following a trial.[26] Adding a confusing and more difficult standard of

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[20] See Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev. Legal & Soc. Issues 1 at 11.

[21] *R. v. Ludlow,* 1999 BCCA 365, 136 C.C.C. (3d) 460, para. 37.

[22] *Leftley,* para. 7; *Kratochvil,* para. 13; *Flores-Rivas,* para. 16.

[23] *Beatty,* para. 36.

[24] Appellant's Record at Tab 1, pp. 8-10.

[25] *R. v. Williams*, 2017 BCPC 291, paras. 67-69; *R. v. Dempter*, 2012 BCPC 275, para. 29.

[26] Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions: *Innocence at Stake: The Need for Continued Vigilance to*

mens rea for the accused to challenge will only further encourage desperate individuals to plead guilty in circumstances where they may technically have a defence.

25. Taken together, the obscurity of an objective standard in this context, the frequency of s. 145(3) charges, and the prevalence of self-represented litigants all call for the imposition of a subjective *mens rea* requirement.

d. An Objective *Mens Rea* Requirement for s. 145(3) would Increase the Demand on the Criminal Justice System's Resources

26. Breach of recognizance is one of the most common offences charged. It falls in the class of administration of justice offences ("AJOs"), which are involved in over one third of all adult criminal court cases.[27] While the overall rate of criminal charges has declined in recent years, the rate of charges for AJOs has increased.[28]

27. Considering the ubiquity of these cases, any modification of the *mens rea* standard will have significant impacts on the operation of Canada's criminal justice system.

Prevent Wrongful Convictions in Canada, "Chapter 8 – False Guilty Pleas" (online: https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch8.html).

[27] Administration of justice offences were involved in over one third of all completed adult criminal cases in 2013/2014. In completed adult criminal court cases where an administration of justice offence represented one or more of the charges, failure to comply with an order (50%) was those most frequently finalized by the courts in 2013/2014. Section 145(3) of the *Criminal Code* represents a failure to comply with a court order. See Marta Burczycka and Christopher Munch, "Trends in offences against the administration of justice" (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 2015) (online: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2015001/article/14233-eng.pdf?st=DFH3YIEv), pp. 3, 13, Appendix I ["Statistics Canada, 2015"].

[28] For administration of justice offences, the rate of persons charged increased by 8% from 2004 to 2014. Meanwhile, over the same time period, charges related to *Criminal Code* violations in general declined by 20%: Statistics Canada, 2015 at 10-11.

28. An objective *mens rea* requirement would arguably lead to a higher volume of charges under s. 145(3), and it will certainly lead to more convictions. This will result in an increased volume of AJO cases, which already demand a large proportion of court time. To compound these concerns, as noted above, an increase in convictions under s. 145(3) would tend to lead to a higher incidence of pre-trial custody for those who are charged with subsequent, unrelated offences.[29] Taken together, the practical impacts of an objective standard will result in a higher demand on finite court resources.

29. These limited resources should be considered in conjunction with the negligible culpability of those who are solely caught by an objective *mens rea* standard. As stated by Moldaver J. in ***R. v. Jordan***:

> A criminal proceeding does not take place in a vacuum. Each procedural step or motion that is improperly taken, or takes longer than it should, along with each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts. [Emphasis added][30]

30. In the case of s. 145(3), the benefits of criminalizing those with a low level of culpability do not outweigh the practical challenges that an objective standard would impose on the criminal justice system. As the majority in *Jordan* explained, the modern criminal justice system requires "reasonable and responsible decisions regarding who to prosecute and for what".[31]

II. Conclusion

31. An objective *mens rea* presents many challenges to an already overburdened system, with little to no benefit added. Any concern that a subjective *mens rea* will result in a floodgate of persons escaping culpability for breaching bail conditions is misplaced and ignores the true dangers of imposing an objective standard in this context.

32. Establishing a subjective *mens rea* for s. 145(3) would not present the Crown with an insurmountable barrier to establishing criminal liability. As recognized by the Ontario Court of

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[29] Trotter, 3.2(iv).

[30] *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 ["*Jordan*"].

[31] *Jordan*, para. 138.

Appeal, there is a "common sense presumption" that a person "foresees or intends the natural consequences of his or her acts".[32] In other words, the *actus reus* can sometimes support an inference of a subjective *mens rea*. Accordingly, a subjective standard will not drastically impede the Crown's ability to establish a mental fault element. In contrast, however, an objectively defined *mens rea* lowers the Crown's evidentiary burden and captures persons that have not subjectively intended to engage in wrongdoing. It criminalizes persons with minimal moral culpability who should not be stigmatized with a criminal record.

33. In sum, the scope of conduct criminalized by s. 145(3), the experience of marginalized groups, the criminal justice system's finite resources, and the lack of floodgate concerns all support the imposition of a subjective *mens rea* for the offence of breach of recognizance.

PART IV – COSTS SUBMISSION

34. CDAS seeks no costs and respectfully requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2019.

FOR Jeffrey T. Campbell, Q.C.

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FOR Chantelle van Wiltenburg

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[32] *R. v. Magno* (2006), 212 O.A.C. 16 (Ont. C.A.), para. 17; *R. v. Daviault*, [1994] 3 S.C.R. 63, para. 117.

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Legislation

***Criminal Code*, R.S.C., 1985, c. C-46**

145 (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2),	**145 (3)** Quiconque, étant en liberté sur sa promesse remise ou son engagement contracté devant un juge de paix ou un juge et étant tenu de se conformer à une condition de cette promesse ou de cet engagement, ou étant tenu de se conformer à une ordonnance prise en vertu des paragraphes 515(12), 516(2) ou 522(2.1), omet, sans excuse légitime, de se

and who fails, without lawful excuse, to comply with the condition, direction or order is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

conformer à cette condition ou ordonnance est coupable :

(a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;

(b) soit d'une infraction punissable sur déclaration de culpabilité par procedure sommaire.

515 (6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

…

(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or …

515 (6) Malgré toute autre disposition du présent article, le juge de paix ordonne la détention sous garde du prévenu jusqu'à ce qu'il soit traité selon la loi — à moins que celuici, ayant eu la possibilité de le faire, ne fasse valoir l'absence de fondement de la mesure — dans le cas où il est inculpé :

…

(c) soit d'une infraction visée à l'un des paragraphes 145(2) à (5) et présumée avoir été commise alors qu'il était en liberté après qu'il a été libéré relativement à une autre infraction en vertu des dispositions de la présente partie ou des articles 679, 680 ou 816;

…