

No. S272850

In the
Supreme Court of California

EMILY WHEELER

Petitioner and Defendant,

v.

APPELLATE DIVISION OF THE
LOS ANGELES SUPERIOR COURT

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest and Plaintiff.

Court of Appeal, 2d Dist., Div. 3, No. B310024
Superior Court, Los Angeles, Appellate Division, No. BR054851
Superior Court, Los Angeles, Trial Ct. No. 9CJ00315-02
The Honorable H. Elizabeth Harris, Judge Presiding

**ANSWER TO PUBLIC DEFENDERS'
AMICUS BRIEF**

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INTRODUCTION

The California Public Defenders Association and the Los Angeles County Public Defender (amici) principally argue that trial courts may dismiss any strict liability offense under Penal Code section 1385 on the basis that defendants “did not know they were breaking the law or intend to break the law.” (AB 9.) That argument lacks merit.

The land use and business licensing ordinances at-issue in this case—Los Angeles Municipal Code (LAMC) sections 104.15 and 12.21—are public welfare offenses that impose strict liability and place an affirmative duty on property owners to acquire knowledge of whether their property is being lawfully occupied. Section 104.15 was enacted, and both sections are enforced, as part of the City of Los Angeles’s (City) comprehensive framework for regulating the licensed commercial cannabis market. The Legislature’s stated purpose in enacting these cannabis regulations was to combat the deleterious effects unlicensed commercial cannabis activity has on public welfare, including increased crime and distribution of tainted cannabis. Permitting trial courts to consider the bare assertion a defendant lacked knowledge to dismiss these public welfare offenses under section 1385 is not in furtherance of justice, as required by that statute. Instead, such a dismissal would undermine the salutary principles animating strict liability, public welfare offenses and frustrate the legislative goals of the commercial cannabis regulatory scheme.

Amici also raise two new claims in the amicus brief: that the reviewing courts failed to honor the presumption of correctness

and that any error in considering lack of knowledge was harmless. To the extent the Court considers these new claims at all—and it need not—they fail. The presumption of correctness applies when the record is silent or ambiguous. It does not apply here, where the record affirmatively demonstrates error. And that error was not harmless. Defendant’s asserted lack of knowledge was the linchpin of the trial court’s decision to dismiss the charges. As the Appellate Division and the Court of Appeal both determined, reversal was warranted.

ARGUMENT

I. Dismissing the strict liability, public welfare charges in this case based on defendant’s asserted lack of knowledge was not in furtherance of justice.

A. Defendant’s asserted lack of knowledge was not an appropriate basis on which to dismiss charges under LAMC sections 104.15 and 12.21.

A trial court may, “in furtherance of justice,” order an action dismissed. (Pen. Code, § 1385 (section 1385), subd. (a).) But a “trial court’s power to dismiss under section 1385 may be exercised *only* ‘in furtherance of justice,’ which mandates consideration of ‘the constitutional rights of the defendant, and *the interests of society represented by the People.*” (*People v. Clancey* (2013) 56 Cal.4th 562, 580, emphasis in original, internal quotation marks omitted.)

Criminal offenses generally have “two components: (1) an act or omission, sometimes called the *actus reus*; and (2) a necessary mental state, sometimes called the *mens rea*.” (*People v. McCoy*

(2001) 25 Cal.4th 1111, 1117.) LAMC sections 104.15 and 12.21, however, are “public welfare statutes,” which “call for the sanctions imposed even though the prohibited acts are committed without criminal intent or criminal negligence.” (*People v. Stuart* (1956) 47 Cal.2d 167, 172.) That is, public welfare offenses impose strict liability, where the *actus reus* “requirement that the defendant’s conduct violated the law remains.” (*People v. Wetle* (2019) 43 Cal.App.5th 375, 382.) But the offenses “eliminate the ‘requirement of *mens rea*; that is, the requirement of a ‘guilty mind’ with respect to an element of a crime.” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331.) Consequently, “questions of good faith, lack of knowledge and motive are ordinarily immaterial” in strict liability offenses. (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544.)

In addition to the general considerations pertinent when strict liability applies, the nature of LAMC sections 104.15 and 12.21 as public welfare offenses illustrates why it is not in the interests of justice to dismiss violations of those offenses based on a defendant’s asserted lack of knowledge. Public welfare offenses “are purely regulatory in nature and seek to protect the health and safety of the public.” (*People v. King* (2006) 38 Cal.4th 617, 623.) It is not the defendant’s moral culpability—or even punishment or rehabilitation—that are important. The purpose of the offenses are instead regulation and public protection. (*In re Jorge M.* (2000) 23 Cal.4th 866, 872 [“Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction”].)

Because their primary purpose is public protection, public welfare offenses place an obligation on the person in the position to best avert public harm to acquire knowledge of—and prevent—the harm. (*People v. Dillard* (1984) 154 Cal.App.3d 261, 266 [public welfare offenses “embrace[] a legislative judgment that in the interest of the larger good, the burden of acting at hazard is placed upon a person who, albeit innocent of criminal intent, is in a position to avert the public danger”].) Public welfare offenses thus “impose obligations upon [property] owners such as the defendant.” (*People v. Bachrach* (1980) 114 Cal.App.3d Supp. 8, 12-13.) Those obligations, nonetheless, are not particularly arduous because the defendants are “in a position to prevent [the violations] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed [those] responsibilities.” (*Ibid.*, quoting *Morisette v. United States* (1952) 342 U.S. 246, 256 [96 L.Ed. 288, 72 S.Ct. 240].)

Here, LAMC sections 104.15 and 12.21 create an obligation for property owners to know, or learn, if their tenant is operating an unlicensed cannabis storefront. Cannabis storefronts are unique businesses that are not difficult to identify. (See Petition for Writ of Mandate, Exh. A, p. 70 [inside the cannabis storefront on defendant’s property “officers observed and seized large amounts of a green leafy substance resembling cannabis”].)¹ As explained in the Answer Brief on the Merits (ABM), it is also easy

¹ All exhibit references are to the exhibits in support of the Petition for Writ of Mandate. Consecutive pagination of those exhibits is cited rather than the internal exhibit pagination.

to determine if that storefront is licensed. (ABM, 38; *Wheeler v. Appellate Division* (2021) 72 Cal.App.5th 824, 841 [“the City maintains a publicly accessible website listing all licensed cannabis businesses”].)

Relying on a defendant’s asserted lack of knowledge to dismiss the charges would also contradict the fundamental purpose of the City’s cannabis regulations and would not be in furtherance of justice. Unlicensed cannabis businesses “pose[] a current and immediate threat to the public welfare.” (*People v. Gonzalez* (2020) 53 Cal.App.5th Supp. 1, 15, quoting L.A. Ord. No. 185,343, § 3.) The “proliferation of these unauthorized [cannabis] businesses has led to increased crime and negative secondary impacts in neighborhoods, including but not limited to violent crimes, robberies, [and] the distribution of tainted marijuana” (*Ibid.*) Cannabis regulations are thus “essential to the City’s ongoing efforts to combat the negative impact of unlicensed commercial cannabis activity on the health, safety, and welfare of the City’s residents.” (*Wheeler, supra*, 72 Cal.App.5th at p. 841.) And properly enforcing those regulations is necessary to protect “consumers in the City [from] dangers inherent in ingesting and using a substance that [is] not [otherwise] subject to basic rules of safety for ingestible substances.” (*Gonzalez, supra*, 53 Cal.App.5th Supp. at p. 12.)

The totality of these considerations—LAMC sections 104.15 and 12.21 are strict liability, public welfare offenses that protect consumers by regulating a substance that can cause substantial harm if ingested with adulterated ingredients and that mitigate

the attendant crime that follows unlicensed cannabis storefronts— demonstrates it was not in the furtherance of justice for the trial court to “dismiss[] the case in its entirety” (Exh. B, p. 108) based on an assertion by defense counsel that his client lacked knowledge. These public welfare offenses were intended to place an affirmative requirement on a property owner to attain such knowledge.

But even if the trial court could somehow have permissibly relied upon lack of knowledge to dismiss the offenses, defendant failed to support the assertion she lacked knowledge with any substantial evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [“A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence”].) The amicus brief states it was “undisputed” defendant did not know her tenant was operating an unlicensed cannabis business. (AB 8, 12.) But as the proponent of her alleged lack of knowledge, defendant had the burden of proof to present evidence supporting the claim. (Evid. Code, §§ 115, 190.)² A “party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid. Code, § 500.) When a defendant attempts to establish a fact, but produces no evidence supporting that fact, the nonexistence of the fact must be assumed. (*People v. Harmon* (1948) 89 Cal.App.2d 55, 58-59.) Defense counsel’s conclusory assertion in the motion to dismiss, unsupported by a declaration or other evidence, that defendant

² Given the strict liability, public welfare offenses at issue here, the People did not have the burden to show defendant knew of the unlicensed cannabis activity.

lacked knowledge (see Exh. A, p. 65) was not “reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, emphasis omitted).

In its opposition to the motion to dismiss, the People explained “there [was] no evidence that the Defendant has no prior criminal history; there [was] no evidence that she [was] an upstanding member of the community; there [was] no evidence that she had no connection to the illegal cannabis business; and no evidence that she did not know that the activity was occurring on her property.” (Exhibit A, p. 81.) The opposition reiterated this point several times: “Here, the Defendant has presented *no evidence* to support her alleged comparison to the defendant in *People v. S.M.*” (*Ibid.*, emphasis in original.) “She simply makes a number of unsupported assertions.” (*Ibid.*) The defense could easily have provided a declaration from defendant herself asserting that she did not have knowledge of the underlying offense. The defense did not. The trial court abused its discretion by dismissing this case based on an assertion unsupported by substantial evidence. (*Cluff, supra*, 87 Cal.App.4th at p. 998.)

Relying on defendant’s asserted lack of knowledge was all the more erroneous because the defense provided no context or explanation for why she lacked knowledge. The public welfare offenses in this case placed an affirmative obligation on defendant, as the property owner and the person in the best position to prevent harm, to acquire knowledge. Yet the bare assertion she lacked knowledge told the court nothing about her efforts to obtain

such knowledge. Unlicensed activity resulting from willful blindness, for example, would make the property owner's conduct more, not less, blameful. The defense could have provided a declaration providing context for why defendant did not know what was occurring at her property and what she had done or not done to obtain such knowledge. The defense did not. On this record, her asserted lack of knowledge provided no basis to conclude it would be in the interests of justice to dismiss these charges even if lack of knowledge could in some circumstances be an appropriate consideration.

B. Amici's contrary arguments fail.

Amici's contrary claims are unavailing. The amicus brief argues that trial courts may consider lack of knowledge because "section 1385 contains no such restriction" and courts have broad discretion under section 1385. (AB 10, 14.) While a court's discretion to dismiss pursuant to section 1385 is "broad, [it] is by no means absolute." (*People v. Williams* (1998) 17 Cal.4th 148, 158.) Trial court discretion is significantly curtailed when dismissing offenses supported by probable cause. "[A]ppellate courts have shown considerable opposition to the granting of dismissals under section 1385 in instances where the People are thereby prevented from prosecuting defendants for offenses of which there is probable cause to believe they are guilty as charged." (*People v. Orin* (1975) 13 Cal.3d 937, 946-947.) A trial court's power to dismiss an offense on its own motion is also substantially narrower than when the motion is brought by the

People: “when a court considers on its own motion whether to dismiss a charge or an enhancement, the scope of those interests narrow to reflect the separation of powers between the prosecution . . . and the court.” (*Nazir v. Superior Court* (2022) 79 Cal.App.5th 478, 498, internal citations omitted.)

Regardless, the question is whether the trial court abused its discretion. Consideration of “impermissible factors” may be an abuse of discretion. (*Nazir, supra*, 79 Cal.App.5th at p. 490.) An order resting upon a “demonstrable error of law” also “constitutes an abuse of the court’s discretion.” (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49.) Here, the trial court demonstrably erred by dismissing defendant’s violations of LAMC sections 104.15 and 12.21 based on an impermissible factor—defense counsel’s conclusory assertion that defendant did not know she was breaking the law.

Amici also argue that if section 1385 can only be used when a defendant “has not violated the statute in question,” it “would be a nullity” because defendants may file a demurrer to the complaint and courts should dismiss cases in the absence of probable cause that the defendant is guilty. (AB 10, fn. 2.) But determining that a court may not rely upon a mere asserted lack of knowledge to dismiss public welfare charges such as violations of LAMC sections 104.15 and 12.21 would not somehow render section 1385 inapplicable to most criminal offenses, which generally require proof of a mental state. Amici’s argument also ignores that trial courts can consider appropriate factors under section 1385, as the reviewing courts ruled, even for a public welfare offense. (Exh. I,

p. 286, fn. 12; *Wheeler, supra*, 72 Cal.App.5th at p. 843.) Moreover, the argument does not consider other situations in which section 1385 may be used, such as to dismiss sentencing enhancements (Pen. Code, § 1385, subd. (c)), striking additional punishment (Pen. Code, § 1385, subd. (b)(1); *People v. Fuentes* (2016) 1 Cal.5th 218, 228 [trial courts have long since “had the authority to strike just the punishment of a sentencing enhancement”]), dismissing offenses in conjunction with plea agreements (*Nazir, supra*, 79 Cal.App.5th at p. 494), and dismissing charges “where the prosecutor believes [the] defendant[] to be innocent” (*Orin, supra*, 13 Cal.3d at p. 946.)

Amici argue that a “rule prohibiting courts from considering a defendant’s mental state at the time of the crime would also be absurd” because a defendant’s ignorance is relevant to “whether the defendant is likely to continue with the allegedly unlawful behavior.” (AB 11.) Amici’s argument is inapt in the context of the public welfare offenses at issue here. Public welfare offenses “are not crimes in the orthodox sense.” (*Jorge M., supra*, 23 Cal.4th at p. 872.) The purpose of the provisions is not “punishment or correction” (*ibid.*) but public protection (LAMC, § 105.00). It is to prevent the violation from occurring in the first instance. As previously explained, these offenses place the onus on the defendant to gain knowledge and avert public danger. (*Dillard, supra*, 154 Cal.App.3d at p. 266.) Amici’s proposed rule would contradict the public protection purposes of the provisions by discouraging property owners from learning what is happening at their properties to evade criminal charges.

Ultimately, amici argue it is appropriate to dismiss any strict liability offense under section 1385 if a defendant did not know they were breaking the law or intend to break the law. That argument is too broad—different factors may be appropriate for courts to consider depending on the purpose and contour of the code provision or statute at issue in any individual case. What the record and pertinent authority shows here is that asserted lack of knowledge is not an appropriate basis to dismiss charges under LAMC sections 104.15 and 12.21 given the provisions are strict liability, public welfare offenses that seek to combat the proliferation of unlicensed cannabis businesses and protect the public from harm resulting from unlicensed establishments.

II. Amici’s two new arguments lack merit.

Amici’s two new arguments need not be addressed by this Court. (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 572 [“An amicus curiae ordinarily must limit its argument to the issues raised by the parties on appeal, and a reviewing court need not address additional arguments raised by an amicus curiae”].) But the arguments fail in any event.

A. The presumption of correctness does not aid defendant because the record affirmatively shows error.

Amici argue that the reviewing courts failed to apply the presumption of correctness. (AB 13.) The argument is without merit.

“A judgment or order of the lower court is presumed correct.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, emphasis

omitted.) As a result, “presumptions are indulged to support” the trial court’s decision “on matters as to which the record is silent” and “error must be affirmatively shown.” (*Ibid.*) The presumption also applies to ambiguities in the trial court’s decision. (*In re Harris* (2021) 71 Cal.App.5th 1085, 1104.) But when the record is not silent and error is apparent, the presumption no longer applies. (*Smith v. Ogbuehi* (2019) 38 Cal.App.5th 453, 474 [explaining “the presumption of correctness did not apply” because “the order was not silent on the matter of the court’s authority to appoint counsel”].)

The trial court’s ruling is then reviewed for abuse of discretion. An act “exceeding the bounds of reason manifestly constitutes an abuse of discretion, [but] abuse is not limited to such an extreme case.” (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831, fn. 3.) “The scope of discretion always resides in the particular law being applied.” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) In “the case of a statutory grant of discretion,” judicial discretion must be measured against “the specific law that grants the discretion.” (*Horsford v. Bd. of Trustees* (2005) 132 Cal.App.4th 359, 393.) Consideration of “impermissible factors” may be an abuse of discretion. (*Nazir, supra*, 79 Cal.App.5th at p. 490.) Similarly, an order resting upon a “demonstrable error of law” constitutes an abuse of the court’s discretion.” (*Jennings, supra*, 128 Cal.App.4th at p. 49.) In the context of section 1385, this means a trial court abuses its discretion if dismissal of an offense

was not in the interests of justice. (See *Orin, supra*, 13 Cal.3d at pp. 945-946.)

While the amicus brief states “[n]either the panel or the appellate division began by presuming that the trial judge followed the law,” the record shows otherwise. (AB 15.) The trial court did not state it weighed the People’s interests in considering the motion to dismiss. (Exh. B, pp. 108-111.) But the Appellate Division of the Superior Court, nonetheless, “presume[d] the court considered the People’s interests and concluded they were outweighed by the court’s assessment of the circumstances of the case and defendant.” (Exh. I, p. 281.)³ The Appellate Division also cited Evidence Code section 664, which provides that “[i]t is presumed that [an] official duty has been regularly performed.”

Even considering these presumptions, the record affirmatively showed error. The trial court stated defendant had no criminal history before devoting its attention to the asserted lack of knowledge:

[t]here is nothing to suggest that she knows anything about this, other than the fact the she owns the property, and the code says, “in the interests of justice;” and I think justice can only be served if a person who has lived an exemplary life for 80 plus years, and finds herself, because she owns property, and that property is leased to another individual, and that individual is operating a dispensary, that says to this court that justice would properly be served by dismissing the case in its entirety against Ms. Emily Wheeler.

³ As discussed below, the People believe the trial court abused its discretion by failing to consider the interests of society as represented by the People. (*Williams, supra*, 17 Cal.4th at p. 159 [section 1385 “requires consideration” of “the interests of society represented by the People”].)

(Exh. B, p. 108.) The court shortly thereafter reiterated its focus on what defendant knew while discounting the People's interests in the prosecution of the offense:

The prosecutor: Additionally, the People believe that by dismissing one of the codefendants, it is hampering the People's ability to --

The court: Really!

The court: Now, your position is that all Ms. Wheeler has done is be the owner of the property; is that correct?

The prosecutor: Your honor, Ms. Wheeler is the owner of the property.

The court: Okay, you're not suggesting that she has any contact with or any business position in running this illegal dispensary is that correct?

(Exh. B, p. 109.) When it summarized its reasons for dismissal, the court repeated its focus on the lack of knowledge while implying the People should have presented evidence of knowledge in this strict liability case:

I don't see where justice requires that she be subjected to prosecution on a situation where there's no showing that she even knew anything about it.

(Exh. B, p. 110.) The record is not silent. The trial court repeatedly explained it was dismissing the strict liability, public welfare charges because defendant did not know of the underlying offenses. The Appellate Division of the Superior Court thus properly determined, notwithstanding presumptions of correctness, that the trial court's significant focus on defendant's asserted lack of knowledge "was fatal to the order." (Exh. I, p. 282.)

The trial court also abused its discretion because it failed to consider the interests of society as represented by the People. (*Williams, supra*, 17 Cal.4th at p. 159 [courts abuse their discretion by failing to consider "the interests of society

represented by the People” and by ignoring a defendant’s background, “‘the nature of his present offenses,’ and other ‘individualized considerations’”].) The People’s opposition to defendant’s motion to dismiss detailed those interests: unregulated cannabis has “left residents subject to negative impacts and secondary effects associated with Cannabis related activities,” the cannabis regulatory scheme was enacted “to address the numerous social evils associated with the distribution of a controlled substance in the City of Los Angeles,” and LAMC section 104.15 is part of that “larger statutory scheme” endeavoring “to protect the public welfare.” (Exh. A, pp. 78-80.) As previously explained, the prosecutor attempted to articulate some of those interests at the hearing, but the trial court interrupted the prosecutor, and returned to focusing on defendant’s asserted lack of knowledge. (Exh. B, p. 109.) The trial court’s failure to consider the interests of society as part of its discretionary determination was an abuse of discretion. (See *People v. Lettice* (2013) 221 Cal.App.4th 139, 147 [a “failure to exercise discretion is an abuse of discretion”].)

The trial court similarly erred by ignoring the nature of defendant’s offenses. It “dismiss[ed] the case in its entirety” without identifying the code provisions at issue, LAMC sections 104.15 and 12.21, or considering their purpose. (See Exh. B, p. 108; see also LAMC, § 105.00 [cannabis regulations balance protecting “neighborhoods from the known effects of cannabis activities” with providing for lawful commercial activity].) Nor did it contemplate that, as public welfare offenses, sections 104.15 and 12.21 seek “regulation rather than punishment or correction.”

(*Jorge M.*, *supra*, 23 Cal.4th at p. 872.) The trial court did not consider how the provisions place the onus on property owners to ensure commercial activity at their property complies with the law. (*People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062 [public welfare offenses place the burden of harm on the person “standing in responsible relation to a public danger”].) Instead, the trial court’s ruling effectively shifted the burden to the People to prove knowledge in a strict liability offense. (Exh. B, p. 110 [the trial court stated: “I don’t see where justice requires that she be subjected to prosecution where there’s no showing that she even knew anything about it”]; *Wetle*, *supra*, 43 Cal.App.5th at p. 383 [“The greater the difficulty [of proving a culpable mental state], the more likely it is that the legislature intended to relieve the prosecution of that burden so that the law could be effectively enforced”], citing *People v. Estes* (2013) 218 Cal.App.4th Supp. 14, 20.)

Amici’s contrary claims are unavailing. They argue the trial court “never stated or suggested that it was dismissing petitioner’s case because it ‘disagreed with the law.’” (AB 13.) But the lack of an explicit statement from the trial court here is not dispositive. Proper discretion “is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.” (*People v. Dent* (1995) 38 Cal.App.4th 1726, 1731.)

Given the legal principles and spirit of LAMC sections 104.15 and 12.21, the trial court’s repeated focus on defendant’s asserted

lack of knowledge demonstrated the trial court's disagreement with the law. (Exh. B, pp. 108 ["There is nothing to suggest that she knows anything about this"], 109 ["Really! Now, your position is that all [defendant] has done is be the owner of the property; is that correct?"]; 109 ["you're not suggesting that she has . . . any business position in running this illegal dispensary"], 110 ["I don't see where justice requires" a prosecution "where there's no showing that she even knew anything about it"].) Dismissing the violations of the code provisions at-issue because defense counsel claimed his client did not know what was happening at her property frustrated legislative policy designed "to aid the City in enforcing its commercial cannabis licensing scheme, and to minimize incentives to undercut this scheme by operating unlicensed cannabis businesses, by imposing criminal liability on landlords who rent to cannabis businesses without ascertaining that such businesses are licensed." (*Wheeler, supra*, 72 Cal.App.5th at p. 843.) The trial court's decision was thus "predicated on the judicial repudiation of [this] legislative policy" and "constitutes an abuse of discretion." (*People v. Juarez* (2004) 114 Cal.App.4th 1095, 1104; *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 108 ["The scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion"].)

The trial court's error was apparent from the face of the record. The presumption of correctness does not save a facially erroneous order.

B. The error in relying on defendant's asserted lack of knowledge to dismiss the charges was not harmless; it was reversible error.

Amici argue that the trial court's error in dismissing the charges based on defendant's asserted lack of knowledge was harmless because the court considered several factors in its ruling and "no evidence establishe[d] that the trial court would have reached a different decision absent consideration of" defendant's knowledge. (AB 16.) But defendant's asserted lack of knowledge of her tenant's unlicensed activities was the linchpin of the trial court's determination to dismiss her offenses. It is reasonably probable the court would have reached a different conclusion absent its error.

In determining whether error was prejudicial, reviewing courts ask whether it is reasonably probable the trial court might have reached a different conclusion absent the error. (*People v. Courtney* (1985) 174 Cal.App.3d 1004, 1007.) This Court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, emphasis in original.)

Because defendant's asserted lack of knowledge was repeatedly the focus of the trial court's rationale to dismiss the

charges, there is a reasonable chance the court would have reached a different result absent its error. The trial court emphasized defendant did not know she was breaking the law when it first stated it was going to dismiss the charges. (Exh. B, p. 108.) The trial court again referenced what defendant knew when the prosecutor attempted to explain how dismissal would harm the interests of society. (Exh. B, p. 109.) And the trial court returned to asserted lack of knowledge when it summarized its reasons for dismissal, in effect putting the burden on the People to establish knowledge. (Exh. B, p. 110.)

Moreover, while amici argue the trial court considered three other factors in dismissing the charges: defendant's "age, her exemplary life, [and] her lack of criminal record" (AB 17), the trial court considered these factors as part of a singular consideration: that defendant was older without a criminal history (see, e.g., Exh. B, pp. 108 ["You have a woman born in 1934 who has no prior criminal history"]; 110 ["The age of [defendant], the fact that she has no prior criminal history [and] has lived an exemplary life"]). The trial court thus dismissed the charges based on two primary considerations: defendant was unaware of her tenant's unlicensed activities and she had lived a long life without a criminal history. It is reasonably probable the trial court would have reached a different conclusion if one of its two primary reasons for dismissing the charges were removed. As both the Appellate Division of the Superior Court and the Court of Appeal explained, the trial court retains the ability to reconsider dismissal of the offense based on

defendant's age and lack of criminal record on remand. (Exh. I, p. 286, fn. 12; *Wheeler, supra*, 72 Cal.App.5th at p. 843.)

Amici respond that because the trial court denied “the 1385 motion as to the co-defendant, who had an identical *mens rea* and was charged with the same offense” but was younger and had not lived an exemplary life, it would have dismissed the charges against defendant irrespective of her asserted lack of knowledge. (AB 18.) Even if the premise of amici's claim were true, amici's conclusion does not follow. The trial court, under this premise, dismissed charges because defendant lacked knowledge and had lived a long life without a criminal record. The trial court did not dismiss charges against the co-defendant who, ostensibly, lacked knowledge but had not lived a long life without a criminal record. The only conclusion that can be drawn from the trial court's actions is that it would not have dismissed the charges against a theoretical defendant with a similarly checkered past. *Declining to dismiss* charges against the co-defendant cannot compel the conclusion the court would have *affirmatively dismissed* the charges against defendant had it not considered asserted lack of knowledge—a factor fundamental to its decision.

In any event, the record does not support amici's premise or claim. There was no properly pending motion to dismiss the charges against the co-defendant. (See Exh. A, p. 55 [motion to dismiss]; Exh. B, pp. 107-111.)⁴ The trial court had also received

⁴ Defense counsel stated “there was another motion that was filed” and counsel for the co-defendant stated “I join in that motion, your honor.” (Exh. B, p. 107.) It is unclear whether this statement was

an offer of proof that the co-defendant knew of the dispensary. The trial court stated the co-defendant “lives in the back house, and the dispensary is in the front” of the same house. (Exh. B, p. 104.)

The prosecutor confirmed that “at least on the date of the execution of the warrant, [the co-defendant] was staying in the back house.” (*Ibid.*) It is not reasonable to conclude a person staying in a residence was unaware of a cannabis dispensary operating out of that same residence.

To the extent the amicus brief is relying on the trial court’s statement that it was not assuming “knowledge [was] an element of the offense” because “if [it] were assuming that, [it] would be granting the motion to dismiss the case as against [the co-defendant], because that’s what they’re saying, is that there’s no showing of knowledge,” the claim also fails. (Exh. B, p. 110.) It is not entirely clear what the trial court meant by this statement, other than to express an understanding that the ordinances here do not require knowledge. At any rate, the statement in no way undermines what is clear from the record: the trial court

referencing a motion to dismiss under section 1385. But even if it were, defendants have no right to formally move the court to dismiss offenses under section 1385. (*People v. Andrade* (1978) 86 Cal.App.3d 963, 973 [“Granting a defendant’s motion [to dismiss] cannot be properly characterized as a dismissal of charges in furtherance of justice as authorized by Penal Code section 1385”].) The record contains no information co-defendant’s counsel also filed a written motion or proffered argument in support of dismissing the charges under section 1385. (See Exh. B, pp. 107-111.) A co-defendant’s perfunctory statement he was “join[ing] in that motion” cannot be the sole basis for a proper consideration of the dismissal of charges in the interests of justice.

disagreed with the legislative decision not to require knowledge in these regulations.

Moreover, any conclusion by the trial court that the co-defendant lacked knowledge was unsupported by the evidence and reliance on that conclusion would have been an abuse of discretion. (*Cluff, supra*, 87 Cal.App.4th at p. 998 [“A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence”].) The prosecutor had just explained the co-defendant was staying at the home when the warrant was executed. No affirmative evidence to the contrary was proffered by co-defendant.⁵ There was thus no substantial evidence to support a conclusion the co-defendant lacked knowledge of the cannabis business. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681 [findings of fact are reviewed under the substantial evidence standard].) An unsupported statement about what the co-defendant knew, or did not know, cannot have supported a proper exercise of discretion towards the defendant.

Rather, the trial court’s statements regarding both the defendant and co-defendant, as explained in the People’s Answer Brief on the Merits, illustrate how the court relied on disputed and non-existent facts to prematurely dismiss the charges. The motion

⁵ The record is notably sparse, but co-defendant’s counsel appears to have contested the trial court’s statement the co-defendant was living at the property but not the prosecutor’s statement he was staying at the property when the search warrant was executed. (See Exh. B, pp. 104-105.) Regardless, there was no evidence, let alone substantial evidence, the co-defendant lacked knowledge. It cannot have been the prosecutor’s burden to prove knowledge of these strict liability offenses.

to dismiss was filed at the hearing directly following defendant's arraignment. (Exh. A, pp. 53-55.) When the trial court "dismiss[ed] the case in its entirety against" defendant (Exh. B, p. 108), the parties were still arguing over discovery and no evidentiary hearings had been held (Exh. A, pp. 46-51, 55, 69, 86; Exh. B, p. 99). Given the state of the proceedings, the trial court "should [have] consider[ed] whether the existing record concerning the defendant and the defendant's offense or offenses [was] adequate to make a reasoned and informed judgment." (*Clancey, supra*, 56 Cal.4th at p. 575 [discussing premature use of an indicated sentence].)

Instead, the trial court abused its discretion by relying on unsupported and conclusory assertions from defendant's counsel—factual findings not supported by substantial evidence. (*Cluff, supra*, 87 Cal.App.4th at p. 998.) That decision did not "promote the goals of fairness and efficiency" because the trial court had "reason to believe the assumed facts [were] suspect or incomplete in a material way." (*Clancey, supra*, 56 Cal.4th at p. 581.) Put another way, the record was insufficient to dismiss under section 1385 on the court's own motion. (See *People v. Superior Court (King)* (1967) 249 Cal.App.2d 714, 718 ["Under the adversary nature of our criminal procedure, the prosecuting attorney, as the People's representative, is often in a position to make application for a dismissal 'in furtherance of justice' when the record then before the trial judge would not justify a dismissal by the judge on his own motion"].)

The trial court's error warranted reversal. As the reviewing courts below properly determined, the trial court on remand can reconsider dismissal without relying on improper considerations.

CONCLUSION

Relying on an unsupported and conclusory assertion that defendant lacked knowledge of her tenant's unlicensed activity to dismiss strict liability, public welfare, regulatory offenses was not "in furtherance of justice." The judgment of the Court of Appeal should be affirmed.

DATED: March 17, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies, pursuant to California Rules of Court, rule 8.520(c)(1), that this Answer to Public Defenders' Amicus Brief, including footnotes, contains 6,100 words. I have relied on the word count of the Microsoft Word program used to prepare the brief.

/s
Zachary T. Fanselow

PROOF OF SERVICE

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the above-referenced action. My business address is 200 North Main Street, Fifth Floor, James K. Hahn City Hall East, Los Angeles, California 90012.

On **March 17, 2023**, I served the foregoing **ANSWER TO PUBLIC DEFENDER'S AMICUS BRIEF** as follows:

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I placed a true copy of the foregoing ANSWER TO PUBLIC DEFENDERS' AMICUS BRIEF in a sealed envelope(s) for collection and mailing, following ordinary business practice, at 200 North Main Street, Fifth Floor, James K. Hahn City Hall East, Los Angeles, California 90012, addressed to the following:

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I declare under penalty of perjury that the foregoing is true
and correct. Executed on **March 17, 2023**, at Los Angeles,
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/s/

ZACHARY T. FANSELOW

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **WHEELER v. APPELLATE DIVISION (PEOPLE)**

Case Number: **S272850**

Lower Court Case Number: **B310024**

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