

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(APPEAL FROM THE MICHIGAN COURT OF APPEALS)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

GERALD MAGNANT,

Defendant/Appellant.

_____ /

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Michigan Supreme Court Docket No.

COA No. 341627

Ingham CC: 17-407-FH

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED

1. Can a defendant, while acting as an employee be convicted of transporting cigarettes without a license in violation of the Tobacco Products Tax Act (“TPTA”) in the absence of evidence establishing that he knowingly possessed or transported cigarettes contrary to the TPTA or, stated differently, that he knew that he was required to obtain a transporter license but did not do so?
2. Does the TPTA give fair notice that an employee is required individually to obtain and possess a transporter license to deliver tobacco products?

I. STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant/Appellant, Gerald Magnant (“Magnant”), brings this Application for Leave to Appeal (“Application”) from the Court of Appeals’ unpublished¹ decision issued on February 5, 2019, that affirmed, on an interlocutory basis, orders entered by the Ingham County Circuit Court denying motions to quash the Information and to dismiss for a due process violation (“Decision”). (See Appendix A, Decision)

Magnant has been charged with transporting cigarettes without a license in violation of the Tobacco Products Tax Act (“TPTA”), MCL § 205.421, *et. seq.*, and, in particular, MCL § 205.428(3), a felony offense. The State alleges that Magnant possessed and/or transported cigarettes without obtaining a transporter license as purportedly required by MCL § 205.423.

Magnant filed a motion to quash the Information arguing that: 1) the evidence produced at the preliminary examination (“PE”) failed to establish that he even knew that he was transporting cigarettes; and 2) the examining magistrate applied the wrong *mens rea* element—mere knowledge that he was transporting cigarettes, as opposed to doing so contrary to the TPTA. In his Motion to Dismiss, Magnant argued that the TPTA gives insufficient notice in violation of his due process rights, that an employee can be held individually criminally liable for transporting tobacco products on behalf of his/her² employer unless the employee personally obtains a license.

¹ On February 26, 2019, the Michigan Attorney General’s Office filed a request for publication of the Decision on the grounds that it “construes a provision of a . . . statute” and “establishes a new rule of law,” making publication mandatory. The request also asserted that “[t]his opinion, if published, would greatly assist in enforcing the tobacco laws in this State.” Defendants filed a statement opposing the request on March 12, 2019. The Court of Appeals panel denied the request for publication on March 21, 2019.

² Magnant, for ease of reading, will only use the masculine pronoun for the remainder of his Application.

The trial court, and the majority of the Court of Appeals panel, concluded that the relevant statute only requires proof that a defendant have knowledge that he is transporting cigarettes, and that there was no deprivation of Magnants' due process right to fair notice. The lower courts also found that sufficient evidence had been produced at the PE for Magnants' bindover with respect to his knowledge that he was transporting cigarettes.

In this Application, Magnant contends that the statutory prohibition against transporting tobacco products "contrary to this act" requires the State to prove that he had knowledge of both the fact that he was transporting cigarettes *and* that he did so in a way that was contrary to the TPTA. He requests this Court to adopt, in addition to his due process argument, Judge Ronayne Krause's dissenting opinion finding that the lower courts incorrectly applied only the former *mens rea* requirement to the charge, and that low-level employees like Magnant are not required to be licensed and are not truly engaging in "transportation" within the meaning of the "TPTA". Magnant, therefore, requests this Court to grant his application for leave to appeal, reverse the Court of Appeals' decision, and dismiss the charge of transporting cigarettes without a transporter's license.

This Court should grant Magnant's application because it presents issues of significant public interest involving interpretation of a tax revenue statute and its application to employees in the context of a criminal prosecution. The majority and dissenting opinions in the Court of Appeals take opposing positions on the lesser *mens rea* requirement, and while there are no prior controlling decisions interpreting this section of the statute, the members of the panel disagree on the application of prior Court of Appeals' decisions interpreting the TPTA. The non-unanimous opinion of the Court of Appeals drew guidance from a published opinion interpreting another section of the same statute, and a non-binding opinion addressing the instant provision in dicta.

This application affords this Court an opportunity to settle the instant mens rea controversy and to eliminate the uncertainty as to whether the TPTA was intended to apply to individual low-level employees of an entity charged as transporters under the statute, and who were not involved as employees in day-to-day tobacco business. The dissent recognized the apparent ongoing dispute between Michigan, KBIC, and the Federal Government and whether KBIC could be required to obtain a license under the TPTA. The dissent further recognized that the State's prosecution of low-level employees with no meaningful control of the transportation operation, was contrary to the fundamental purposes of the TPTA and "amounts to an overreach that makes a mockery of both the legislator's intent and fundamental justice." Magnant, therefore respectfully requests this court to grant his application, reverse the Court of Appeals' Decision and dismiss the charge of transporting cigarettes without a transporter license.

II. STATEMENT OF JURISDICTION

Magnant timely brings this Application from the Court of Appeals' February 5, 2019, Decision, which affirmed the Circuit Court's order denying Defendants' joint motions to quash the Information and to dismiss the case for a due process violation. *See* MCR 7.305(C)(2)(a). This Court has jurisdiction to review Magnant's appeal of that Decision. *See* MCR 7.303(B)(1).

III. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Material Facts

In December of 2015, Magnant was a nonsupervisory employee of the KBIC, a federally-recognized Indian tribe. On December 11, 2015, as part of his employment with the KBIC, he was a passenger in a pickup truck that was pulling a small cargo trailer en route from a KBIC facility,. The truck, trailer, and all of the contents of the trailer belonged to the KBIC. Magnant's co-worker and co-defendant, John Davis ("Davis"), was the driver of the truck.

At the time, unbeknownst to Magnant and Davis, Michigan State Police (“MSP”) Detective Sergeant Kevin Ryan (“Ryan”) and a MSP tobacco tax enforcement team were conducting an investigation involving KBIC. (PE at 52).³ When Ryan and his partner, Detective Sergeant Chris Croley (“Croley”), observed trucks at a KBIC convenience store/gas station located on the tribe’s reservation in Baraga, Michigan (PE at 52-53), they decided to surveil one of them and, acting purely on a “hunch”, requested MSP dispatch to contact a trooper to initiate a traffic stop and pull the truck over. (PE at 55-56, 86).

MSP Trooper Chris Lajimodiere (“Lajimodiere”) was advised of the truck’s location, clocked the truck on his radar traveling 62 mph in a 55-mph zone, and effectuated a pretext traffic stop. (PE at 12-13, 33, 43). Instead of simply issuing a traffic citation, the trooper questioned Defendants about where they were coming from and what they were hauling in the trailer. (PE at 17, 34-35).

When the trooper asked what was inside the trailer, he was told “supplies” and “chips” but significantly could not remember which occupant said what. (PE at 17-18). He asked Davis to let him look inside the trailer. (PE at 18, 37). Davis complied by exiting the truck, unlocking the trailer, opening the door and stating, “here you go, boss.” (PE at 19, 37, 39). Inside the trailer, the trooper observed a number of brown cardboard boxes with the word “Seneca” on them. (PE at 19, 25). The police neither sought nor obtained permission to enter the trailer or to open any cardboard box containers.

Lajimodiere was not familiar with what the word Seneca meant (PE at 46) or whether Seneca was even a brand of cigarettes, so he waited for the tobacco tax enforcement team. (PE at

³ All citations to “PE” herein are to the transcript for the first or March 16, 2017, session for the PE, which transcript is attached hereto as Appendix C.

47-49). After Ryan and Croley arrived, Ryan went into the trailer, opened one of the cardboard boxes, pulled out a carton of cigarettes, and opened it to check the cigarettes for a tax stamp. (PE at 56-58). The cigarettes had a KBIC stamp, which is not a recognized stamp of the Michigan Department of Treasury (“Treasury”). (PE at 58). At no time were either Davis or Magnant asked to produce a transporter or other tobacco-related license. (PE at 81).

Angela Littlejohn (“Littlejohn”), the Treasury manager of the Tobacco Tax Unit – the agency responsible for administering the TPTA and its related licensing requirements - testified at the PE that an individual who is transporting tobacco products on behalf of his or her employer would *not* need a license to do so if the employer were a wholesaler or unclassified acquirer. (PE at 102). When asked whether Davis would need a transporter license if he were an employee of a wholesaler tasked with driving cigarettes to a customer; Littlejohn responded “no.” (PE at 106). Littlejohn also testified that wholesalers and unclassified acquirers do not have to have the license on them while transporting, but that she was not sure whether other transporters would have to have the license on their person. (PE at 104-05).

Littlejohn also explained the requirements for obtaining a license. The first step would be to submit an application, known as a Form 336 (which was introduced as a defense Exhibit), with a \$50 application fee to her department at Treasury. (PE at 108-09; *see also* Appendix B, Treasury Form 336). To her knowledge, Treasury does not publish any additional rules or regulations with respect to how to acquire the transporter license. (PE at 109). The only requirements, instructions, and guidance for applying for a transporter license are found on Form 336 itself, which specifically requires only a “business” involved in transporting tobacco to obtain a transporter license not each individual employee transporting tobacco. (PE at 109, 111).

Doug Miller (“Miller”), the Administrator of Special Taxes for Treasury, was called as a defense witness at the PE and testified that his job involved making sure that taxes are being properly administered pursuant to the TPTA. (PE at 118). He reviewed Form 336 and confirmed that an applicant could rely on the information set forth on it. (PE at 121-22). He also testified that the law on this topic is very unclear and that Treasury provides no additional guidance or notice with respect to whether or under what circumstances employees must obtain a transporter license. (PE at 135-39).

B. Nature of the Action and Proceedings

1. Bindover and Motions to Quash and Dismiss

Magnant was charged with a single count of violating the TPTA, contrary to MCL § 205.428(3). In short, the State alleges that he possessed and /or transported cigarettes without obtaining a transporter license as purportedly required by MCL § 205.423.

Following a PE held in the 54-A District Court on March 16, 2017 and April 6, 2017, the examining magistrate issued an Opinion and Order binding each Defendant over to the Ingham County Circuit Court for trial on the charge against him. (*See* Appendix C, March 16, 2017, PE Transcript; Appendix D, April 6, 2017, PE Transcript; and Appendix E, District Court Judge Louise Alderson’s April 24, 2017, Opinion and Order).

Magnant filed a Joint Motion to Quash the Information, arguing, among other things, that 1) the evidence adduced at the PE failed to establish the necessary mens rea element of the offense, *i.e.* that Magnant knowingly possessed or transported cigarettes “contrary to this act” or with knowledge that he was required to obtain a transporter license but did not do so.

Magnant and Davis also filed a Joint Motion to Dismiss for Due Process Violation, arguing that the TPTA fails to provide the requisite “fair notice” of the proscribed conduct such that

charging them with a violation of the TPTA under the instant circumstances violated their due process rights guaranteed by the United States and Michigan Constitutions.

2. The Circuit Court's Decision

On November 30, 2017, the Ingham County Circuit Court entered written orders denying Defendants' motions, (*See* Appendix F, November 2, 2017, Motion Hearings Transcript; Appendix G, Order Denying Defendants' Motion to Quash; and Appendix H, Order Denying Defendants' Motion to Dismiss for Due Process Violation), and entered an Order for Stay of Proceedings pending the Court of Appeals' rulings on Defendants' Applications for Leave to Appeal. (*See* Appendix I, Order Staying Proceedings; Appendix J, Circuit Court Register of Actions).

3. The Court of Appeals' Decision

On July 18, 2018, the Court of Appeals granted Defendants' Applications for Leave to Appeal and *sua sponte* consolidated them. On February 5, 2019, it issued an unpublished⁴ opinion affirming the trial court's orders denying Defendants' motions to quash the Information and to dismiss. Judge Ronayne Krause wrote separately in dissent, finding that the language and purpose of the TPTA require that Defendants have knowledge that they were not only transporting cigarettes but that they were doing so in violation of the TPTA.

⁴ See discussion of the Office of the Michigan Attorney General's request for publication of the opinion, *supra* n. 1.

IV. ARGUMENT

A. Summary of the Argument

1. Summary of Argument: MCL § 205.428(3) Requires Proof that Defendant Knew That he was Transporting Cigarettes and that His Conduct was “Contrary to this Act”

As relevant here the TPTA requires that a person possessing cigarettes as a transporter must be licensed under the Act, MCL § 205.423(1), and, if that person “transports . . . *contrary to this act* 3,000 or more cigarettes,” then he is guilty of a felony. MCL § 205.428(3) (emphasis added) (hereafter “Subsection (3)”). Subsection (3) does not contain an express intent element. Yet, it is well-established that, “[u]nder Michigan’s common law, every conviction for an offense required proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea*),” and, as a result, “courts will not lightly presume that the Legislature intended to dispense with the criminal intent traditionally required at common law.” *People v. Janes*, 302 Mich. App. 34, 41-43 (2013). Thus, even when a statute does not expressly include an intent element, a court must still determine, based on various factors, “whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt.” *People v. Nasir*, 255 Mich. App. 38, 41-45 (2003).

There is no dispute here that *some* intent element applies to Subsection (3); rather, the dispute is over the level of that intent. The Circuit Court adopted, and the Court of Appeals affirmed, an intent element that merely requires defendant to have knowledge that he was in possession of or was transporting cigarettes. This low-level intent element flies in the face of clear indicia of the Legislature’s intent—as evident in certain legislative amendments—to impose a higher *mens rea* requirement. Such a low-level intent element is also otherwise inappropriate for a revenue offense. *See Nasir, supra*. Further, it risks making felons of workers who engage in the otherwise innocent activity of making deliveries for their employer. *Id.* It also permits the State

to prosecute without offering evidence of intent regarding a required element—that the defendant transported “contrary to this act.” For all of these reasons, and as explained in detail below, the Decision is not defensible. Subsection (3) requires the State to prove that a defendant had knowledge of both the fact that he was transporting cigarettes and that he was doing so “contrary to this act”.

2. Summary of Argument: The TPTA Does Not Give Fair Notice that Employees of a Transporter (or Other Licensee) May Be Required to Obtain their Own License—or Face Felony Charges

The TPTA licensing provisions do not give fair notice to workers who might transport tobacco products as part of their employment that they must individually obtain a transporter license; thus, the criminal charges against Magnant for violation of Subsection (3) deprive him of his constitutional right to due process of law. Indeed, the plain language of the TPTA when read as a whole, requires the conclusion that, as a low-level employee, Magnant would not even be eligible for a license. When considered in its entirety, the overall statutory framework, makes it clear that the transporter license requirement applies only to businesses, not to employees of such businesses. A “transporter” is a “person” who engages in transportation, and, while a “person” is defined to include an “individual” in addition to business entities like a corporation and a partnership, the term “individual,” when read in context with the rest of the statute (as well as Form 336 Appendix B), is clearly meant to apply only to an individual operating a business on his own account.

By way of example, as the statute itself makes clear, licenses are required for each “place of business,” not each employee, and license applicants are required to prove a net worth of at least \$25,000. *See* MCL § 205.423(2), (6)(a). Further, the statute itself specifically mandates that the license “application shall be on a form prescribed by” Treasury, MCL § 205.423(2), and, thus,

appears to incorporate that form as well as its contents into its licensing provisions. Treasury Form 336 is the only other guidance besides the statute itself for TPTA licensing, and clearly states—consistent with the statute’s overall framework—that only “businesses” are required to obtain licenses. (*See* Appendix B.) Treasury officials responsible for administering the TPTA and its licensing provisions testified that individual employees are not required to obtain licenses under the TPTA. Nevertheless, the Court of Appeals affirmed the Circuit Court’s denial of Defendants’ Joint Motion to Dismiss for Due Process Violation—an error of constitutional magnitude because, until Davis and Magnant were charged with violating Subsection (3), they had no way of even knowing that they could be liable for the offense as low-level employees of a tribal nation that engages in a broad range of governmental and revenue-raising activities, in addition to tobacco commerce.

B. There are Compelling Grounds for Granting Review under Michigan Court Rule 7.305(B) Because the Application Raises Issues Significant to the Public Interest and the State’s Jurisprudence, and the Court of Appeals’ Decision is Clearly Erroneous and Will Cause Material Injustice

This Court should grant Magnant’s Application because it presents issues of significant public interest involving the interpretation of a tax revenue statute as well as its application to employees in the context of a criminal tobacco tax prosecution. The majority and dissenting opinions in the Court of Appeals take opposing positions on the *mens rea* requirement for the charged offense. While there are no prior controlling decisions interpreting the particular section of the TPTA at issue here, the members of the panel disagree on the application of certain prior Court of Appeals’ decisions interpreting the TPTA. Specifically, the non-unanimous Court of Appeals’ Decision here drew guidance from a published opinion interpreting a similar section of the TPTA and a non-binding opinion addressing the instant TPTA provision in dicta. This

Application affords this Court the opportunity to settle the instant *mens rea* controversy and, in doing so, to clarify both the applicability and weight of such appellate case law.

It also presents the Court with the opportunity to eliminate the uncertainty as to whether the TPTA was actually intended to apply—and whether it gives fair notice of any such application—to individual, low-level employees of an entity that was not even a day-to-day tobacco business. The Court of Appeals’ Decision in this case is critically important to the interests of every person in Michigan employed by an entity that transports tobacco products.⁵ Following that Decision, all such employees may be subject to criminal charges unless they individually obtain a transporter license. The Court of Appeals recognized, to a small extent, the unfairness of applying the statute in this way and suggested that any employee who does not obtain a transporter license might avoid criminal liability by inquiring whether his employer holds such a license before the employee undertakes any duties for his employer. (Appendix A, Decision at 7.) But the Court of Appeals does not go so far as to hold that making such an inquiry would relieve the employee of criminal liability if the employer does have a license, and the possibility remains that the employee might still be subject to criminal liability even if the employer does have a license.

The Court of Appeals’ Decision further creates an impossible situation for many workers such as Magnant because they would not even be eligible to obtain a license individually. For example, in order to obtain a transporter license, the statute requires an applicant to show proof of a certain minimum net worth and that “the applicant owns, or has an executed lease for, a secure nonresidential facility for the purpose of receiving and distributing cigarettes and conducting its

⁵ While the Court of Appeals has recognized that low-level employees of retailers are exempt from the TPTA’s licensing provisions, the reasoning in its Decision here would appear to apply to low-level employees of manufacturers, wholesalers, and unclassified acquirers as well as transporters. This Court has recognized that low-level employees of retainers are exempt from the TPTA’s licensing requirements. *People v Assy*, 316 Mich. App. 302, 311-12 (2016)

business if the applicant owns or has an executed lease for such a facility.” MCL § 205.423(6)(a), (b) (emphasis added). Further, Form 336, the application form required by statute, expressly limits a transporter license as one for a “*business*” and otherwise requires certain application information for the “*business*.” (Appendix B)(emphasis added).

In addition to the important public policy issues regarding the scope of the TPTA transporter license requirement, there are other compelling grounds for granting review because the Court of Appeals’ Decision is, as shown in detail below, clearly erroneous and inflicts material injustice on Magnant. First, contrary to legislative intent, the Court of Appeals’ Decision would wrongly permit a felony conviction and a sentence of up to five years in prison based only on a low-level intent element—knowing transportation of cigarettes—that scarcely rises above a strict liability possessory offense. Second, Magnant would be forced to stand trial even though the State failed to satisfy, to the requisite probable cause standard, that he even knew that he was transporting cigarettes. Finally, the TPTA does not provide fair notice to Magnant as a mere employee that he is subject to any license requirement, and that the State could apply the TPTA accordingly. Against all notions of fair play and justice, the Court of Appeals’ Decision would make Magnant bear the severe consequences of the State’s decision to apply the TPTA license provisions to him rather than the true transporter, his employer.

C. The Court of Appeals Erred in its Construction of Subsection (3) by Incorrectly Applying Only a Lesser Mens Rea Element

1. The Charge

The Criminal Information here alleges that Magnant, contrary to MCL § 205.428(3), “did possess, acquire, transport, or offer for sale 3,000 or more cigarettes, in the State of Michigan, without obtaining/possessing a Michigan tobacco license as required by MCL § 205.423.” In

short, the State alleges that Magnant possessed and/or transported such cigarettes without obtaining a transporter license as purportedly required by MCL § 205.423.

MCL § 205.423(1) provides:

[A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

Subsection (3) of MCL § 205.428 provides, in **Error! Bookmark not defined.** pertinent part:

A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes . . . is guilty of a felony, punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.

Thus, the State contends a person possessing cigarettes as a transporter must be licensed under the Act, and, if that person “transports . . . contrary to this act 3,000 or more cigarettes,” then he is guilty of a felony.

2. Standard of Review

When reviewing a bindover decision, the following standards apply:

A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [de novo] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion.... Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion.

People v Beydoun, 283 Mich App 314, 322 (2009).

A district court's decision regarding a bindover is reviewed for an abuse of discretion, but a court necessarily abuses its discretion when it makes an error of law.” *People v Waterstone*, 296 Mich App 121, 132 (2012). The interpretation or construction of a statute is a question of law that

is reviewed *de novo*. *People v Morey*, 467 Mich 325, 329 (1999); *People v. Moore*, 470 Mich. 56, 61 (2004).

3. The Court of Appeals Erred in Finding that the State May Prove a Violation of Subsection (3) Based on an Intent Element that Requires Only Knowledge that a Defendant Is Transporting Cigarettes

Under well-established principles of law for determining the intent element of a statutory offense, Subsection (3) requires the State to prove that a defendant had knowledge both of the fact that he was transporting cigarettes and that a license was required to do so (as the statute requires that such transport otherwise be “contrary to this act”). The Court of Appeals erred in finding that Subsection (3) requires only that the State prove that a defendant knew that he was transporting cigarettes as a basis for criminal liability—virtually devoid of criminal intent—thereby imposing severe punishment for conduct that causes only financial harm—in the form of a lost license fee to the State.

a. The *Nasir/Quinn* Factors Apply to Subsection (3) and Require an Intent Element that Defendant Knew that he Was Transporting Cigarettes and that His Transportation was Contrary to the TPTA

Under Michigan’s common law, every conviction for an offense requires proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea*). *Janes*, 302 Mich. App. at 41. Speaking of this philosophy of criminal law, the United States Supreme Court in *Morissette v United States*, 342 U.S. 246, 250-51 (1952), explained:

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. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory cry ‘But I didn't mean to,’ and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a ‘vicious will’ ...

While the Michigan Supreme Court has previously recognized that the Michigan Legislature can constitutionally enact statutes that impose criminal liability without regard to fault, Michigan courts, in construing statutes, “will not lightly presume that the Legislature intended to dispense with the criminal intent traditionally required at common law. *Janes*, 302 Mich. App, at 42.

If a statute does not contain an express intent element, then the court must determine “whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt.” *Nasir*, 255 Mich. App. at 41, citing *People v Lardie*, 452 Mich. 231, 239 (1996). In doing so, courts may consider seven factors, as set forth in *Nasir* and *People v Quinn*, 440 Mich. 178, 190 n.14 (1992).⁶ The seven factors are whether the statute: 1) defines a public welfare offense; 2) addresses potential harm to the public at large; 3) carries a severe punishment and damage to reputation upon conviction; 4) would, with an intent element, criminalize a broad range of otherwise innocent conduct; 5) would, without an intent element, impose an oppressive burden on prosecutors; 6) affords an opportunity to ascertain the true facts; and 7) has relevant legislative history or interpretive guidance from other statutes. This analysis does not merely determine whether *some* intent element applies; it also informs the level of that intent element. All of the *Nasir/Quinn* factors weigh strongly in favor of an intent element requiring proof that Magnant knew both that he was transporting cigarettes and that such transportation violated a provision of the TPTA (*i.e.* that he was required to obtain a transporter license but did not do so).

⁶ If the “statute at issue is a codification of the common law” and “mens rea was a necessary element of the crime at common law,” then the statute will not be interpreted “as dispensing with the knowledge as a necessary element.” *Nasir*, 255 Mich. App. at 38, 41-42 (citing *Quinn* 440 Mich. at 186). The TPTA has no common law roots. Enacted in 1993, “it is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded.” *Value, Inc v Dep’t of Treasury*, 320 Mich App 571, 577 (2017). Accordingly, this factor does not inform the analysis of what intent element applies to Subsection (3).

i. **The TPTA is a Revenue Statute, Not a Public Welfare Law, and Violation of Subsection (3) Causes No Harm to the Public**

The TPTA is a revenue statute, not a public welfare law. *Value, Inc.*, 320 Mich. App. at 577. Transporting cigarettes without a tobacco license is not a dangerous activity and it causes no physical harm to the public. Notably, prosecuting the driver of a truck transporting contents that he does not own and that he is hauling at the direction of his employer fails to advance the revenue-compliance purpose of the TPTA because low-level employees do not have the necessary knowledge of or control over their employer’s operations for the purpose of ensuring compliance. “Transporters” are not responsible for collecting or remitting tobacco tax nor do they have any role or responsibilities with respect to the handling of tobacco tax stamps.

When someone acts as a “transporter” without a license, the harm to the public is, at worst, the loss of the \$50 license fee payable to the Treasury. Mere loss of revenue—even in more substantial amounts—is not a harm to the public at large. *Nasir*, 255 Mich. App at 45. Further, as the dissent aptly pointed out, “[p]rosecuting ministerial agents like defendants would not further the goal of ensuring tax revenue is properly collected from the ultimate consumers of tobacco products” and there is “no Michigan authority suggesting that “an agent may be held strictly liable for the misconduct of [his] principal.” (Appendix A, Dissent at 6). Accordingly, this factor weighs strongly in favor of a more stringent intent requirement.

ii. **Without a More Stringent Intent Requirement, Subsection (3) Would Criminalize “a Broad Range of Apparently Innocent Conduct”**

There is nothing inherently criminal in the act of transporting cigarettes. Indeed, the TPTA itself implicitly recognizes that transporting cigarettes is generally innocent conduct—it specifically exempts interstate carriers from the transporter licensing requirement, even if the carrier is transporting or delivering cigarettes in Michigan. See MCL § 205.422(y). Here, the

criminality of transporting cigarettes without a license in Michigan turns on the size and scope of the operations, not the inherent nature of the underlying conduct. Thus, imposing a low threshold for the intent element of Subsection (3) could potentially criminalize a broad range of innocent conduct. This logic applies with particular force to a revenue statute like the TPTA. The United States Supreme Court has recognized that “the proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws,” and that it is therefore only appropriate to punish knowing violations of the law “because in our complex tax system uncertainty often arises even among taxpayers who earnestly wish to follow the law.” *Cheek v. United States*, 498 U.S. 192, 199-200,205 (1991).

Moreover, as discussed in detail in Part E, below the statutory licensing provisions for transporters do not provide adequate notice of the circumstances, if any, under which mere employee drivers (as opposed to their employers) are required to obtain a transporter license. Further, as is evident in the TPTA itself, Form 336, as required by the TPTA, and Treasury’s sound interpretation of the TPTA—which is critical here because Treasury administers the licenses, employees of an entity engaging in tobacco commerce are not required to obtain a license separate from their employer. Thus, the true transporter and not its low-level agents should be charged.

iii. **The TPTA Imposes Severe Punishment and Significant Damage to Reputation—Penalties that Should Only Apply upon Proof of Criminal Fault**

If the “punishment provided for in the statute and the danger that conviction poses to a defendant’s reputation is severe,” then an intent element should be required. *Nasir*, 255 Mich. App. at 43-44 (quoting from prior precedents noting that “felony is . . . as bad a word as you can give to a man or thing”). A violation of Subsection (3) is a felony that would not only severely

damage Magnant’s reputation, but would expose him to a 40-60 month sentence, and a maximum fine of \$50,000. This punishment weighs in favor of requiring a more stringent intent element in Subsection (3), as reflected in the TPTA’s subsequent amendments and legislative history.

iv. **Prosecutors Would Not Face an Oppressive Burden if Required to Prove a More Stringent Intent Element.**

Criminal offenses generally require some proof of intent—strict liability offenses are the rare exception to the rule. *See Janes*, 302 Mich. App. at 41. Prosecutors have the tools and techniques to prove intent for all manner of actions and do so every day—the task is not “so difficult that it cannot be established through minimal circumstantial evidence” and the intent element urged by Magnant does not impede ascertaining the fact of the incident. *Nasir*, 255 Mich. App. at 45; *Quinn* 440 Mich. at 190, n. 14. The State does not contend that there is anything that sets Subsection (3) apart in this respect; thus, there is no basis for finding that any purported burden on the prosecutor warrants a minimal intent requirement for Subsection (3). Further, imposing a 5-year prison sentence should require the State to make some showing that the penalty is deserved.

v. **Legislative History and Interpretive Guidance Favors a More Stringent Intent Requirement**

Importantly, the legislative evolution of the TPTA also points to the *mens rea* element urged by Magnant. Indeed, the very thrust of the legal factors discussed herein is to determine whether and to what extent the Legislature “‘intended to require some fault as a predicate to finding guilt.’” *Nasir*, 255 Mich. App. at 41-45. Thus, carrying out legislative intent is the key objective here.

Tellingly, the Legislature amended MCL § 205.428 in 2008, by, among other things, adding Subsection (11), a misdemeanor offense that is otherwise identical to the felony offense in

Subsection (3), but with a smaller quantity, and that expressly contains a “knowingly” element.⁷ See generally 2007 MI SB 882 (as enacted January 9, 2009); MCL § 205.428(11) (“A person who knowingly possesses, acquires, transports, or offers for sale *contrary to this act* 600 or more, but not more than 1,199 cigarettes, tobacco products other than cigarettes with an aggregate wholesale value of \$50.00 or more but less than \$100.00, or 600 or more, but not more than 1,199 counterfeit cigarettes, counterfeit cigarette papers, gray market cigarettes, or gray market cigarette papers is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00 or imprisonment of not more than 90 days, or both.”) (emphasis added). Thus, rather than abrogate *Nasir* or expressly disclaim any *mens rea* element in MCL § 205.428, the Legislature made clear that it intended a specific *mens rea* element (*i.e.*, “knowingly” transports “contrary to this act” X amount of cigarettes) even for a mere misdemeanor under this revenue statute.

All of the *Quinn/Nasir* factors weigh in favor of finding an intent requirement that contains a level of wrongdoing sufficient to ensure that the severe penalty of 5 years imprisonment (and

⁷ The legislative history to Senate Bill 882, adding Subsection (11) to MCL § 205.428 with the term “knowingly” expressly contained therein, reflects that: 1) the amendment was to add to the TPTA “specific criminal and civil penalties for violations of the act involving smaller quantities of cigarettes or other tobacco products than currently trigger such penalties”; 2) the Legislature was simultaneously amending the General Sales Tax Act, MCL § 205.51, *et. seq.*, to, among other things, “allow the state treasurer to prohibit the sale of any products subject to the sales tax at any location where a person had *knowingly* violated certain specified provisions of the” TPTA (*i.e.*, Subsections (3) to (7) and (11) of MCL § 205.428); and 3) thus, in including the term “knowingly” in the misdemeanor provision in Subsection (11), it appears that the Legislature may even have intended to require actual knowledge of violating the TPTA. See 2007 Legis. Bill Hist. MI SB. 882 (legislative analysis, Dec. 18, 2008; *id.*, May 12, 2008; Senate Fiscal Analysis, Jan. 8, 2009) (also expressly noting that “[t]he proposed penalty for a quantity of 600 to 1,199, or a value of \$50 to \$99.99, would apply to offenses committed *knowingly*”) (emphasis added). See also 2007 MI SB 883 (as enacted January 9, 2009, amending the General Sales Tax Act by, among other things, adding Subsection (6)); MCL § 205.53(6) (“The state treasurer or his or her designee may prohibit the sale of any products subject to the tax levied under this act at any location where a person *knowingly* violated section 8(3) to (7) and (11) of the tobacco products tax act, 1993 PA 327, MCL 205.428”) (emphasis added).

finer) is imposed only upon a defendant who acted with an “evil state of mind” and to justify making criminal the otherwise innocent act of transporting cigarettes. *See Morissette*, 342 U.S. at 264. Thus, the offense of “transport[ing] . . . contrary to this act 3,000 or more cigarettes” requires proof that a defendant knowingly transported: 1) contrary to this act [*e.g.*, without a license]; 2) cigarettes. Merely possessing or transporting cigarettes is not inherently harmful to the public or otherwise indicative of any criminal fault. Rather, such fault or culpability attaches only by applying the intent element to *all* the elements of the offense, and any other approach would impose severe consequences on conduct that is essentially harmless. As Judge Ronayne Krause aptly noted in her dissent, requiring proof that a defendant had a general awareness that he was transporting cigarettes in violation of the TPTA “reasonably balances fundamental fairness, the purposes of the TPTA, and the need for realistic law enforcement.” (Appendix A, Dissent at 8 n.9).

b. *Nasir* Addressed a TPTA Provision Similar to Subsection (3) and Found an Intent Requirement that Aligns with Defendants’ Position

Nasir not only set forth the analytical framework for determining the intent element of a criminal offense, but it also applied that framework to a provision of the TPTA that has substantial similarities to the one at issue here—and supports finding that the intent element of Subsection (3) requires knowledge that possessing or transporting cigarettes is contrary to the TPTA in some respect. In *Nasir*, the court considered whether MCL § 205.428(6) (“Subsection (6)”), a subsection of the same TPTA statute that is at issue here, contained a *mens rea* requirement. Subsection (6) states:

A person who manufactures, possesses, or uses a stamp or manufactures, possesses, or uses a counterfeit stamp or writing or device intended to replicate a stamp without authorization of the department . . . is guilty of a felony.

The *Nasir* Court found that a Subsection (6) offense requires “knowledge that the stamp, writing, or device was not an authentic tax stamp.” 255 Mich. App. at 39, 46. The court held that, while Subsection (6) does not expressly include a fault element, the Legislature, nevertheless, “intended to require some fault as a predicate to finding guilt.” *Id.* at 41 (internal quotations omitted). Thus, the intent element is tied to what fundamentally distinguishes the offense from otherwise innocent conduct—a defendant’s knowledge that the stamp in his possession is counterfeit. The corresponding application of this principle to Subsection (3) is to require the State to prove that a defendant knew that his possession or transportation of cigarettes was contrary to the TPTA in some respect. Otherwise, the State could prove a violation of Subsection (3) without establishing any element of fault or culpability whatsoever.

4. The Court of Appeals Erred by Disregarding the *Nasir/Quinn* Analysis, Ignoring a Statutory Intent Element of the Charged Offense, and Improperly Extending the Holding of *Shouman*, an Unpublished and Unpersuasive Case

Though it purported to agree that the *Nasir/Quinn* factors required the application of an intent element to Subsection (3), the Court of Appeals did not actually apply the *Nasir/Quinn* analysis in reaching its conclusion. Instead, it disregarded the compelling reasons that emerge from the *Nasir/Quinn* analysis for requiring a more stringent intent element for Subsection (3) and adopted an intent element that barely rises above strict liability—possessory offenses requiring only that the State prove Defendants knew they were transporting cigarettes. The Court of Appeals made three principal errors in its analysis. First, instead of addressing Defendant’s argument that Subsection (3) requires a general knowledge that one is acting “contrary to this act,” the Court of Appeals characterized it as an argument for specific intent—and incorrectly applied *Nasir* to reject it. Second, the Court of Appeals improperly disregarded “contrary to this act” as an intent element of the offense. Third, the Court of Appeals inappropriately relied on *Shouman*—an unpublished

case that addressed the *mens rea* element required for Subsection (3) only in dicta)—and that is otherwise unpersuasive—and applied it retroactively.

a. The Court of Appeals Interpreted Magnant’s Argument, and Nasir’s Statement on Specific Intent Incorrectly

Magnant contends that the appropriate intent element for Subsection (3) is proof of 1) knowledge by defendant that he is in possession of or transporting cigarettes; and (2) knowledge that he is doing so “contrary to this act” (*i.e.* with knowledge that he was required to obtain a license but did not do so). Importantly, Magnant does not contend that Subsection (3) requires a showing of specific intent, as such—*i.e.*, knowledge of the particular TPTA provision at issue and the intent to act in violation of it. Rather, he contends that Subsection (3) requires a showing of general intent for each intent element of the offense. Thus, the statute does not require proof that a defendant had any knowledge of either the specific legal source of the license requirement or even that there are criminal penalties for a license violation. Instead of addressing Defendant’s position squarely, however, the Court of Appeals incorrectly characterized it as claiming that Subsection (3) requires “specific intent” to violate the license provisions of the TPTA. The Court of Appeals then invoked the *Nasir* Court’s statement that it did “not believe that the Legislature

intended that the offense contain a specific intent element.”⁸ *See Nasir*, 255 Mich. App. at 46. The Court of Appeals incorrectly relied on this statement to reject Magnant’s position.⁹

The intent requirement that Magnant advocates—general awareness that transportation of cigarettes is "contrary to this act"—aligns with *Nasir's* requirement that the defendant must have knowledge of the counterfeit or illegal nature of the stamp; as a defendant need not know the specific provision of the TPTA at issue to know that fault attaches to the use or possession of a counterfeit stamp. The knowledge that a stamp is “not authentic” or counterfeit and thus, by its nature, unlawful – demonstrates the assumption of legal risk and attendant consequences of using or possessing it, thereby making the conduct blameworthy. Likewise, possessing or transporting cigarettes is not, in itself, culpable or blameworthy unless it is done with knowledge that they are being possessed or transported under circumstances that make it improper to do so.¹⁰ A defendant

⁸ To the extent that *Nasir* found that the Legislature did not intend the offense in Subsection 6 to “contain a specific intent element” or to require that “a defendant need act with knowledge that ... [he] does so without the authorization of the ... Treasury,” 255 Mich. App. at 46, it is important to note that *Nasir*, decided in 2003, pre-dated the Legislature’s 2008 amendments to MCL § 205.428, which strongly suggest that the Legislature did intend to require actual knowledge of violating the TPTA. If this Court, upon granting review, were to determine as a matter of law that the Legislature actually intended to require specific intent due to, for example, Subsection (3)’s “contrary to this act” language (which is not included in Subsection (6)), “[s]tipulations of law are not binding on the courts,” as the dissent aptly noted. (Appendix A, Dissent at 6)(citing *In re Finlay Estate*, 430 Mich. 590, 595-96 (1988)).

⁹ While one can easily define specific intent as “a particular criminal intent beyond the act done” and general intent as the intent simply to do the physical act, the ease of stating this distinction belies the difficulty of applying it in practice. *See People v. Langworthy*, 416 Mich 630, 639 (1982).

¹⁰ The United States Supreme Court’s decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), helps to illustrate this distinction. In *Ratzlaf*, the defendant was charged with violating provisions of the Bank Secrecy Act. Pursuant to 31 U.S.C. § 5313(a), banks and other financial institutions were required to report any transactions that exceeded \$10,000.00. Under 31 U.S.C. § 5324(3), it was illegal to structure or break into two or more or separate transactions, a single cash transaction with a bank or other financial institution for the purpose of evading the reporting requirement of Section 5313(a). *Ratzlaf*, was charged with violating 31 U.S.C. § 5322(a), which provided that a person who willfully violated the anti-structuring provision of Section 5324 is subject to criminal

can know that he does not have the requisite license to possess or transport a certain item without knowing the specific legal source of that requirement or that it is a crime to do so. Defendant's position imposes no greater intent requirement than what the *Nasir* court specifically endorsed. The mens rea element adopted by the Court of Appeals majority here, however, would not carry any level of "fault" or "culpability" at all.

In short, the Court of Appeals' reliance on the *Nasir* court's statement on specific intent is entirely misplaced. The *Nasir* court was merely rejecting the notion that a defendant must have specifically intended to violate that section of the TPTA that is consistent with Magnant's argument here; the court, however, was not backtracking on its holding that a defendant had to know that a stamp was counterfeit in order to be guilty of using or possessing a counterfeit stamp.

b. The Court of Appeals Improperly Disregarded "Contrary to this Act" as an Intent Element of Subsection (3).

Subsection (3) sets forth the felony of "possess[ing], acquir[ing], transport[ing], or offer[ing] for sale contrary to this act 3,000 or more cigarettes." Instead of interpreting the term "contrary to this act" as an element of the offense subject to the knowledge requirement, the Court

penalties. The trial court instructed the jury that the government had to prove both that the defendant knew of the Section 5313(a) reporting obligation and that he attempted to evade that obligation, but it did not have to prove that he knew that the structuring in which he engaged was unlawful. The Supreme Court reversed the conviction, giving effect to the statute's "willfulness" requirement by holding that the government had to prove that the defendant acted with knowledge that the structuring in which he engaged was unlawful, not simply that the defendant's purpose was to circumvent the bank's reporting obligation.

The Court's reasoning is instructive here. The anti-structuring provision in *Ratzlaf* is akin to the "contrary to this act" requirement in this case. Just as the government had to prove knowledge of the structuring provision that *Ratzlaf* evaded, the State here must show Magnant's knowledge of the licensing requirement and his intention to violate a known legal duty. Magnant is not arguing that the prosecution must prove knowledge of the criminal offense but only that he was aware that he was transporting or in possession of the cigarettes "contrary to this act"—that is, without the requisite license.

of Appeals found that it merely “describes the unlicensed status of the tobacco transporter, possessor, or manufacturer, rather than the knowledge of the defendants.” (Appendix A, Decision at 4). As an initial matter, “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) (quotations omitted). Here, the words “contrary to this act” modify “possess[ing], acquir[ing], transport[ing], or offer[ing] for sale.” The modifying clause, “contrary to this act” is applicable as much to the first and other verbs as to the last, and the natural construction of the language demands that the clause be read as applicable to all, qualifying not just the last word but the entire series. *See Paroline v. United States*, 134 S.Ct. 1710, 1714 (2014). Thus, as relevant to Magnant here, Subsection (3) criminalizes “transport[ing] . . . contrary to this act 3,000 or more cigarettes.” Further, when reading in the express “knowingly” requirement that is evident from the legislative history and Subsection (11), Subsection (3) criminalizes “[knowingly] transport[ing] . . . contrary to this act 3,000 or more cigarettes.” The Court of Appeals offered no explanation for why the Legislature would include language—“contrary to this act”—that supposedly merely “describes” the nature of the offense in a statutory provision that actually defines the offense itself. Indeed, there is no reasonable explanation.

The Court of Appeals attempted to justify its construction by relying on yet another statement from *Nasir*—here, the finding that the intent requirement for Subsection (6) did not go so far as to require proof that the defendant “act[ed] with knowledge that the defendant does so without the authorization of the Michigan Department of Treasury.” The Court of Appeals concluded incorrectly that the “contrary to this act” element of Subsection (3) is comparable to the Subsection (6) element of “acting without authorization of the Michigan Department of Treasury.”

It is not an appropriate comparison. Rather, the *Nasir* court had already established an intent element—knowledge that the stamp was counterfeit—that would permit a conviction only upon a showing of actual criminal fault or culpability. The Court of Appeals made no corresponding finding of such an intent element for Subsection (3). Further, as a general matter, most people possessing tax stamps known to be counterfeit would necessarily also know they are doing so without Treasury’s authorization, thereby making any additional intent element as to such authorization largely duplicative in the vast majority of cases.

c. *Shouman* is Unpublished, Unpersuasive, Dicta That Cannot Be Applied Retroactively.

The Court of Appeals improperly relied on dicta in *People v. Shouman*, an unpublished *per curiam* opinion of the Court of Appeals issued on October 4, 2016, to justify its interpretation of the intent requirement for Subsection (3). (See Appendix K, *People v. Shouman*, No. 330383, 2016 Mich. App. Lexis 181nasir2). *Shouman* was charged with violating Subsection (3). On interlocutory appeal of the trial court’s order adopting the prosecution’s proposed jury instruction, the defendant argued that the trial court had incorrectly concluded that Subsection (3) creates a strict liability offense. 2016 Mich. App. Lexis 1812, at *2. The *Shouman* Court found the “premise of” the defendant’s argument faulty because the trial court’s jury instruction did require “proof of some knowledge on the part of [the] defendant,” and, therefore, found it “unnecessary” to determine whether the offense was a strict liability crime. *Id.* at **2, 7-10, 13. Importantly, the *Shouman* Court found that the defendant had waived the argument that a different intent element applied because he had not preserved the issue for appeal. *Id.* at **13-14. In dicta, the *Shouman* Court was dismissive of the argument that Subsection (3) is a specific intent crime requiring “proof that [the] defendant knew [that] he was required to have a license in order to transport tobacco

products *and that he specifically intended to violate the TPTA.*"¹¹ *Id.* at *13 (emphasis added). But that is not what Magnant contends here. Thus, *Shouman* presents no persuasive authority with respect to Magnant's argument that Subsection (3) requires the State to prove, in addition to knowledge of possession or transportation of cigarettes, that a defendant had a general awareness that such possession or transportation was in violation of the TPTA. Further, to the extent that *Shouman* could somehow be construed as providing notice that the conduct with which Magnant has been charged is unlawful under the TPTA, any such notice would only apply prospectively. *Shouman* was decided nearly a year after the underlying conduct charged in this case.

D. The Court of Appeals Erred by Denying Defendants' Joint Motion to Dismiss for Due Process Violation

1. Standard of Review

Constitutional issues, including those relating to due process, are reviewed *de novo* by this Court. *Wayne Co. v Hathcock* 471 Mich 445, 455 (2004); *People v McGee* 258 Mich. App. 683, 699 (2003).

2. The TPTA Licensing Provisions and the Charge

Magnant is charged with a single count of violating the TPTA, specifically, MCL §205.428(3), by virtue of not having a transporter license as purportedly required by MCL §205.423(1). The pertinent sections for analysis in this case are:

MCL § 205.423(1):

[A] person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.

¹¹ It is important to note that, although *Shouman* was decided in 2016, well after the Legislature's 2008 amendments to MCL § 205.428, which strongly suggest that the Legislature did intend to require actual knowledge of violating the TPTA, *Shouman* did not address the legislative history.

MCL § 205.422(y):

“Transporter” means a person importing or transporting into this state, or transporting in this state, a tobacco product obtained from a source located outside this state, or from any person not duly licensed under this act. Transporter does not include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce, or a licensee maintaining a warehouse or place of business outside of this state if the warehouse or place of business is licensed under this act.

Person means an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity.

Importantly, the TPTA specifically provides that, with respect to transporters and certain other classes (i.e. manufacturers, wholesalers, secondary wholesalers, vending machine operators, and unclassified acquirers), “each place of business shall be separately licensed”; it does not require separate licenses for each employee of such classes. *See* MCL §205.423(2). Further, the TPTA itself requires, among other things, that each applicant for a license show proof of the following:

- “[t]he applicant’s financial responsibility, including but not limited to, satisfactory proof of a minimum net worth of \$25,000.00; and”
- “[t]hat the applicant owns, or has an executed lease for, a secure nonresidential facility for the purpose of receiving and distributing cigarettes and conducting its *business* if the applicant owns or has an executed lease for such a facility.”

MCL § 205.423(6)(a), (b). (emphasis added).

Notably, the TPTA specifically authorizes Treasury to adopt rules for the administration of the Act, MCL § 205.433(2), and also provides that “[t]he application for licensure shall be on a form prescribed by the department....” MCL§ 205.423(2). The prescribed form, Treasury Form 336, requires only a “business” engaged in the transportation of tobacco products, to obtain a

transporter license—as opposed to requiring each individual employee to obtain his own license.¹² See PE at 109-111; Appendix B. It expressly limits eligibility for a transporter license to “[a] *business* that imports or transports into this state, or transports in this state, cigarettes or other tobacco products obtained from a source located outside this state, or obtained from a person that is not a Michigan tobacco tax licensee,” and otherwise requires certain application information for the “*business*.” (Appendix B) (emphasis added). Because the TPTA itself specifically mandates that the license “application shall be on a form prescribed by” Treasury, MCL § 205.423(2), it incorporates that form as well as its contents into the licensing provisions. Thus, Treasury Form 336 adds to the lack of “fair warning” and legal ambiguity in this case. Since the TPTA was enacted over 25 years ago, Treasury has not adopted any other rule, regulation, or guideline advising that individual employees are required to obtain a “transporter” license to deliver tobacco products for their employer.

3. The TPTA Does Not Give Fair Notice that the Charged Conduct is Prohibited

Charging Magnant with a felony for transporting cigarettes without a transporter license in violation of Subsection (3) violates his rights to due process of law, as guaranteed by the United States and Michigan Constitutions. It is fundamental that “[n]o person may be deprived of life, liberty, or property without due process of law.” (United States Const., Am. V; Mich. Const. 1963, Art. 1, § 17). Due process of law requires that “a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *People v. Hall*, 499 Mich. 446, 460-61 (2016). A vague law violates the right to due process of law by failing to provide fair warning that particular conduct is prohibited; the law must provide a

¹² Interestingly, the form was recently revised to clarify the discussed ambiguity that was extant in December of 2015.

person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly. *People v. Howell*, 396 Mich. 16, 20 n.4 (1976); *see also, People v. Assy*, 316 Mich. App. 302, 305 (2016). A criminal statute fails to provide “fair warning” if individuals of reasonable intelligence are left “to guess at or meaningfully differ in opinion regarding what conduct is proscribed.” *People v Mesick*, 285 Mich. App. 535, 545 (2009). Conversely, “a ‘statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words.’” *Id. (citing People v. Noble*, 238 Mich. App. 647, 651-652 (1999)). The TPTA licensing provisions do not give fair notice to workers who transport tobacco products as part of their employment that they must individually obtain a transporter license; in fact, the plain language of the TPTA and Treasury Form 336 require the conclusion that a mere low-level employee like Magnant would not even be eligible for a license.

a. By its Plain Terms, the TPTA Does Not Impose a License Requirement on Employees of an Entity Subject to the Licensing Provisions

There is no fair notice in the TPTA itself to a person employed merely as a delivery person, that one could face felony charges if it should happen that the cargo, that he is assigned to transport includes cigarettes. The Court of Appeals incorrectly dismissed Magnant’s argument as “focus[ing] not on the language of the relevant statutes, but rather on the interpretation of that language by two Department of Treasury employees.” It is true, as discussed in further detail below, that Treasury’s interpretation of the TPTA’s licensing provisions supports Magnant’s argument. But the Court of Appeals’ criticism is misplaced because Treasury—and Magnant—reached this conclusion based on the language of the TPTA itself, which cannot fairly be read as requiring each individual employee of a “transporter” business to obtain his own transporter license.

The license requirements apply to any “person” that is a transporter (or other category of licensee), MCL § 205.423(1), and a “person” is defined as “an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity.” MCL § 205.422(o). Significantly, the definition of “person” does not specifically include employees of any of the enumerated legal entities. Reading all of the relevant provisions of the TPTA in *para materia*, it is appropriate to interpret “individual” as inclusive only of an individual operating a business on his own account. This reading is consistent with the nature of the other nouns listed in the definition of “person”—business entities—and, thus, is a straightforward application of *ejusdem generis*, one of the fundamental rules of statutory construction. *People v. Jacques*, 456 Mich. 352, 357-58 (1998) (“[T]he statute before us does contain a list of specific words, all of which are of the same kind, class, . . . or nature. It is exactly the type of statute where the doctrine of *ejusdem generis* has traditionally been used”). Any other interpretation renders the statutory terms superfluous. It would make no sense to require a company, corporation, or other entity to obtain a license if every individual comprising the entity is also required to obtain a license.

Furthermore, as discussed above, the TPTA itself, when read in its entirety, imposes requirements on license applicants that only make sense—and likely could only be satisfied—if applied to a business entity rather than an employee of such a business. For example, a license applicant must prove “a minimum net worth of \$25,000.” *See* MCL § 205.423(6)(a). This would be an onerous, if not impossible, requirement for low-level employees who might earn minimum wage. Similarly, the TPTA expressly requires, with the exception of transportation companies, all other licensees, including transporters, to obtain a separate license for “each place of business,” not each employee. *See* MCL § 205.423(2) (further providing that “[e]ach license or a duplicate copy shall be prominently displayed on the premises covered by the license”). Requiring every

employee to obtain a separate license for each of their employer’s places of business would be onerous and impose an unnecessary burden on the employee, not to mention the agency that processes the applications. There is nothing in the TPTA that is sufficient to give Magnant, or any similarly-situated person, reason to believe that his employment by KBIC on December 11, 2015, could result in felony prosecution for failure to comply with a tax provision. *See Marinello v. United States*, 138 S.Ct. 1101, 1108 (2018) (holding that the offense of impeding administration of the Internal Revenue Code is void for vagueness because it created circumstances where minor tax infractions—e.g., keeping certain receipts—could become felonies and “we sincerely doubt that persons engaging in the described behavior would believe they are facing felony prosecution for tax obstruction”).

The reading of the TPTA advanced by Magnant here is also consistent with the holding of another panel of the Court of Appeals that the TPTA tobacco retail record-keeping requirements applied only to a person “who operates a place of business” and, thus, that only a manager with “control over the business’s day to day operations” could be subject to criminal penalties for violation of the record-keeping requirements—but “a cashier or stocker” would presumably not control business operations and thus not be subject to such penalties. (Appendix A, Decision at 7) (discussing *People v Assy*, 316 Mich App 302 (2016)). The Court of Appeals dissent here found that the statutory transporter licensing requirements—including the net worth requirement and obligation to obtain a license for each place of business—showed “that licensure is, much like the situation in *Assy*, linked to some degree of meaningful control” and does not apply to mere employees. (*Id.* Dissent at 4). The majority incorrectly found that *Assy* is distinguishable, improperly focusing on the plain meanings of “transporter” and “person” under the TPTA—without reading such terms *in pari materia* with the other pertinent statutory provisions bearing

on their meaning (i.e., simply reasoning that a “transporter” is a person who “transports” and “transport” is a physical action that can be carried out by an individual driver such that the driver is required to be licensed). (*Id.* Decision at 7.) The majority’s reasoning does not, however, hold up—it fails to account for the greater statutory framework that is inconsistent with requiring individual employees to be licensed, as discussed above. Moreover, as the dissent pointed out, the majority’s approach is not consistent with advancing the TPTA’s purpose of ensuring that tobacco taxes are collected—instead, the TPTA becomes a needlessly punitive scheme that inflicts severe punishment on workers for technical violations of law that cause no harm to the public. The *Assy* Court took the correct approach to interpreting the TPTA and the panel here should have followed it.

b. Treasury Applied the Plain Terms of the TPTA’s Licensing Provisions for Guidance on its Form 336 as well as in its Testimony at the PE—the License Requirement Does Not Apply to Mere Employees

It is not just the case that the TPTA fails to provide fair notice that a low-level employee like Magnant must obtain a transporter license—and could face felony charges if he does not. Rather, the TPTA itself as well as the application form that it requires—Form 336—affirmatively leads employees like Magnant to believe that they would not be required to obtain a license and, indeed, would not even be eligible for one. The Court of Appeals erred in finding that Magnant could not rely on the legal interpretative evidence of the TPTA as disseminated by the agency and officials charged with the administration of the law. Treasury’s construction should be given deference because it is not clearly wrong, and another construction is not plainly required. *See ACCO v. Dept. Treasury*, 134 Mich. App. 316, 322; *see also In Re: Complaint of Rovas*, 482 Mich. 90, 117-118 (2008); *Fulman v. United States*, 434 U.S. 528, 533 (1978).

At the time of the alleged offense, Treasury's only guidance available to potential TPTA license applicants was Form 336, the license application that, importantly—the TPTA itself expressly requires. Form 336 states that only a “business” involved in transporting tobacco needs a transporter license and otherwise requires certain application information for the “*business*” – as opposed to requiring each individual employee of a business to obtain his or her own license. (See PE at 109, 111; Appendix A, Form 336) (emphasis added). Treasury's handling of the issue in Form 336 was not an anomaly or mistake; rather, it expressed a sound and careful understanding of the TPTA licensing system, as evident in the statute itself, by Treasury officials charged with carrying it out. Angela Littlejohn, the manager of Treasury's Tobacco Tax Unit, testified at the PE and confirmed that the TPTA's license provisions do not require employees to obtain a license separate from their employer.

The Court: So let me just ask if an employee of a wholesaler was a transporter, does that individual need a license to move the product?

The Witness: No.

(PE at 102).

Ms. Littlejohn also testified that the TPTA does not require an individual employee to secure a transporter license to pick up or deliver tobacco products for and on behalf of his employer.

Q Now, if I'm a wholesaler, right, which I think Mr. Grano was asking, so I'm a wholesaler and I am going to sell my tobacco, I gotta get my tobacco from my warehouse to my customer, correct?

A Correct.

Q Okay. And I have an employee, Mr. Davis is my employee, let's say, and I say, Mr. Davis, this customer bought 56 cases of tobacco products, *i.e.*, cigarettes, can you drive them over

to my customer who is a mile away. He does. Does he need a transporter's license?

A No.

(PE at 106).

Doug Miller, the Administrator of Special Taxes for Treasury, testified that the scope of his employment involved making sure that taxes are being properly administered pursuant to the TPTA. (PE at 118). Mr. Miller stated that an applicant could rely on the information set forth on Form 336 (PE at 121-22).¹³

Treasury's position, as expressed at the PE and reflected in Form 336, is consistent with the plain terms of the TPTA. Magnant had no reasonable basis to believe that Treasury's interpretation of the law was even arguably wrong, much less that another construction was plainly required, especially given the above-discussed provisions in the TPTA itself counseling against any reading of it applying to individual employees. *ACCO*, 134 Mich. App. at 322.

- c. The Court of Appeals' Position is Fundamentally Unfair to Workers, But if its Construction of the TPTA Stands, the Rule of Lenity Forbids Prosecution of Magnant

The Court of Appeals' decision creates an impossible situation for Magnant and other similarly-situated Michigan workers performing services solely for their employers: Magnant cannot rely on the plain terms of the TPTA to determine his legal duties, and he cannot even rely on the interpretation of the TPTA implemented by Treasury. Rather, he is left to the mercy (or lack thereof) of state police and prosecutors, who may now—with the Court of Appeals'

¹³ Mr. Miller also testified that he believed that the law on this topic is very unclear and confirmed that Treasury provided no additional guidance or notice with respect to whether or under what circumstances employees must obtain a transporter license. (PE at 135-39).

blessing—use their investigative and prosecutorial discretion to impose felony charges on the workers trapped in that impossible situation.

According to the Court of Appeals, the only recourse for someone in Magnant’s position would be to embrace the newly-created duty—aptly described in the dissent as “*respondeat inferior*”—to verify their employer’s compliance with the TPTA licensing provisions or suffer the consequences. The Court of Appeals does not explain what an employee should do if they believe their employer is not in compliance. It is not plausible to think that a low-level employee could force compliance, and extraordinarily unfair to expect the employee to forego the chance to earn a living if their employer does not agree on the interpretation of the TPTA. Thus, the Court of Appeals “answer” to the impossible situation only makes it worse.¹⁴

Magnant’s position that the TPTA is unconstitutionally vague as applied to him is also supported by the rule of lenity. Grounded in due process, the rule of lenity is a legal principle that provides that any doubt or ambiguity in the enforcement of a criminal statute will be resolved in a defendant’s favor. It applies with particular force in a case like this involving complex tax laws, which are to be construed *against* the Government. *Brunswick v. Treasury*, 267 Mich. App. 682, 685 (2005); *Dekoning v. Treasury*, 211 Mich. App. 359, 361 (1995); *Michigan Bell v. Treasury*, 445 Mich. 470, 477 (1994). These rules of construction also support Magnant’s position, counseling in favor of resolving the doubt or ambiguity in the TPTA in his favor.

¹⁴ Indeed, based on the prosecutions here, it appears that the State would have the TPTA require that even the employee *passenger* (Magnant) obtain his own transporter license. (*But see* PE at 135) (Miller, the individual responsible for administering the TPTA, testifying that he is not aware of any Treasury policy indicating whether one or two transporter licenses would be required).

V. **CONCLUSION AND REQUEST FOR RELIEF**

As the dissent recognized, allowing the State to proceed in its effort impose criminal liability on “KBIC’s low-level employees not only fails to serve the purposes of the TPTA, but amounts to an overreach that makes a mockery of both the legislature’s intent and fundamental justice.” (Slip Op. p. 5.) Thus, for all of the reasons stated herein, Magnant requests that this Honorable Court reverse the Court of Appeals’ decision affirming the trial court’s denial of Defendants’ Joint Motion to Quash Information and Joint Motion to Dismiss for Due Process Violation and enter an order instructing the trial court to dismiss this case.

Respectfully submitted,

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