

Supreme Court Issues
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October 11, 2023

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Cases Not Yet Set

Arbitration—Judicial Review—Motion to Confirm Award—Award Satisfied—Effect

Whether under RCW 7.04A.220, which provides that a court “shall” confirm an arbitration award upon motion of the prevailing party unless the award is modified or corrected or vacated, the court may dismiss a confirmation motion as moot if the nonprevailing party has meanwhile paid the award in full.

No. 101872-0, *AURC III, LLC* (respondent) v. *Point Ruston Phase II, LLC, et. al.* (petitioners). (See also: [Arbitration—Judicial Review—Scope—Motion to Confirm Award—Order Confirming Award—Attachment of Award—Propriety](#)).

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Arbitration—Judicial Review—Scope—Motion to Confirm Award—Order Confirming Award—Attachment of Award—Propriety

Whether in relation to a motion to confirm an arbitration award under RCW 7.04A.220, it is inappropriate for the superior court to attach to the order of confirmation a copy of the arbitrator’s award because it implies the court approved the arbitrator’s reasons for the award.

No. 101872-0, *AURC III, LLC* (respondent) v. *Point Ruston Phase II, LLC, et. al.* (petitioners). (See also: [Arbitration—Judicial Review—Motion to Confirm Award—Award Satisfied—Effect](#)).

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Consumer Protection—Action for Damages—Unfair or Deceptive Conduct—Unfairness—What Constitutes—Price Gouging—Determination

Whether in this class action brought in part under the Washington Consumer Protection Act (CPA) by consumers who made purchases from an online retailer following the declaration of the COVID-19 national emergency, alleged price gouging by the retailer may constitute an “unfair” act or practice under the CPA, and if so, whether the court or the jury determines what percentage increase in the price of goods is “unfair.”

No. 101858-4, *Greenberg, et al.* (plaintiffs) v. *Amazon.com, Inc.* (defendant).

Certified from U.S. Dist. Court, W. Dist. of Wash.

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Criminal Law—Aggravated First Degree Murder—Punishment—Sentence—Life Imprisonment Without Parole—Youthful Offender—Resentencing—Sentencing Authority—Community Custody as Exceptional Sentence

Whether in resentencing a 20-year-old offender pursuant to *In re Personal Restraint of Monschke*, [197 Wn.2d 305, 482 P.3d 276 \(2021\)](#), on a conviction for aggravated first degree murder for which the original sentence was mandatory life without release, the trial court had authority to impose a determinate sentence, and whether it could impose community custody as an exceptional sentence.

No. 101859-2, *State* (appellant) v. *Reite* (respondent).

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***Criminal Law—Pretrial Proceedings—Physical Restraint of Defendant—Placement in Separate Secured Room With View of Proceedings—Freedom from Restraint—Constitutional Protection—Applicability**

Whether in this criminal prosecution, Cowlitz County’s practice of placing in-custody defendants in a confined windowed room in the back of the court room during pretrial hearings violated the defendant’s right to appear without restraints under the state or federal constitutions.

No. 101828-2, *State* (respondent) v. *Luthi* (petitioner).

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***Criminal Law—Punishment—Sentence—Resentencing—CrR 7.8 Motion—Facial Invalidity—Scope of Resentencing**

Whether, when a defendant files a [CrR 7.8](#) motion for resentencing on the basis that the defendant’s original offender score included a prior drug possession conviction now invalid under *State v. Blake*, [197 Wn.2d 170](#), [481 P.3d 521 \(2021\)](#), and thus the judgment and sentence is facially invalid, the superior court must consider all sentencing issues raised by the defendant de novo, including new matters, or whether the court has discretion to limit the scope of resentencing.

No. 102045-7, *State (petitioner) v. Vasquez (respondent)*.

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***Criminal Law—Punishment—Sentence—Resentencing After *Blake*—Concurrent Firearm Enhancements—Propriety—Invited Error**

Whether in this resentencing on multiple convictions occurring after the defendant’s prior convictions for possession of a controlled substance were invalidated by *State v. Blake*, [197 Wn.2d 170](#), [481 P.3d 521 \(2021\)](#), the trial court improperly imposed firearm enhancements on two of the nondrug convictions concurrently, and if so, whether the State invited the error.

No. 102002-3, *State (respondent) v. Kelly (petitioner)*. (*See also:* [Criminal Law—Punishment—Sentence—Resentencing After *Blake*—Timeliness—Validity of Judgment and Sentence as to Nondrug Offenses—Change in Law](#)).

Consolidated with: 102003-1, *State (respondent) v. Kelly (petitioner)*.

[25 Wn. App. 2d 879 \(2023\)](#).

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***Criminal Law—Punishment—Sentence—Resentencing After *Blake*—Timeliness—Validity of Judgment and Sentence as to Nondrug Offenses—Change in Law**

Whether a defendant convicted of multiple offenses including possession of a controlled substance may be resentenced on all of his convictions beyond the one-year time limit on collateral relief even though invalidation of the drug possession conviction pursuant to *State v. Blake*, [197 Wn.2d 170, 481 P.3d 521 \(2021\)](#), does not alter the standard ranges of the nondrug convictions, either because invalidation of the drug possession conviction effectively vacates the entire judgment and sentence, or because *Blake* constitutes a material retroactive change in the law.

No. 102002-3, *State (respondent) v. Kelly (petitioner)*. (See also: [Criminal Law—Punishment—Sentence—Resentencing After *Blake*—Concurrent Firearm Enhancements—Propriety—Invited Error](#)).

Consolidated with: 102003-1, *State (respondent) v. Kelly (petitioner)*.

[25 Wn. App. 2d 879 \(2023\)](#).

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Eminent Domain—Statutory Authority—Public Use—Mixed Purposes—Prohibited Purpose—Salmon Recovery Act

Whether in this action to condemn a property owner's rights in a creek for purposes of a public storm drainage project, the city of Sammamish is prohibited under the Salmon Recovery Act, [chapter 77.85 RCW](#), from using its powers of eminent domain because one of the purposes of the project is to improve fish passage.

No. 101894-1, *City of Sammamish (respondent) v. Titcomb, et al. (petitioner)*.

[25 Wn. App. 2d 820 \(2023\)](#).

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Employment—Compensation—Damages for Nonpayment of Wages—Uncompensated Hours—Meal Period—Minimum Wage—Overtime—Limitation of Actions—Tolling Statute—Equitable Grounds

Whether, in this class action in which nurses seek relief against their employer for unpaid wages and other Minimum Wage Act violations, the statute of limitations on the action should have equitably tolled during the pendency of a nurses' association's action seeking relief for the same grievances, which was ultimately dismissed for lack of associational standing.

No. 102047-3, *Campeau (petitioner) v. Yakima HMA, LLC (respondent)*.

[528 P.3d 855 \(2023\)](#).

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Financial Institutions—Checking Accounts—Customer Agreement—Overdraft Penalties—Breach of Contract—Consumer Protection—Unfair or Deceptive Conduct.

Whether a credit union member stated a claim for which relief could be granted in alleging that the credit union's method of calculating overdraft fees under its optional checking account overdraft protection service violated the terms of the membership agreement or was unfair or deceptive for purposes of the Consumer Protection Act.

No. 101288-8, *Feyen (respondent) v. Spokane Teachers Credit Union (petitioner)*.

[23 Wn. App. 2d 264 \(2023\)](#).

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Insurance—Breach of Contract—Declaratory Relief—Resulting Loss Clause

Whether in this breach of contract action brought by an insured against its insurer, the policy requires the insurer to pay most costs associated with replacing the building components in the insured’s roof assembly, where the policy provides coverage for all risks except those that are specifically excluded, excludes coverage for faulty workmanship and for any event that “initiates a sequence of events” resulting in loss, and contains a resulting loss clause providing that “if loss or damage by a Covered Cause of Loss results,” the insurer will pay for the resulting loss or damage.

No. 101892-4, *The Gardens Condo. (respondent) v. Farmers Ins. Exchange (petitioner)*.

[24 Wn. App. 2d 950 \(2022\)](#).

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Mandamus—Duty to Act—Competency Restoration—In-Custody Criminal Defendants—Timeliness

Whether the secretary of the State Department of Health and Human Services has a clear nondiscretionary legal duty, actionable through mandamus in favor of a county, to perform expedient competency evaluations and restorations of criminal defendants in custody pending trial.

No. 101520-8, *Spokane County (petitioner) v. Meneses (respondent)*.

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***Process—Service—Sufficiency—Proof—Corporations and Business Organizations—Persons Authorized to Accept Service—Statutory Authority—Human Resources Manager—Whether a “Managing Agent” or “Office Assistant.”**

Whether in this personal injury action against a limited liability company, the plaintiff made a prima facie showing of proper service of process on a “managing agent” of the company or an “office assistant” of the head of the company or the company’s registered agent within the meaning of [RCW 4.28.080](#) when process was served on the company’s human resources manager.

No. 102147-0, *Spencer (respondent) v. Franklin Hills Health Spokane, LLC (petitioner)*.

[Unpublished.](#)

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Public Contracts—Construction Contracts—Prevailing Wages—Wage Rate—Determination—Statutory Provisions—Revision of Preexisting Statute—Constitutionality—Failure to Set Forth in Full

Whether [Substitute Senate Bill 5493](#), 6th Legislative Regular Session (Wash. 2018), which altered the method by which the prevailing wage for some public works projects is determined, violates article II, section 37 of the Washington Constitution on the basis that it renders erroneous the determination of the scope of rights or duties under [RCW 39.12.026\(1\)](#) without setting forth that statute in full.

No. 101997-1, *Assoc. General Contractors of Washington, et al. (respondent) v. Inslee, et al. (petitioner)*.

[Unpublished.](#)

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Public Employment—Wrongful Discharge—Violation of Public Policy—Accommodation of Employee—Religious Practices

Whether, in this case for wrongful termination of a public employee in violation of public policy, the employee raised a material question of fact as to whether the employer failed to adequately accommodate the employee’s absences to attend religious events.

No. 101386-8, *Suarez (respondent) v. State, et al. (petitioner)*.

[23 Wn. App. 2d 609 \(2022\)](#).

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Records—Judicial Review of Administrative Decisions—Limitation of Actions—Equitable Tolling—Discovery Rule

Whether in this action under the Public Records Act, where the agency reopened the public records request and twice disclosed additional records after purporting to “close” the request, the statute of limitations expired before the plaintiff filed their PRA action, and whether equitable tolling is a sufficient exception to the statute of limitations under the Public Record Act.

No. 101769-3, *Cousins (petitioner) v. State, & Dep’t of Corr. (respondent)*.

[25 Wn. App. 2d 483 \(2023\)](#).

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States—Torts—Washington Criminal Justice Training Commission—Statutory Immunity—Scope—Intentional Torts—Acts Performed in the Course of Duties

Whether in an action alleging wrongful discharge, violation of the Washington Law Against Discrimination, and intentional infliction of emotional distress, [RCW 43.101.390](#), which grants immunity to the Washington State Criminal Justice Commission and persons acting for the commission from liability for official acts performed in the course of duties, extends to claimed intentional torts committed in the administration of the Basic Law Enforcement Academy, and whether acts committed with unlawful intent qualify as official acts performed in the course of duties under the statute.

No. 101945-9, *Cruz* (plaintiff-appellee) v. *City of Spokane, et al.*
(defendants-appellants).

Certified from U.S. Court of Appeals Ninth District Federal Court.

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Taxation—Business and Occupation Tax—Exemptions—Insurance Business—Applicability—Activities Under Contract with Parent Insurance Company

Whether in this case challenging business and occupations tax assessments, Envolve Pharmacy qualifies for the “insurance business” exemption from the tax under RCW 82.04.320 because it administers pharmaceutical insurance coverage under a contract with its health insurer parent company, which pays the premium taxes required for the exemption.

No. 101845-2, *State of Washington* (petitioner) v. *Envolve Pharmacy Solutions, Inc.*
(respondent).

[25 Wn. App. 2d 699 \(2023\)](#).

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**Waters—Water Rights—Temporary Donation to Instream Trust Program—
Administrative Water Rights Division Forms—Refusal of Department of Ecology
to Accept Forms—Judicial Challenge—Administrative Procedure Act—Standing
of County Water Conservancy Board**

Whether the Benton County Water Conservancy Board had standing under Washington’s Administrative Procedure Act to obtain judicial review of the Washington State Department of Ecology’s refusal to accept and record administrative division forms when water rights have been temporarily donated to a water rights trust program, as required by [RCW 90.54.030](#).

No. 101838-0, *Benton Cnty. Water Conservancy Board* (petitioner) v. *Wash. State Dep’t of Ecology* (respondent).

[25 Wn. App. 2d 717 \(2023\)](#).

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Automobiles—Driving While Intoxicated—Breath or Blood Test—Testing Procedure—Draeger Alcotest 9510—Administrative Rules—Noncompliance—Effect

Whether the breath alcohol concentration test results obtained from all Draeger Alcotest 9510 machines are invalid and inadmissible under [RCW 46.61.506](#) because they do not comply with [WAC 448-16-060\(2\)](#), which requires the mean of the breath samples to be calculated and rounded to four decimal places before being analyzed.

No. 101171-7, *State* (plaintiff-petitioner) v. *Keller* (defendant-respondent). (Oral argument 10/26/23).

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Constitutional Law—Right to Travel—Intrastate Travel—Recreational Vehicle Parking Ordinance

Whether the Washington Constitution protects the right in intrastate travel, and if so, whether the city of Lacey’s recreational vehicle parking ordinance, [LMC §§ 10.14.020-045](#), violates that right.

No. 101188-1, *Potter* (plaintiff) v. *City of Lacey, et al.* (defendant-appellee). (Oral argument 10/10/23).

Certified from the US Court of Appeals 9th Circuit Fed. Court.

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Criminal Law—Felony Murder—Arraignment—Delay—Effect—Due Process

Whether the defendant was entitled to reversal of his conviction for felony murder on the basis the prosecutor delayed filing charges until 12 years after concluding that probable cause existed to charge the defendant.

No. 101502-0, *State (petitioner) v. Stearns (respondent)*. (Oral argument 10/10/23).

[23 Wn. App. 2d 580 \(2022\)](#).

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Criminal Law—First Degree Child Molestation—Ineffective Assistance of Counsel—Failure to Request Jury Instruction—Lesser Included Offense—Fourth Degree Assault

Whether in this criminal prosecution for first degree child molestation, defense counsel was prejudicially ineffective in failing to request a lesser included offense instruction on fourth degree assault.

No. 100953-4; *State (respondent) v. Bertrand (appellant)*. (Oral argument 10/12/23).

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Criminal Law—Punishment—Sentence—Community Custody—Consecutive Community Custody Terms—Validity

Whether in this prosecution for escape from community custody and failure to register as a sex offender, the trial court had authority to impose a 36-month term of community custody consecutively to any other term of community custody in light of [RCW 9.94A.589\(5\)](#), which limits consecutive community supervision to 24 months, and [RCW 9.94A.701\(1\)](#), which specifies 36 months community custody for sex offenses and serious violent offenses.

No. 101703-1, *State (respondent) v. Buck (petitioner)*. (Oral argument 10/17/23).

[25 Wn. App. 2d 120 \(2023\)](#).

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Employment—Compensation—Minimum Wage Act—Applicability—Civil Detainees—“Employee”—Determination

Whether in this wage action in federal court brought by the State of Washington and a class of federal immigration detainees who participate in voluntary work programs while held in a private detention center operating under a federal government contract, the detainees qualify as “employees” within the meaning of the Washington Minimum Wage Act, and if so, whether civil detainees working in comparable circumstances in a private detention facility operating under a State contract do not qualify as “employees” under the act, thus barring the act’s application to this action under the intergovernmental immunity doctrine.

No. 101786-3, *Nwauzor, et al.* (plaintiffs-appellees) v. *The GEO Grp., Inc.* (defendant-appellant). (Oral argument 10/17/23). (See also: [Employment—Compensation—Minimum Wage Act—Civil Detainees—Claim for Damages—Equitable Remedies—Unjust Enrichment—Adequate Remedy](#)).

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Employment—Compensation—Minimum Wage Act—Civil Detainees—Claim for Damages—Equitable Remedies—Unjust Enrichment—Adequate Remedy

Whether, if the Washington Minimum Wage Act applies to work performed by civil detainees confined in a private detention center operating under a federal contract, an award of damages to the detainees in a class action under the act is an adequate legal remedy that forecloses an award of unjust enrichment to the State in its own action under the act.

No. 101786-3, *Nwauzor, et al.* (plaintiffs-appellees) v. *The GEO Grp., Inc.* (defendant-appellant). (Oral argument 10/17/23). (See also: [Employment—Compensation—Minimum Wage Act—Applicability—Civil Detainees—“Employee”—Determination](#)).

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**Mechanics’ Liens—Enforcement—Notice to Owners—Second-Tier
Subcontractor—Labor Lien—Prelien Notice—Necessity**

Whether in this case involving a second-tier subcontractor’s lien for labor and materials for unpaid framing work, the subcontractor was required to provide the property owner with prelien notice of its labor lien in order to enforce the lien under the applicable statutes.

No. 101591-7, *Velazquez Framing, LLC* (petitioner) v. *Cascadia Homes, Inc.* (respondent). (Oral argument 10/10/23).

[24 Wn. App. 2d 780 \(2022\)](#).

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**Medical Treatment—Malpractice—Emergency Services—Hospitals—Vicarious
Liability—Nonemployee Physician**

Whether in this medical negligence action involving the actions of nonemployee physicians working in a hospital emergency department, the hospital may be held liable for the claimed negligence of the nonemployee physicians under theories of nondelegable duty and inherent function.

No. 101745-6, *Estate of Cindy Essex, et al.* (petitioner) *Grant County Pub. Hosp. Distr., et al.* (respondent). (Oral argument 10/24/23).

[25 Wn. App. 2d 272 \(2023\)](#).

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***Personal Restraint—Petition—Timeliness—Actual Innocence Doctrine—Applicability—Second Degree Assault—Sufficiency of the Evidence—Intent**

Whether in this timely personal restraint petition challenging a conviction for second degree assault on the basis of insufficient evidence, the Court of Appeals erred in applying the actual innocence doctrine, and whether there was sufficient evidence that the petitioner had the requisite intent to commit second degree assault when he displayed a firearm but did not point it at anyone.

No. 101635-2, *In re Pers. Restraint of Arntsen* (petitioner). (Oral argument 10/26/23).

[25 Wn. App. 2d 102 \(2023\)](#).

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Schools—Students—Discipline—Suspension—Indefinite Suspension—School Board Discretion—Safety Concerns—Due Process—Remedy

Whether a school board had authority to suspend a student indefinitely on the basis of the student’s alleged gang involvement, and if not, whether compensatory education was an available remedy for the improper suspension.

No. 101799-5, *M.G., et al. (respondent) v. Yakima School Dist. No. 7* (petitioner). (Oral argument 10/24/23).

[24 Wn. App. 2d 703 \(2023\)](#).

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Taxation—Business and Occupation Tax—Sales Tax—Applicability—Provision of Free Wireless Services to Low Income Persons—Federal Program—Substance of Transaction—Person Legally Obligated to Pay—Exemptions—Federal Preemption

Whether the provision of free wireless service to low-income persons under a federal program, funded through fees imposed on wireless service providers by federal statute, constitutes “retail sales” for purposes of Washington’s business and occupation and sales taxes, and if so, whether the buyer in the transaction is a federal agency, such that preemption principles preclude the State from taxing the sales.

No. 101873-8, *Assurance Wireless* (petitioner) v. *Wash. Dep’t. of Revenue* (respondent). (Oral argument 10/26/23).

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