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STATE OF WASHINGTON
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No. 1011733

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

VICTOR ALFONSO PANIAGUA, Petitioner

ANSWER TO PETITION FOR REVIEW

Respectfully submitted:
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TABLE OF CONTENTS

Page No.

A. **IDENTITY OF RESPONDENT** 1

B. **COURT OF APPEAL DECISION** 1

C. **ISSUES PRESENTED FOR REVIEW** 1

D. **STATEMENT OF THE CASE** 2

E. **ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED** 3

(1) The decision of Division Three of the Court of Appeals applied settled law. Thus, there is no need for review by the Washington Supreme Court.

(2) Division Two of the Court of Appeals recently reached the same result as Division Three in the instant case. This is further evidence that the controlling law is settled.

(3) The court in Benton County clearly had jurisdiction to adjudicate the charge of possession of controlled substance and to require the defendant's attendance.

(4) Defendant's policy argument are irrelevant and not well taken.

F. **CONCLUSION** 18

TABLE OF AUTHORITIES

State Cases

Page No.

State v. Paniagua,
22 Wn. App. 2d 350, 511 P.3d 113 (2022) 1

State v. Blake,
197 Wn.2d 170, 481 P.3d 521 (2021).......................... 2

State v. Downing,
122 Wn. App. 185, 93 P.3d 900 (2004) 3

State v. Arndt,
194 Wn.2d 784, 820, 453 P.3d 696 (2019).................. 6

State v. Eaton,
302 A.2d 588, 594 (Me. 1973) 8

State v. Brake,
15 Wn. App. 2d 740, 747, 476 P.3d 1094 (2020), *review dismissed*, 197 Wn.2d 1016 (2021) 17

State v. Henning,
2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871, 881-82).
.... 18

Other Cases

Page No.

What Justifies Escape or Attempt to Escape or Assistance in that Regard, 70 A.L.R 2d 1430 § 12 (1960).......................8

Kelley v. Meyers,
124 Or. 322, 263 P. 903, 56 A. L. R. 661 (1928).........9

In re Personal Restraint of Stacy,
No. 56110-7-II, 2022 WL 4090744.............................10

Unites States v. De Vaughn,
694 F.3d 1141, 1153-54 (10th Cir. 2012)....................12

Steel Co. v. Citizens for Better Environment,
523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998) 12

Unites States v. Williams,
341 U.S. 58, 68-69, 71 S. Ct. 595, 601, 95 L. Ed. 2d 747 (1951)...12

Unites States v. De Vaughn,
694 F.3d 1141, 1153-54 (10th Cir. 2012)....................12

People v. Minfree,
14 Ill. App. 3d 796, 303 N.E.2d 591 (1973).................13

Banowsky v. Backstrom,
193 Wn.2d 724, 738, 445 P.3d 543 (2019).................14

A. IDENTITY OF RESONDENT

State of Washington is the respondent.

B. COURT OF APPEALS DECISION

On June 9, 2022, Division Three of the Court of Appeals issued its opinion affirming the decision of the Superior Court for Franklin County to include the prior conviction for bail jumping in the offender score of Victor Alfonso Paniagua. A copy of the opinion is attached to this answer as an appendix. The opinion is published as *State v. Paniagua,* 22 Wn. App. 2d 350, 511 P.3d 113 (2022).

C. ISSUES PRESENTED FOR REVIEW

The State respectfully submits that the instant case presents no issues in need of review by the Washington Supreme Court.

D. STATEMENT OF THE CASE

Victor Alfonso Paniagua (hereinafter defendant) was convicted and sentenced for murder in the second degree, unlawful possession of a firearm in the second degree, assault in the second degree and tampering with a witness, with judgment and sentence being entered on December 18, 2018. CP 21-34. The Court of Appeals affirmed in an unpublished opinion. CP 36-62. The mandate was issued on January 12, 2021. CP 35.

Following this court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), the defendant moved for resentencing. CP 63-68. The First Amended Judgment and Sentence was entered on May 28, 2021. CP 200-213. While the trial court struck adult and juvenile convictions for unlawful possession of controlled substances from defendant's criminal history, it retained his conviction for

bail jumping. *Compare* CP 23 *with* CP 202. The bail jumping conviction arose from Benton County Cause No. 11-1-01179-1, for which judgment and sentence was entered on August 25, 2015. CP 153-162. The underlying offenses for which defendant failed to appear were a felony of unlawful possession of controlled substance and a gross misdemeanor of minor in possession of alcohol. CP 153. The underlying offenses occurred on October 8, 2011 and the bail jumping took place on November 9, 2011. CP 153.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

(1) The decision of Division Three of the Court of Appeals applied settled law. Thus, there is no need for review by the Washington Supreme Court.

Division Three found that the previously established law of *State v. Downing,* 122 Wn. App. 185, 93 P.3d 900

(2004) “controls this appeal.” *Paniagua,* 22 Wn. App. 2d at 356. Since the matter is controlled by settled law, review by the Washington Supreme Court is unnecessary.

Defendant challenged the use of his 2015 conviction for bail jumping in calculating his offender score at resentencing. He claimed that since the felony charge for which he failed to appear was for unlawful possession of controlled substance, his bail jumping conviction is invalid in light of *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521 (2021). *Blake* held former RCW 69.50.4013, the drug possession statute, did not pass constitutional muster. However, the fact that the statute he was accused of violating was later found to be unconstitutional has no effect on the validity of his bail jumping conviction.

In *Downing*, the defendant argued that his bail jumping conviction was invalid because the trial court

dismissed all of the underlying charges for which he failed to appear. However, the Court of Appeals stated:

> No Washington case squarely addresses whether the charge underlying the allegation of bail jumping must be valid. But we find the issue sufficiently analogous to charges of escape. In such cases, our courts have rejected arguments that the invalidity of the underlying conviction is a defense to the crime of escape. In a prosecution for first degree escape, the State is not required to prove that a defendant was detained under a constitutionally valid conviction. Accordingly, we reject Downing's argument that the validity of the underlying offense is an implied element of bail jumping.

Downing, 122 Wn. App. at 193 (citations omitted).

As noted in the above quotation, the *Downing* court based its decision on an analogy to the crime of escape. The analogy between escape and bail jumping is a perfect one. Escape and bail jumping both appear in chapter 9A.76 of the Revised Code of Washington, which is the chapter entitled

"Obstructing Governmental Operations." This court has recognized that when two statutes are located in different chapters of the criminal code, they "are intended to protect different societal interests." *State v. Arndt,* 194 Wn.2d 784, 820, 453 P.3d 696 (2019). The converse of this is that when two statutes appear in the same chapter of the criminal code, they are designed to protect closely aligned societal interests. Since escape and bail jumping are both crimes of obstructing governmental operations, it is logical to give them similar treatment.

At the pre-trial stage, the only difference between the two is whether the absconding defendant was being held in custody or had been released on bail or recognizance. If a defendant absconds while being held in custody pending trial, the crime is escape in the second degree. *See*

RCW 9A.76.120(1)(a)&(b) ("A person is guilty of escape in the second degree if . . . [h]e or she knowingly escapes from a detention facility; or . . . [h]aving been charged with a felony or equivalent juvenile offense, he or she knowingly escapes from custody[.]") If the defendant absconds after having been released on bail or recognizance, the crime is bail jumping. *See* former RCW 9A.76.170(1) ("Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . who fails to appear . . . as required . . . is guilty of bail jumping.") In either instance, the defendants are defying the orders of the court and scorning the court's authority over them.

Moreover, when a defendant absconds it obstructs the governmental operations regardless of

whether the charge is meritorious or invalid. The ultimate objective is to administer justice. If a charge is for any reason invalid, the goal becomes to ascertain that as quickly as possible and dismiss the charge. That can only be done when all of the parties are before the court and everyone is given an opportunity to be heard.

As Division Three of the Court of Appeals observed at 22 Wn. App. 2d 358, courts have universally found the fact that the defendant was being held pursuant to an unconstitutional statute does not justify escape; rather, the defendant must pursue the proper legal remedies. *See* W.E. Shipley, Annotation, *What Justifies Escape or Attempt to Escape or Assistance in that Regard,* 70 A.L.R 2d 1430 § 12 (1960). *See also, e.g., Eaton v. State,* 302 A.2d 588, 594 (Me. 1973)

("Furthermore, the law is established that the mere claim of the unconstitutionality of the statute under which a person is confined cannot justify an escape"). As further stated in *Kelley v. Meyers,* 124 Or. 322, 263 P. 903, 56 A. L. R. 661 (1928):

> If the statute under which Kelley had been convicted and was serving at the time of his escape had been unconstitutional as claimed, it could not have afforded any justification to Kelley to make an escape. It had not been declared to be unconstitutional in any judicial proceeding and, until so declared, the presumption was that the statute was constitutional. . . . [I]f he desired to have the constitutionality of the statute determined, his sole remedy would have been to sue out a writ of habeas corpus and, in that proceeding, to have the constitutionality of the statute judicially determined.

Id. at 263 P. 906. Like the *Downing* court before it, Division Three concluded: "[W]e discern no reason to distinguish between a charge for escape and one for bail jumping." *Paniagua,* 22 Wn. App. 2d at 358. The

eventual determination that the statute was unconstitutional provided no justification for the defendant in our case to jump bail (thereby delaying the resolution of the case for almost four years). Former RCW 69.50.4013 had not been declared to be unconstitutional in any judicial proceeding and, until so declared, the presumption was that the statute was constitutional. If defendant wished to litigate the constitutionality of the statute, he could certainly have done so in the criminal proceedings. The thing he was not entitled to do was to simply obstruct the governmental operations.

(2) Division Two of the Court of Appeals recently reached the same result as Division Three in the instant case. This is further evidence that the controlling law is settled.

Division Two of the Court of Appeals recently reached the same result as Division Three in the instant case in *In re Personal Restraint of Stacy,* No. 56110-7-II,

2022 WL 4090744 (decided September 7, 2022) (an unpublished opinion cited as persuasive authority pursuant to GR 14.1). Like Division Three, the *Stacy* court relied on *State v. Downing* in finding *Blake* did not require vacation of a bail jumping conviction where the charge giving rise to the bail jumping was unlawful possession of controlled substance.

Division Two's decision is further evidence that *Downing* is settled law which controls this question. Again, there is no need for further review.

(3) The court in Benton County clearly had jurisdiction to adjudicate the charge of possession of controlled substance and to require the defendant's attendance.

Contrary to defendant's arguments, it is clearly established that the court in Benton County had jurisdiction to adjudicate the charge of unlawful possession of controlled substance and to require defendant's

attendance at those proceedings. "A claim that a criminal statute is unconstitutional does not implicate the court's subject matter jurisdiction. Subject matter jurisdiction refers to the 'the courts' statutory or constitutional power to adjudicate the case.'" *United States v. De Vaughn,* 694 F.3d 1141, 1153-54 (10th Cir. 2012) (quoting *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998)). "Furthermore, as the Supreme Court explained in *Williams,* a court has jurisdiction over a criminal case even when it or a higher court later determines the statute under which the defendant was prosecuted is unconstitutional." *Id.* at 1154 (quoting *United States v. Williams,* 341 U.S. 58, 68-69, 71 S. Ct. 595, 601, 95 L. Ed. 2d 747 (1951)). ("'Though the trial court or an appellate court may conclude *that the statute is wholly unconstitutional,* or that the facts stated in the indictment do not constitute a crime or are not proven,

it has proceeded with jurisdiction. . . . ' (emphasis added.")

People v. Minfree, 14 Ill. App. 3d 796, 303 N.E.2d 591 (1973) is directly on point. The defendant in that case was convicted of possession of cannabis. When he failed to appear to serve his sentence, he was charged with bail jumping. Two years later, the Illinois Supreme Court declared the drug possession statute to be unconstitutional. The issue on appeal was "whether a conviction for bail jumping is void when bail is given in connection with the violation of a statute subsequently determined unconstitutional." *Id.,* 303 N.E.2d at 592. "Petitioner maintains that a conviction under an unconstitutional statute is a nullity and void and contends that as the offense of bail jumping arose out of the prior unconstitutional and void conviction, any order of court requiring petitioner to begin his sentence would be null

and void. Petitioner contends that his conviction for bail jumping is void." *Id.* (citation omitted). The court disagreed, finding that "the Legislature intended to create a separate offense for violation of the conditions of a bail bond apart from the initial offense for which the bond was issued." *Id.* The court further noted that the bail jumping occurred two years before the drug possession statute was found to be unconstitutional "and thus it cannot be said that his actions were taken pursuant to any reasonable belief that his convictions were void, but rather his actions were in deliberate violation of the court's order, the conditions of petitioner's bail and the bail jumping statute." *Id.*

Moreover, a court has jurisdiction to determine its own jurisdiction. *Banowsky v. Backstrom,* 193 Wn.2d 724, 738, 445 P.3d 543 (2019). Doing so requires having all parties before the court and giving them an opportunity to

be heard. The legislators are sworn to uphold the state and federal constitutions. When they pass a bill, it represents their determination that it is constitutional. The chief executive is likewise sworn to uphold the state and federal constitutions. When the chief executive signs a bill into law, it constitutes that official's determination that it is constitutional. Unless and until a law is declared by a court to be unconstitutional, it is presumed to be constitutional and the trial courts may treat it as such. *Kelley,* 263 P. at 906.

Just as the executive branch was justified in arresting and prosecuting defendant for unlawful possession of controlled substance in 2011, the trial court quite justifiably required defendant to appear in response to that charge. It would create an intolerable situation if defendants could decide on their own which charges were meritorious enough to necessitate their attendance in

court. In *Downing,* the court noted that "the fact that the court later dismissed the charges does not mean that it lacked jurisdiction to order Downing to appear and answer for those charges, even if his answer could have been that double jeopardy barred further prosecution." *Downing,* 122 Wn. App. at 193. In the instant case, the trial court in Benton County properly required defendant to appear and answer the charge, even if his answer could have been that former RCW 69.50.4013 is unconstitutional (something that no court had held up to that time).

(4) Defendant's policy arguments are irrelevant and not well taken.

Finally, defendant makes policy arguments related to the 2020 amendments to the bail jumping statutes. However, these arguments are irrelevant. The statutes existing when the bail jumping was committed in 2011 are the ones that control. Under RCW 10.01.040, the criminal

statute in effect at the time of conduct applies unless there is express legislative intent for an amendment to apply retroactively. "[T]here is no clear legislative intent that the 2020 amendment to the bail jumping statutes apply retroactively." *State v. Brake,* 15 Wn. App. 2d 740, 747, 476 P.3d 1094 (2020), *review dismissed,* 197 Wn.2d 1016 (2021) (holding that the 2020 amendments to the bail jumping statute are not retroactively applied).

In any event, the arguments are not well taken. While the 2020 amendments restricted the scope of the bail jumping statute to some degree, bail jumping remains a serious crime. As stated by the Court of Appeals: "The State did not convict Victor Paniagua of a nonexistent crime when convicting him of bail jumping. The crime remains in existence today." *Paniagua,* 22 Wn. App. 2d at 356. As further noted by the Court of Appeals, "[a] purpose behind outlawing bail jumping is to effectuate

orderly administration of justice." *Paniagua,* 22 Wn. App. 2d at 359 (citing *State v. Henning,* 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871, 881-82).

Mr. Paniagua failed to appear for court on November 9, 2011, approximately one month after the underlying crime was alleged to have been committed. CP 13. His case was not adjudicated until August 25, 2015. CP 153-162. By his obstruction of the governmental operations, he was able to delay resolution of the case by nearly four years. The instant case provides a prime example of why bail jumping should be considered a serious crime.

F. CONCLUSION

On the basis of the foregoing arguments, it is respectfully requested that discretionary review by the Washington Supreme Court be denied

I certify that this document contains 2,603 words according to word processing software, exclusive of matters that are not required to be included in the word count by RAP 18.17.

DATED: September 14, 2022.

Respectfully submitted:

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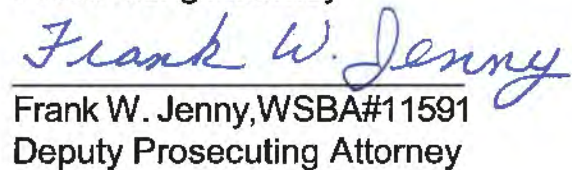

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Kate L. Benward katebenward@washapp.org	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 14, 2022 Pasco, WA /s/ Misty McBrearty **Misty McBrearty,** **Legal Secretary** **Original filed at the Court of Appeals,** **500 N. Cedar Street,** **Spokane, WA 99201**

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 38274-5-III
v.	)	PUBLISHED OPINION
VICTOR ALFONSO PANIAGUA, Appellant.	)	

FEARING, J. — This appeal requires consideration of one of many consequences attended to the Washington Supreme Court's landmark decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The decision held Washington's possession of a controlled substance criminal statute unconstitutional. In turn, Washington courts have removed, from offender scores, earlier convictions for possession of a controlled substance. This appeal travels further down the path and asks whether a court should remove, from the offender score, a former conviction for bail jumping when the offender failed to appear at a scheduled hearing while on bail pending charges for possession of a controlled substance. Based on decisional authority surrounding the law of escape and bail jumping and the purposes behind the bail jumping proscription, we decline to reduce the offender score.

FACTS

In this appeal, Victor Paniagua only challenges his sentence for his 2018 convictions for murder and other crimes. The relevant facts begin, however, with earlier convictions.

In 2007, the State of Washington convicted Victor Paniagua with unlawful possession of a controlled substance. In 2011, the State again convicted Paniagua with possession of a controlled substance and the additional charge of bail jumping. The bail jumping charge arose from Paniagua's failure to appear at a November 9, 2011 omnibus hearing on the 2011 possession charge.

In June 2018, law enforcement responded to the shooting death of Abel Contreras at a Pasco residence. Police spotted Victor Paniagua, who they suspected fled from the abode. Law enforcement spoke with two eyewitnesses, both of whom identified Paniagua as the shooter. Following trial, a jury found Victor Paniagua guilty of second degree murder, second degree assault, unlawful possession of a firearm, and witness tampering. The jury further found that Paniagua committed second degree murder and second degree assault with a firearm.

The trial court calculated Paniagua's offender score at 8 for the murder and assault charges and 7 for the unlawful firearm possession and witness tampering charges. The offender score calculation included one point each for the 2007 and 2011 possession of a

controlled substance convictions and one point for the 2011 bail jumping conviction. The court then sentenced Paniagua to 453 months' total confinement.

PROCEDURE

After the issuance of *State v. Blake*, 197 Wn.2d 170 (2021), Victor Paniagua requested resentencing. With his postsentencing request, Paniagua argued that, pursuant to *Blake*, his two earlier convictions for unlawful possession of a controlled substance and his previous conviction for bail jumping, predicated on one of the possession charges, were void. Thus, the superior court should resentence him after reducing his offender score by three points.

The State agreed to the exclusion of the convictions for possession of a controlled substance from Victor Paniagua's offender score. The State argued that the one point for bail jumping should remain. The superior court agreed with the State and deducted only two points from Paniagua's offender score. The superior court resentenced Paniagua to 412 months' total confinement.

LAW AND ANALYSIS

Victor Paniagua repeats his worthy argument on appeal. Resolution of the appeal requires rereading of *State v. Blake*, examining Washington's offender score statute, consideration of the use of an unconstitutional conviction for the accused's offender score, assessment of the nature of a predicate crime, parsing of the bail jumping statute, and a review of limited decisions addressing the validity of escape and bail jumping

convictions when the statute under which the offender was charged when jumping bail was later declared unconstitutional.

We begin with *State v. Blake*, 197 Wn.2d 170 (2021). In 2021 and for many years preforth, RCW 69.50.4013(1) declared: "It is unlawful for any person to possess a controlled substance." Based on a reading of the statute, the Washington Supreme Court earlier ruled that the State need not prove any mens rea or mental state element to secure a conviction for possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 534-35, 98 P.3d 1190 (2004). In *State v. Blake*, the Washington Supreme Court overruled decades of precedent and held RCW 69.50.4013(1) to violate the due process clause because the statute penalizes one for passive, innocent, or no conduct without requiring the State to prove she had a guilty mind.

State v. Blake involved a direct challenge to Shannon Blake's conviction for possession of a controlled substance. The Supreme Court did not address the ramifications of an earlier conviction for possession being added to an offender's score for purposes of sentencing for a later crime.

The Washington Supreme Court also did not address, in *State v. Blake*, the retroactivity of its decision. Nevertheless, the State and other courts have operated on the assumption that *Blake* should be applied retroactively. If a statute is unconstitutional, it is and has always been a legal nullity. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952). *Blake* represents a new substantive rule decided

on constitutional grounds such that it should operate retroactively. *In re Personal Restraint of Ali*, 196 Wn.2d 220, 236, 474 P.3d 507 (2020); *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Victor Paniagua argued before the resentencing court and the State conceded the argument that his 2007 and 2011 convictions for possession of a controlled substance should be removed from his offender score based on *State v. Blake*. The superior court agreed. But this decision by the superior court did not end Victor Paniagua's challenge to his offender score. Paniagua also wants to erase his 2011 conviction for bail jumping because, at the time of his failure to appear, he faced charges for possession of a controlled substance. According to Paniagua, since he should never have been charged in 2011 for possession of a controlled substance, he could not have been convicted of bail jumping. Paniagua characterizes his bail jumping conviction as an unconstitutional conviction. Paniagua repeats these arguments on appeal.

The State does not carry an affirmative burden of proving the constitutional validity of a prior conviction before the State may exploit the conviction during sentencing. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). Nevertheless, a sentencing court may not consider in the score a prior conviction constitutionally invalid on its face. *State v. Ammons*, 105 Wn.2d 175, 187-88 (1986). Constitutionally invalid on its face means a conviction that without further elaboration evidences infirmities of a constitutional magnitude. *State v. Ammons*, 105 Wn.2d 175, 188 (1986).

Victor Paniagua cites *State v. Ammons*, 105 Wn.2d 175 (1986), in support of his argument that his 2011 conviction for bail jumping cannot be included in his offender score. *Ammons* addressed the use of an alleged unconstitutional plea to a crime in an offender score. We do not deem *Ammons* helpful since the decision did not address our underlying question of whether bail jumping requires a predicate crime or whether one can be convicted of bail jumping when held for an unconstitutional crime. We must address the validity of the bail jumping conviction before addressing whether to add any conviction for bail jumping to the offender score.

We next decide whether the bail jumping conviction is invalid on its face. When a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face. *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004); *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000); *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 627 P.2d 1316 (1981). The State did not convict Victor Paniagua of a nonexistent crime when convicting him of bail jumping. The crime remains in existence today. The conviction is not facially invalid.

Victor Paniagua impliedly, if not expressly, contends that charges under a constitutionally valid statute serve as a predicate to a bail jumping conviction. In 2011, the year of Victor Paniagua's conviction, former RCW 9A.76.170 (2001), the bail jumping statute, read in part:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, and . . . fails to appear . . . as required is guilty of bail jumping.
>
> . . . .
>
> (3) Bail jumping is:
>
> . . . .
>
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony.

Former RCW 9A.76.170 does not require that, to be guilty of the crime, the accused must have later been found guilty of the pending charge at the time of release on bail, only that he be under charges at the time of the failure to appear. Thus, a predicate crime does not constitute an element of bail jumping.

State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004), controls this appeal. The superior court found Robert Downing guilty of bail jumping for his failure to appear for arraignment on charges of unlawful issuance of bank checks (UIBC). The court dismissed all three counts of UIBC, two on double jeopardy grounds and one on motion by the State. The court denied Downing's motion to dismiss the bail jumping charge, however. On appeal, Downing argued that: (1) his bail jumping conviction was invalid, because the trial court dismissed the underlying charges of UIBC; and (2) defense counsel provided ineffective assistance by not moving to dismiss count I, one of the UIBC charges, under the mandatory joinder rules.

The *Downing* court first addressed Robert Downing's ineffective assistance of counsel argument and rejected the contention because joinder was not mandatory. This court next considered Downing's challenge to his bail jumping conviction. We wrote:

> There is no serious dispute that the superior court had jurisdiction over the UIBC charges. Indeed, the fact that the court later dismissed the charges does not mean that it lacked jurisdiction to order Downing to appear and answer for those charges, even if his answer could have been that double jeopardy barred further prosecution. We have rejected Downing's argument that Count I would have been dismissed under mandatory joinder but for his counsel's failure to move to dismiss. But even if we were to find Downing's prosecution on Count I invalid on other nonjurisdictional grounds, Downing's argument still fails.

State v. Downing, 122 Wn. App. at 193.

In *State v. Downing*, we applied three elements of bail jumping (1) the accused was held for, charged with, or convicted of a crime; (2) the accused possessed knowledge of the requirement of a subsequent personal appearance; and (3) the accused failed to appear as required. Robert Downing did not dispute the three elements of bail jumping. Rather, he argued for an additional implied element: that the charge underlying the bail jumping must be valid at the time the defendant failed to appear. We disagreed:

> No Washington cases squarely address whether the charge underlying an allegation of bail jumping must be valid. But we find the issue sufficiently analogous to charges of escape. In such cases, our courts have rejected arguments that the invalidity of the underlying conviction is a defense to the crime of escape. In a prosecution for first degree escape, the State is not required to prove that a defendant was detained under a constitutionally valid conviction.

State v. Downing, 122 Wn. App. at 193.

Victor Paniagua argues that the *Downing* court's analysis of whether the charge underlying a bail jumping conviction must be valid is dicta. According to Paniagua, the *Downing* court conclusively decided the case when ruling that joinder was not mandatory and any further discussion was unnecessary. We disagree. The joinder ruling did not resolve the validity of the bail jumping conviction.

Victor Paniagua highlights that the *Downing* court addressed a bail jumping conviction based on charges brought under a valid statute, but later dismissed. He emphasizes that, contrary to *Downing*, the State convicted him of bail jumping while facing charges brought pursuant to an unconstitutional statute. Still, he cites no decision supporting the proposition that being convicted or held, under an unconstitutional criminal statute, renders escaping from jail or bail jumping permissible. To the contrary, under the universal rule, the unconstitutionality of a statute under which the defendant was convicted or charged does not justify escape from imprisonment. *Eaton v. State*, 302 A.2d 588 (Me. 1973); *State v. Lopez*, 79 N.M. 235, 441 P.2d 764, 766 (1968); *People ex rel. Haines v. Hunt*, 229 A.D. 419, 242 N.Y.S. 105 (1930); *Kelley v. Meyers*, 124 Or. 322, 263 P. 903 (1928); W.E. Shipley, Annotation, *What Justifies Escape or Attempt To Escape or Assistance in That Regard*, 70 A.L.R.2d 1430 (1960). We find no decision addressing bail jumping when facing charges under an unconstitutional statute. Nevertheless, we discern no reason to distinguish between a charge for escape and one for bail jumping.

We agree with the State that the accused must submit to confinement until discharged by due process of law. *Kelley v. Meyers*, 263 P. 903, 906 (Or. 1928); *People ex rel. Haines v. Hunt*, 229 A.D. 419, 420-21 (1930). His or her remedy is to seek a declaration of the unconstitutionality of the statute, not flee from justice. *People ex rel. Haines v. Hunt*, 229 A.D. 419, 421 (1930). A purpose behind outlawing bail jumping is to effectuate orderly administration of justice. *State v. Henning*, 2004 Wis. 89, 273 Wis. 2d 352, 681 N.W.2d 871, 881-82.

Victor Paniagua relies on our recent decision in *State v. French*, __ Wn. App. 2d __, 508 P.3 1036 (2022). Jarvis French pled guilty to one count of possession of a controlled substance with intent to manufacture or deliver. On appeal, the State argued that the superior court erred by declining to add one point to the offender score as a result of French committing his current offense while on community custody. Because the sentence condition of community custody was imposed on French pursuant to a constitutionally invalid conviction for possession of a controlled substance, this court disagreed. This court followed the precedent of *State v. Ammons*, 105 Wn.2d 175 (1986), which held that a prior conviction based on a constitutionally invalid statute may not be considered when a sentencing court calculates an offender score.

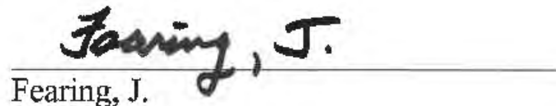
We have already distinguished *State v. Ammons*. We also differentiate between being on community custody for committing a constitutionally invalid crime and bail jumping when held on such a crime. The same considerations of submitting to the

authority of the law, until held unconstitutional, rather than taking the law into one's own hand, do not apply to committing an additional crime while on community custody.

Finally, Victor Paniagua concedes that foreign decisions oppose his contention, but he underscores that he does not seek to vacate his 2011 bail jumping conviction. He only wishes to erase the conviction from his offender score. Paniagua promotes the unfairness of counting the conviction in his score. No decision supports Paniagua's argument, however. To the contrary, RCW 9.94A.525(2)(c) requires this court to include a class C felony conviction in the offender score unless circumstances not found here exist. Paniagua's remedy lies with the legislature, not the courts.

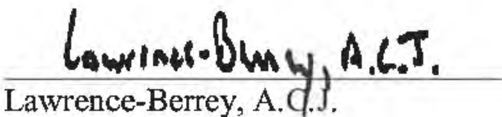
CONCLUSION

We affirm the superior court's inclusion of Victor Paniagua's 2011 conviction for bail jumping in his offender score and affirm his resentencing.



Fearing, J.

WE CONCUR:



Lawrence-Berrey, A.C.J.

Staab, J.

FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE

September 14, 2022 - 10:58 AM

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