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Supreme Court No. 101173-3
(COA No. 382745)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VICTOR PANIAGUA,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR FRANKLIN COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Victor Paniagua, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' published decision under RAP 13.3 and RAP 13.4. The court's decision, dated June 9, 2022, is attached as Appendix 1; the court's denial of Mr. Paniagua's motion to reconsider, dated July 14, 2022, is attached as Appendix 2.

B. ISSUE PRESENTED FOR REVIEW

Mr. Paniagua was convicted of bail jumping for failing to attend a pre-trial hearing on the State's charge of a non-existent crime – possession of a controlled substance (PCS) – that was invalidated in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

The Court of Appeals found Mr. Paniagua's bail jumping conviction predicated on this void statute remained a valid conviction and could therefore be

included in calculating his offender score. The Court of Appeals' decision conflicts with this Court's decisions prohibiting conviction and punishment under an unconstitutional statute and other Court of Appeals' decisions properly vacating prior offenses predicated on Washington's void drug possession statute.

This issue is pending in a number of other courts throughout the State. Review by this Court is necessary because people should not continue to be punished for a non-existent crime and suffer the same harms and inequities that led this Court to invalidate the draconian drug law in the first place.

C. STATEMENT OF THE CASE

Mr. Paniagua was convicted of a felony and sentenced in 2018. CP 21, 63. The court's calculation of Mr. Paniagua's offender score included two prior convictions for possession of a controlled substance,

and a bail jumping conviction for failure to appear at an omnibus hearing for one of the charges of possession of a controlled substance. CP 23, 63; 153; RP 3.

After *Blake,* Mr. Paniagua moved for resentencing. CP 63. He argued the two PCS offenses and the bail jumping conviction predicated on one of these PCS convictions were void and could not be included in his offender score. CP 63-68; RP 5.

The court agreed Mr. Paniagua's prior convictions for possession of a controlled substance offenses were void and excluded them from Mr. Paniagua's offender score. RP 8. Despite agreeing the predicate offense for his bail jumping conviction was void, the trial court determined the bail jumping conviction was not facially invalid. RP 8. With that conviction included, the court sentenced him on an offender score of seven instead of six. CP 202.

The Court of Appeals affirmed by misconstruing this Court's case law and recent Court of Appeals' decisions that establish a conviction predicated on a void statute cannot be included in a person's offender score. Op. at 5–11

D. ARGUMENT

The Court of Appeals' opinion perpetuates the harms and inequities of the unconstitutional PCS statute by permitting conviction for bail jumping based on this void statute. This decision also conflicts with this Court's decisions invalidating unconstitutional convictions and recent Court of Appeals' decisions invalidating prior convictions predicated on the void PCS statute.

1. Mr. Paniagua's bail jumping conviction based on the void PCS statute is unconstitutional.

Bail jumping requires a person be charged with a specific offense. While the court and prosecutor in Mr. Paniagua's case believed that RCW 69.50.4013 properly defined a crime, it never did. The court thus had no basis to require he attend court on this charge, or to

convict him for failure to appear for this non-existent offense.

In *Blake,* this Court found that the simple possession statute, RCW 69.50.4013(1), violated due process because it criminalized "wholly innocent and passive nonconduct on a strict liability basis." 197 Wn.2d at 193. "Valid strict liability crimes require that the defendant actually perform some conduct. Blake did not. Under the due process clauses of the state and federal constitutions, the legislature may not criminalize such nonconduct." *Id.* at 195. Accordingly, the portion of the simple drug possession statute creating this crime violates the due process clauses of the state and federal constitutions and is void. *Id.*

Blake was specifically concerned about the consequences of a felony conviction based on innocent conduct: "Washington's strict liability drug possession

statute . . . makes possession of a controlled substance a felony punishable by up to five years in prison, plus a hefty fine; leads to deprivation of numerous other rights and opportunities; and does all this without proof that the defendant even knew they possessed the substance." *Blake*, 197 Wn.2d at 173.

Among the consequences of a felony conviction is increased punishment at future sentencings, because a person's prior felony convictions are used to calculate their offender score. RCW 9.94A.517; RCW 9.94A.525.

The Court of Appeals acknowledged that this Court's decision in *Blake* meant Washington's former PCS statute "is and has always been a legal nullity." Op. at 4 (citing *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952)). But the Court of Appeals refused to vacate the felony bail jumping

conviction Mr. Paniagua accrued for failing to attend a court hearing for a non-existent crime. Op. at 6.

When this Court interprets a criminal statute such that a convicted person's conduct was "a nonexistent crime," the conviction is void. *In re Pers. Restraint of Hinton,* 152 Wn.2d 853, 860, 100 P.3d 801 (2004). In *Hinton*, the petitioners were convicted of second degree felony murder predicated on assault, but "no statute established a crime of second degree felony murder based upon assault at the time the petitioners committed the acts for which they were convicted." *Id.* at 857. Because the petitioners were found guilty of murder based on second-degree assault, they were "convicted of nonexistent crimes." *Id.* at 860.

The same is true when a person is charged with bail jumping for missing court on the State's charge of PCS, because it is a necessary element for conviction.

An essential element of bail jumping is that the defendant was held for, charged with, or convicted of a particular crime. *State v. Pope,* 100 Wn. App. 624, 629, 999 P.2d 51 (2000). For the bail jumping charge to be constitutionally sufficient, the underlying offense for which the person was required to attend court must be provided in the to-convict instruction. *State v. Gonzalez-Lopez*, 132 Wn. App. 622, 637, 132 P.3d 1128 (2006). And while the classification of the charge is not required, identification of the underlying charge is. *State v. Williams*, 162 Wn.2d 177, 188, 170 P.3d 30 (2007).

Washington courts only have jurisdiction over a person who allegedly commits a crime. RCW 9A.04.030. The former bail jumping statute is premised on the trial court's jurisdiction to order a defendant to return to court to answer for the charge. If no crime could have

been committed, the trial court lacked jurisdiction over the person and could not compel them to appear in court in the first place, much less punish them for failing to appear.

Instead of analyzing the validity of Mr. Paniagua's conviction under the relevant case law, the Court of Appeals instead based its decision on *State v. Downing,* 122 Wn. App. 185, 93 P.3d 900 (2004). Op. at 7. *Downing* concerned a different issue—whether the defendant could be prosecuted for bail jumping charges brought under a valid statute, but where the underlying charges were later dismissed. 122 Wn. App. at 187.

Without a valid criminal charge, the court had no jurisdiction over Mr. Paniagua such that it could force him to appear. Without that authority, there was no basis to convict or punish Mr. Paniagua for this offense.

Mr. Paniagua should certainly not continue to face increased punishment for this non-existent crime by having it included as a point in his offender score.

2. The Court of Appeals' insistence that a person face increased punishment for a non-existent crime conflicts with opinions from other courts invalidating prior convictions predicated on the void PCS statute.

If the State must stop charging, convicting, or holding a person for a particular crime, they must also be precluded from using past convictions under an unconstitutional law in subsequent proceedings.

An unconstitutional law is void, and is no law; accordingly, "*a penalty imposed pursuant to an unconstitutional law is void* even if the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery v. Louisiana,* 577 U.S. 190, 204,

136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (internal citations omitted, emphasis added).

State v. Ammons holds that "[a] prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered" at future sentencings. 105 Wn.2d 175, 187–88, 713 P.2d 719 (1986). Whether a conviction is facially invalid is answered by looking to the documents relating to the plea agreement, charging instruments," "statements of guilty pleas," and "jury instructions." *Hinton*, 152 Wn.2d at 858.

The question here is whether a conviction for bail jumping based on the underlying offense of possession of a controlled substance is facially invalid, or apparent from these documents. The Court of Appeals sidestepped *Ammons*' analysis, claiming that *"Ammons*

did not address our underlying question of whether bail jumping requires a predicate crime[.]" Op. at 6. The Court of Appeals then simply ignored Mr. Paniagua's citation to legal authority demonstrating that a bail jumping conviction based on failure to attend court for a non-existent crime is readily apparent from the face of conviction because it must be either alleged in the information, *Pope,* 100 Wn. App. at 629, or included in the jury instructions. *Gonzalez-Lopez*, 132 Wn. App. at 637. Op. at 6.

Because the constitutional infirmity of a bail jumping conviction based on a non-existent crime is apparent from the face of conviction, the Court of Appeals decision conflicts with Division I's reasoning in *State v. French,* 21 Wn. App.2d 891, 508 P.3 1036 (2022) and other unpublished Court of Appeals'

decisions invalidating prior offenses predicated on the void PCS statute.

In *Matter of Gonzales*, the court found that "because Mr. Gonzales's previous felony convictions for possession of a controlled substance were unconstitutional, they could not be predicates for his conviction for unlawful possession of a firearm." 2021 WL 4860031, at *1 (October 19, 2021) (unpublished, cited pursuant to GR 14.1). Likewise, in *State v. Shaquille Capone Jones*, 2022 WL 1133164 (April 18, 2022) (GR 14.1) the Court of Appeals agreed that "[b]ecause the statute criminalizing unlawful possession of a controlled substance was held constitutionally invalid in *Blake,* it cannot serve as a predicate offense for unlawful possession of a firearm in the second degree." *Id.* at *1.

In *French,* the State appealed the sentencing court's decision not to include one point for being on community custody in the defendant's offender score because it was "imposed on French pursuant to his sentence for violating RCW 69.50.4013(1)—a statute that, pursuant to *Blake,* has always been void under both the state and federal constitutions." *Id*. at 894. The Court of Appeals correctly applied this Court's case law prohibiting a court from imposing a sentence pursuant to a constitutionally invalid conviction. *Id.* at 892 (citing *Ammons,* 105 Wn.2d at 187–88).

To distinguish *French*'s correct application of *Ammons,* the Court of Appeals drew a meaningless distinction between "being on community custody for committing a constitutionally invalid crime and bail jumping when held on such a crime." Op. at 10. The Court of Appeals believed the latter raised concerns

that a person should not be able to evade the "authority of the law" until that law is "held unconstitutional, rather than taking the law into one's one hand." Op. 10–11. But the court never explained how those concerns are somehow lessened when a person evades the "authority of the law" by violating the conditions of a court order.

This shows the Court of Appeals' fundamental misunderstanding about the nature of Mr. Paniagua's challenge on appeal. Mr. Paniagua is not refusing to submit to the court's "authority of law" based on his belief the crime he is charged with is unconstitutional; rather, he argues his prior conviction should be vacated because it is no longer a crime after this Court's decision in *State v. Blake*. *Ammons,* 105 Wn.2d at 187–88. This Court should correct the Court of Appeals' misapprehension of this straightforward issue that

conflicts with decisions from this and other courts. RAP 13.4(b)(1)-(3).

3. Continuing to increase a person's punishment for inadvertently missing a court date—most often due to poverty and life circumstances beyond one's control— is a matter of substantial public interest that is pending in a number of cases.

The Court of Appeals misconstrued not just the applicable law establishing the facial invalidity of prior convictions, but also the nature of a bail jumping conviction, finding Mr. Paniagua's felony conviction for failure to attend court on a non-existent crime should stand because a person may not be permitted to "flee from justice" simply because the underlying criminal charge is invalid. Op. at 10.

Under the former bail jump statute Mr. Paniagua was convicted for violating, the State was not even required to prove a willful disregard of a court order. CP 23. Every missed court hearing in a criminal case

was punishable as a felony, regardless of the reason for the person's absence. Former RCW 9A.76.170(1), (3); Laws of 2020, ch. 19, § 1. This resulted in people being convicted of a felony for missing court for "real-life reasons" beyond the accused's control such as "homelessness, an inability to stay organized, transportation issues, the choice between coming to court or keeping a job or caring for a child." *State v. Slater*, 197 Wn.2d 660, 676, 486 P.3d 873 (2021).

The legislature has since found this penalty was unjustly harsh and often abused. Senate Bill Report, ESHB 2231 at 3–4 (Feb. 27, 2020).[1] Effective June 2020, the Legislature amended the statute to make failure to appear a felony only if (1) the missed hearing is part of a trial, or (2) the defendant is charged with a

[1] Available at https://www.tvw.org/watch/?eventID= 2020021343.

violent or sex offense. RCW 9A.76.170(1); Laws of 2020, ch. 19, § 1.b. Mr. Paniagua's failure to attend a court hearing for the non-existent crime of possession of a controlled substance would no longer be a felony, *even if* the underlying charge had been valid.

The Court of Appeals' erroneous assessment of the facial validity of a bail jumping conviction will result in many people unjustly facing longer sentences based on a crime of poverty that is no longer even a crime at all. This issue is pending in a number of other cases. *See, e.g.*, *Personal Restraint of Stacy,* no. 56110-7-II, *State v. Garoutte,* no. 38524-8-III*, consolidated with* no. 38411-0-III. And the State has appealed a number of trial court decisions that reached the opposite conclusion as the Court of Appeals in Mr. Paniagua's case. *See, e.g., State v. Hagen,* no. 56432-7-

II; *State v. Koziol*, no. 38630-9-III; *State v. Strandberg-Biggs,* no. 38830-1-III.

Subjecting people to increased punishment for a crime of poverty that is no longer a crime is a matter of public interest. The Court of Appeals' flawed application of this Court's case law will result in unnecessarily longer sentences for many people who have been convicted for failing to attend court on the State's charge of a non-existent crime. This Court should accept review. RAP 13.4(b)(4).

E. CONCLUSION

Based on the foregoing, petitioner Victor Paniagua respectfully requests that review be granted pursuant to RAP 13.4(b)(1)-(4).

In compliance with RAP 18.17, this document contains 2,584 words.

DATED this 15th day of August, 2022.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

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

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.

APPENDIX 2

FILED
JULY 14, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. VICTOR ALFONSO PANIAGUA, Appellant.	)	No. 38274-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 9, 2022, is hereby denied.

PANEL: Judges Fearing, Lawrence-Berrey, Staab

FOR THE COURT:

Siddoway, C.J.

LAUREL SIDDOWAY, Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 38274-5-III
	)	
VICTOR PANIAGUA,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF AUGUST, 2022, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	FRANK JENNY, DPA [fjenny@co.franklin.wa.us] [appeals@co.franklin.wa.us] FRANKLIN CO PROSECUTOR'S OFFICE 1016 N 4TH AVE PASCO, WA 99301	( )	U.S. MAIL
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		(X)	E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF AUGUST, 2022.

X_____

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WASHINGTON APPELLATE PROJECT

August 15, 2022 - 4:40 PM

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Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38274-5
Appellate Court Case Title:	State of Washington v. Victor Alfonso Paniagua
Superior Court Case Number:	18-1-50354-9

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