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No. 1017031

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON
Respondent,

v.

STEVEN ALLEN BUCK
Petitioner.

BRIEF OF AMICUS CURIAE BRIEF
WASHINGTON DEFENDER ASSOCIATION
IN SUPPORT OF THE PETITION FOR REVIEW

WASHINGTON DEFENDER ASSOCIATION

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I. INTRODUCTION

This Court should grant Mr. Buck’s petition for review. Amicus write to highlight considerations under RAP 13.4(b)(4), favoring review. The decision sentencing Mr. Buck to 72 months of aggregate community custody on consecutive sentences raises issues involving matters of substantial public interest needing this Court’s direction.¹

The precedential *Buck* decision is a matter of first impression. The Court’s interpretation contradicts the plain language of the statute by applying statutory definitions only effective prior to 2000.²

Even if the statute were ambiguous, the decision contradicts the legislative intent for courts to aggregate

¹ RAP 13.4(b)(4); *State v. Buck*, 522 P.3d 1010, No. 38382-2-III (2023); RCW 9.94A.589(5).

² RCW 9.94A.589(5); RCW 9.94A.120 (recodified in 2001 under RCW 9.94A.505, removing “community supervision” and its legal distinction by combining definition of community supervision into definition of community custody); *Buck*, at 1012.

community custody when they impose consecutive sentences.³ Superior Courts are mandated to apply *Buck*, as currently decided, to each consecutive sentencing case with community custody aggregates in excess of 24 months. These cases disproportionately impact persons experiencing poverty and Black, Indigenous, and People of Color (BIPOC) communities. Review should be granted pursuant to RAP 13.4(b)(4).

I. IDENTITY OF AMICI

Amici curiae identities are incorporated by reference as set forth in the Motion for Leave to Join.

II. STATEMENT OF THE CASE

Amicus adopt and incorporate by reference the Procedural History and Statement of the Facts set forth by the Petitioner's petition for review.

III. ARGUMENT

³ If the statute had been ambiguous, the rule of lenity would have caused the decision to be in Mr. Buck's favor.

This Court should accept review of this case because it raises topics of substantial public interest. First, because *State v. Buck* is binding precedent as all trial courts must follow it despite the misinterpretation of the statute.⁴ Next, the decision affects individuals with repeat offenses, the majority of whom are poor and primarily persons of color.⁵

⁴ See e.g., *In re Pers. Restraint of Arnold*, 198 Wn. App 842, 846, 396 P.3d 375 (2017) (“Under vertical stare decisis, courts are required to follow decisions handed down by higher courts in are required to follow decisions handed down by higher courts in the same jurisdiction.”), *rev'd on other grounds*, 190 Wn.2d 136, 410 P.3d 1133 (2018).

⁵ See e.g., Todd J. Clark et. al., *Trauma: Community of Color Exposure to the Criminal Justice System As an Adverse Childhood Experience*, 90 U. Cin. L. Rev. 857, 858 (2022);

See also, Am. Pub. Health Ass'n, *Policy Statement No. 201811, Addressing Law Enforcement Violence as a Public Health Issue* (Nov. 13, 2018), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2019/01/29/law-enforcement-violence>;

Howard Pinderhughes, Rachel A. Davis, & Myseha Williams, *Adverse Community Experiences and Resilience: A Framework for Addressing and Preventing Community Trauma* (2016), <https://www.preventioninstitute.org/publications/adverse-community-experiences-and-resilience-framework-addressing-and-preventing>.

A) Statutory Interpretation And Precedential Impact

In 2008, the Legislature rewrote the law combining the definitions of “community supervision” and “community custody.” Laws of 2008, c.231 §6, effective 2009. The change in the 2008 law removed use of the separate term “community supervision.” The Legislature did not go through existing laws and replace “community supervision” with “community custody” but made clear the terms were combined to “community custody.”

Prior to that change, since 1988, the Legislature limited the authority of the court to impose consecutive “community supervision” sentences to an aggregate maximum of 24 months.

“In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for

exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.” RCW 9.94A.589(5)(formerly codified RCW 9.94A.400); added in WA. Laws 1988, SHB No.12711 §24, §11, Ch. 115. In every amendment since inception in 1988, the limit on aggregated consecutive community supervision, or “community custody” sentences after 2009, remained unchanged. Once the combination of definitions occurred effective 2009, eliminating the term “community supervision,” no legal distinction remained.

If the statute was unambiguous, the plain language controls.⁶ If the Appellate Court believed RCW 9.94A.589(5)

⁶ *State v. Elmore*, 154 Wn. App. 885, 228 P.3d 760 (2010); *State v. Michielli*, 132 Wn.2d 229, 237, 937 P.2d 587 (1997) (when the words in a statute are clear and unequivocal, a court must apply the statute as written).

was ambiguous, the next step in statutory interpretation is to look at the legislative history and intent.⁷ The plain language analysis includes context and related provisions. The purpose of the SRA is in a related provision and includes making punishment proportionate to the seriousness of an offense; ensuring punishments are similar to those imposed on others in similar situations; making frugal use of state resources, and “offering the offender an opportunity to improve himself or herself.” RCW 9.94A.010.

The Court of Appeals neglected to examine legislative history, which shows ongoing discussions behind decisions relating to the standard having community custody running concurrently, rather than consecutively. “The bill retains discretion for judges to impose consecutive terms of

⁷ *Desmet v. State by and through DSHS*, 17 Wn. App. 2d 300 485 P.3d 356 (2021)(after the plain language of the statute is considered with context and related provisions, the legislative intent is the next step in statutory interpretation).

community custody. This may be really useful for serious, violent cases.” However, the default standard is for the Department of Corrections (DOC) to supervise multiple terms of community custody concurrently. HBR 2394, Committee on Public Safety, 2020. Legislative testimony also indicated that the imposition of consecutive community custody sentences causes confusion and errors regarding which conditions are in effect, when and how to know if conditions were violated; and which protections are in place for which specific victims.

Further, if the second set of consecutive community custody conditions impose treatment, an individual must wait until the first community custody period runs prior to receiving treatment. Notably, the committee report says, “*Supervision is not designated to be punishment – incarceration is the punishment. To the contrary, supervision is a program oriented towards facilitating reentry and rehabilitation. Excessive terms of supervision do not help anyone.*” *Id.* (emphasis added).

Legislative history reveals the reasons for using concurrent community custody periods and supporting the 24 month aggregate limit on consecutive sentences. Community custody is not to be punishment. Therefore, extending it excessively prevents the person the opportunity to reform, to move on with life, and to get out of the criminal cycle. It also is not a frugal use of state DOC resources to keep any person on community custody for 72 months rather than the 24 month statutory aggregate limit on consecutive sentences.

The Court of Appeals' *Buck* decision uses separate definitions for the terms "community custody" and "community supervision" despite noting in the opinion that the terms were combined in 2008 laws.⁸ Superior Courts are required to follow the ruling, which authorizes and mandates excessive community custody sentences, in direct contradiction to the plain language,

⁸ *Buck*, at 1012.

the related purposes provision, and unambiguous legislative intent.

Review of this ruling would clarify the sentencing court's authority and provide future guidance on an issue capable of repetition, yet easily evading review. By definition, this is a matter of continuing public interest.⁹

B) Consecutive Sentences Disproportionately Impact Persons Living In Poverty and BIPOC.

Race, poverty and criminalization are inextricably intertwined, “forged through America’s legacy of systemic and structural racism.”¹⁰ Some of the factors related to persons living in poverty and persons of color being involved in the criminal system include, “*law enforcement practices...and punitive*

⁹ See e.g. *State v. Murray*, 118 Wn. App. 518, 77 P.3d 1188 (2003).

¹⁰ Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 Harv. C.R.-C.L. L. Rev. 367, 371 (2021).

*sentencing policies; which contribute to racial disparities in criminal justice involvement.”*¹¹

Repeatedly, evidence has demonstrated the legacy of systemic racism.¹² BIPOC communities in Washington State and throughout the country are overpoliced, face higher rates of prosecution, and receive longer sentences, exposing the racial disparity in the criminal justice system.¹³ People of color are

¹¹ The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* 6 (2008)(emphasis added).

¹² Rankin, at 371.

¹³ Rankin, at 371-72; (citing *Sent'g Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* 2-8 (2018), [https://www.sentencingproject.org/publications/un-report-on-racial-disparities/#:~:text=report%20to%20the%20United%20Nations%20on%20Racial%20Disparities,of%20Racism%2C%20Racial%20Discrimination%2C%20Xeno-phobia%2C%20and%20Related%20Intolerance,archived at https://perma.cc/5VXS-QMZX](https://www.sentencingproject.org/publications/un-report-on-racial-disparities/#:~:text=report%20to%20the%20United%20Nations%20on%20Racial%20Disparities,of%20Racism%2C%20Racial%20Discrimination%2C%20Xeno-phobia%2C%20and%20Related%20Intolerance,archived%20at%20https://perma.cc/5VXS-QMZX))

(See also, Race and the Criminal Justice System, Task Force 2.0.; "Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court" (2021). Fred T.

disproportionately sentenced to longer sentences, more often consecutive sentences, and longer or more rigorous community custody terms.¹⁴ Often the conditions of community custody are so severe, individuals would rather spend the time in prison.¹⁵ The condition prohibiting contact with others with felony convictions, negatively impacts BIPOC individuals on community custody who need contact with family and friends

Korematsu Center for Law and Equality. 116.
https://digitalcommons.law.seattleu.edu/korematsu_center/116/
(Accessed: April 3, 2023)).

¹⁴ See e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 6-7 (2010); Elizabeth Tsai Bishop et. al, *The Crim. Just. Pol'y Program: Har. L. Sch., Racial Disparities in the Massachusetts Criminal System* (Sept. 2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.

¹⁵ Alexis Karteron, *Family Separation Conditions*, 122 Colum. L. Rev. 649, 651 (2022)(citing See Cecilia Klingele, *Rethinking the Use of Community Supervision*, 103 *J. Crim. L. & Criminology* 1015, 1059 & n.188 (2013) (collecting studies “show[ing] that a significant number of individuals with experience in the criminal justice system prefer short custodial sentences to longer periods of community supervision”)).

who may have felony convictions, to successfully reintegrate into society.¹⁶

The absurd result of the *Buck* decision de facto extends sentences under the Court's reading, causing further harm to persons of color, and those living in poverty. Like BIPOC individuals, individuals living in poverty are also disproportionately represented within the criminal system caused by systemic racism.¹⁷ Accordingly, the system should not fail these individuals in new ways by also imposing excessive, consecutive community custody terms as a form of punishment, in direct contradiction of legislative intent. That is exactly what the *Buck* decision requires of trial courts.

IV. CONCLUSION

It is essential this Court rule on the issue of whether the aggregate community custody limit of 24 months applies to

¹⁶ Karteron, at 651.

¹⁷ Rankin, at 371.

consecutive sentences as indicated in RCW 9.94A.589(5), or whether Superior Courts are to follow the Court of Appeals' ruling in *Buck*, requiring consecutive community custody, without limit, when a consecutive sentence is standard.

There are substantial public interests due to the decision being precedential, the inaccurate statutory interpretation, and the disproportionate negative impact on BIPOC communities and those living in poverty. These issues are of substantial public interest and require the Supreme Court's direction.

DATED this 10th day of April, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2023, I served one copy of the foregoing document by email via the Washington Courts E-Portal on the following:

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Dated this 10th day of April, 2023.

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