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STATE OF WASHINGTON
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NO. 102003-1

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent

v.

TIMOTHY MICHAEL KELLY,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 05-1-00889-1

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT 10

A. Review Should Be Denied As this Court Cannot Provide the Defendant With Effective Relief..... 10

B. Kelly has Not Established that *Richardson* is Both Wrong and Harmful..... 13

V. CONCLUSION..... 19

TABLE OF AUTHORITIES

State Cases

<i>In re Pers. Restraint of Adams</i> , 178 Wn.2d 417, 309 P.3d 451 (2013).....	15, 18
<i>In re Pers. Restraint of Ali</i> , 196 Wn.2d 220, 474 P.3d 507 (2020).....	16
<i>In re Pers. Restraint of Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	17
<i>In re Pers. Restraint of Cross</i> , 99 Wn.2d 373, 662 P.2d 828 (1983).....	8
<i>In re Pers. Restraint of Davis</i> , 200 Wn.2d 75, 514 P.3d 653 (2022).....	16
<i>In re Pers. Restraint of Garcia Mendoza</i> , 196 Wn.2d 836, 479 P.3d 674 (2020).....	14
<i>In re Pers. Restraint of Kennedy</i> , 200 Wn.2d 1, 513 P.3d 769 (2022).....	16
<i>In re Pers. Restraint of Richardson</i> , 200 Wn.2d 845, 525 P.3d 939 (2022).....	2, 13, 17
<i>In re Pers. Restraint of Skylstad</i> , 160 Wn.2d 944, 162 P.3d 413 (2007).....	7, 8, 17
<i>In re Pers. Restraint of Snively</i> , 180 Wn.2d 28, 320 P.3d 1107 (2014).....	18

<i>In re Pers. Restraint of West</i> , 154 Wn.2d 204, 110 P.3d 1122 (2005).....	19
<i>In re Pers. Restraint of Williams</i> , 200 Wn.2d 622, 530 P.3d 933 (2022).....	16
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719 (1986).....	15
<i>State v. Blake</i> , 197 Wn.2d 170, 481 P.3d 521 (2021).....	1, 3, 5, 6, 10, 15, 16, 17, 18, 19
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	16
<i>State v. Jones</i> , 172 Wn.2d 236, 257 P.3d 616 (2011).....	12
<i>State v. Kelly</i> , ___ Wn. App. 2d ___, 526 P.3d 39 (2023).....	12
<i>State v. Kelly</i> , COA No. 35057-2-II, 143 Wn. App. 1032 (March 11, 2008) (unpublished).....	4
<i>State v. Kelly</i> , No. 56475-1-II, 2023 WL 2661927 (Wash. App. Mar. 28, 2023) (unpublished).....	8
<i>State v. Larranaga</i> , 126 Wn. App. 505, 108 P.3d 833 (2005).....	12
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	11
<i>State v. Waller</i> , 197 Wn.2d 218, 481 P.3d 515 (2021).....	7, 8, 17, 18

<i>State v. Ward</i> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	8
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Constitutional Provisions

Wash. Const. art. IV, § 2	13
---------------------------------	----

Statutes

Former RCW 9.94A.715 (Laws of 2003, ch. 379, § 6)	11
RCW 9.94A.525(1).....	6, 7
RCW 10.73.090.....	2, 5, 7, 8, 9, 12, 13, 14, 17
RCW 10.73.090(1).....	1, 17
RCW 10.73.090(3)(a).....	14
RCW 10.73.090(3)(b)	5
RCW 10.73.100.....	13, 15
RCW 10.73.100(2).....	9
RCW 10.73.100(6)	7, 8, 9, 15, 16

Rules and Regulations

CrR 7.8(b).....	7, 18
RAP 2.2(b)(3).....	18

Other Authorities

WAC 437-20-010..... 11

I. INTRODUCTION

Many years after Timothy Kelly's judgment and sentence became final and after he completed serving his term of incarceration, Kelly requested resentencing on the grounds that *State v. Blake*¹ required the vacation and removal of a conviction for unlawful possession of a controlled substance (UPCS) and an adjustment to his offender score. The trial court declined to disturb or alter Kelly's sentences on his five remaining non-UPCS convictions. The court of appeals affirmed finding that Kelly's motion for resentencing was barred by RCW 10.73.090(1).

Kelly renews his request for a remand for resentencing on the five non-UPCS convictions, Kelly requests that this Court overrule one of its prior precedents and find that his motion for resentencing is not time-barred. Kelly's request must be denied because a remand will not provide Kelly with any relief and because Kelly has not demonstrated that this Court's opinion in

¹197 Wn.2d 170, 481 P.3d 521 (2021).

*In re Pers. Restraint of Richardson*² is both incorrect and harmful.

II. RESTATEMENT OF THE ISSUES

- A. Should review be denied where this Court cannot provide Kelly with meaningful relief?
- B. Should review be denied of Kelly's claim that RCW 10.73.090 does not bar resentencing in his case where Kelly did not present that argument in the trial court, in his brief of appellant, or in his reply brief and Kelly does not establish that *In re Pers. Restraint of Richardson*, 200 Wn.2d 845, 525 P.3d 939 (2022), is both wrong and harmful?

III. STATEMENT OF THE CASE

Timothy Kelly was charged with one count of burglary in the first degree, two counts of assault in the second degree, one count of possession of stolen property in the first degree, one count of attempted theft in the first degree, and one count of UPCS for an incident that occurred on February 18, 2005. CP 1.

² 200 Wn.2d 845, 525 P.3d 939 (2022).

Kelly was convicted of all six crimes by a jury. *See* CP 8; 2006 RP 3.³

Kelly’s sentencing hearing was conducted on June 2, 2006. Based upon an extensive and agreed criminal history, 2006 RP 6-7, 16, his offender score for each crime was calculated as follows:

Count	Offense	Offender Score	Standard Range
I	Burglary in the First Degree	14	87-118 mos.
II	Assault in the Second Degree	11	63-84 mos.
III	Assault in the Second Degree	11	63-84 mos.
IV	Possessing Stolen Property in the Second Degree	11	43-57 mos.
V	Attempted Theft in the First Degree	11	32.25-42.75 mos.
VI	UPCS	11	12+ - 24 mos.

³ The State’s motion to transfer the transcript of Kelly’s 2006 sentencing hearing from his first appeal, COA No. 35057-2-II, to this matter was granted in the court of appeals on July 8, 2022. Because both the original sentencing hearing transcript and the *Blake* hearing transcript begin with page “1,” the State will refer to the original sentencing hearing transcript as “2006 RP,” and the *Blake* hearing transcript as “2021 RP.”

2006 RP 6-7; CP 10.

The trial court imposed the top of the standard range for all offenses. CP 12. The court explained that it selected these terms of confinement because of the “significant impact” of the crime on the victims, “the events involved in this case,”⁴ and Kelly’s “horrible criminal record.” 2006 RP 27. *See also* CP 45. The court also imposed community custody of 36 months on the burglary and assault counts, and 12 months on the UPCS count. CP 13. Absent an award of earned early release credits or credit for pre-trial detention, Kelly’s 116 months of incarceration concluded no later than February 2, 2016.

Kelly unsuccessfully appealed his convictions. *See State v. Kelly*, COA No. 35057-2-II, 143 Wn. App. 1032 (March 11, 2008) (unpublished).⁵ The mandate issued on April 24, 2008.

⁴ A summary of the trial facts may be found at CP 22-27.

⁵ A copy of this court opinion may be found at CP 22-53.

CP 20. His judgment and sentence became final the same day.
RCW 10.73.090(3)(b).

On November 4, 2021, 13 years, 6 months, and 11 days after the mandate issued, the superior court held a hearing to address the impact *Blake* had upon this case. Kelly did not file a written motion prior to the hearing. At no point during the hearing did Kelly discuss any of the exceptions to RCW 10.73.090's one-year time bar on collateral attacks. See 2021 RP 9, 12-20.

The trial court vacated Kelly's UPCS conviction pursuant to *Blake* and eliminated the community custody imposed solely on this conviction. CP 58. The court declined to resentence Kelly because removing the UPCS from his offender score resulted in an unchanged standard range for burglary. CP 62. This is because Kelly's offender score was "14" with the inclusion of his UPCS, and "11" when the UPCS was vacated. CP 63; 2021 RP 10. In addition, Kelly's conviction of additional crimes after the June 2, 2006, sentencing hearing, more than

offset the 3 points deducted due to *Blake*. CP 63 (Blake reduces current offender score by 3 points and subsequent convictions increase the offender score by 18 points); 2021 RP 10 (a new offender score calculated at the time of the *Blake* hearing for the burglary count would be a 23). The court also declined to resentence Kelly because he had already served his sentence. CP 62.

Kelly, who had already completed his term of incarceration in this case and had begun serving his sentence in another cause number (05-1-001173-6)⁶ that was also before the court during the *Blake* hearing, had requested resentencing on the grounds that RCW 9.94A.525(1) would create a presumption that the sentence in the other cause number would run concurrently with the sentence in this cause number. 2021 RP

⁶ The trial court heard three cases in a single *Blake* hearing. See 2026 RP 3 (“This is the *State of Washington vs. Timothy Kelly*, Cause No. 05-1-001173-6, Cause No. 05-1-00889-1, and Cause No. 03-1-05256-8”). This petition for review relates solely to Cause No. 05-1-00889-1.

14-15. Kelly cited no legal authority that renders RCW 9.94A.525(1) applicable to CrR 7.8(b) motions heard the same day regarding sentences originally imposed six months apart. *See* 2021 RP 9-10, 12-20.

Kelly appealed the trial court's denial of his request for resentencing. His brief of appellant did not, however, address the one-year time bar on collateral attacks or the exceptions thereto. *See* Brief of Appellant. The brief also contained no citations to either *State v. Waller*, 197 Wn.2d 218, 481 P.3d 515 (2021), or *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007). *Id.* at ii-iii.

The State's brief of respondent asserted that Kelly's appeal should be denied on three separate grounds: mootness, RCW 10.73.090's one year time-bar, and inability to demonstrate actual prejudice. *See* Brief of Respondent. The State's time bar argument discussed both the facial invalidity exception and RCW 10.73.100(6)'s material change in the law exception. *Id.* at 10-20.

Kelly filed a reply brief. This brief contained no response to the State's RCW 10.73.090 argument. His failure to respond constituted a concession that neither facial invalidity nor RCW 10.73.100(6) permitted resentencing on his non-UPCS counts. *See In re Pers. Restraint of Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (the respondent "does not respond and thus, concedes this point."). The reply brief also contained no citations to either *Waller* or *Skylstad*. *See* Reply Brief of Appellant at ii.

Although the court of appeals rejected the State's mootness argument, it affirmed the trial court's decision as Kelly's request for resentencing was time barred. *State v. Kelly*, No. 56475-1-II, 2023 WL 2661927 (Wash. App. Mar. 28, 2023) (unpublished).

Kelly filed a timely motion for reconsideration. The reconsideration motion contained Kelly's first citations to either *Waller* or *Skylstad*. *See* Motion for Reconsideration at 2. The

reconsideration motion contained Kelly's first comprehensive discussion⁷ of RCW 10.73.090 and of RCW 10.73.100(2) and (6). *Id.* at 2, 6. Kelly's belated arguments were rejected by the court of appeals, which denied his motion to modify.

Kelly filed a timely petition for review that repeatedly refers this Court to other pleadings. *See, e.g.*, Petition for Review at 3 (Brief of Appellant for the statement of the case); 3, 4, and 9 (petition for review in cause number 102002-3). Kelly's petition

⁷ In Kelly's January 25, 2023, answer to a statement of additional authorities, he provided the court with the following discussion of exceptions to the one-year time bar:

Because the drug possession conviction is unconstitutional, any collateral attack on that conviction was not subject to the one year time limit. RCW 10.73.100(2). Additionally, any collateral attack was timely because Blake is a significant change in the law that is retroactive and material to Mr. Kelly's sentence. See In re Pers. Restraint of Ali, 196 Wn.2d 220, 233-242, 474 P.3d 507 (2020).

Answer to Statement of Additional Authorities at 3.

for review is largely based on arguments first presented to the court of appeals in his motion for reconsideration.

IV. ARGUMENT

Kelly's petition asks this Court to ignore the clear prohibition against adopting portions of other pleadings and the principle that review will not be granted of arguments raised for the first time in a motion for reconsideration. Kelly requests review by this Court in a case in which he can no longer be given effective relief. Kelly's final request, that this Court overrule a precedent, is unsupported by evidence of both incorrectness and harmfulness. Kelly's petition for review should be denied.

A. Review Should Be Denied As this Court Cannot Provide the Defendant With Effective Relief

Kelly served his entire 116-month sentence on count I prior to the *Blake* hearing. Because of this, the trial court could provide no effective relief under this cause number other than the vacation of his conviction for UPCS and the accompanying term of community service. The trial court, therefore, denied Kelly's motion to be resentenced.

The trial court's decision is consistent with existing precedent that holds a resentencing based upon an error in an offender score is not required once an offender has completed his or her term of incarceration. *State v. Ross*, 152 Wn.2d 220, 228-29, 95 P.3d 1225 (2004). A resentencing is also not required when the court cannot provide effective relief to the defendant. *Id.* Both circumstances are present in the instant case, providing ample grounds for denying Kelly's petition for review.

While Kelly's term of community placement remains tolled while he serves a subsequently imposed term of incarceration, the 36-month term of community placement was statutorily mandated based upon his crimes of conviction – burglary and assault. *See* Former RCW 9.94A.715 (Laws of 2003, ch. 379, § 6); WAC 437-20-010. This term of community placement is not increased or decreased based upon other current or prior convictions. *Id.* This term of community placement may not be decreased or offset by the service of excess days of incarceration. *State v. Jones*, 172 Wn.2d 236, 257 P.3d 616

(2011). For these reasons, post-release supervision will not prevent a challenge to the term of incarceration from being dismissed as moot upon completion of the period of incarceration. *See State v. Larranaga*, 126 Wn. App. 505, 507, 108 P.3d 833 (2005) (“While review of this case was pending, Larranaga was released from custody and placed on post-release supervision. Consequently, this case is moot.”).

In addition, this Court cannot provide Kelly with the relief he requests in his petition for review. Kelly requests that this matter be remanded for a resentencing hearing at which the trial court will also resentence him in another cause number. Kelly makes this request in the belief that the sentences on the two cause numbers would then be required to be served concurrently. *See* Petition for Review at 7. But resentencing in the other matter is foreclosed by RCW 10.73.090. *See State v. Kelly*, ___ Wn. App. 2d ___, 526 P.3d 39, 45-46 (2023). And Kelly has not identified any legal authority that would compel the trial court to

set a resentencing in this case on the same day as a resentencing in any other case.

Because this Court cannot provide Kelly with any effective relief in the trial court, his petition for review should be denied.

B. Kelly has Not Established that *Richardson* is Both Wrong and Harmful

Kelly requests that this Court accept review and overrule its recent decision in *Richardson* because it is “wrong” and “was decided by five justices through an order.” Petition for Review at 9-10. Kelly, who concedes that he did not assert any exception to RCW 10.73.090 in the trial court, in his brief of appellant, or in his reply brief,⁸ does not explain how *Richardson* is harmful. Kelly also does not address article IV, sec. 2 of the Washington Constitution which states that a

⁸ See Petition for Review at 10 (claiming that he asserted an exception to RCW 10.73.100 in “his answer to the prosecution’s second statement of additional authorities, filed on January 25, 2023”).

majority of the justices of this Court constitutes a quorum and may pronounce a decision.

While not the foundation of “our system of ordered liberty,” finality of a judgment is nevertheless an important principle. *In re Pers. Restraint of Garcia Mendoza*, 196 Wn.2d 836, 840, 479 P.3d 674 (2020) (citations omitted). There is often tension between finality and other closely held values. *Garcia Mendoza*, 196 Wn.2d at 841. “The judicial branch strives to ensure that no one is judged by a fundamentally flawed process or restrained by a fundamentally flawed judgment.” *Id.* “But challenges to judgments must be timely raised.” *Id.*

The important principle of finality shapes the analytical structure that is employed for collateral attacks on judgments. A judgment is final when it is filed with the clerk of the court if the defendant does not appeal. RCW 10.73.090(3)(a). A person has one year after the judgment is final to collaterally attack the judgment. RCW 10.73.090. After the one year statute of limitations, a petitioner has the burden of showing that one of the

six exceptions of RCW 10.73.100 applies, or the judgment is invalid on its face. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 422, 309 P.3d 145 (2013).

In this Court, Kelly asserts that *Blake* satisfies RCW 10.73.100(6), the significant change in the law exception. While the State agrees that *Blake* is a material change in the law with respect to convictions for UPCS that requires vacation of such convictions and the removal of such convictions from all offender scores,⁹ *Blake* is not a material change in the law with respect to other crimes or to sentences in which the reduction in the offender score did not alter the standard range. That an opinion can constitute a significant change in the law in some cases and not others is well established. *See, e.g., Compare with In re Pers. Restraint of Williams*, 200 Wn.2d 622, 621, 530 P.3d

⁹ *See generally State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986) (unconstitutional convictions must be removed from offender scores).

933 (2022) (*Houston-Sconiers*¹⁰ is not material to an indeterminate sentence for RCW 10.73.100(6) exception to the one-year time bar) with *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 233-36, 474 P.3d 507 (2020) (*Houston-Sconiers* represents a significant material change in the law for purposes of RCW 10.73.100(6) with respect to minors who received determinate sentences). See also *In re Pers. Restraint of Davis*, 200 Wn.2d 75, 83, 514 P.3d 653 (2022) (sentencing decision involving 19- and 20-year-olds not material under RCW 10.73.100(6) where the defendant was 21 when he committed the charged crimes); *In re Pers. Restraint of Kennedy*, 200 Wn.2d 1, 21, 513 P.3d 769 (2022) (case involving sentencing for aggravated first degree murder not material for purposes of RCW 10.73.100(6) to a sentence imposed under a different statute).

Here, Kelly does not explain how *Blake* is material to the non-UPCS convictions in *his* June 2, 2006, judgment and

¹⁰ *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

sentence. *Blake* did not impact the validity of Kelly's non-UPCS convictions that were included in his offender score or his prior convictions for forgery, attempt to elude, burglary, possession of stolen property, assault, or attempted theft. CP 9. These convictions alone yielded an offender score of 9+ on count 1—burglary in the first degree. This offender score, in turn, supported the standard range identified in the 2006 judgment and sentence. And a sentence within the applicable standard range is facially valid for purposes of RCW 10.73.090(1). *Richardson*, 200 Wn.2d at 847; *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011). Kelly's petition for review must be denied.

This conclusion is not altered by Kelly's untimely citations to *Waller* and *Skylstad*. Both of those cases are distinguishable. *Skylstad* dealt with when the RCW 10.73.090 one-year time period began to run in a case involving a single crime of conviction. *See Skylstad*, 160 Wn.2d at 946, 948-49 (conviction of first degree robbery with a firearm enhancement; "final" for purposes of RCW 10.73.090 means when litigation of

both the convictions and sentence has concluded). *Waller* involved a trial court's imposition of a new sentence on a single count of murder and whether the State had an appeal of right from the decision. *Waller*, 197 Wn.2d at 220, 224 (“jury convicted Waller of first degree murder”; “We granted review to decide whether RAP 2.2(b)(3) gives the State the right to appeal an order granting a CrR 7.8(b) motion.”).

This Court's relevant precedent that is relevant to this case are those that recognize the important principle of finality of judgments. These cases hold that a facial invalidity, such as that created by *Blake* with respect to UPCS convictions, is not a “super exception” to the one-year time bar. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013). The existence of a facial invalidity only authorizes the court to address the facial invalidity. *Id.* at 425. The court is precluded from considering other time barred claims. *See In re Pers. Restraint of Snively*, 180 Wn.2d 28, 320 P.3d 1107 (2014) (community placement ordered for indecent liberties properly struck from

judgment and sentence, but the facial invalidity did not allow the defendant to pursue his otherwise time barred claim to withdraw his guilty plea on the grounds he was misadvised of the community custody term); *In re Pers. Restraint of West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (correcting an erroneous portion of a sentence does not affect the finality of those portions of the judgment and sentence what was correct and valid when imposed).

In this case, further review is unwarranted because the finality and validity of the sentences on Kelly's five non-UPCS convictions were unaffected by Kelly's oral motion for *Blake* relief.

V. CONCLUSION

Kelly's petition for review should be denied as he did not timely assert the issues raised and because this Court cannot provide Kelly with effective relief.

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RESPECTFULLY SUBMITTED this 20th day of June, 2023.

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