No. 102131-3 COA
No. 56574-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.
CHRISTOPHER OLSEN,

Appellant.

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

Cause Nos. 03-1-01537-1, 03-1-1697-1, and 05-1-1887-2
.

ANSWER TO AMICUS CURIAE MEMORANDUM

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A. ISSUES PERTAINING TO PETITION FOR REVIEW RELATED TO AMICUS

1. Whether the decision of the Court of Appeals conflicts with other decisions of this Court regarding the standard that should be applied to collateral attacks such that review is appropriate.

2. Whether substantial public interest justifies acceptance of review where a consideration of public interest must include consideration of finality of judgments.

3. Whether the decision of the Court of Appeals, which follows precedent from this Court, the United States Supreme Court, and other decisions of the Court of Appeals, creates confusion in the law such that review is appropriate.

B. STATEMENT OF THE CASE

For the purposes of this response, the State relies on the Statement of the Case that was included in the Brief of Respondent filed in the Court of Appeals, cause no. 56574-

9-II and in the Answer to Petition for Review and Cross Petition for Review previously filed in this Court. This court has set this matter for consideration of the Petition for Review. This Court granted leave for amicus curiae on behalf of Civil Survival Project, Washington Association of Criminal Defense Lawyers, The Way of Justice, and King County Department of Public Defense and indicated any response to the memorandum should be filed no later than September 15, 2023. This answer addresses the amicus curiae memorandum.

C. ARGUMENT

1. The decision of the Court of Appeals does not conflict with prior precedent from this Court.

Amicus indicates that the decision of the Court of Appeals conflicts with prior decisions of this Court, however, a review of the cases demonstrates otherwise. "A motion to withdraw guilty plea after judgment has been entered is a collateral attack." State v. Buckman, 190

Wn.2d 51, 60, 409 P.3d 193 (2018). The Petitioner's burden on collateral review is different than that of a direct appeal. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 596-597, 316 P.3d 1007 (2014). A petitioner who collaterally attacks their conviction by asserting that their guilty plea was involuntary must show "'actual and substantial prejudice'" to prevail. Buckman, at 60 (*quoting,* Stockwell, at 598-99). To show actual and substantial prejudice, "the petitioner must show that the outcome of the guilty plea proceedings would more likely than not have been different had the error not occurred." Buckman*,* at 60; In re Personal Restraint of Riley, 122 Wn.2d 772, 780-781, 863 P.2d 554 (1993); Buckman, at 62. A bare allegation that a petitioner would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice. Riley, at 782. The decision of the Court of Appeals was consistent with the precedent set forth by this Court. Olsen did not demonstrate any

likelihood that the guilty plea proceedings would have been different, nor could he.

There can be no showing that he would not have entered the pleas but for error. There was no error. Neither defense counsel, the prosecutor nor the trial court could foresee the future decision in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Moreover, in each of the guilty plea hearings, Olsen received favorable plea deals. With regard to the forgery conviction in 03-1-01537-1, Olsen was sentenced close to the low end of his standard range. CPA 3-6. The sentence was run concurrent to the sentence in 03-1-01697-1, which would have happened by operation of law even if the trial court had not specified in the judgment that the cases were to run concurrently. RCW 9.94A.589(1) (2002).

In the 05-1-01887-2 case, Olsen took advantage of a very favorable recommendation for a DOSA sentence on the unlawful possession of a firearm charge. CPC 6, 15-

16. Moreover, his sentences were long completed by the time this Court entered its ruling in State v. Blake. Olsen could not meet the standards for withdrawal of his guilty plea under CrR 7.8.

Amicus' reliance on State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) is misplaced. In Mendoza, this Court allowed a defendant to raise voluntariness of a guilty plea for the first time in a direct appeal. Id. at 589. That situation is different than Olsen's position in a collateral attack. The petitioner's reliance on In re Pers. Restraint of Isadore, 151 Wn.2d 294, 299, 88 P.3d 390 (2004), is also misplaced. In that case, the prosecutor filed a motion to amend the judgment and sentence more than a year after *Isadore's* guilty plea to add a year of community custody. Id. at 296-297. This Court held that "where a petitioner has not had a prior opportunity for judicial review, we do not apply the heightened threshold requirements of personal restraint petitions." Id. at 299. Importantly, the action of

the prosecutor in seeking modification occurred after the time frame for a direct appeal. The Court *cited to,* In re Pers. Restraint of Garcia, 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001), where the Department of Corrections revoked good time credits. Unlike, those cases, there was no action by the State taken at a time when a direct appeal was not available in this case.

This Court explained the different situations in Buckman, at 87-88, 89. This Court stated "*Isadore*, however, involved a unique situation." Id. at 89. This case did not involve a sentence modification. As the Court of Appeals noted, the plea was knowing, voluntary and intelligent at the time the plea was entered. *See,* Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970) ("[A] plea of guilty intelligently made in light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a

faulty premise."); State v. Lamb, 175 Wn.2d 121, 129, 285 P.3d 27, 31 (2012).

The decision of the Court of Appeals is consistent with the precedent of this Court. There is no basis upon which review should be granted.

2. This Court should not accept review because substantial public interest requires recognition of the importance of finality.

Amicus argues, similar to the petitioner, that this Court should accept review because the crime of unlawful possession of controlled substance was historically disproportionately applied to persons of color. There is a substantial public interest in finality of judgments. In re Pers. Restraint of Meippen, 193 Wn.2d 310, 315, 440 P.3d 978 (2019). Collateral attacks are purposefully limited, and our Courts have a long-standing view of "limiting the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to

punish admitted offenders." In re Personal Restraint of Forcha-Williams, 200 Wn.2d 581, 600, 520 P.3d 939 (2022); *citing,* In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992).

Adopting the rule sought by Olsen would lead to an absurd result of allowing an offender to take advantage of a knowingly entered and completely voluntary plea agreement and twenty years later, when evidence and witnesses may no longer be available, withdraw the guilty plea simply because they also had a controlled substance violation around the same time. The substantial public interest in finality must dictate otherwise. An offender who pled guilty to a homicide and a controlled substance charge, or an offender who pled guilty to a rape and a controlled substance charge, or, a forgery or unlawful possession of a firearm charge and a controlled substance charge, is not entitled to a windfall from Blake. Olsen's case is a good example of why principles of finality should

still apply as he is not incarcerated on any of the cases at bar, rather, he later committed a homicide and is currently incarcerated for his later offense, not the offenses that he seeks to withdraw his pleas from. CPC 25, 52; State v. Sublett, 176 Wn.2d 58, 65, 292 P.3d 715 (2012). Substantial public interest weighs against review in this case.

Historical inequities in the application of the unlawful possession of a controlled substance charge do not justify the relief that Olsen seeks in this case. Olsen seeks to set aside his guilty pleas for non-drug offenses simply because he also had convictions for controlled substance violations. Amicus indicates that the State has not identified the "unjust windfall" that Olsen would receive from this Court adopting a rule that would allow him to withdraw his non-controlled substance pleas. As the State has noted, Olsen is confined not in these cases, but for a subsequent homicide. Allowing withdrawal of guilty pleas which were

knowing, intelligent and voluntarily entered many years ago, thus lowering Olsen's offender score further on the homicide he later committed constitutes an unjust windfall that erodes the important concept of finality of judgments.

Substantial public interest should lead this Court to conclude that review is not warranted.

3. This Court, our Court of Appeals, and the United Sates Supreme Court have repeatedly noted that a statute that is subsequently invalidated does not render a guilty plea invalid. The reasoning of the Court of Appeals does not create confusion over the consequences of vacating a single charge.

At the time of Olsen's guilty pleas, he was properly advised of the consequences. Even this Court had ruled that RCW 69.50.4013 was a valid charge and those rulings were controlling at the time of Olsen's guilty pleas. *See*, State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981); State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004). In In re Pers. Restraint of Newlun, 158 Wn. App. 28, 35, 240

P.3d 795 (2010), Division I of the Court of Appeals considered whether a guilty plea to two counts of identity theft was involuntary because, subsequent to the guilty plea, this Court clarified the unit of prosecution for the offense in State v. Leyda, 157 Wn.2d 335, 337-338, 138 P.3d 610 (2006). Citing to the United States Supreme Court decision in Brady, the Newlun Court found that "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Newlun, at 35, *citing*, United States v. Broce, 488 U.S. 563, 572, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989), *quoting*, Brady, at 757.

This Court has adopted the rationale of Brady, stating, "Whether a plea is voluntary is determined by ascertaining whether the defendant was sufficiently informed of the direct consequences of the plea that existed *at the time* of the plea." Lamb, at 129. The fact

that this Court found that convictions based on unlawful possession of a controlled substance are unconstitutional in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), many years after Olsen's guilty pleas, does not render his pleas involuntary.

In State v. Knight, 162 Wn.2d 806, 812-813, 174 P.3d 1167 (2008), this Court held that regardless of whether a plea was indivisible, a challenge based on double jeopardy principles did not invalidate the plea agreement. The Court noted, "since the plea agreement has been fully satisfied here, the indivisibility of the plea has no bearing on our analysis." Id. at 813.

Here, the decision in State v. Blake is much like Knight's claim of double jeopardy. While the decision renders the UPCS convictions void, it does not invalidate the plea agreement. The trial court in this case correctly vacated the UPCS convictions pursuant to State v. Blake, which was the only appropriate remedy available under

CrR 7.8. The decision of the Court of Appeals is neither incorrect nor confusing.

D. CONCLUSION

For the reasons previously noted in the Answer to Petition for Review and noted above, the State respectfully requests that this Court deny review of the decision of the Court of Appeals. If this Court accepts review, the State continues to request that any acceptance of review also include the issues that were not addressed by the Court of Appeals as previously noted in the Answer to Petition for Review/Cross Petition for Review.

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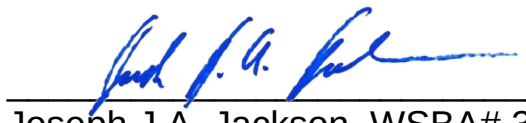
Respectfully submitted this 14th day of September 2023.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 14th day of September 2023.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

September 14, 2023 - 4:15 PM

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