

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
8/23/2023 3:21 PM  
BY ERIN L. LENNON  
CLERK

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

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER LEE OLSEN,

Petitioner.

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AMICI CURIAE MEMORANDUM OF CIVIL SURVIVAL  
PROJECT, WASHINGTON ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS, THE WAY TO JUSTICE, AND KING  
COUNTY DEPARTMENT OF PUBLIC DEFENSE IN  
SUPPORT OF PETITION FOR REVIEW

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## I. INTRODUCTION

The lower court's decision in this matter not only failed to apply Supreme Court precedent but calls into question significant rights under the Washington State Constitution and threatens to exacerbate the impact of the War on Drugs upon Washingtonians of color for years to come. For these reasons Amici urge this Court to accept review under RAP 13.4(b)(1), (3), and (4).

Mr. Olsen did not have the opportunity to directly appeal his pleas on the grounds that his 2003 and 2005 charges were unconstitutional under *Blake*, which is in direct conflict with prior decisions by this Court. Since Mr. Olsen has not had a prior chance for judicial review, the Court should not apply the heightened threshold requirements as held by the lower court. Rather, Mr. Olsen only needs to show that he was restrained, and that the restraint was unlawful under RAP 16.4(b)(c). Review is warranted to correct this misapplication of Supreme Court precedent. RAP 13.4(b)(1).

Furthermore, the heightened standard of review adopted by the court below will exacerbate the terrible impact of the War on Drugs on people of color. For 40 years, BIPOC communities were disproportionately harmed by the drug possession statute that the *Blake* Court deemed unconstitutional. The statute forever altered the lives of thousands of individuals in Washington State, especially Black men. The collateral consequences of convicting people of color for innocent conduct reaches far beyond incarceration itself; it affected their ability to live a meaningful life and destroyed Washington State families in the process. Given the substantial public interest, the Court should accept review. RAP 13.4(b)(4).

The lower court's holding conflicts with this Court's reasoning as to what the definition of a void statute is, and therefore warrants review by this court. Contrary to the lower court's holding, Mr. Olsen signed plea agreements to nonexistent laws, laws that were inoperative as if they had never been passed. These charges should be ineffective for any purpose since the unconstitutionality of his possession charges date back to when he signed the plea agreements.

Similarly, the lower court's decision also creates substantial confusion over the definition and effect of vacation in general, and the constitutional ramifications thereof. The lower court's ruling created a paradox whereby Mr. Olsen has somehow voluntarily pled guilty to non-existent and constitutionally void charges. If we are to understand that a vacating a conviction pursuant to statute necessitates the withdrawal of a guilty plea, vacating a conviction under an unconstitutionally void statute should certainly require the same. The court should accept review in this matter as it presents a significant question under the Washington and U.S. constitutions impacting an issue of substantial public interest that this Court should decide. RAP 13.4(b)(3), (4).

## II. IDENTITY AND INTEREST OF AMICUS

The identity and interest of amicus are set forth in their Motion for Leave to File.

### III. STATEMENT OF THE CASE

Amicus adopts and incorporates by reference Mr. Olsen's Statement of the Case.

### IV. ARGUMENT

#### **A. The Court should accept review to resolve a conflict with Washington Supreme Court precedent.**

Mr. Olsen pled guilty in 2003 and 2005 to possession of a controlled substance charges that were later deemed unconstitutional. The charges were not ruled unconstitutional until 2021 in *State v. Blake*.<sup>1</sup> Therefore, Mr. Olsen did not have an opportunity to directly appeal his pleas on the grounds that the charges were unconstitutional, and his motion to withdraw those pleas must be reviewed under the standard outlined in RAP 16.4.

When a defendant has not had a prior chance for judicial review, the Court does not apply the heightened threshold requirements for personal restraint petitions as held by the lower court. Rather, the defendant need only show unlawful restraint

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<sup>1</sup> *State v. Blake*, 197 Wn.2d 170, 195 (2021)

under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). *In re Isadore*, 151 Wn.2d 294, 299 (2004); *In re Pers. Restraint of Garcia*, 106 Wash.App. 625, 628 (2001).

When a guilty plea rests on misinformation about the consequences, due process allows withdrawal of the plea as involuntary. *State v. Mendoza*, 157 Wn.2d 582, 584 (2006). “Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent.” *Isadore*, 151 Wn.2d at 297-298. “A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.” *Id.* “An involuntary plea constitutes a manifest injustice.” *In re Stockwell*, 179 Wn.2d 588, 595 (2014) (citing *State v. Walsh*, 143 Wash.2d 1, 6 (2001)).

Here, Mr. Olsen's freedom is restrained based on convictions that included unconstitutional charges. This satisfies RAP 16.4(b). His restraint is unlawful for several reasons under RAP 16.4(c). First, his convictions and sentences were based in part on laws that violate the state and federal constitutions.<sup>2</sup> Second, the fact that this Court voided the possession statute 16

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<sup>2</sup> RAP 16.4(c)(2).

years after Mr. Olsen's conviction constitutes a material fact that did not previously exist and requires vacating the pleas in the interest of justice.<sup>3</sup> Finally, *Blake* voided a law with a 40 year history of criminalizing people of color for innocent and passive conduct, thus representing a significant change in the law that requires retroactive application.<sup>4</sup>

Mr. Olsen's pleas were premised on valid charges that were later invalidated. This misinformation rendered his pleas unknowing and involuntary, which equates to manifest injustice permitting withdrawal. *Stockwell*, 179 Wn.2d at 595.

Because Mr. Olsen lacked a prior opportunity for judicial review, he need only show unlawful restraint to withdraw his unconstitutional guilty pleas. The lower court erred by requiring he prove actual and substantial prejudice. Review is warranted to correct this misapplication of the law.

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<sup>3</sup> RAP 16.4(c)(3).

<sup>4</sup> RAP 16.4(c)(4).

**B. The Court should accept review because the heightened prejudice standard, as proposed by the lower court, will disproportionately harm people of color, and presents an issue of substantial public interest to be resolved by the Court.**

The lower court's heightened prejudice standard for defendants seeking to withdraw unconstitutional guilty pleas will have a disparate impact on communities of color and will exacerbate the damage wrought by the void statute for more than 40 years. People of color, especially Black men, were disproportionately harmed by the unconstitutional drug possession statute. They suffered harsher penalties and collateral consequences. *Blake*, 197 Wn.2d at 192.

The respondent stated below that to grant Mr. Olsen's motion would convey upon him an "unfair windfall," and yet, the respondent failed to identify what that "windfall" might be exactly. Respondent's Brief, p.33. This assertion is all the more ponderous when considering Mr. Olsen, like many Washingtonians in similar positions, has already done his time and endured the racially disproportionate effect of the void statute.

As the *Blake* Court stated, “the drug statute that [the legislature] interpreted has affected thousands upon thousands of lives, and its impact has hit young men of color especially hard.” *Blake*, 197 Wn.2d at 192. The evidence supports this assertion. “[A]mong felony drug offenders, the odds that a Black defendant will be sentenced to prison are 62% greater than the odds for similarly situated White defendants.”<sup>5</sup> Additionally, people of color are saddled with high legal financial obligations that, if not paid, may lead to reincarceration.<sup>6</sup>

Beyond incarceration itself, convictions under the void statute had lingering consequences that fell more heavily on people of color. Formerly incarcerated people have unemployment rates higher than during the peak of the Great Depression<sup>7</sup>, and are more than 10 times more likely to experience homelessness than the general public.<sup>8</sup> As with many other aspects of the criminal legal system, these collateral

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<sup>5</sup> Lucius Couloute, GETTING BACK ON COURSE: EDUCATIONAL EXCLUSION AND ATTAINMENT AMONG FORMERLY INCARCERATED PEOPLE | PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/reports/education.html> (last visited Aug 15, 2023).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Lucius Couloute, NOWHERE TO GO: HOMELESSNESS AMONG FORMERLY INCARCERATED PEOPLE PRISON | POLICY INITIATIVE, <https://www.prisonpolicy.org/reports/housing.html> (last visited Aug 15, 2023).



consequences hit people of color hardest due to systemic inequities.

The unconstitutional statute also broadly harmed families and communities of color. There are 79 million people in the United States with a criminal record, which in turn, amounts to 113 million people in the United States who have an immediate family member that has been to jail or prison at one time or another<sup>9</sup>, largely due to the War on Drugs and its associated statutes.

By hampering defendants' ability to challenge these unconstitutional convictions, the lower court's prejudice standard will exacerbate harm to communities of color. Given the substantial public interest, this Court should accept review.

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<sup>9</sup> Wendy Sawyer and Peter Wagner, MASS INCARCERATION: THE WHOLE PIE 2023 | PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/reports/pie2023.html> (last visited Aug 15, 2023).

**C. The lower court's refusal to allow Mr. Olsen to withdraw his guilty pleas presents a significant question of law under the Constitution of the State of Washington and warrants review.**

***1. Division II's holding conflicts with this Court's reasoning as to what the definition of a void statute is, and therefore warrants review by this Court.***

In holding that Mr. Olsen had not pled guilty to non-existent crimes, but only valid crimes later invalidated, the lower court's opinion runs afoul of this Court's holding in *Blake* and casts doubt upon what exactly a vacated possession conviction means under the State Constitution.

The lower court's holding directly contradicts the accepted view that:

An unconstitutional statute, though having the form and name of law is in reality no law, but is wholly void, and ineffective for any purpose; since *unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it*. An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.”

16 Am Jur 2d, Sec 177 late 2d, Sec 256. (*emphasis added*).

“An unconstitutional law is void, and is as 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. *State v. French*, 21 Wn. App. 2d 891, 895 (2022) (citing *Montgomery v. Louisiana*, 577 U.S. 190, 204 (2016)). “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 (1952).

Here, Mr. Olsen made plea agreements to charges that were in reality, no law. His possession charges should be *ineffective for any purpose* since the unconstitutionality of his possession charges date back to when he signed the plea agreements. Essentially, Mr. Olsen signed a deal to a nonexistent law because they were inoperative as if they had never been passed. Additionally, a void law bestows no power or authority on anyone,<sup>10</sup> and therefore, the State did not have the power or authority to have Mr. Olsen sign plea agreements to unconstitutional charges.

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<sup>10</sup> See *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886).

If we were to accept the standard outlined by Division II for reviewing motions to withdraw pleas involving *Blake* charges, not only would it run counter to the intent of *Blake* itself and prior precedent, but it would require petitioners to overcome an objectively impossible burden. In Washington State, “less than five percent of superior court criminal cases go to trial,” which would mean that 95 percent of cases do not.<sup>11</sup> By virtue of our system’s very design, it would statistically never be more likely than not that someone would go to trial, particularly where the defendant was unaware at the time of the unconstitutionality of their charges.

***2. Division II’s holding also creates substantial confusion over the definition and effect of vacation in general, and the constitutional ramifications thereof.***

As part of Mr. Olsen’s motion under CrR 7.8 seeking to vacate his *Blake* convictions, he also necessarily requested to withdraw his guilty pleas to those same charges. However, while the lower court vacated Mr. Olsen’s *Blake* convictions, it refused

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<sup>11</sup> Washington State Courts - time for trial, WELCOME TO WASHINGTON STATE COURTS, [https://www.courts.wa.gov/programs\\_orgs/pos\\_tft/index.cfm?fa=pos\\_tft.reportDisplay&fileName=appendixE](https://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportDisplay&fileName=appendixE) (last visited Aug 15, 2023).

to withdraw his guilty pleas, thus calling into question the very meaning of vacation.

In its holding below, the lower court inexplicably differentiated between vacating Mr. Olsen's convictions and allowing him to withdraw his guilty pleas to those same void convictions. The lower court required Mr. Olsen to demonstrate both that his plea agreements were involuntary and that he experienced actual and substantial hardship. As outlined above, such a standard makes little to no sense where a defendant has pled to a void, and thus non-existent crime. The statute invalidated by this Court in *Blake* is now, and has always been constitutionally void, thus one could not possibly have voluntarily pled or have failed to experience substantial hardship from such a conviction.

Moreover, the lower court's ruling has broader implications for post-conviction relief in that it undermines what the word vacate means in practical terms. For example, upon vacating a felony or misdemeanor conviction under RCW 9.94A.640 or 9.96.060, the court deems a defendant's guilty pleas withdrawn, and releases them from all penalties and

disabilities resulting from the conviction.<sup>12</sup> Certainly, if we are to understand that a vacate pursuant to statute necessitates the withdrawal of a guilty plea, vacating a conviction under a void statute, such as the possession statute at issue in *Blake*, would have to require the same. There is no conceivable policy reason why a conception of what vacate means in the context of a defendant demonstrating rehabilitation, would be broader than the conception in circumstances that involve a defendant convicted unconstitutionally.

Based on the foregoing reasons, this Court should accept review of this case, as the lower court's ruling runs afoul of the due process guaranteed under the Washington Constitution.

## V. CONCLUSION

For the foregoing reasons, amici urge the Court to accept review of this case pursuant to RAP 13.4.

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<sup>12</sup> Washington State Courts - court forms - vacating/sealing records, WELCOME TO WASHINGTON STATE COURTS, <https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=38> (last visited Aug 15, 2023) (*See* Court Forms CrRLJ 09.0200 and CrR 08.0920).

RAP 18.17 Certification

Pursuant to RAP 18.17, the undersigned certifies the number of words contained in this document, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, is 2,456.

Respectfully submitted this 23<sup>rd</sup> day of August, 2023

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## Transmittal Information

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