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No. 98496-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALAN JENKS,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Black people make up about 4% of the Washington’s population, 19% of those sentenced to prison, and 28% of those sentenced to life in prison.¹ But, Black people make up 38% of the persons sentenced to die in prison under the Persistent Offender Accountability Act (POAA).² That means that Black people are far more likely to receive a life sentence for something other than the State’s most serious offense of aggravated first degree murder.

The Legislature responded to the unjustness of these sentencing outcomes but redefining the term “most serious offense” so it does not include second degree robbery. Laws 2019, Ch. 187, § 1.

Had Mr. Jenks committed his crime today, there would be no question he would be serving a sentence of less than 14 years. However, since he committed his crime in 2014, the Court of Appeals concluded he must spend the rest of his life in prison. That decision is contrary to more than a century of case law from this Court and the United States Supreme Court and fails to give effect to the Legislature’s efforts to remedy unjust sentencing practices. Second degree robbery is not a most serious offense,

¹ *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, ACLU of Washington, p. 28 (2020).

² Nina Shapiro, *Washington’s Prisons May Have Hit Pivotal Moment As They Eye Deep Cut In Their Population*, *Seattle Times*, September 17, 2020.

and it cannot serve as a basis of a life sentence regardless of when the current offense was committed.

Only recently this Court expressed the duty of all in the legal community to address the racial injustices, future, present, and past, that pervade the criminal legal system. *Open Letter to the Legal Community*, June 4, 2020. “[W]e can administer justice and support court rules in a way that brings greater racial justice to our system as a whole.” *Id.* This case provides just such an opportunity.

B. ISSUES PRESENTED

1. When the Legislature reduces the punishment for a crime, that reevaluation of the appropriate punishment presumptively applies to all pending cases. The Legislature has reclassified the punishment for Mr. Jenks’s offense such that today he could not be sentenced to life in prison and would instead only face a sentence of less than 14 years. Despite this Court’s well-established case law, the Court of Appeals refused to give effect to the Legislature’s actions.

2. The Equal Protection Clause of the Fourteenth Amendment requires similarly situated people be treated the same with regard to the legitimate purpose of the law. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. While the effect of the statutes is the same – increased punishment based

on recidivism – in some instances this court has required the State prove the fact to a jury beyond a reasonable doubt, in others the Court has not. That arbitrary distinction deprives people the equal protection of the law.³

C. STATEMENT OF THE CASE

A jury convicted Allen Jenks of first-degree robbery. CP 73. Based in part upon a prior second-degree robbery conviction and despite “frustration” with its lack of discretion under the POAA, the trial court sentenced Mr. Jenks to life in prison without the possibility of parole. RP 424-26.

While his case was pending appeal, the Legislature has amended the definition of “most serious offense” to exclude second-degree robbery. Laws 2019, Ch. 187, § 1. Under the current law, Mr. Jenks would be facing a sentence of just less than 14 years. CP 108.

D. ARGUMENT

Because his criminal history does not include three most serious offenses, Mr. Jenks’s life sentence is unlawful.

The life sentence Mr. Jenks received is the harshest sentence permitted under Washington Law. Yet, the sentence is not reserved for the most serious offenses. Mr. Jenks, who committed a robbery, received the same sentence as a person who commits aggravated first degree murder.

³ This argument is fully addressed in Mr. Jenks’s petition review and previous briefing, no supplemental briefing is offered.

Yet if he had committed the same crime today, no one disputes he would receive a sentence of less than 14 years.

Despite decisions of this Court applying changes in law, both statutory and judicial, to all pending cases, the Court of Appeals refused to do so. While this Court has recognized that reductions in punishment are presumed to apply retroactively, the Court of Appeals concluded that can only occur when the Legislature expressly says so. Although this Court has required a narrow construction of criminal statutes, the Court of Appeals provided as broad an interpretation as possible to RCW 9.94A.345 and RCW 10.01.040. In doing so, the lower court failed to give effect to the Legislature's intention that people like Mr. Jenks should not die in prison.

1. Seeking to ameliorate harsh and unjust sentences, the Legislature has determined that people convicted of second degree robbery are not persistent offenders subject to life in prison.

The trial court sentenced Mr. Jenks to die in prison, concluding he was a persistent offender. The court reasoned his prior second-degree robbery conviction constituted a most serious offense. However, second-degree robbery is no longer included in the list of most serious offenses. RCW 9.94A.030(33). The Legislature ameliorated the harsh and racist

effect of the prior statute in 2019, before the Court of Appeals decided Mr. Jenks's case. Laws 2019, Ch. 187, § 1.

“It is familiar law that the repeal of a statute pending a prosecution thereunder, without any saving clause as to such prosecution, will prevent its being further prosecuted; and this rule applies as well after judgment and sentence pending an appeal duly taken therefrom as before the final determination in the trial court.” *State v. Allen*, 14 Wn. 103, 105, 44 P. 121 (1896). Instead, “[a] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Marine Power & Equip. Co. v. Wash. State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 621, 694 P.2d 697 (1985) (quoting *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974)); *In re Dependency of A.M.M.*, 182 Wn. App. 776, 789, 332 P.3d 500, 507 (2014).

Similarly, courts have found new decisional law applies “to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a clear break from the past.” *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (quoting *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). A case is “final” when “a judgment of conviction has been rendered, the

availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” *Matter of St. Pierre*, 118 Wn.2d at 327. Thus, a statutory change can apply to pending cases not yet final including cases pending on direct review.

Recently in *State v. Ramirez*, this Court applied this same standard to statutory changes enacted after a person committed their offense. 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018). *Ramirez* found the trial court improperly imposed costs as a part of a person’s sentence. The Court reached that conclusion despite the fact that Mr. Ramirez committed the offense, was convicted and sentenced long before the Legislature even passed the statute. The statute did not contain any expression of legislative intent to apply to pending cases. Because the statute took effect while his appeal was pending and his conviction was not yet final, the new statute had to apply to Mr. Ramirez’s case. *Id.* at 749. The sentence including costs was not lawful.

That is precisely the case here. Mr. Jenks’s conviction is not yet final. Mr. Jenks’s case was pending on appeal when the Legislature redefined the term “most serious offense.” Laws 2019, Ch. 187, § 1. Now, the definition of most serious offense in RCW 9.94A.030(33) does not include second-degree robbery. Because his conviction is not yet final, under *Allen* and *Ramirez*, Mr. Jenks must benefit from that change. His

2004 conviction for second-degree robbery is not a most serious offense.

He is not a persistent offender. His sentence of life in prison is unlawful.

2. RCW 10.01.040 does not prevent the Legislature or the courts from providing relief to Mr. Jenks.

In 1901 the Legislature adopted the predecessor to what is now RCW 10.01.040. The Court of Appeals concluded this statute prevents reductions in sentences from applying to pending cases except in very narrow circumstances.

The statute provides in part:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

That statute is contrary to the common law. That long-dead Legislature cannot control a future Legislature's ability to amend or enact statutes, nor can it dictate the manner or language used to accomplish such amendments. As set forth below, these principles have led this Court and the United States Supreme Court to each conclude that such statutes

cannot require future amendments to take a particular form or use particular words to affect their purpose.

This Court has held RCW 10.01.040 “does not require that an intent to affect pending litigation be stated in express terms” it is enough that the amendment “fairly convey that intention.” *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970); *see also Dorsey v. United States*, 567 U.S. 260, 274, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012) (interpreting 1 U.S.C. § 109). That intent is presumed and fairly implied by the Legislature’s elimination or reduction of punishments.

a. *Statutes which seek to prevent retroactive application must be narrowly construed.*

This Court has required a narrow construction of statutes which seek to limit application of reduced punishment because such statutes are contrary to common law principles. *Zornes*, 78 Wn.2d at 13. *Id.* (citing *Marble v. Clein*, 55 Wn.2d 315, 347 P.2d 830 (1959)).

Such narrow construction is also required by the recognition that “Insofar as legislative power is not limited by the constitution it is unrestrained.” *Cedar County Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (citing *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 555, 503 P.2d 86 (1972)). Each Legislature is free to

amend statutes and to do so in whatever fashion it pleases, within constitutional constraints.

“One legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.” *Fletcher v. Peck*, 6 Cranch 87, 135, 10 U.S. 87, 3 L. Ed. 162 (1810); *United States v. Winstar Corp.*, 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). This Court has said the same thing.

Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power. As this court has recognized, there is “a general rule that one legislature cannot abridge the power of a succeeding legislature, and succeeding legislatures may repeal or modify acts of a former legislature.”

Washington State Farm Bureau Fed’n v. Gregoire, 162 Wn.2d 284, 301–02, 174 P.3d 1142 (2007) (footnote and internal citations omitted).

Recognizing the implicit power of each Legislature, a prior Legislature cannot require subsequent amendments to take a particular form or to use special incantations in order to effectuate the legislative intent. *See e.g.* Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 279 (2012).

Thus, this Court has long insisted RCW 10.01.040 must be narrowly construed and the legislation need not expressly state its intent for retroactive application. *Zornes*, 78 Wn.2d at 13.

That conclusion is consistent with the United States Supreme Court's interpretation of 1 U.S.C. § 109 which, like RCW 10.04.010, purports to require an express statement of Congressional intent to apply a new criminal statute retroactively. The Supreme Court has historically interpreted that statute as permitting retroactive application whenever that may be fairly implied. *Dorsey*, 567 U.S. at 274. Echoing this Court's words in *Washington State Farm Bureau Fed'n*, *Dorsey* noted "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Id.* And each subsequent Congress enjoys this freedom without any requirement that it use "magical passwords." *Id.* (quoting *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955)). The legislative body remains free to express its intention of retroactivity "either expressly or by implication as it chooses." *Dorsey*, 567 U.S. at 274 (citing *Fletcher*, 6 Cranch at 135; *Reichelderfer v. Quinn*, 287 U.S. 315, 318, 53 S. Ct. 177, 77 L.Ed. 331 (1932)).

The Legislature need not expressly state its intention for retroactive application.

b. Reductions in punishment are presumptively retroactive.

When the Legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases. *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). In such cases:

the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption against retroactivity and the new penalty applied in all pending cases.

State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975); *see also Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986); *State v. Johnson*, 51 Wn. App. 836, 839, 759 P.2d 459 (1988). *Wiley* recognized this is so because “the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment. 124 Wn.2d at 687.

The Court of Appeals has reached a similar conclusion with respect to recent statutory changes eliminating criminal penalties for many marijuana offenses. *See State v. Gradt*, 192 Wn. App. 230, 236-37, 366 P.3d 462 (2016); *State v Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015). In those cases, the courts recognized the reduction in punishment fairly

implied an intent to apply to offenses committed prior to enactment.

Gradt, 192 Wn. App at 236; *Rose*, 191 Wn. App. at 868.

Dorsey concerned drug reforms, which much like the redefining of “most serious offense,” sought to eliminate racial disparities evident in the preexisting law stemming from the different mandatory minimum terms for powder and crack cocaine. The Court concluded those penalty reductions applied to cases committed prior to enactment. Again, applying an analysis that mirrors that used by this Court, the United States Supreme Court found such an intent in part due to the reduction in punishment.

Dorsey, 567 U.S. at 276.

This Court’s presumption that a reduced sentence should apply is consistent with and likely guided by its proportionality and categorical-bar analysis under Article I, section 14. Applying an older, harsher punishment despite the legislative assessment that it is unjust, racially disparate, or merely out of step with modern norms would likely be unconstitutionally disproportionate under Article I, section 14. Imposing substantially different punishments for precisely the same act would always fall short of the constitutional standard when a court must consider how the sentence compares to others meted out in Washington for the same offense. *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018); *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

Prior to July 2019, a person in Mr. Jenks's shoe's faced a mandatory sentence of life without the possibility of parole. After July 2019, a person who committed Mr. Jenks's offense would receive a sentence of less than 14 years, and under no circumstances could the person receive a sentence of life without the possibility of parole. The elements of the crime itself have not changed, yet the punishment is substantially reduced. That is just the sort of "fundamental reevaluation of the value of punishment" of which *Wiley* spoke.

The legislative reduction in punishment is a fundamental reevaluation of the appropriate punishment for an offense. Such a reduction fairly implies an intent to apply the new reduced punishment to all previous and pending cases. The legislative determination that a prior or current second-degree robbery conviction should not subject a person to life imprisonment must apply to Mr. Jenks. The Legislature's reduction of punishment for Mr. Jenks's offense must apply to him.

c. No statute prevents this Court from giving effect to the Legislature's effort to address unjust and racist sentencing practices.

(i). RCW 10.01.040 does not prevent courts from applying reductions in punishment to existing cases.

Despite this established precedent discussed above, the Court of Appeals insists RCW 10.01.040 creates a "bright-line rule," one that

requires a clear expression of intent in order for legislation to apply retroactively. Opinion at 10. As the foregoing discussion makes clear, that has never been the case. Just recently, this Court applied changes to the cost statutes to all pending cases even though the statutory amendment made no mention of retroactive application. *Ramirez*, 191 Wn.2d at 747-48

Following the wholesale restructuring of Washington's sentencing statutes brought about by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), this Court concluded RCW 10.01.040 did not bar application of the many newly minted statutes to crimes committed long before their effective dates. *State v. Pillatos*, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). The Court reasoned the array of statutes that defined when exceptional punishment could be imposed, delineated the substantive rights that attached, and provided the procedure to apply did not alter "substantive rights and liabilities." *Id.* (quoting *State v. Hodgson*, 108 Wn.2d 662 669-70, 740 P.2d 848 (1987)).

No substantive right is affected by redefining the term "most serious offense." Thus, RCW 10.01.040 does not apply. The elimination or lowering of criminal penalties implies the legislative intent that those new lower punishments apply retroactively. *Pillatos*, 159 Wn.2d at 472.

For two centuries the United States Supreme Court has similarly construed such statutes narrowly.

Even the Legislature has made clear its understanding and intention that courts may provide relief in existing cases when the Legislature enacts changes to the law. RCW 10.73.100(6) provides an exception to the one-year limitation on the filing of a personal restraint petition where:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

By its plain terms this statute applies to changes in law by new legislation. If an express statement of retroactivity in an amendment were essential, as the Court of Appeals insists, it would be unnecessary for the Legislature to expressly allow for a PRP raising such a claim and to expressly exempt that PRP from the time bar. The Legislature understands and intends that amended statutes will apply in criminal cases and has empowered the courts to provide that relief.

The Legislature intends that people such as Mr. Jenks should have the benefit of a “significant change in the law, whether substantive or procedural, which [are] material to [his] sentence” and made clear its intent to allow such relief even in the absence of an express statement of legislative intent. RCW 10.73.100(6)

The Court of Appeals brushes these cases aside. The opinion reasons *Wiley* did not really mean what it said claiming *Wiley* failed to properly analyze the issue by failing to address RCW 10.01.040. Opinion at 10. Similarly, the Court of Appeals attempts to narrow the holding of *Ramirez*, concluding because the Court did not address RCW 10.01.040, this Court intended to limit its analysis only to costs. Opinion at 6-7.

Whether the Court of Appeals agrees with the thoroughness of the analysis or the conclusions reached by the Court, the Court of Appeals is bound to follow this Court’s decisions. As this Court has said, “even if we had not cited authority for our holding, the Court of Appeals is not relieved from the requirement to adhere to it.” *In re Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012). Thus, whether the Court of Appeals believes *Wiley* and *Ramirez*’s analysis is complete or not, it was required to follow it.

The Court of Appeals starts with the assumption RCW 10.01.040 applies, that it is a “bright-line rule,” and then dismisses this Court’s

opinions to the contrary as anomalous, isolated exceptions, or new rules. Surely, this Court was aware of the law when it decided *Ramirez* just two years ago or *Wiley* 25 years ago or *Zornes* a half century ago. The Court of Appeals must have been aware of the law when it decided *Rose* and *Gradt* just a few years ago. Each of those cases reached the same conclusion: reductions in punishment apply to all cases. Additionally, *Pillatos* did not view RCW 10.01.040 as a bright-line rule when it applied the substantial alteration of the SRA to pending cases following *Blakely*.

Instead, the Court of Appeals cites to a handful of other Court of Appeals opinions that engaged in the same faulty analysis. See Opinion at 7 (citing *State v. Toney*, 103 Wn. App. 862, 14 P.3d 826 (2000); *State v. Kane*, 101 Wn. App. 607, 5 P.3d 741 (2000)). Those cases did not concern reductions in punishment but rather changes in eligibility requirements for a sentence alternative. The opinion also cites to this Court's decision in *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004), as rejecting the analysis of *Wiley* and *Heath*. Opinion at 8-9. To the extent it suggests an amendment must contain a clear statement of retroactive intent, *Ross* is an anomaly in this Court's jurisprudence, requiring a narrow construction of RCW 10.01.040. Indeed, only three years later in *Pillatos*, this Court again applied sentencing changes to pending cases

even where the amendment did not expressly state such an intention. 159 Wn.2d at 472.

Cases such as *Ross* and *Kane*, just like the Court of Appeals opinion here, treated RCW 10.01.040 as the bright-line rule. But it is instead a narrow exception to the general rule presuming retroactive application of reductions in punishment.

The new definition of “most serious offense” does not affect vested or substantive rights parties and RCW 10.01.040 does not apply. *Pillatos*, 159 Wn.2d at 472. By its terms the RCW 10.01.040 only applies to penalties “incurred” prior to a change in the law. Mr. Jenks’s conviction is not yet final and he has not yet incurred any penalty. That mirrors the Court’s analysis in *Ramirez*. That also construes the statute narrowly, as this Court requires.

(ii) RCW 9.94A.345 does not apply or prevent courts from applying the new definition of “most serious offense.”

The Court of Appeals commits the same error in its application of RCW 9.94A.345 as it does with RCW 10.01.040. That statute provides “Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. Just as the 1901 Legislature could not limit a future Legislature, the 2000 Legislature that enacted RCW 9.94A.345

could not limit the scope or impact of future penalty reductions. That Legislature was free to limit its own actions but not those of succeeding bodies. *Washington State Farm Bureau Fed'n*, 162 Wn.2d at 301–02.

Too, RCW 9.94A.345 is contrary to the presumption that cases are decided based on the law in effect at the time of decision and must be narrowly construed. *Zornes*, 78 Wn.2d at 13. A narrow construction begins with the express statement of legislative intent that the statute applies only to the calculation of the offender score and the determination of eligibility for sentence alternatives. Laws 2000, ch. 26, § 1.

The Court of Appeals dismisses this express limitation, saying a general statement of legislative intent cannot override the plain language of the statute. Opinion at 9. While that may be true of other legislative materials, here the statement of intent is part of the law itself. Thus, the “plain language” includes the statute’s limits on its own reach and it simply cannot be ignored. Courts are not free to ignore such legislative acts.⁴ Instead, courts must construe legislative acts to give effect to every portion. *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

In fact, *Pillatos* relied on that very statement of limited intent to conclude RCW 9.94A.345 did not prevent application of new sentencing

⁴ While insists on a clear statement of legislative intent for retroactive application, the court ignores just such a plainstatement regarding the reach of RCW 9.94A.345. Again elevating RCW 9.94A.345 to be the rule rather than an exception

statutes to crimes committed long before their enactment. 159 Wn.2d at 472-73. Because the post-*Blakely* amendments did not concern offender score calculations or sentencing alternatives, the Court concluded RCW 9.94A.345 did not prevent application of those amendments to pending cases. *Pillatos*, 159 Wn.2d at 472-73.

RCW 9.94A.345 does not apply to the classification of an offense as a most serious offense. The amendment of the definition of “most serious offense” does not impact scoring or alternatives. RCW 9.94A.345 does not preclude application of the current definition of “most serious offense” to Mr. Jenks’s case.

E. CONCLUSION

Second degree robbery is not a most serious offense and it cannot serve as the basis for a life sentence, regardless of when the current offense was committed. Mr. Jenks’s sentence is unlawful and he is entitled to be resentenced.

Submitted this 9th day of October, 2020.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 98496-4
)	
ALAN JENKS,)	
)	
PETITIONER.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF OCTOBER, 2020.



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