NO. 101634-4
(COA NO. 56444-1-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY COLEMAN,

Appellant.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Rules

Other Authorities

A. INTRODUCTION

Punishment must follow a crime. The State may not penalize a person's conduct unless a statute defines the conduct as an offense. Imprisoning a person for a nonexistent crime is a breach of due process.

Corey Coleman pleaded guilty to felony drug possession and received a prison sentence, which he served at home due to the COVID-19 crisis. The prosecution alleged he left home without permission and charged him with escape.

Before the trial, the Supreme Court struck down the felony drug possession statute as void. The conduct underlying Mr. Coleman's sentence is not—and never was—an offense, and the State had no power to confine Mr. Coleman in the first place. By finding Mr. Coleman guilty of first-degree escape, the trial court convicted him of a nonexistent crime.

B. IDENTITY OF PETITIONER

Petitioner Corey Coleman asks for review of the decision affirming his conviction of escape though the underlying felony was vacated.

C. COURT OF APPEALS DECISION

Mr. Coleman seeks review of the unpublished opinion in *State v. Coleman*, No. 56444-1-II (Wash. Ct. App. Dec. 20, 2022).

D. ISSUE PRESENTED FOR REVIEW

A statute the Legislature has no power to enact is void ab initio. When this Court struck down the felony drug possession statute, it rendered all convictions under the statute void for all purposes, including the conviction underlying Mr. Coleman's confinement. By nonetheless holding that the void charge could support Mr. Coleman's conviction of escape, the Court of Appeals deprived him of due process.

E. STATEMENT OF THE CASE

In 2019, Mr. Coleman pleaded guilty to possession of a controlled substance under former RCW 69.50.4013(1), as well as a misdemeanor assault. CP 26, 56 FF 1.1a–1.3.[1] The court sentenced him to a prison term. CP 28, 56 FF 1.2. Due to the COVID-19 crisis, by order of the governor, Mr. Coleman was released from prison to serve the sentence on electronic home monitoring. CP 56 FF 1.4–1.5.

In May 2020, Mr. Coleman's ankle monitor reported a location in a different town from his approved residence. CP 56–57 FF 1.12, 1.16. The battery in the monitor then died. CP 57 FF 1.17. Law enforcement visited Mr. Coleman's house and did not find him there. CP 57 FF 1.20.

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[1] "CP 56 FF 1.3" refers to the trial court's finding of fact number 1.3, on page 56 of the designated clerk's papers.

The prosecution charged Mr. Coleman with first-degree escape. CP 1.

On February 25, 2021, before Mr. Coleman's trial on the escape charge, this Court struck down former RCW 69.50.4013(1). *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021); *see* CP 59 (trial held November 2021). *Blake* rendered all convictions under the former statute—including Mr. Coleman's— "void." 197 Wn.2d at 195.

Mr. Coleman moved to dismiss the first-degree escape charge, arguing the prosecution could not show his confinement rested on a felony conviction after *Blake*. CP 7; 10/13/21 RP 9. By holding the Legislature lacked the power to enact former RCW 69.50.4013(1), he argued, the Supreme Court rendered the statute void "from the start." 10/13/21 RP 12–13. Mr. Coleman distinguished cases holding a person may not attack

the predicate conviction at the escape trial—unlike those cases, the "Supreme Court said his conviction was illegal" before the trial even began. *Id.* at 9.

The trial court denied the motion. CP 50. Based on stipulated facts, the court found Mr. Coleman guilty of first-degree escape. CP 55, 58. It imposed a sentence of more than five years in prison. CP 60.

The Court of Appeals affirmed.

F. ARGUMENT

The Legislature never had authority to enact former RCW 69.50.4013(1), and the State never had authority to confine Mr. Coleman for violating the statute. Mr. Coleman's confinement was unlawful from the start, and escaping from it was a nonexistent crime. The same error infects numerous other convictions predicated on void possession charges, and

this Court's guidance is necessary. This Court should grant review.

The Court of Appeals deprived Mr. Coleman of due process by affirming his conviction of first-degree escape based on a void predicate offense.

"If a statute is unconstitutional, it is and has always been a legal nullity." *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952). A conviction under a void statute "is illegal and void, and cannot be a legal cause of imprisonment." *Montgomery v. Louisiana*, 577 U.S. 190, 203, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (quoting *Ex parte Siebold*, 100 U.S. 371, 376–77, 25 L. Ed. 717 (1879)). When a person violates a statute "repugnant to the constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity." *Ex parte Royall*, 117 U.S. 241, 248, 6 S. Ct. 734, 29 L. Ed. 868 (1886).

Accordingly, when this Court interprets a statute such that a convicted person's act was "a nonexistent crime," the conviction is void. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801 (2004).

By holding former RCW 69.50.4013(1) was beyond the Legislature's power to enact, this Court established the statute "*has always been void* under both the state and federal constitutions." *State v. French*, 21 Wn. App. 2d 891, 894, 508 P.3d 1036 (2022) (emphasis added). Following *Blake*, courts must treat convictions under the statute as if they never occurred.

Accordingly, when a possession conviction is an element of a later-charged offense, *Blake* requires vacation of the later conviction. *In re Pers. Restraint of Jones*, No. 83076-7-I, 2022 WL 1133164, at *1 (Wash. Ct. App. Apr. 18, 2022) (unpub.); *In re Pers. Restraint of Gonzalez*, No. 38080-7-III, 2021 WL 4860031, at *1

(Wash. Ct. App. Oct. 19, 2021) (unpub.) (citing *Hinton*, 152 Wn.2d at 860; *Evans*, 41 Wn.2d at 143).

To convict Mr. Coleman of first-degree escape, the prosecution had to prove the state detained Mr. Coleman "pursuant to a conviction of a felony." RCW 9A.76.110(1); WPIC 120.26. The stipulated findings set forth only one felony conviction—possession of a controlled substance under former RCW 69.50.4013(1). CP 56 FF 1.2–1.3; *accord* CP 26. The trial court held Mr. Coleman's possession conviction fulfilled this element of first-degree escape. CP 50, 57–58.

The trial court was wrong. Nine months before the trial, this Court held former RCW 69.50.4013(1) was void. *Blake*, 197 Wn.2d at 195. The crime the statute defined ceased to exist and all convictions under it became invalid on their faces. *Montgomery*, 577 U.S. at 203; *Royall*, 117 U.S. at 248. The trial

court's guilty verdict therefore deprived Mr. Coleman of due process. *Hinton*, 152 Wn.2d at 859–60.

Though *Blake* made Mr. Coleman's possession conviction void on its face, the trial court and the Court of Appeals nevertheless held the conviction could support the first-degree escape charge based on *State v. Gonzales*, 103 Wn.2d 564, 693 P.2d 119 (1985). Slip op. at 5; CP 50.

On the contrary, *Gonzales*'s holding does not apply here. And even if it does, *Gonzales* is incorrect and harmful when applied to a conviction based on a statute that was void from the date of its enactment.

In *Gonzales*, this Court held the prosecution need not prove a predicate conviction was "constitutionally valid" to convict of first-degree escape. 103 Wn.2d at 567. This holding follows from the broader rule that a person may not "challenge the legality of their

confinement at the escape trial." *Id.* at 567–68 (citing 70 A.L.R.2d 1430 (1960 & Supp. 1984)).

Gonzales's reasoning is flawed. It disregarded precedent that, when a prior conviction is an element, " 'conviction'" means "a valid, constitutional conviction." 103 Wn.2d at 568 (Williams, J., concurring in result). In fact, this Court had recently held unlawful firearm possession requires proof of a valid conviction. *Id.* at 568–69; *State v. Gore*, 101 Wn.2d 481, 485–86, 681 P.2d 227 (1984); *State v. Swindell*, 93 Wn.2d 192, 196–97, 607 P.2d 852 (1980). *Gonzales* distinguished these cases based on the constitutional right to own firearms, overlooking the more basic right to be free from restraint without due process. *Id.* at 569–70 (Williams, J., concurring in result); 10/13/21 RP 11.

In any event, *Gonzales* did not address a conviction based on a statute this Court found void

from the start. There, the trial court held a conviction invalid because the guilty plea statement supported only a misdemeanor. *Gonzales*, 103 Wn.2d at 566. Likewise, in *State v. Hall*, 104 Wn.2d 486, 706 P.2d 1074 (1985), the defendant argued the prosecution breached a plea agreement. *Id.* at 491. In a similar bail jumping case, the defendant argued double jeopardy barred the current charges. *State v. Downing*, 122 Wn. App. 185, 193, 93 P.3d 900 (2004).

Unlike in *Gonzales*, *Hall*, and *Downing*, this Court held the statute underlying Mr. Coleman's conviction was "void" *before* the escape trial. *Blake*, 197 Wn.2d at 195. There was no need to "challenge the legality of [Mr. Coleman's] confinement at the escape trial"—the Supreme Court established its illegality before the trial began. *Gonzales*, 103 Wn.2d at 567–68.

Prohibiting punishment based on a void prior conviction is not the same as requiring proof the conviction is valid. *See State v. Ammons*, 105 Wn.2d 175, 187–88, 713 P.2d 719, *as amended*, 718 P.2d 796 (1986). In *Ammons*, like in *Gonzales*, this Court held the prosecution does not have to prove a prior conviction is valid before a court can rely on it to determine a sentence. *Id.* at 187. Nevertheless, this Court went on to hold a trial court may not consider "a prior conviction . . . which is *constitutionally invalid on its face*." *Id.* at 187–88 (emphasis added).

In *Blake*, the Supreme Court held that former RCW 69.50.4013(1) was beyond the Legislature's power to enact and therefore "void." 197 Wn.2d at 195. There can be no question a conviction of violating the former statute is "constitutionally invalid on its face." *State v.*

Jennings, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022) (citing *Ammons*, 105 Wn.2d at 187–88).

While the prosecution did not have to produce evidence the conviction was "constitutionally valid," it had to prove Mr. Coleman had a felony conviction in the first place. *Gonzales*, 103 Wn.2d at 567; RCW 9A.76.110(1). Where this Court held before the trial that all convictions under former RCW 69.50.4013(1) are void, the prosecution could not rely on such a conviction to prove this element of the offense. After *Blake*, a conviction of drug possession cannot support first-degree escape, and *Gonzales* is not to the contrary.

If *Gonzales* cannot be distinguished, this Court should overrule it. *Blake* established once and for all time that the former drug possession statute was void ab initio. Escaping from confinement pursuant to a conviction based on this void statute is a "nonexistent

crime." *Hinton*, 152 Wn.2d at 860. Reading *Gonzales* to uphold an escape conviction based on an act "the State had no power to proscribe" sanctions a due process violation. *Montgomery*, 577 U.S. at 202 (quoting *Desist v. United States*, 394 U.S. 244, 261 n.2, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J., dissenting)). *Gonzales* is incorrect and harmful in this context.

This issue will arise as long as people are held for crimes predicated on void possession convictions. This Court recently denied review of a bail jumping conviction where a void possession charge was the only predicate offense. Order, *State v. Paniagua*, No. 101173-3 (Wash. Dec. 7, 2022). Similar issues are pending before this Court and the Court of Appeals in *In re Personal Restraint of Stacy*, No. 101335-3; *State v. Hagen*, No. 101613-1; *State v. Smith*, No. 83875-0-I; *State v. Willyard*, No. 56569-2-II; *State v. Garoutte*,

No. 38524-8-III; *State v. Koziol*, No. 38630-9-III; *State v. Strandberg-Biggs*, No. 38830-1-III, and likely other cases. This Court's guidance is necessary.

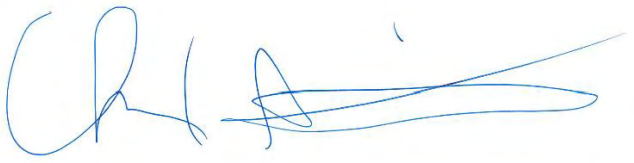
Mr. Coleman's conviction of escape premised on a conviction under a void statute violates due process. RAP 13.4(b)(3). This issue has arisen and will continue to arise in many other cases until this Court resolves it. RAP 13.4(b)(4). This Court should grant review.

G. CONCLUSION

This Court should grant review and reverse Mr. Coleman's conviction of first-degree escape.

Pursuant to RAP 18.17(c)(10), the undersigned certifies this brief of appellant contains 2,037 words.

DATED this 17th day of January, 2022.



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

December 20, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. COREY BLAINE COLEMAN, Appellant.	No. 56444-1-II UNPUBLISHED OPINION

VELJACIC, J. — Corey Coleman appeals his conviction and sentence for one count of escape in the first degree. Coleman argues that the State failed to present sufficient evidence to support his conviction because he was not "being detained pursuant to a felony conviction," which is an essential element of escape in the first degree. Br. of Appellant at 20 n.2; *see* RCW 9A.76.110(1). In so arguing, he principally relies on the Supreme Court's recent decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), which held that former RCW 69.50.4013 (2017)—the portion of the statute that makes possession of a controlled substance a felony punishable by up to five years in prison—was unconstitutional and void.

We hold that the State presented sufficient evidence to support Coleman's conviction because, under *State v. Gonzales*, 103 Wn.2d 564, 693 P.2d 119 (1985), the State is not required to prove that the defendant was being detained pursuant to a constitutionally valid conviction in a prosecution for escape in the first degree. Accordingly, we affirm Coleman's conviction and sentence for escape in the first degree.

FACTS[1]

On December 4, 2019, Coleman was convicted and sentenced for one count of possession of a controlled substance under former RCW 69.50.4013 (a felony) and one count of assault in the fourth degree under RCW 9A.36.041 (a gross misdemeanor). In his statement of defendant on plea of guilty, Coleman admitted to knowingly possessing a controlled substance.

While Coleman was incarcerated in the Department of Corrections (DOC), Governor Jay Inslee and the DOC created the rapid re-entry program (program) to address the COVID-19 pandemic for confined individuals. As part of that program, Coleman was placed onto electronic home monitoring (EHM) to serve the remainder of his sentence in home confinement. The EHM unit was equipped with a GPS tracking device so that Coleman's location could be monitored.

Coleman's home confinement was set at a residence located in Chehalis. On or about May 2, 2020, Coleman began his home confinement.

Coleman was instructed on the program's rules and conditions. Coleman acknowledged that he understood the program's requirements and signed all of the documents provided. The rules and conditions made clear that, although not inside a DOC facility, Coleman was still "in custody" and considered a DOC inmate. Clerk's Papers (CP) at 56.

Coleman was required to reside at the Chehalis residence unless DOC gave him prior approval to travel elsewhere. Coleman was also required to call DOC when directed and keep the EHM unit charged.

[1] The facts presented in this opinion are derived from the trial court's unchallenged findings of fact, which are verities on appeal. *State v. A.M.*, 163 Wn. App. 414, 419, 260 P.3d 229 (2011).

Coleman was approved to travel to the Lewis County Gospel Mission Monday through Friday from 9:00 AM to 11:00 AM to pick up food.[2] He was also approved to travel to the Chehalis Food Bank on May 8.

On May 12, Coleman did not call DOC as required. DOC checked Coleman's EHM data which showed that his last recorded location was in Morton on May 11. No further EHM data could be obtained because the EHM unit's battery died. Coleman was not approved to travel to Morton. The authorities checked Coleman's residence, but he was not present and his location was unknown.

On June 26, the State charged Coleman with one count of escape in the first degree. Coleman moved to dismiss the charge arguing that, as a matter of law, he was not being detained pursuant to a felony conviction (a necessary element to establish escape in the first degree) because former RCW 69.50.4013(1) was declared void by the Supreme Court in *Blake*, 197 Wn.2d 170.

The court denied Coleman's motion. The court reasoned that, under *Gonzales*, 103 Wn.2d 564, the State was not required to prove that Coleman was being detained pursuant to a constitutionally valid conviction in a prosecution for escape in the first degree.

On November 16, 2021, the matter proceeded to a stipulated facts bench trial. Coleman renewed his sufficiency of the evidence argument based on *Blake*. The court again disagreed and found Coleman guilty of escape in the first degree. The court sentenced Coleman to 63 months of confinement.[3] Coleman appeals.

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[2] The findings of fact state that "[t]he defendant had been given approval to travel to the Lewis County Gospel Mission (72 SW Chehalis Ave., Chehalis, WA) from 9:99 a.m. to 11:00 a.m." CP at 56. The time of 9:99 AM appears to be a typo. The trial court clearly meant to convey the time as "9:00 AM." This is of limited significance because Coleman failed to call as directed.

[3] The court stayed Coleman's sentence pending the resolution of this appeal.

ANALYSIS

Coleman argues the State failed to present sufficient evidence to support his conviction for escape in the first degree. Coleman contends that substantial evidence does not support the trial court's finding that he was "being detained pursuant to a felony conviction"—an essential element of escape in the first degree—because in *Blake*, 197 Wn.2d 170, the Supreme Court held that former RCW 69.50.4013 was unconstitutional and void. Br. of Appellant at 20 n.2. The State responds that it did present substantial evidence to support Coleman's conviction for escape in the first degree because in *Gonzales*, 103 Wn.2d 564, the Supreme Court held that the State is not required to prove that a defendant was being detained pursuant to a constitutionally valid conviction in a prosecution for escape. We agree with the State.

Under both the federal and state constitutions, due process requires that the State prove every element of a crime beyond a reasonable doubt. *State v. Hummel*, 196 Wn. App. 329, 352, 383 P.3d 592 (2016). "The sufficiency of the evidence is a question of constitutional law that we review de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

The test for determining sufficiency of evidence is whether any rational trier of fact could find all the elements of the charged crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the State. *State v. Dreewes*, 192 Wn.2d 812, 821, 432 P.3d 795 (2019). For a bench trial, "appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014).

RCW 9A.76.110(1) provides that "[a] person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility *while being detained pursuant to a conviction of a felony* or an equivalent juvenile offense." (Emphasis added.)

In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, former RCW 69.50.4013(1), "violates the due process clauses of the state and federal constitutions and is void." 197 Wn.2d at 195. But, the *Gonzales* court held that "in a prosecution for escape [in the first degree] the State is not required to prove the defendant had been detained pursuant to a constitutionally valid conviction." 103 Wn.2d at 565.

Here, *Gonzales* is directly on point and controls the outcome of this appeal. Like Gonzales, Coleman was convicted of escape in the first degree. Although Coleman and Gonzales challenged the validity of their predicate felonies and resulting confinement in different ways, both in essence argued that their predicate felonies were constitutionally invalid and could not be used to support their conviction for escape in the first degree. Under these specific circumstances, *Gonzales* makes clear that the constitutional validity of the defendant's predicate felony and resulting confinement is irrelevant in a prosecution for escape. 103 Wn.2d at 567. Accordingly, *Blake*'s holding simply has no effect here.

Coleman argues that we should decline to follow *Gonzales* because its reasoning is flawed. However, it is well-established that "once [the Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled." *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Coleman also argues that Division One's recent decision in *French*, 21 Wn. App. 2d 891, requires reversal of his conviction.[4] But again, *Gonzales* controls here.

We hold that the substantial evidence supports the trial court's finding of fact that Coleman was "being detained pursuant to a felony conviction" despite the *Blake* court's decision holding former RCW 69.50.4013(1) void. Accordingly, we affirm Coleman's conviction and sentence for escape in the first degree.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Lee, P.J.

Price, J.

[4] In *State v. French*, Division One of this court explained the impact of the *Blake* decision:

> *Blake* announced that courts were *never* with lawful authority to enter judgment on a conviction for unlawful possession of a controlled substance in violation of [former] RCW 69.50.4013(1). Moreover, because courts were never with lawful authority to enter judgment on a conviction for unlawful possession of a controlled substance, they were also never with lawful authority to impose a *sentence* pursuant to such a conviction.

21 Wn. App. 2d 891, 897, 508 P.3d 1036 (2022).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56444-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 17, 2023

WASHINGTON APPELLATE PROJECT

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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56444-1
Appellate Court Case Title:	State of Washington, Respondent v. Corey Blaine Coleman, Appellant
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