FILED
SUPREME COURT
STATE OF WASHINGTON
6/20/2023 11:21 AM
BY ERIN L. LENNON
CLERK

NO. 102002-3

---

**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. 05-1-01173-6

---

# ANSWER TO PETITION FOR REVIEW

---

MARY E. ROBNETT
Pierce County Prosecuting Attorney

PAMELA B. LOGINSKY
Deputy Prosecuting Attorney
WSB # 18096 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2913

## TABLE OF CONTENTS

I. INTRODUCTION .......... 1

II. RESTATEMENT OF THE ISSUES .......... 2

III. STATEMENT OF THE CASE .......... 3

IV. ARGUMENT .......... 9

A. The Correction of Void Sentences is Not Precluded by Which Party Reduced the Court's Oral Ruling to Writing .......... 11

B. Kelly has Not Established that the 1999 *Brown* Decision is Both Wrong and Harmful .......... 14

C. Kelly has Not Established that *Richardson* is Both Wrong and Harmful .......... 17

V. CONCLUSION .......... 21

## TABLE OF AUTHORITIES

**State Cases**

*Allen v. Milligan*, 2023 WL 3872517 (U.S. Jun. 8, 2023) ....... 15

*In re Pers. Restraint of Adams*, 178 Wn.2d 417,
309 P.3d 145 (2013) ............................................................ 18

*In re Pers. Restraint of Ali*, 196 Wn.2d 220,
474 P.3d 507 (2020) ............................................................ 19

*In re Pers. Restraint of Coats,* 173 Wn.2d 123,
267 P.3d 324 (2011) ....................................................... 11, 20

*In re Pers. Restraint of Cross*, 99 Wn.2d 373,
662 P.2d 828 (1983) .............................................................. 8

*In re Pers. Restraint of Davis*, 200 Wn.2d 75,
514 P.3d 653 (2022) ............................................................ 20

*In re Pers. Restraint of Finstad*, 177 Wn.2d 501,
301 P.3d 450 (2013) ............................................................ 12

*In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581,
520 P.3d 939 (2022) ............................................................ 11

*In re Pers. Restraint of Garcia Mendoza*, 196 Wn.2d 836,
479 P.3d 674 (2020) ....................................................... 17, 18

*In re Pers. Restraint of Kennedy*, 200 Wn.2d 1,
513 P.3d 769 (2022) ............................................................ 20

*In re Pers. Restraint of Richardson*, 200 Wn.2d 845,
525 P.3d 939 (2022) .................................................. 3, 17, 20

*In re Pers. Restraint of Shriner*, 95 Wn.2d 541,
627 P.2d 99 (1981)................................................................ 12

*In re Pers. Restraint of Williams*, 200 Wn.2d 622,
530 P.3d 933 (2022)............................................................... 19

*In re Sargent*, 2023 WL 3874919 (Wash. Jun. 8, 2023).......... 16

*State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986) ......... 19

*State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011)...... 12, 15

*State v. Blake*, 197 Wn.2d 170,
481 P.3d 521 (2021).................................. 1, 3, 5, 7, 18, 19, 20

*State v. Brown*, 139 Wn.2d 20,
983 P.2d 608 (1999)................................................ 2, 8, 14, 16

*State v. Brown*, 196 Wn.2d 1013 (2020) ................................... 9

*State v. Guzman Nuñez,* 174 Wn.2d 707,
285 P.3d 21 (2012).................................................................. 11

*State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996)....... 12

*State v. Houston-Sconiers*, 188 Wn.2d 1,
391 P.3d 409 (2017)............................................................... 19

*State v. Kelly*, __ Wn. App. 2d ___, 526 P.3d 39 (2023)....... 8, 9

*State v. Loux*, 69 Wn.2d 855, 420 P.2d 693 (1966), *overruled in part on other grounds by State v Moen*, 129 Wn.2d 535,
919 P.2d 69 (1996).................................................................. 12

*State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996) ................ 13

*State v. Otton*, 185 Wn.2d 673, 374 P.3d 1108 (2016) ........... 15

*State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369 (1983) ......... 12

*State v. Paulson*, 131 Wn. App. 579, 128 P.3d 133 (2006) ..... 11

*State v. Smissaert,* 103 Wn.2d 636, 694 P.2d 654 (1985)........ 11

*State v. Wallin*, 125 Wn. App. 648, 105 P.3d 1037 (2005)...... 13

*State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005) ............. 8

**Constitutional and Other Provisions**

Const. art. IV, § 2……………………………………………..…10

**Statutes**

H.B. 1148, 64th Leg. Reg. Sess. (Wash. 2015) ....................... 15

H.B. 1169, 67th Leg. Reg. Sess. (Wash. 2021) ....................... 15

H.B. 1268, 68th Leg. Reg. Sess. (Wash. 2023) ....................... 15

H.B. 1862, 63rd Leg. Reg. Sess. (Wash. 2013) ....................... 15

RCW 9.94A.533(3)(e)............................................................ 15

RCW 9.94A.585(7) ................................................................ 14

RCW 10.73.090................................................. 1, 2, 6, 8, 17, 18

RCW 10.73.090(1) ............................................................. 9, 20

RCW 10.73.090(3)(a)............................................................ 18

RCW 10.73.100 .................................................................. 17, 18

RCW 10.73.100(6) ...................................................... 18, 19, 20

RCW 10.83.090(3)(a) ................................................................. 5

**Rules and Regulations**

CrR 7.8 ........................................................................ 13

RAP 10.1(c) ......................................................................... 8

RAP 10.1(f) ……………………………………………………..17

**Other Authorities**

Karl Jones, Kevin Keogh, and Connor Saxe,
*Sentence Enhancements and Race* (Mar. 1, 2022) ............. 16

## I. INTRODUCTION

Twelve years after his sentences for two counts of burglary in the first degree with a firearm enhancement, three counts of theft of a firearm, three counts of theft in the first degree, and two counts of unlawful possession of a firearm became final, Timothy Kelly sought resentencing based on *State v. Blake*.[1] Kelly's request for resentencing was not supported by a written motion or any authority that allowed for resentencing where the standard range remained unchanged following the removal of prior simple possession convictions from the offender score. Kelly, moreover, did not identify any applicable exception to RCW 10.73.090's one-year time bar in the trial court, or in his brief of respondent/cross-appellant that would allow the trial court to reduce his sentence years after it became final.

While the trial court declined to alter Kelly's sentences based on the reduced offender score, it did sua sponte order that the firearm enhancements be served concurrently rather than

[1]197 Wn.2d 170, 481 P.3d 521 (2021).

consecutively. Because Kelly was an adult when he committed the crimes, binding precedent barred this alteration. The State, therefore, appealed. In granting the State's appeal, the appellate court agreed that the provision should be struck and that RCW 10.73.090 precluded Kelly's request for a resentencing.

In this petition, Kelly requests that this Court accept review to reverse two of its prior precedents. Because Kelly does not establish that the prior opinions are both wrong and harmful, his request for review should be denied.

## II. RESTATEMENT OF THE ISSUES

A. Should review be denied where the public's interest in uniform statutorily authorized sentences is paramount and is not lessened by which party reduced the court's oral ruling to writing?

B. Should review be denied of Kelly's request to overrule the 23-year-old case of *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999), where the legislature has declined to amend the firearm enhancement law to allow for multiple enhancements imposed on defendants who were over the age of 18 when they committed their crimes to be served concurrently and similar recent requests have been denied by this Court?

C. 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 or in his brief of respondent/cross-appellant or in a reply brief of cross-appellant 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

Kelly was convicted by a jury of two counts of burglary in the first degree with firearm enhancements, three counts of theft of a firearm in the first degree, three counts of theft in the first degree, and two counts of unlawful possession of a firearm in the first degree. All crimes were committed when Kelly was 29 years old, and the burglaries involved two separate victim residences. CP 6. 17, 29, 42 FOF 1. Based on an extensive criminal history that was supported by certified copies of Kelly's prior judgment and sentences, 2006 RP 26-27, [2] Kelly's offender score for each crime was calculated as follows:

[2] The State's motion to transfer the transcript of Kelly's 2006 sentencing hearing from his first appeal, COA No. 35057-2-II, was granted 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

| **Count** | **Offense** | **Offender Score** | **Standard Range** |
|---|---|---|---|
| I | Burglary in the First Degree | 26.5 | 87-116 mos + 60 mos firearm enhancement |
| II | Theft of a Firearm | 21.5 | 77-102 mos |
| IV | Theft in the First Degree | 22.5 | 43-57 mos |
| V | Burglary in the First Degree | 26.5 | 87-116 mos + 60 mos firearm enhancement |
| VII | Theft in the First Degree | 22.5 | 43-57 mos |
| VIII | Theft in the First Degree | 22.5 | 43-57 mos |
| XIII | Unlawful Possession of a Firearm in the First Degree | 21.5 | 87-116 mos |
| XIV | Theft of a Firearm | 21.5 | 77-102 mos |
| XV | Theft of a Firearm | 21.5 | 77-102 mos |
| XVI | Unlawful Possession of a Firearm in the First Degree | 21.5 | 87-116 mos |

CP 25, 29.

Kelly was first sentenced on these crimes on December 14, 2006. CP 45-46. This sentence was reversed on appeal and a

---

as “2021 RP.”

new mitigated exceptional sentence, based upon the same offender scores, was imposed on September 25, 2009. CP 82. Because Kelly did not appeal this sentence, it became final on September 25, 2009. RCW 10.83.090(3)(a).

On November 4, 2021, twelve years after the post-appeal resentencing was held, Kelly was before the trial court for entry of an order adjusting his offender score and sentence to account for the holding in *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521 (2021). *See* CP 106; 2021 RP 3. Kelly did not file a written motion prior to the hearing.

The State requested that the court correct Kelly's offender score and leave the imposed sentence otherwise undisturbed. 2021 RP 12. The State made this request because while Kelly's offender scores decreased from the old high of 26.5 and low of 21.5, to a new high of 23 and new low of 19, his standard range on each count remained the same. CP 108-09; 2021 RP 6-7, 9.

During the hearing, Kelly acknowledged that after removing his simple possession convictions from his offender

score, his offender score remained above 9 and that his standard ranges were unchanged. *See* 2021 RP 12-13, 19. Kelly, without identifying any applicable exception to RCW 10.73.090's one-year time bar on collateral attacks or any other authority that would permit a complete resentencing, requested that the court impose terms at the bottom of the standard ranges for all counts, maintain the mitigated exceptional sentence structure from the 2009 resentencing hearing, and run the sentence in this cause number concurrently with the sentence in 05-1-00889-1. 2021 RP 18-19. In making these requests, Kelly acknowledged that the two firearm enhancements must run consecutive to each other and to the terms imposed on all other counts. 2021 RP 19 ("And then the two firearm enhancements consecutive to that. So that being a total of 120 months – 60 on Count 1 and 60 on Count 5.").

The court denied Kelly's request that the sentence in this case run concurrently to the sentence Kelly had already completed in 05-1-00889-1 due to the "multitude of crimes"

committed between the two cause numbers. 2021 RP 27. Although not related to *Blake*, Judge Sorensen took "advantage of the exceptional sentence that Judge Culpepper declared," by "allow[ing] the firearm sentence enhancements to run [] concurrent to each other." 2021 RP 25. *See also* RP 28-29; CP 109, 111. The State presented an order that it prepared during the hearing to the court that conformed with its decision. CP 114.

The State filed a timely appeal from the Order Correcting Judgment and Adjusting Sentence Pursuant to *Blake*. CP 112. In its brief of appellant, the State identified binding precedent that required Kelly's firearm enhancements to run consecutive to the base sentence and to each other. *See* Brief of Appellant at 6-9. The State's requested relief was entry of an order striking the trial court's amendment. *Id.* at 10.

Kelly disagreed with the State's requested remedy. He contended that if the State were to prevail, the matter should be remanded for a new sentencing hearing. *See* Brief of Respondent/Cross-Appellant at 24. Kelly also requested

resentencing on other grounds. *Id.* at 25, 29. Kelly did not, however, identify any exception to RCW 10.73.090 that would allow his request to be granted.

The State's Reply Brief of Appellant and Brief of Cross-Respondent (State's Reply Brief) explained that the one-year time bar in RCW 10.73.090 precluded resentencing and any changes to the 2009 judgement and sentence other than the correction of Kelly's offender score. State's Reply Brief at 17-23. Although Kelly was entitled to file a responsive brief to this argument, *see* RAP 10.1(c), he elected to concede the applicability of RCW 10.73.090 through silence. *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 court of appeals granted the State's appeal based upon this Court's opinion in *Brown*. *State v. Kelly*, __ Wn. App. 2d

___, 526 P.3d 39, 43-45 (2023). The court agreed with the State's requested relief, holding that Kelly's request for a new resentencing is barred by RCW 10.73.090(1). *Kelly*, 526 P.3d at 45.

Kelly filed a timely petition for review. His petition requests, in part, that this Court overrule its decision in *Brown*. Petition for Review at 2, 10-18. This portion of Kelly's petition for review is similar to the petition for review that this Court rejected in *State v. Brown*, 196 Wn.2d 1013 (2020). *See State v. Brown*, No. 98656-8, Petition for Review. [3]

## IV. ARGUMENT

Kelly's petition asks this Court to ignore the strong policy considerations favoring finality of convictions and compliance with sentencing statutes. Kelly asks this Court to impose a barrier on the correction of a void and illegal sentence whenever

[3] This petition for review is available at https://www.courts.wa.gov/content/petitions/98656-8%20Petition%20for%20Review.pdf (last visited Jun. 15, 2023).

the State reduces the sentencing court's oral pronouncements to writing. But the new rule requested by Kelly is foreclosed by a long line of cases.

Kelly's request that this Court overrule two of its precedents is based upon a belief that any opinion supported by five justices is "dubious,"[4] particularly when the case was not heard en banc.[5] He argues that such decisions are not entitled to deference and may be reversed solely upon a showing that the opinion is "wrong." *See* Petition for Review, at 21. His position is contrary to article IV, section 2 of the Washington State constitution which provides that the Washington Supreme Court renders a binding decision when a majority of the court agrees on the ruling, whether sitting en banc or with a quorum. Kelly's petition for review, therefore, should be denied.

---

[4] Petition for Review at 10.

[5] Petition for Review at 21.

### A. The Correction of Void Sentences is Not Precluded by Which Party Reduced the Court's Oral Ruling to Writing

Kelly contends that the public has a significant interest in barring the correction of void sentences solely because the State reduces the trial court's oral ruling to writing. Petition for Review at 9. Kelly, however, fails to explain why this is so. His request to immunize void sentences must be rejected.

The fixing of penalties and punishments for criminal offenses is a legislative function. *In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 591, 520 P.3d 939 (2022); *State v. Guzman Nuñez,* 174 Wn.2d 707, 711, 285 P.3d 21 (2012). A sentence that is beyond the trial court's statutory authority is an invalid and void sentence. *In re Pers. Restraint of Coats,* 173 Wn.2d 123, 136, 267 P.3d 324 (2011); *State v. Smissaert,* 103 Wn.2d 636, 639, 694 P.2d 654 (1985); *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

Where a sentence is imposed without legislative authority, courts have "not only the power but indeed the duty to correct

the length of sentence in a criminal case and even to lengthen it." *In re Pers. Restraint of Shriner*, 95 Wn.2d 541, 544, 627 P.2d 99 (1981); *accord State v. Loux*, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) (this court "has the power and duty to correct the error upon its discovery" even where the parties not only failed to object but agreed with the sentencing judge), *overruled in part on other grounds by State v Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996). When the trial court imposes a non-statutorily authorized sentence, Washington appellate courts will regularly correct it, whether challenged directly or collaterally. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 509 n. 9, 301 P.3d 450 (2013); *State v. Paine*, 69 Wn. App. 873, 881-85, 850 P.2d 1369 (1983). Neither invited error, consent, or inaction by any party relieves a court of the duty to vacate a non-statutorily authorized sentence. *See, e.g., State v. Barber*, 170 Wn.2d 854, 870, 872 n. 4, 248 P.3d 494 (2011) (no specific performance of plea agreement that violates statutory sentencing provisions); *State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (State's

failure to appeal sentence did not preclude a CrR 7.8 motion filed two years after sentencing); *State v. Wallin*, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (2005) (defendant's agreement to a sentence that violated the court's statutory authority is unenforceable).

The justification for courts to correct sentences imposed without statutory authority whenever the court becomes aware of the issue is to bring sentences in conformity and compliance with existing sentencing statutes and to avoid permitting widely varying sentences to stand simply because counsel did not register a timely objection or file a timely appeal. *State v. Moen*, 129 Wn.2d 535, 544-45, 919 P.2d 69 (1996). Sentences which are not authorized by statute result in unjust disparities, compromise public safety, and interfere in the offender's reintegration into the community.

The public's interest in compliance with sentencing statutes is so acute that the legislature has authorized a stranger to the criminal prosecution to enforce this principle when the

State fails to do so. *See* RCW 9.94A.585(7) (authorizing the department of corrections to petition for review from errors of law contained in a sentence). Kelly, however, is asking this Court to create an exception to these long and well-established principles that applies when the State memorializes the court's sentence on the judgment and sentence form. Adopting the rule Kelly seeks would require trial court judges to fill out the judgment and sentences themselves at a significant cost in efficiency. Such a squandering of scarce judicial resources should be avoided at all cost. Review should be denied.

### B. Kelly has Not Established that the 1999 *Brown* Decision is Both Wrong and Harmful

Kelly makes a request similar to that rejected by this Court in 2020: the overruling of this Court's 1999 decision in *Brown*. Petition for Review at 10-18. Kelly does not explain why this Court should reach a different conclusion based on his slightly reworded arguments.

This Court will only overrule its own precedent if the precedent is both incorrect and harmful. *See, e.g., State v.*

*Barber*, 170 Wn.2d 854, 864-65, 248 P.3d 494 (2011). Incorrectness and harmfulness are separate inquires. *State v. Otton*, 185 Wn.2d 673, 687-88, 374 P.3d 1108 (2016). Kelly has satisfied neither prong.

The *Brown* opinion implicates statutory stare decisis. This doctrine recognizes that the reversal of potentially wrongheaded cases construing a statute should largely be left to the legislature. *See, e.g., Allen v. Milligan*, 2023 WL 3872517 at *19 and *21 (U.S. Jun. 8, 2023) (lead opinion and Kavanaugh, J., concurring). In the 22 years since this Court issued *Brown*, the legislature has not amended RCW 9.94A.533(3)(e) to allow for exceptional mitigated sentences for adult offenders or to permit concurrent service of multiple firearm violations. In fact, multiple attempts to alter the statute in the manner Kelly requests in this appeal have been rejected. *See, e.g.*, H.B. 1268, 68th Leg. Reg. Sess. (Wash. 2023); H.B. 1169, 67th Leg. Reg. Sess. (Wash. 2021); H.B. 1148, 64th Leg. Reg. Sess. (Wash. 2015); H.B. 1862, 63rd Leg. Reg. Sess. (Wash. 2013). The legislature's acceptance

of this Court's decision in *Brown* precludes a finding of incorrectness.

As for harmfulness, Kelly points to racial differences in the imposition of firearm enhancements. Petition for Review at 17-18. He relies on a report from the Department of Corrections. *Id.* But such policy arguments in favor of allowing firearm enhancements to be served concurrently do not justify ignoring the plain language of the statute. *Cf. In re Sargent*, 2023 WL 3874919 at *7 (Wash. Jun. 8, 2023) (plain language of a constitutional provision). Furthermore, the study Kelly relies upon shows no increased probability of receiving a weapons enhancement based upon race in burglary cases. *See* Karl Jones, Kevin Keogh, and Connor Saxe, *Sentence Enhancements and Race* at 2 (Mar. 1, 2022). The study also does not distinguish between Kelly's circumstances – one firearm enhancement for separate burglaries committed on different dates – from those cases in which multiple enhancements were imposed for crimes

committed at the same time and place. Kelly's policy argument must be redirected to the legislature.

### C. 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 21. Kelly, who concedes that he did not assert any exception to RCW 10.73.090 in the trial court, in his brief of respondent/cross appellant, or in an RAP 10.1(f) reply brief,[6] does not explain how *Richardson* is harmful.

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*

---

[6] *See* Petition for Review at 21-22 (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").

*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 simple possession of drugs that

requires vacation of such convictions and the removal of such convictions from all offender scores,[7] *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 In re Pers. Restraint of Williams*, 200 Wn.2d 622, 621, 530 P.3d 933 (2022) (*Houston-Sconiers*[8] 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*

---

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

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

*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 *his* 2009 sentences. *Blake* did not impact the validity of Kelly's current 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 24. These convictions alone yielded an offender score of 9+. This offender score, in turn, supported the standard range identified in the 2009 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; *Coats*, 173 Wn.2d at 136. Kelly's petition for review must be denied.

## V. CONCLUSION

The court of appeals' compliance with binding decisions of this Court was proper. Kelly's petition for review should be denied.

This document is in 14 point font and contains 3,474 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of June, 2023.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

*s/ Pamela B. Loginsky*
PAMELA B. LOGINSKY
Deputy Prosecuting Attorney
WSB # 18096 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2913
pamela.loginsky@piercecountywa.gov

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

| 6-20-23 | *s/ Therese Kahn* |
|---|---|
| Date | Signature |

## PIERCE COUNTY PROSECUTING ATTORNEY

## June 20, 2023 - 11:21 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 102,002-3 |
| **Appellate Court Case Title:** | State of Washington v. Timothy Michael Kelly |
| **Superior Court Case Number:** | 05-1-01173-6 |

**The following documents have been uploaded:**

- 1020023_Briefs_20230620111844SC682323_8304.pdf
  This File Contains:
  Briefs - Respondents
  *The Original File Name was State Answer to Petition for Review Kelly.pdf*

**A copy of the uploaded files will be sent to:**

- pcpatcecf@piercecountywa.gov
- pcpatvecf@piercecountywa.gov
- richard@washapp.org
- wapofficemail@washapp.org

**Comments:**

Respondent's Answer to Pet for Review

---

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us
**Filing on Behalf of:** Pamela Beth Loginsky - Email: pamela.loginsky@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

**Note: The Filing Id is 20230620111844SC682323**