SUPREME COURT NO. 98499-9

NO. 78981-3-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

HONOLULU MOLIA,

Petitioner.

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

The Honorable Andrea Darvas, Judge

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Honolulu Molia asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Molia seeks review of the Court of Appeals' published decision in State v. Honolulu Molia, filed April 6, 2020 ("Opinion" or "Op."), which is appended to this petition. See State v. Molia, __ Wn. App. 2d ____, ___ P.3d ____, 2020 WL 1675786 (Apr. 6, 2020).

C. ISSUES PRESENTED FOR REVIEW[1]

The petitioner was sentenced to life in prison without the possibility of parole because, with his prior convictions, he was considered a "persistent offender."[2] His sentence is based in part on his 1995 conviction for second degree robbery. While the petitioner's current appeal was pending, however, the legislature

[1] State v. Jenks, ___ Wn. App. 2d ____, 459 P.3d 389, 391 (2020) addresses similar issues. The appellant in that case recently sought review by this Court under case number 98496-4.

[2] RCW 9.94A.030(38) (defining persistent offender).

removed second degree robbery as a "most serious offense," i.e., one that requires sentencing as a persistent offender.

1. Does the change in the law removing second degree robbery as a most serious offense apply prospectively to this case pending on appeal?

2. Alternatively, does the change in the law apply retroactively because it downgrades culpability for the offense?

D. STATEMENT OF THE CASE[3]

The State charged Molia with 11 crimes including first degree child rape and second degree incest relating to his children A.M. and S.M. The State alleged that each charge was a crime of domestic violence and that each charge satisfied RCW 9.94A.535(3)(h)(i) (pattern of abuse over prolonged period

[3] This petition refers to the verbatim reports as follows: 1RP – 11/17/17; 2RP – 1/19/18; 3RP – 2/28/18; 4RP – 6/5/18; 5RP – 6/6/18; 6RP – 6/7/18; 7RP – 6/11/18; 8RP – 6/12/18 (morning); 9RP – 6/12/18 (afternoon); 10RP – 6/13/18; 11RP – 6/14/18; 12RP – 6/18/18 (morning); 13RP – 6/18/18 (afternoon); 14RP – 6/19/18; 15RP – 6/25/18; 16RP – 6/26/18; 17RP – 7/2/18; 18RP – 7/3/18; 19RP – 7/5/18; 20RP – 7/9/18; 21RP – 7/10/18; 22RP – 7/11/18; 23RP – 7/18/18; 24RP – 9/21/18; and 25RP – 10/4/18. Three individuals prepared the transcripts; consecutive pagination occurs only by transcriptionist/court reporter.

constitutes aggravating factor). CP 259-64.[4] Count 11, attempt to elude a pursuing police vehicle, was severed for trial and ultimately dismissed. 2RP 45; CP 344.

Molia waived his right to trial by jury. CP 255; 10RP 497-505, 512-13. Following a bench trial, the court found Molia guilty of counts 1-10 as charged, except that it found the State failed to prove the pattern-of-abuse aggravator as to counts 1 and 2. CP 266-308, 343; see also 23RP 868-925 (oral ruling); CP 364-65 (supplemental written findings).

At Molia's September 2018 sentencing, the court found by a preponderance of the evidence that Molia had two qualifying prior "most serious offense" convictions. These were a 1995 conviction for second degree robbery[5] and a 2002 conviction for

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[4] Molia was charged with the following crimes: first degree child rape of A.M. (counts 1 and 2, RCW 9A.44.073); second degree child rape of A.M. (count 3, RCW 9A.44.076); first degree incest as to A.M. (counts 5-8, RCW 9A.64.020(1)); second degree incest as to S.M. (counts 9 and 10, RCW 9A.64.020(2); and attempt to elude a pursuing police vehicle (count 11, RCW 46.61.024).

[5] See RCW 9A.56.190 (defining robbery); RCW 9A.56.21 ("person is guilty of robbery in the second degree if he or she commits robbery"). The statutes were amended in 2011 to replace "he" with "he or she." Laws of 2011, ch. 336, §§ 379, 380.

second degree assault of a child. 24RP 980-82; CP 344, 350. Current counts 1, 2, 3, 9, and 10 were likewise "most serious" or "strike" offenses.[6] Thus, the trial court imposed a sentence of life in prison without the possibility of parole under the Persistent Offender Accountability Act (POAA). CP 346-47; see RCW 9.94A.030(33) (defining "most serious offense"); RCW 9.94A.030(38) (defining "persistent offender" based on strike, i.e., "most serious," offenses); RCW 9.94A.570 (mandating life sentence for person deemed "persistent offender").[7]

Molia appealed his sentence, CP 340, arguing that following a change in the applicable statutes, his second degree robbery conviction no longer qualified as a strike offense. In a published decision, the Court of Appeals, Division One disagreed and affirmed his sentence.

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[6] See RCW 9.94A.030(33) (qualifying current offenses include first degree child rape (here, counts 1 and 2); second degree child rape (here, count 3); and second degree incest committed against a child under 14 (here, counts 9 and 10)).

[7] On counts 4-8, the trial court sentenced Molia to 102 months of confinement, the high end of the standard range, as well as 18 months of community custody. CP 343, 346.

Molia now asks that this Court grant review, reverse the Court of Appeals, and reverse his life sentence.

E. REASONS REVIEW SHOULD BE ACCEPTED

**The legislative change removing second degree robbery as a strike offense applies to Mr. Molia's sentence. This Court should grant review and reverse the Court of Appeals.**

This Court should grant review. Review is appropriate because the Court of Appeals' decision conflicts with recent decisions from this Court, as well as an older decision which is still good law. RAP 13.4(b)(1). Review is also appropriate under RAP 13.4(b)(4) because this case presents an issue of substantial public interest.

Mr. Molia's life sentence as a persistent offender is based on a prior conviction for second degree robbery. But before Molia's sentence was final, the legislature changed the law. Second degree robbery no longer qualifies as a strike offense. The change in the law applies prospectively to Molia's case pending on appeal. Alternatively, the change in the law applies retroactively because it downgrades the offense. In either case, the life sentence must be reversed, and the case remanded for resentencing.

1. The change in the law applies prospectively to Mr. Molia's sentence.

The change in the law applies prospectively to Molia's sentence, requiring reversal of his the sentence.

Under the POAA, a "persistent offender" shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. A person is a "persistent offender" if he has been convicted in Washington of a "most serious offense," and has on at least two other prior occasions been convicted of a most serious offense. RCW 9.94A.030(38)(a)(i).

As of September 2018, when Molia was sentenced, second degree robbery was defined as a "most serious offense." Former RCW 9.94A.030(33)(o) (Laws of 2018, ch. 166, § 3). Molia's second degree robbery conviction from 1995 was counted as a strike offense. CP 344. Accordingly, the court sentenced Molia as a persistent offender to life in prison without possibility of parole. CP 346-47.

On April 29, 2019, the governor signed into law Engrossed Substitute Senate Bill 5288, which amends RCW 9.94A.030(33) by removing second degree robbery from the "most serious

offense" definition. The effective date of the legislation is July 28, 2019. Laws of 2019, ch. 187, § 1. Under the new law, then, a life sentence under the POAA cannot be based on a second degree robbery conviction.

As a threshold matter, Molia acknowledges that the "saving statute," or RCW 10.01.040, "generally requires that crimes be prosecuted under the law in effect at the time they were committed." State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007) "[C]ourts have long held that under the saving clause, amendments to criminal statutes (which include reclassification of crimes) do not apply retroactively to offenses committed before the effective dates of those amendments." Rivard v. State, 168 Wn.2d 775, 781, 231 P.3d 186 (2010) (citing State v. Ross, 152 Wn.2d 220, 237-39, 95 P.3d 1225 (2004) (no retroactive application of statutory change that affected offender score calculation); State v. McCarthy, 112 Wn. App. 231, 236-37, 48 P.3d 1014 (2002), review denied, 148 Wn.2d 1011 (2003) (same); State v. Kane, 101 Wn. App. 607, 610-12, 5 P.3d 741 (2000) (change in eligibility for sentencing alternative not retroactive)).

As to Molia's first argument, however, he is not seeking the retroactive application of a change in the statute. His case is pending on appeal when the legislative change takes place. His case is not yet final. The change in the statute applies prospectively to his sentence while his case is pending on appeal.

"[S]tatutes generally apply prospectively from their effective date unless a contrary intent is indicated." State v. Jefferson, 192 Wn.2d 225, 245, 429 P.3d 467 (2018). Another rule must also be considered in determining whether a statutory change applies to a given case: "the rule that a newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final." Id. at 246 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)).

A statutory amendment applies prospectively when the precipitating event for application of the statute occurs after its effective date. State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). "[A] newly enacted statute or court rule will only be applied to proceedings that occurred far earlier in the case if the 'triggering event' to which the new enactment might apply has

not yet occurred." Jefferson, 192 Wn.2d at 246 (quoting Pillatos, 159 Wn.2d at 471). "The question this court asks to determine whether a new statute or new court rule would be operating prospectively or retroactively if applied on appeal to preexisting events is 'whether the new provision attaches new legal consequences to events completed before its enactment.'" Jefferson, 192 Wn.2d at 246 (quoting In re Pers. Restraint of Flint, 174 Wn.2d 539, 548, 277 P.3d 657 (2012)).

This Court "generally hold[s] that when the new statute concerns a postjudgment matter like the sentence or revocation of release . . . then the triggering event is not a 'past event' but a future event. In such a case, the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred." Jefferson, 192 Wn.2d at 247.

In Ramirez, for example, this Court held the 2018 statutory amendments addressing several legal financial obligations (LFOs) applied prospectively to cases that were pending on direct appeal from the judgment and sentence on the date the amendments took effect. Ramirez, 191 Wn.2d at 747-49. This

Court held the precipitating event for the imposition of LFOs was the termination of the defendant's case. Id. The 2018 amendments therefore applied to imposition of LFOs in Ramirez's judgment and sentence because the case was pending on direct appeal and not yet final. Id. at 749.

In Jefferson, this Court made it clear "that when the new statute concerns a postjudgment matter like the sentence or revocation of release . . . then the triggering event is not a 'past event' but a future event." Jefferson, 192 Wn.2d at 247. The new statute removing second degree robbery as a strike offense concerns the sentence, which is a postjudgment matter, according to Jefferson.

Applying this Court's analysis in Ramirez and Jefferson, the triggering event for imposition of the sentence in Molia's case is termination of Molia's appeal, which has not yet happened. The change in the statute removing second degree robbery as a qualifying offense under the POAA "concerns a postjudgment matter like the sentence," in which case "the triggering event is not a 'past event' but a future event." Jefferson, 192 Wn.2d at 247. As a result, the statutory amendment applies prospectively

to the sentence "while the case is pending on direct appeal, even though the charged acts have already occurred." Id. Because the change in the law applies prospectively to a triggering event that has not yet occurred while his case remains pending on appeal, Molia receives its benefit.

In Molia's case, however, the Court of Appeals rejected the language in Ramirez and Jefferson as inapplicable. Op. at 7-8 (appended to this petition). But, in Jefferson, this Court clearly stated that a new statute will apply to a sentence being appealed where the judgement is not yet final. Jefferson, 192 Wn.2d at 247; cf. RCW 9.94A.345 (sentence imposed under chapter 9.94A RCW "shall be determined in accordance with the law in effect when the current offense was committed").

The Court of Appeals' decision in this case cannot be reconciled with this Court's decisions in Ramirez and Jefferson. For this reason, this Court should grant review and reverse the Court of Appeals.

2. Alternatively, the change in the law applies retroactively to Mr. Molia's sentence.

Alternatively, the new law applies retroactively; this also requires reversal of Molia's sentence.

In State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994), this Court addressed the distinction between legislative modification of the elements of a crime and a legislative downgrade of an entire crime, in which case the legislature "has judged the specific criminal conduct less culpable." "[A] change in elements does not affect prior convictions under the [Sentencing Reform Act (SRA)]." Wiley, 124 Wn.2d at 688. However, "[a] downgrade in the classification of a crime does retroactively alter the status of prior convictions." Id.

By removing second degree robbery as a "most serious offense," the legislature has downgraded the culpability of that offense for persistent offender sentences. "[T]he underlying distinction between the refinement of an existing crime and the reclassification of a crime is significant. Only when the Legislature has reassessed the culpability of criminal conduct should a sentencing court give a change in law retroactive effect

under the SRA." Wiley, 124 Wn.2d at 688. Thus, "when the Legislature downgrades the status of an offense . . . a sentencing court must give retroactive effect to the Legislature's decision." Id. at 687.

By removing second degree robbery as a strike offense, the legislature has reassessed the culpability of that offense by downgrading it to a non-strike offense that cannot form the basis for a mandatory life sentence. Under Wiley, the sentencing court must give retroactive effect to this change in this law.

On the other hand, in Ross, this Court held a change in the classification of a prior conviction to compute the offender score did not have retroactive effect under the saving statute. This Court *distinguished* Wiley because "the amendments in this case do not reflect a legislative determination that the offenses are less culpable." Ross, 152 Wn.2d at 240 (quoting Court of Appeals decision).

Although Wiley did not address the saving statute, Ross did not overrule Wiley. Ross, 152 Wn.2d at 239. Rather, as stated, Ross distinguished Wiley. As described by Ross, "the Wiley court addressed the effect of SRA amendments that

downgrade crimes from a felony to a misdemeanor," whereas "the amendments in this case do not reflect a legislative determination that the offenses are less culpable." Ross, 152 Wn.2d at 239. The amendment in Ross involved a reduction in how the offender score is calculated for drug crimes. Id. at 227. Ross did not involve the downgrade of the crime itself.

Molia's situation is more like Wiley. Removal of second degree robbery as a strike offense reflects a legislative determination that the offense is less culpable in that it no longer serves as the basis for imposing a sentence of life without parole.

Here, in rejecting Molia's related claim, the Court of Appeals did not engage in detailed analysis; rather it relied on Division Two's analysis in State v. Jenks, ___ Wn. App. 2d ___, 459 P.3d 389, 395-96 (2020).[8] See Op. at 9-10 (appended to this petition). But the Jenks court's rejection of this Court's Wiley decision is likewise cursory. See Jenks, 459 P.3d at 395 (noting that Wiley predates RCW 9.94A.345 and did not address RCW 10.01.040; "we conclude that Wiley is inapplicable here").

[8] As stated in footnote 1 above, a petition for review has now been filed in that case.

The Court of Appeals failed to acknowledge that the rule in Wiley applies to this case. For this reason, as well, this Court should grant review.

F. CONCLUSION

The Court of Appeals' decision conflicts with recent and prior authority from this Court. This case also presents an issue of substantial public interest. This Court should accept review under RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and remand for resentencing.

DATED this 5th day of May, 2020.

Respectfully submitted,

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# APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| THE STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>HONOLULU MOLIA,<br><br>Appellant. | ) | No. 78981-3-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION |

HAZELRIGG, J. — Honolulu Molia seeks resentencing, arguing that his sentence of life without the possibility of parole is unauthorized because a statutory amendment enacted after he was sentenced removed second degree robbery from the list of most serious offenses. Because Molia has not shown that the subsequent change in the statute applies to his case either prospectively or retroactively, we affirm.

## FACTS

Honolulu Molia was convicted of three counts of rape of a child in the first degree, domestic violence; five counts of incest in the first degree, domestic violence; and two counts of incest in the second degree, domestic violence. The court also found as an aggravating circumstance for eight of the ten counts that the offenses were part of an ongoing pattern of psychological, physical, or sexual

abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time.

At his sentencing in 2018, the court found that Molia's prior separate convictions for second degree robbery and second degree assault of a child had been proven by a preponderance of the evidence. The court found that the prior convictions and five of his current offenses were most serious offenses and Molia was therefore a persistent offender. Molia was sentenced to life imprisonment without the possibility of parole. He appealed.

ANALYSIS

Molia argues that he should be resentenced because a recent legislative change removing second degree robbery as a most serious offense applies either prospectively or retroactively to his sentence. We review questions of law de novo. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

The Sentencing Reform Act (SRA)[1] provides that a persistent offender shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. A "persistent offender" is one who has been convicted in Washington of a felony considered a most serious offense and who has been convicted on two or more prior separate occasions of felonies considered most serious offenses. RCW 9.94A.030(38)(a). The statute contains a list of felonies that are considered most serious offenses. RCW 9.94A.030(33). This list includes any class A felony and assault of a child in the second degree, among others. RCW 9.94A.030(33)(a), (c).

[1] Chapter 9.94A RCW.

When Molia was sentenced in September 2018, robbery in the second degree was listed as a most serious offense. Former RCW 9.94A.030(33)(o); Laws of 2018, ch. 166, § 3. In April 2019, the legislature approved an amendment to the statute that removed robbery in the second degree from the list of most serious offenses. Laws of 2019, ch. 187, § 1. The amendment became effective on July 28, 2019. Id.

As a preliminary matter, the State argues that Molia's claim of error is not justiciable on direct appeal because he does not argue that the trial court erred in any way. It contends that "[a]ny claim of unlawful restraint that is premised on a statutory amendment that occurred after sentencing and the filing of the notice of appeal must be raised in a personal restraint petition." Assuming without deciding that this appeal is properly before this court, we will reach the merits of Molia's argument.

I. Prospective Application

Molia argues that the change in the law applies prospectively to his case because it is still pending on direct appeal and not yet final, or, in the alternative, that the statutory change applies retroactively.

Division Two of this court recently considered a similar argument. State v. Jenks, No. 52450-3-II, slip op. (Wash. Ct. App. Mar. 3, 2020) (published in part), https://www.courts.wa.gov/opinions/pdf/D2%2052450-3-II%20Published%20Opinion.pdf. In 2017, Jenks was sentenced to a term of life in prison without the possibility of parole as a persistent offender after being convicted of a third most serious offense. Id. at 2. One of his prior most serious

offense convictions was for second degree robbery. Id. Like Molia, Jenks argued that the 2019 amendment to RCW 9.94A.030(33) "should be applied on appeal to invalidate his sentence." Id. at 3. Division Two disagreed. Id.

Any sentence imposed under the provisions of the SRA "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. However, "[t]o say that we look to the law in effect at the time the defendant committed the offense does not answer whether the law applies retroactively or prospectively." In re Carrier, 173 Wn.2d 791, 809, 272 P.3d 209 (2012).

When assessing whether a new statute applies prospectively or retroactively, we consider "'whether the new provision attaches new legal consequences to events completed before its enactment.'" In re Flint, 174 Wn.2d 539, 548, 277 P.3d 657 (2012) (quoting Pillatos, 159 Wn.2d at 471). If the "triggering event" for the application of the statute occurred before the effective date of the amendment, we analyze whether the change applies retroactively to this case. Pillatos, 159 Wn.2d at 471. However, if the triggering event occurred or will occur after the effective date of the statute, the statute presumptively applies prospectively to the case. Flint, 174 Wn.2d at 547. "A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." Pillatos, 159 Wn.2d at 471 (emphasis omitted) (quoting In re Estate of Burns, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997)). "To determine what

event precipitates or triggers application of the statute, we look to the subject matter regulated by the statute." Carrier, 173 Wn.2d at 809.

RCW 9.94A.030 is a definitional statute, and the amended provision governs only which felonies are defined as "most serious offenses." RCW 9.94A.030(33). This term is also used in the definition of a "persistent offender." RCW 9.94A.030(38). The court applies these provisions when it determines the appropriate sentence for a person who falls within these statutory definitions. RCW 9.94A.570.

Molia argues that the triggering event for the operation of the statutory amendment is the termination of his direct appeal, which has not yet happened. Molia relies primarily on two relatively recent Supreme Court cases in support of his argument: State v. Jefferson and State v. Ramirez. 192 Wn.2d 225, 429 P.3d 467 (2018) (plurality opinion); 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Division Two addressed the application of Ramirez to this issue in Jenks. Jenks, slip op. at 5–7. The Ramirez court concluded that changes to the statutes concerning permissible legal financial obligations applied prospectively to a pending appeal because the amendments "pertain[ed] to costs imposed upon conviction and Ramirez's case was not yet final when the amendments were enacted." 191 Wn.2d at 749. The Jenks court found that Ramirez "clearly limited its holding to 'costs imposed on criminal defendants following conviction[,]'" rather than stating "a rule of general application to all sentences." Jenks, slip op. at 6 (quoting Ramirez, 191 Wn.2d at 747). It concluded that Ramirez did not support

the argument that the 2019 amendment to RCW 9.94A.030(33) must be applied prospectively to cases pending on direct appeal. Id. at 7. We agree.

The Jenks court, however, did not consider the application of Jefferson to this issue. In Jefferson, the Supreme Court considered whether GR 37, a general court rule adopted to address deficiencies in the Batson[2] framework for assessing discriminatory use of peremptory strikes, applied to Jefferson's case on appeal. 192 Wn.2d at 243. The rule did not become effective until after Jefferson's trial, voir dire, and Batson challenge had occurred. Id. The Court determined that the precipitating event in the context of a Batson challenge was the voir dire itself, which had occurred before the enactment of the rule. Id. at 248. Although Jefferson did not concern sentencing, the Court summarized its interpretation of the case law:

> [W]e generally hold that when the new statute concerns a postjudgment matter like the sentence or revocation of release, or a prejudgment matter that has not yet occurred because of the interlocutory nature of the appeal, then the triggering event is not a "past event" but a future event. In such a case, the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred. [See, e.g., Flint, 174 Wn.2d at 548; State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997).] In contrast, where the new statute concerns a problem with the charging document but the trial and conviction are over, then the triggering event is over—so the new statute does not apply on appeal to that past event. Pillatos, 159 Wn.2d at 471, 150 P.3d 1130.

Id. at 247.

Despite the broad phrasing, neither case cited by the Jefferson Court concerns a change in sentencing statutes. In Flint, the Court found that the

[2] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

triggering event for application of the statute regarding the effect of community custody violations was the finding that a defendant had "committed violation(s) of conditions of community custody at a third violation hearing." 174 Wn.2d at 548. In Blank, the Court found that the triggering event for application of a statute allowing courts to require a convicted offender to pay appellate costs was termination of the appeal and affirmance of a defendant's conviction. Blank, 131 Wn.2d at 249.

Molia argues that Jefferson and Ramirez require us to conclude that the triggering event for application of the 2019 amendment to RCW 9.94A.030 in this case is the termination of his direct appeal, rather than the imposition of his sentence. Although Jefferson contains some expansive language indicating that "a newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final[,]" it did not involve an amendment to a statute affecting sentencing. 192 Wn.2d at 246. Accordingly, the applicability of its statements on post-judgment matters to the current case is limited.

Likewise, Ramirez does not compel the result that Molia suggests. Although the Ramirez Court concluded that the newly enacted bill applied prospectively to Ramirez's case "because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez's case was pending on direct review and thus not final when the amendments were enacted," it did so in the context of fashioning an unusual remedy for a Blazina[3] error. 191 Wn.2d at 746–47. The Supreme Court held that the trial court had failed

[3] State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

to make an adequate individualized inquiry into Ramirez's current and future ability to pay before imposing discretionary legal financial obligations, as required by Blazina. Id. at 746. Although the usual remedy would have been to remand for resentencing, the Court concluded that the newly enacted statutory amendment prohibiting courts from imposing discretionary costs and filing fees on defendants who were indigent at the time of sentencing would have applied at the resentencing. Id. Therefore, the Court found resentencing to be unnecessary and remanded the case to the trial court for amendment of the judgment and sentence to strike the improperly imposed legal financial obligations. Id. at 746, 750.

Ramirez does not require the triggering event here to be the termination of Molia's appeal because of its procedural posture and because it concerned only costs and fees attendant to a sentence rather than the sentence itself. Molia's situation is also distinct from the multitude of appeals that have cited Ramirez to argue that legal financial obligations, though properly imposed at the time of sentencing, should be stricken from cases still pending on appeal. We are not aware of any case in which the State has opposed the striking of these fees where the record made clear that the fees would not be permitted under the current statutes, even when remand is not required on any other issue. The State makes no such concession here.

Molia's requested remedy also provides some insight. Molia requests remand for resentencing so that the court can apply the amended statute when assessing his criminal history. This suggests that the court has already performed the application of the statute to his case. The triggering event for application of the

amended statute has already occurred, and the appropriate analysis is whether the amendment applies retroactively to Molia's case on appeal.

II. Retroactive Application

Molia argues in the alternative that the change in the law applies retroactively to his case.

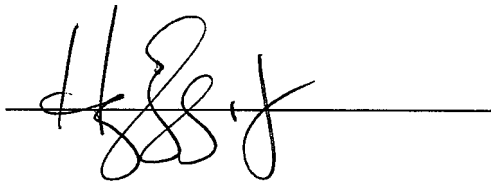
Washington courts have long held that, under the saving clause of RCW 10.01.040, "amendments to criminal statutes (which include reclassification of crimes) do not apply retroactively to offenses committed before the effective dates of those amendments." Rivard v. State, 168 Wn.2d 775, 781, 231 P.3d 186 (2010). Accordingly, statutory amendments are presumed to apply only prospectively to offenses committed on or after the effective date of the amendment unless the legislature indicates a contrary intent. State v. Humphrey, 139 Wn.2d 53, 55, 60, 983 P.2d 1118 (1999). An amendment that is curative or remedial applies retroactively even without language showing legislative intent unless the statute is subject to RCW 10.01.040. State v. Kane, 101 Wn. App. 607, 613, 5 P.3d 741 (2000).

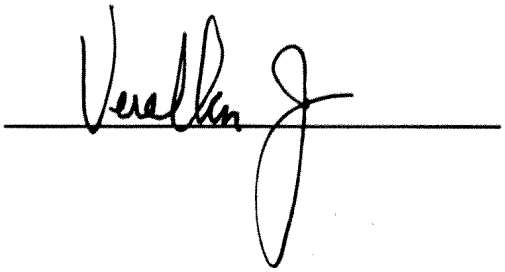
Molia argues that, by amending the statute, the legislature downgraded the culpability of second degree robbery for persistent offender sentences, which retroactively alters the status of prior convictions. He relies primarily on State v. Wiley in support of this contention. 124 Wn.2d 679, 880 P.2d 983 (1994). The Jenks court considered and rejected precisely this same argument. Jenks, slip op. at 7–9. We agree with that analysis and find that Wiley does not compel retroactive application of the amendment to Molia's case.

The 2019 amendment to RCW 9.94A.030 removing second degree robbery as a most serious offense did not contain any indication that the legislature intended the change to apply retroactively. Laws of 2019, ch. 187, § 1; Jenks, slip op. at 10. The saving statute applies to sentences for persistent offenders. Jenks, slip op. at 11. Molia did not argue that the amendment was curative or remedial. Molia has not overcome the presumption that the amendments apply only prospectively. The 2019 amendment to RCW 9.94A.030(33) removing second degree robbery from the list of most serious offenses does not apply to his case on appeal.

Affirmed.

WE CONCUR:





**NIELSEN KOCH P.L.L.C.**

**May 05, 2020 - 1:40 PM**

**Transmittal Information**

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|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 78981-3 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Honolulu Molia, Appellant |

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