IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>SANTIAGO ALBERTO SANTOS,<br><br>Petitioner. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 98846-3<br><br>REPLY IN SUPPORT OF MOTION REQUESTING ADDITIONAL RELIEF UNDER *BLAKE* |

**A. ARGUMENT**

Santiago Santos requests this Court grant him sentencing relief he is entitled to as a consequence of this Court's decision in State v. Blake, 197 Wn.2d 170, 1481 P.3d 521 (2021).

Mr. Santos had two prior convictions from California for possession of a controlled substance. CP 164. These offenses were committed in 2012. CP 164. The trial court determined these two offenses were comparable to Washington's possession of a controlled substance statute and added two points to Mr. Santos's offender score. CP 167; RP 1228. With an offender score of three and an offense seriousness level of 14, the standard range was 154-254 months. CP 164; RCW 9.94A.510. The trial court choose the high end of the range of 254 months, added 24 months for the mandatory weapon enhancement, and imposed an exceptional sentence upward by adding 120 months based on the

aggravating factors found by the jury. CP 167; RP 1206, 1233-34. In total, this resulted in a sentence of 398 months. CP 167; RP 1233.

Mr. Santos's two prior California convictions for drug possession should not score as a result of this Court's decision declaring Washington's drug possession statute, RCW 69.50.4013(1), unconstitutional and void. Blake, 197 Wn.2d 170, 173, 1481 P.3d 521 (2021). "A statute or ordinance which is void as being in conflict with a prohibition contained in the constitution is of no force and effect." City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

Blake's holding means that when Mr. Santos committed his two California offenses for drug possession in 2012, there was no comparable Washington offense even though Washington's (unconstitutional) drug possession statute existed. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998) (comparability analysis based on statutes that existed at time of the foreign offense).

The prosecution appears to argue the unconstitutionality of Washington's drug possession statute does not matter under RCW 9.94A.525(3). The prosecution is incorrect.

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). This requires the court to first

determine "whether a comparable Washington offense exists." State v. McCorkle, 88 Wn. App. 485, 495, 945 P.2d 736, 741 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999). "'The key inquiry is under what Washington statute could the defendant have been convicted if he or she *had committed the same acts in Washington.*'" Morley, 134 Wn.2d at 606 (quoting McCorkle, 88 Wn. App. at 495) (emphasis by Morley court). Applying this test, no comparable Washington offense existed in 2012 because Washington's drug possession statute was unconstitutional and void under Blake. The California drug possession convictions should not score. See State v. Crocker, 196 Wn. App. 730, 736–37, 385 P.3d 197 (2016) (Oregon convictions for offensive littering had no comparable Washington criminal offense); accord State v. Marquette, 6 Wn. App. 2d 700, 701-02, 706, 431 P.3d 1040 (2018).

This is consistent with the purpose of the Sentencing Reform Act ("SRA"). "The legislature purposefully created the SRA scheme broadly in order to ensure that defendants with equivalent prior convictions are treated the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere." State v. Jordan, 180 Wn.2d 456, 464, 325 P.3d 181 (2014) (cleaned up); see State v. Weiand, 66 Wn. App. 29, 33-34, 831 P.2d 749 (1992). People convicted of simple drug possession in Washington in 2012 will no longer have these convictions

counted in their offender scores. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986). Not scoring out-of-state convictions for drug possession is consistent with this result and furthers the goal of treating defendants with equivalent prior convictions the same way.

Further, this result is supported by the language in RCW 9.94A.525(3) addressing how to score prior federal convictions which are not comparable to a Washington offense:

> Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). This provision provides that non-comparable federal convictions score as a class C felony equivalent. No such provision exists as to non-comparable out-of-state convictions. This shows the legislature did not intend to score out-of-state convictions that are not comparable to a Washington offense.

The prosecution incorrectly argues that a decrease in Mr. Santos's offender score will not make a difference because he received an exceptional sentence. But the record does not support the prosecution's position. To reiterate, the Court used the aggravators to impose an

exceptional sentence upward by *adding* 120 months to the sentence. CP 167; RP 1206, 1233-34. The trial court did not state it would impose a total sentence of 398 months regardless of Mr. Santos's offender score and regardless of whether the standard range had been less.

Without the two prior convictions scoring, Mr. Santos's offender score would have been a one, resulting in a sentencing range of 134 to 234 months. RCW 9.94A.510, 515. This is a decrease of 20 months on both ends from the sentencing range used by the court. RCW 9.94A.510, 515. Without the prior convictions scoring Mr. Santos would have received a sentence that is at least 20 months less. Assuming a sentence at the high end of the standard range, with the 24-month weapon enhancement and the exceptional sentence upward of 120 more months, Mr. Santos's total sentence would have been 378 months, not 398 months. Thus, the prosecution's harmless error argument is incorrect and must be rejected.

Moreover, contrary to the prosecution's representations, Mr. Santos has challenged the exceptional sentence on appeal. He did this by challenging the validity of the aggravating factors found by the jury. In fact, several of the issues presented in the petition for review go to the validity of the exceptional sentence. Pet. for Rev. at 13-20. Thus, the exceptional sentence is at play.

Accordingly, if this Court grants Mr. Santos's petition for review on any of the issues presented, the Court should also consider this sentencing issue when the case is before the Court. If the Court denies Mr. Santos's petition for review on the issues presented, this Court should still (1) remand to the Court of Appeals to address this sentencing issue; or (2) grant review on this issue. Review of this issue is merited because it is one of substantial public interest. RAP 13.4(b)(4). Given Blake, the issue is certain to arise in many other cases.

**C. CONCLUSION**

The Court should grant Mr. Santos's motion and consider this additional issue. The Court should grant Mr. Santos's petition for review and grant review of this sentencing issue, or remand this case back to the Court of Appeals to consider this sentencing issue.

Respectfully submitted this 11th day of June, 2021.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 98846-3**, 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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MARIA ANA ARRANZA RILEY, Legal Assistant Date: June 11, 2021
Washington Appellate Project

## WASHINGTON APPELLATE PROJECT

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