

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 99356-4
Respondent,)	
)	MOTION AMEND ISSUES
vs.)	PRESENTED FOR REVIEW
)	IN LIGHT OF <u>STATE v. BLAKE</u>
RONELLE ASHTON WILLIAMS,)	
Appellant.)	
_____)	

I. IDENTITY OF MOVING PARTY

Petitioner, by and through counsel of record, Nielsen, Broman & Koch, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 1.2(a), RAP 7.3, and RAP 18.8, and in light of the Washington Supreme Court's decision in State v. Blake, ___ Wn.2d ___, ___ P.3d ___, 2021 WL 728382 (Feb. 25, 2021), Mr. Williams asks that the arguments set forth in this motion be considered when reviewing his petition for review. Alternatively, Mr. Williams asks for leave to file an amended petition that includes the Blake argument. In light of Blake, Mr. Williams asks that the Supreme Court remand for resentencing with a

III. FACTS RELEVANT TO MOTION

Mr. Williams appeals from his judgment and sentence for second degree assault, first degree unlawful possession of a firearm, and witness tampering. CP 124. For the

A prior conviction that is constitutionally invalid on its face may not be included in an offender score. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, amended by 105 Wn.2d 175 (1986); see also In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) (“Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.”). “Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude.” Ammons, 105 Wn.2d at 188.

Mr. Williams’s prior convictions under Washington’s strict liability drug possession statute are constitutionally invalid given that Blake declared the statute void. They therefore cannot be counted in Mr. Williams’s offender score. His appeal is not yet final, so he is entitled to the benefit of the decision in Blake. E.g., In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (petitioner entitled to retroactive application of a new rule where direct appeal was not yet final). Removal of the prior simple possession convictions from Mr. Jennings’ criminal history will reduce his offender score by at least five points. Thus, even if the Washington Supreme Court denies review based on the petition for review Mr. Williams has already submitted, remand under Blake for resentencing is still appropriate.

The Blake decision is also retroactive and, for that additional reason, must apply to prior convictions for simple drug possession. This Court must first determine whether Blake articulated a “new rule” subject to retroactivity analysis under Teague v. Lane, 489 U.S. 288, 299, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). In re Pers. Restraint of Colbert, 186 Wn.2d 614, 623, 380 P.3d 504 (2016). A new rule is “one that breaks new ground.” Colbert, 186 Wn.2d at 623. “Moreover, if reasonable jurists could disagree on

the rule of law, the rule is new.” Id. (internal quotation marks omitted) (quoting In re Pers. Restraint of Haghghi, 178 Wn.2d 435, 443, 309 P.3d 459 (2013)).

Blake is just such a “new rule.” The opinion breaks new ground, particularly where the Washington Supreme Court twice previously refused to read an implied mens rea element into the simple possession statute. See Blake, 2021 WL 728382, at *9-*10. The legislature acquiesced to this interpretation of the drug possession statute for 40 years by not amending the statute to require knowing possession. Id. at *9. And, clearly, reasonable jurists could disagree on the rule of law, where one justice wrote a concurring opinion in Blake and another three justices dissented. Id. at *12 (Stephens, J., concurring in part, dissenting in part) (would overrule prior decisions and imply a mens rea element), id. at *21-*22 (Johnson, J., dissenting) (would not declare the statute unconstitutional).

Under Teague, a new rule warrants retroactive application where it is a “substantive rule that places certain behavior ‘beyond the power of the criminal law-making authority to proscribe.’” Colbert, 186 Wn.2d at 624 (quoting In re Pers. Restraint of Gentry, 179 Wn.2d 614, 628, 316 P.3d 1020 (2014)). The rule of Blake is exactly that. The Blake court explained “the simple possession statute violates the due process clause because it criminalizes wholly innocent and passive nonconduct on a strict liability basis.” Blake, 2021 WL 728382, at *10. The court held “the legislature may not criminalize such nonconduct.” Id. at *12. In other words, the legislature’s police power “goes far, but not that far.” Id. Thus, the legislature does not have “the criminal law-making authority to proscribe” unknowing possession of drugs. Colbert, 186 Wn.2d at 624.

In a recent unpublished decision, the Court of Appeals remanded for the trial court to evaluate what effect Blake had on the appellant's offender score and what effect a modified offender score would have on the standard sentencing range. State v. Brewer, noted at ___ Wn. App. 2d ___, No. 79442-6-I, 2021 WL 863710 (Wash. Ct. App. Mar. 8, 2021). The appellant in that case requested leave to file a supplemental brief on the Blake issue. The Court of Appeals concluded, "We see no need for supplemental briefing and will remand the case for resentencing." Id. at n.1.

Brewer appears to recognize that the primary duty of Washington's appellate courts is "to see that justice is done in the cases which come before [them], which fall within [their] jurisdiction." State v. Saintcalte, 178 Wn.2d 34, 71-72, 309 P.3d 326, 349 (2013) (González, J., concurring) (quoting O'Connor v. Matzdorff, 76 Wn.2d 589, 600, 458 P.2d 154 (1969)), abrogated on other grounds by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017); accord RAP 1.2; RAP 7.3. Indeed, the Washington Supreme Court is "not constrained by the issues as framed by the parties" and will "reach issues not briefed by the parties if those issues are necessary for decision." City of City v. McCreedy, 123 Wn.2d 260, 269, 868 P.2d 134 (1994) (collecting cases). Brewer's remand under Blake without additional briefing is consistent with court rules and Washington Supreme Court precedent.

Mr. Williams files this motion in light of Brewer and in lieu of a supplemental brief, to alert the Department that considers his petition for review that remand for resentencing is warranted under Blake. Should the Court deem it necessary to receive supplemental briefing on the issue or an amended petition, Mr. Williams will readily oblige.

V. CONCLUSION

Mr. Williams asks that the Supreme Court accept this motion in lieu of a supplemental brief or amended petition, and consider whether remand is warranted for the trial court to determine what effect Blake has on his offender score and standard sentence range.

DATED this 17th day of March, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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NIELSEN KOCH P.L.L.C.

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Motion to Amend Issue on Review in Light of Blake

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