NO. 103571-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER LAMONT POSEY,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Judge Susan Adams

No. 19-1-00036-0

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

A. Whether the petitioner has shown a conflict with this Court's precedent where it is the petitioner who disagrees with the test in *State v. Bagby*, 200 Wn.2d 77, 522 P.3d 982 (2023) which the court of appeals assiduously applied? 2

B. Whether Laws of 2023, ch. 415 contains a fair expression of intent to apply retroactively where there is no such expression at all and where the legislation was passed in the context of the Timing Statute, the Savings Statute, *State v. Jenks*, 197 Wn.2d 708, 487 P.3d 482 (2021), and *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021)? 2

C. Whether the court of appeals' application of the on-point precedent *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (2008) conflicts with the distinguishable case of *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003)? 2

III. STATEMENT OF THE CASE 2

A. Posey's crimes were well corroborated by the broken window, the victim's injuries, and Posey's own admission and flight..... 3

B. When Posey denied intimidating the victim, the prosecutor impeached the testimony by inquiring about a photograph Posey sent the victim in which Posey is displaying a handgun. 6

C. The court of appeals rejected Posey's claim that the prosecutor's few questions regarding his actual and relevant conduct amounted to reversible error. 9

IV. ARGUMENT 10

A. Posey identifies no RAP 13.4(b) consideration which would justify review of the prosecutorial error claim..... 10

B. Where there was no prosecutorial error, defense counsel had no constitutional obligation to object such that this claim also raises no RAP 13.4(b) consideration. 13

C. This year this Court has already twice rejected the claim that Laws of 2023, ch. 415 applies retroactively. 17

D. The court of appeals' decision as to community custody number 12 only directly follows precedent. 22

V. CONCLUSION 25

TABLE OF AUTHORITIES

State Cases

State v. Bagby, 200 Wn.2d 77,
522 P.3d 982 (2023)..... 1, 2, 9, 10, 11

State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021) 2, 20

State v. Hirschfelder, 170 Wn.2d 536,
242 P.3d 876 (2010)..... 21

State v. Jenks, 197 Wn.2d 708, 487 P.3d 482 (2021) 2, 19, 20

State v. Jones, 118 Wn. App. 199,
76 P.3d 258 (2003)..... 2, 22, 24

State v. Kane, 101 Wn. App. 607, 5 P.3d 741 (2000)..... 19

State v. Nelson, 3 Wn.3d 1007, 551 P.3d 441 (2024) 24, 25

State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998),
abrogated on other grounds by State v. Valencia,
169 Wn.2d 782, 239 P.3d 1059 (2010)..... 23

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004)..... 19

State v. Tester, 30 Wn. App. 2d 650, 546 P.3d 94 (2024) 18

State v. Troutman, 30 Wn. App. 2d 592,
546 P.3d 458 (2024)..... 18

State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008)..... 2, 22

State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970) 19

Statutes

Laws of 2023, ch. 415 ..... 2, 20

Laws of 2023, ch. 415, §2 (EHB 1324) 17

RCW 9.94A.345 18

RCW 9.94A.703(2)(c) 22

RCW 9.94A.703(3)(f) 22

RCW 10.01.040 19

Rules and Regulations

ER 404(b) 6

RAP 13.4(b) 2, 10, 13

RAP 13.4(b)(1) 10

RAP 13.4(b)(3) and (4) 12, 13

Other Authorities

H.B. 1324, § 3, 68th Leg., 2023 Reg. Sess. (Wash.) 20

HB 2065 (2024) 21

S.S.H.B. 2065, § 2, 68th Leg., 2024 Reg. Sess 21

Senate Bill Report E2SHB 2065 21

I. INTRODUCTION

Christopher Posey testified that he never intimidates SK, an ex-girlfriend whom he strangled and raped. Without objection, the prosecutor impeached Posey by inquiring about a photograph Posey sent SK in which he displayed a handgun. The court of appeals applied *State v. Bagby*, 200 Wn.2d 77, 522 P.3d 982 (2023) and determined that "the State did not commit race-based prosecutorial misconduct" by impeaching Posey with his own actions. Posey does not show a misapplication of or conflict with precedent. Because there was no error, his counsel was not required to object. The convictions were properly affirmed.

The 2023 sentencing amendment which removes juvenile history from adult offender scores does not express any intent to apply retroactively. Posey was properly scored under the law which applied to his 2018 offenses.

And the court's decision as to a community custody condition follows precedent. When one condition is authorized,

its enforcement and monitoring as expressed in a separate condition is likewise authorized. The Court should decline review where no RAP 13.4(b) consideration is present.

II. RESTATEMENT OF THE ISSUES

A. Whether the petitioner has shown a conflict with this Court's precedent where it is the petitioner who disagrees with the test in *State v. Bagby*, 200 Wn.2d 77, 522 P.3d 982 (2023) which the court of appeals assiduously applied?

B. Whether Laws of 2023, ch. 415 contains a fair expression of intent to apply retroactively where there is no such expression at all and where the legislation was passed in the context of the Timing Statute, the Savings Statute, *State v. Jenks*, 197 Wn.2d 708, 487 P.3d 482 (2021), and *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021)?

C. Whether the court of appeals' application of the on-point precedent *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (2008) conflicts with the distinguishable case of *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003)?

III. STATEMENT OF THE CASE

The Defendant Christopher Posey has been convicted of breaking into an ex-girlfriend's home, strangling her, and raping her. CP 1-2; 147-48.

A. Posey's crimes were well corroborated by the broken window, the victim's injuries, and Posey's own admission and flight.

On May 17, 2018, Posey removed SK's screen and jumped through her window. 4RP 452, 550-57. SK screamed and ran from Posey before he struck her to the ground. 4RP 454, 559-60; 5RP 619-20. Posey robbed SK's friend Victor Garcia of his phone and cash, stripped him to his boxers, took video of him in his underwear, and chased him from the house with a bat. 3RP 423-24; 4RP 446-47, 455, 557-62, 568, 573; 5RP 621-22, 652-53. [Garcia was so traumatized by this incident that he blocked contact and refused to testify. 4RP 506-07; 5RP 616-17.]

Posey then set upon SK. After he strangled her the first time, SK attempted to grab a knife for protection only to be strangled a second time. 4RP 427, 568-69. She screamed for the neighbors to hear: "fire," "help me," and "danger." 4RP 569-70. And she ran halfway down the street only to be

dragged along the concrete back to the house by her arm and hair. 4RP 570-71.

But when Posey began to rape SK, everything became suddenly, strangely quiet. 4RP 456 ("like a switch went off in his head"), 572. This terrified SK, who began to plead with him. 4RP 572 ("I watched crime shows"; "I told him what I thought was best was, I love you, don't hurt me").

Police interrupted the assault, summoned to the home by Garcia. CP 469; 3RP 408. Posey allowed SK to exit the house, locking the door behind her. RP 406, 573-74, 615, 654-55. SK was soon surrounded by worried friends and family.[1] RP 576, 615 (Garcia appeared with her neighbors); RP 577, 597 (SK's sister returned on a school bus at 2:45, followed shortly by SK's grandma, uncle, and aunt). Garcia returned, embraced a relieved SK, and was interviewed by police. RP 576, 615, 660.

[1] Posey argues that family members should have testified, failing to explain what testimony they would have to offer having not been present in the home at the time of the assault. Pet. at 3.

Police searched the curtilage after neighbors spotted Posey running from the house. RP 407, 655, 658-59. While police were talking to SK, Posey called her using Snapchat. RP 661. Officer Batres took the phone and spoke to Posey who admitted that he had just left SK's home[2] and stated he would return with his lawyer. RP 661-62. But Posey did not return, and police subsequently towed Posey's mother's car which he abandoned in his flight from SK's home. RP 490, 662, 706, 767.

Ofc. Batres observed SK's window screen had been removed and broken. RP 664, 669-70.[3] SK's injuries (facial abrasions, bruises, handprints on her neck) were documented, and she was taken to the hospital. RP 382-85, 390, 409, 578, 582, 653.

---

[2] Posey argues that fingerprint evidence would have been probative, ignoring that he admitted being in the home that very day. Pet. at 3.

[3] Posey claims there was no evidence of SK's allegations while citing to some of the very pages in the transcript corroborating her testimony. Pet. at 3.

B. When Posey denied intimidating the victim, the prosecutor impeached the testimony by inquiring about a photograph Posey sent the victim in which Posey is displaying a handgun.

The prosecutor gave notice that, in order to explain the victim's relative passivity during the rape, he may seek to admit evidence that the relationship had been marked by sexual and financial control through force and intimidation. 1RP 62-63.

> For one example, Mr. Posey sent her a photograph of himself holding what appears to be a pistol, fanning out a number of -- what looks like a fairly large amount of cash. He's represented to her on a numbers of occasions that he's -- that he wants her to be a prostitute and work for him.

1RP 62 (describing Ex. 25). At both parties' request, the court did not rule on the matter.[4] 1RP 62 ll. 7-9, 1RP 63 ll. 4-6. And the prosecutor did not admit the evidence in his case in chief.

However, when Posey took the stand, he opened the door by denying that he ever tries to intimidate the victim.

---

[4] The petition repeatedly insinuates that Posey's appeal alleged a violation of the trial court's motion in limine ruling. Pet. at 6-7, 14 (citing ER 404(b)), 16. As the court of appeals explained, this claim was not properly raised as well as being without merit. Unpub. Op. at 15 n. 3.

Q. Okay. Do you ever try to intimidate [SK]?
A. No.
Q. Never?
A. No.

6RP 752-53. The prosecutor then impeached this testimony by asking Posey about Exhibit 25. 6RP 754-55. The prosecutor's few questions were asked and answered without objection.

Posey testified that the photograph depicted him at a music video shoot where he claimed he had been a stand-in and was only holding props. 6RP 754-55. But Posey appears to be in a parking lot, not a music set, and the bills he is holding are twenties.[5] Ex. 25. He holds the gun at his waist out of the view of passersby. *Id.* Posey did not object to the prosecutor's questions but only to the jury seeing the photograph which contradicted his testimony. 6RP 755.

[5] Presumably it would not be worth the effort for producers to obtain such a small amount of low denomination prop money.

Although the court overruled the objection, the jury would never see the exhibit.[6] 6RP 755; 7RP 846-47. The prosecutor decided to withdraw the exhibit and even declined to question SK about it—explaining that the full context of the threat was "perhaps overly aggressive." 7RP 846-47. That context was Posey's history of sex trafficking.

Posey was convicted in 2012 of promoting prostitution. CP 16, 136. During the pendency of this case, in 2020, Posey would be charged with robberies and, in 2021, with promoting the prostitution of a minor and delivering methamphetamine. CP 537-38. He had also attempted to traffic SK on a separate occasion by pointing a gun at her head. CP 545; 1RP 62. Posey posted bond in this case via a honey trap scheme in which a woman seduced Chad Painter on Posey's behalf. CP 509, 516-30. When Painter discovered the swindle, he had the

[6] The petition argues that the Court should presume the jurors saw the unpublished exhibit when Posey viewed it. Pet. at 13. This is in direct contradiction to the record that both attorneys made below. 7RP 847.

bond exonerated but, fearing for his safety, was too afraid to ask Posey to pay back the $20,000 bond fee. CP 519, 529-31, 535. The jury would never hear about any of this—by the prosecutor's own decision.

C. The court of appeals rejected Posey's claim that the prosecutor's few questions regarding his actual and relevant conduct amounted to reversible error.

In the appeal, Posey claimed that it was error for the prosecutor to impeach him with the fact that he had sent his victim a photo of himself holding a gun. Unpub. Op. at 12-13. Posey argued this "appealed to the implicit racial biases of the jurors" that Black men are "dangerous." Br. of Ap. at 35-36, 38. The court of appeals applied *State v. Bagby*, 200 Wn.2d 777, 522 P.3d 982 (2023) and found the examination to be passingly brief, related to a proper impeachment purpose, and "clearly tied concretely to evidence." Unpub. Op. at 14-15 (questions "minor and few in number" "literally about an actual photo of Posey" offered "to show that Posey had actually

attempted to intimidate S.K." contrary to his testimony). The court concluded there was no prosecutorial error. *Id*. at 15.

IV. ARGUMENT

A. Posey identifies no RAP 13.4(b) consideration which would justify review of the prosecutorial error claim.

Posey alleges the Unpublished Opinion must have "water[ed] down" the *Bagby* factors in order to rule against him. Pet. at 19. But the petition does not actually identify any conflict with this Court's precedent. *Id*. (citing RAP 13.4(b)(1)). In fact, it is Posey's petition which conflicts with this Court's precedent. Posey rejects the second and fourth *Bagby* factors. Pet. at 17-18.

The second factor assesses the frequency of challenged remarks. *Bagby*, 200 Wn.2d at 793. Posey disagrees that frequency matters. Pet. at 15. He argues that, instead of frequency, the consideration should be whether the remarks were a "critical part of the trial"[7] in Posey's opinion. Pet. at 17.

[7] The court of appeals found the questions "minor in the context of the entire trial." Unpub. Op. at 16

The fourth factor assesses whether the comments were based on evidence or reasonable inferences in the record. *Bagby*, 200 Wn.2d at 793. The prosecutor did not comment at all. He only asked questions. And Posey cannot deny that the questions were connected to evidence. So instead, he argues that the consideration should be whether the evidence was relevant.[8] Pet. at 18.

It is Posey's analysis, not the court's, that conflicts with precedent.

Posey also misrepresents the court's analysis of the third factor (an assessment of the apparent purpose of the statements). He alleges without argument that the court considered the subjective, rather than objective, purpose of the prosecutor's questions. Pet. at 15, 18. But no subjective record exists. In the absence of an objection, the prosecutor never

[8] Posey did not object on relevance grounds (or any other grounds) below. Because he testified, Posey's credibility is, of course, relevant. The questions were posed to impeach his credibility.

enunciated his purpose. The court found the apparent purpose to be impeachment, because the questioning immediately followed Posey's denial that he intimidates SK, because the questioning would have been admissible to impeach that denial, and because this is the most reasonable reading of the record. Unpub. Op. at 14. Posey would have the courts assume in the absence of evidence that the prosecutor asked the questions only to paint Posey as violent. That is not reasonable, where the evidence of the charged crimes of assault by strangulation (CP 90) and rape by forcible compulsion (CP 85) already made that point.

Posey alleges that his claim raises a significant constitutional question and an issue of substantial public interest. Pet. at 19 (citing RAP 13.4(b)(3) and (4)). However, since the court of appeals only assiduously applied this Court's precedent, the allegation is unsubstantiated.

B. Where there was no prosecutorial error, defense counsel had no constitutional obligation to object such that this claim also raises no RAP 13.4(b) consideration.

Posey argues that his counsel's failure to object to the prosecutor's questions raises a significant constitutional question and an issue of substantial public interest. Pet. at 20 (citing RAP 13.4(b)(3) and (4)). It does not. The prosecutor committed no error. Where there is nothing to object to, counsel does not perform deficiently by failing to object.

Posey misrepresents that the court of appeals found his counsel's performance deficient for failing to object. Pet. at 20. The opinion makes no such finding. It only states that the questions regarding a gun and money "could have evoked images consistent with harmful stereotypes that young Black men are dangerous." Unpub. Op. at 13. This does not mean the questions were improper or the answers inadmissible. Here they were based on Posey's actual behavior toward the victim. He was actually violent and threatening toward her. The court

of appeals found the prosecutor "did not commit race-based prosecutorial misconduct." Unpub. Op. at 15.

Posey rejects the court's prejudice finding, repeating that the jury's verdict turned on his credibility. Pet. at 20; Unpub. Op. at 16. The court heard and rejected this argument. Posey's credibility was damaged in multiple, much more significant ways than a "benign" story about visiting a music video set. Unpub. Op. at 16.

Posey claimed he earned between $30,000 and $50,000 each summer, and yet the evidence was that he lived off his mother and girlfriends. 4RP 520-21, 538-40; 6RP 709, 734, 761-62, 764 (mother testifying Posey "hasn't contributed at all"). Posey lived rent-free at SK's house, using her car, borrowing her money, and having SK pay for his cell phone while SK was holding down three jobs and trying to save money for college. 4RP 514, 516, 521, 524, 538-41, 548-49; 6RP 706, 709, 730-33.

Posey claimed SK's family was "super prejudiced." 6RP 706, 736. This was not credible, where the family permitted him to live in their daughter's bedroom for two years and where Posey claimed he wanted to marry into the family. 4RP 521; 6RP 703-04, 763.

When police came to the door, Posey fled, hid in bushes, and abandoned his mother's car. 3RP 406-07, 489-91; 7RP 913-14, 927-28. If he had not harmed her, there would have been no reason for this.

Posey would testify that he did not believe they were really the police. 6RP 711-13, 743-44. This was not credible where the officers arrived in uniform in separate, marked patrol cars, knocked at length while loudly announcing themselves, and searched the neighborhood for him. 4RP 401-02, 406-07, 446; 6RP 650-52; 7RP 911, 913-14. Moreover, Posey would have known that police impounded his mother's car. 4RP 489-91; 7RP 927-28. And he would have learned that police came to

his mother's house that very day looking for him in relation to the incident with SK. 6RP 771; 7RP 929.

Posey claimed SK made up the allegations all over a dispute over a mere $400. 6RP 706. This was not credible. Years passed between the rape and the trial. SK had moved away and gotten married. 4RP 514. When Posey's friend offered SK $5000 to drop the charges, she rejected the money. 5RP 632. It was never about money.

Posey offered manipulable screenshots rather than his device for forensic testing. 1RP 66; 6RP 714, 717-28, 749-50 (screenshots allegedly obtained by other Snapchat users accessing uploaded content), 776-78; 7RP 933-34. Although Posey claimed SK had sent the messages, the sending account was, in fact, associated with another woman's photograph. 7RP 808. Posey claimed but could not prove that a screen shot of a message detail (phone number and date) was related to a particular message content. 6RP 714-16. Strangely, the message detail only showed a number where an account saved

in Posey's contacts would have displayed a name. 6RP 729-30. Moreover, Posey knew SK's password and allegedly was responsible for a hack of her PayPal account. 4RP 541-42; 6RP 708, 740. The jury could see that none of these messages could be tied to SK.

The sex videos Posey claimed SK sent him after the rape (6RP 723-24, 727-28, 787-89) were actually videos that Posey had made in 2016 without SK's knowledge and which he alone possessed. 5RP 613; 7RP 821.

The jury's verdict did not turn on Posey's benign description of an exhibit they never saw. He had no credibility long before then. The court's prejudice decision is sound.

There is no basis to accept review of this claim.

C. This year this Court has already twice rejected the claim that Laws of 2023, ch. 415 applies retroactively.

Posey argues that Laws of 2023, ch. 415, §2 (EHB 1324), which removed juvenile adjudications from adult offender scores, applies to his 2018 offenses. He claims that any

contrary decision conflicts with precedent and involves an issue of substantial public interest. Pet. at 29-30. In fact, the law on this matter is clear, and this Court had denied review of this very claim at least twice this year. Unpub. Op. at 21 (citing *State v. Tester*, 30 Wn. App. 2d 650, 546 P.3d 94, *review denied*, 556 P.3d 1094 (2024) and *State v. Troutman*, 30 Wn. App. 2d 592, 546 P.3d 458, *review denied*, 554 P.3d 1217 (2024)). The sentencing law which applies is that which existed at the time the current offenses were committed. Posey's offender score is correct.

The Timing Statute states that "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect *when the current offense was committed*." RCW 9.94A.345 (emphasis added). The Savings Statute also requires that crimes be punished pursuant to the statutes in force at the time of commission, not sentencing or appeal.

> …. Whenever any criminal or penal statute shall be amended or repealed, *all offenses committed or penalties or forfeitures incurred while it was in*

> *force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared* in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040 (emphasis added).

Posey cannot point to an express declaration of contrary intention. He argues that he does not need to. Pet. at 22 (citing *State v. Jenks*, 197 Wn.2d 708, 720, 487 P.3d 482 (2021)). However, even this authority requires that any legislative intent for retroactive application must be "expressed in words that fairly convey that intention." *State v. Jenks*, 197 Wn.2d 708, 720, 487 P.3d 482 (2021) (quoting *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004) (quoting *State v. Kane*, 101 Wn. App. 607, 612, 5 P.3d 741 (2000) (quoting *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970)))). And no part of the legislation conveys that intention. The aspirational language Posey points to says absolutely nothing about retroactivity.

So soon after *Jenks*, the legislature very well knew how to make a change in sentencing law that would apply retroactively. In fact, according to the legislative history and bill reports, a retroactivity provision was hotly debated and then removed from the bill. *Compare* H.B. 1324, § 3, 68th Leg., 2023 Reg. Sess. (Wash.) *with* Laws of 2023, ch. 415. In that debate, the legislature had the benefit of *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). It understood that if it gave retroactive effect to this amendment, it would not only affect people like Posey whose appeal has dragged on for more than two years, but it would affect every person currently incarcerated or serving community custody whose criminal history included juvenile history. Such a law would require an expenditure on the scale of *Blake.*

The change from the original bill is conclusive evidence that the law is not intended to apply to already sentenced matters which would necessarily involve offenses committed prior to the effective date. *Jenks*, 197 Wn2d at 721; *see also*

State v. Hirschfelder, 170 Wn.2d 536, 546-47, 242 P.3d 876 (2010).

This intent was further confirmed during the 2024 legislative session when HB 2065 was introduced. The bill would have applied HB 1324 to offenses "committed prior to July 23, 2023." *See* S.S.H.B. 2065, § 2, 68th Leg., 2024 Reg. Sess. The only reason to consider such a bill is because HB 1324 does not already apply to offenses committed prior to July 23, 2023. However, HB 2065 (2024) did not become law, defeated by the cost of the resentencings and the trauma the resentencings will inflict on victims and their families. *See* Senate Bill Report E2SHB 2065; Bill Information HB 2065 (2023-24).

Posey argues that the rule should be that the timing and savings statutes *never* apply absent a specific pronouncement. Pet. at 27-28. This is not logical. If this were the case, there would be no reason for passing the time and savings statutes.

Posey demonstrates no conflict of laws. And his request that this Court do what the legislature plainly did not and for which no appropriations have been made is not an issue of substantial public interest. Review must be denied.

D. The court of appeals' decision as to community custody number 12 only directly follows precedent.

Posey alleges that the court of appeals' opinion affirming community condition 12 conflicts with *State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003). Pet. at 32. There is no conflict. The cases are distinguishable. The Unpublished Opinion directly follows controlling precedent.

Posey had alleged the condition (authorizing breath and urine testing) was not authorized under RCW 9.94A.703(3)(f) which permits a court to impose crime-related community custody conditions. Unpub. Op. at 25. But, of course, that is not the only statutory provision authorizing conditions.

The court of appeals found the provision was authorized by RCW 9.94A.703(2)(c). Unpub. Op. at 25-26 (citing *State v. Vant*, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008)). This

statutory provision permits a court to prohibit the use of drugs or alcohol regardless of the offense. Unpub. Op. at 24-26.

> If these prohibitions are ordered, the trial court has the authority to impose testing to enforce compliance with them. *See State v. Vant*, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008) (holding that the sentencing court has authority to impose random urinalysis and breath analysis to monitor compliance with valid conditions). This includes imposing breath and urine testing. *See id*.

Unpub. Op. at 25-26. That is consistent with this Court's holding that the imposition of one condition (sex offender treatment) will authorize the imposition of another (plethysmograph testing) to monitor compliance with the first, *State v. Riles*, 135 Wn.2d 326, 346, 352, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Here, the sentencing court ordered Posey not to use or consume alcohol, marijuana, or unprescribed controlled substances. CP 162-63 (standard condition 3 and special condition 11). Posey did not challenge these conditions.

Therefore, their enforcement via condition 12 was also authorized. CP 163 (special condition 12—requiring Posey to be available and to submit to urinalysis or breath analysis upon the request of the community corrections officer).

State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003) does not regard a condition necessary to monitor compliance with another. It regarded a condition requiring participation in alcohol counseling. *Jones*, 118 Wn. App. at 208. Counseling is not a simple test of alcohol consumption. The case is distinguishable.

Posey also relies on the July grant of review in *State v. Nelson*, 3 Wn.3d 1007, 551 P.3d 441 (2024) (granted only on the issue of whether breath and urine testing may be ordered where drugs and alcohol played no role in the offense); Petition for Review at 23, *State v. Nelson*, 3 Wn.3d 1007, 551 P.3d 441 (filed Apr. 8, 2024).[9] Again, the undecided case is

[9] https://www.courts.wa.gov/content/petitions/102942-0%20Petition%20for%20Review.pdf

distinguishable. At oral argument on November 19, 2024,[10] the petitioner clarified that the challenge was on constitutional grounds and not statutory grounds. *See also*, Supp. Br. of Pet., *State v. Nelson*, 3 Wn.3d 1007, 551 P.3d 441 (filed Aug. 30, 2024).[11] Conversely, Posey's claim has only ever been on statutory grounds. Moreover, Nelson's procedural posture is distinct, challenging a condition after revocation of a SSOSA and in violation of a negotiated plea agreement.

Posey has identified no conflict with precedent. There is only compliance with precedent. Review must be denied.

V. CONCLUSION

The State requests this Court deny review.

/ / /

/ / /

[10] https://tvw.org/video/washington-state-supreme-court-2024111172/

[11] https://www.courts.wa.gov/content/Briefs/A08/1029420%20Supplemental%20Brief%20of%20Petitioner.pdf

This document is in 14 point font and contains 4,195 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of November, 2024.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
TERESA CHEN
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517
teresa.chen@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 Federal Way, Washington on the date below.

11-21-24	*s/Therese Nicholson*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 21, 2024 - 2:47 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,571-3
Appellate Court Case Title:	State of Washington v. Christopher Lamont Posey
Superior Court Case Number:	19-1-00036-0

The following documents have been uploaded:

- 1035713_Answer_Reply_20241121144554SC139459_4960.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was ANSWER PET REV.pdf

A copy of the uploaded files will be sent to:

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

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us
Filing on Behalf of: Teresa Jeanne Chen - Email: teresa.chen@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 20241121144554SC139459