Supreme Court No. ___
(COA No. 85707-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PRESTON BROWN-LEE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Preston Brown-Lee, petitioner here and below, asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Brown-Lee requests review of the Court of Appeals' decision issued on April 21, 2025, pursuant to RAP 13.3 and 13.4(b). App. A (slip opinion).

C. ISSUES PRESENTED FOR REVIEW

1. Any fact that increases punishment, other than the bare fact of a prior conviction, must be found by a jury beyond a reasonable doubt. This Court has sometimes read the "prior conviction" exception to extend to other closely related facts. However, the United States Supreme Court in *Erlinger v. United States*[1] has since expressly delimited this exception to the literal fact of the prior conviction itself, admonishing parties and courts against attempting to stretch this narrow exception

[1] 602 U.S. 812, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024).

beyond its limits. Here, the sentencing court violated *Erlinger* by concluding, without a jury finding, that Mr. Brown-Lee was on community custody at the time of his offense, and increased his punishment. The Court of Appeals arbitrarily declared that *Erlinger*'s reach is limited it to the particular statute it happened to involve, and is thus inapplicable in any state law case.

This Court should grant review to bring its own decisional law into accord with the Sixth and Fourteenth Amendments and to ensure that the Court of Appeals follows binding United States Supreme Court precedent.

2. The Sentencing Reform Act (SRA) requires sentencing courts to calculate a person's offender score based on convictions existing on the date of sentencing. Recognizing the fundamental unfairness of haunting a person with their childhood misdeeds, the legislature passed a statutory amendment prohibiting the scoring of most juvenile priors, codified in RCW 9.94A.525(1)(b). Though this amendment went into effect prior to Mr. Brown-Lee's sentencing, the

sentencing court exceeded its authority by scoring Mr. Brown-Lee's juvenile priors anyways, increasing his punishment.

This Court should grant review of the Court of Appeals decision affirming the sentence, and clarify whether RCW 9.94A.525(1)(b) applies at sentencing hearings conducted after the amendment's effective date, regardless of a pre-enactment date of offense.

D. STATEMENT OF THE CASE

Preston Brown-Lee was convicted of one count of second-degree assault after an altercation at a convenience store in October of 2021. RP 592, 749, 918; CP 54.

The State's offender score calculation at sentencing reflected that Mr. Brown-Lee's offender score, based on prior adult convictions alone, would have only been a four. CP 120, 342; RP 969.

As a child, Mr. Brown-Lee had also committed two juvenile offenses. CP 122-44, 145-65, 356. At sentencing here, the parties disagreed over whether the court should apply a

legislative amendment to RCW 9.94A.525 prohibiting the scoring of most juvenile offenses, including Mr. Brown-Lee's. RP 970-78, 96-104; CP 206-11; *see* Laws of 2023, ch. 415 § 2 (effective July 23, 2023). Although the amendment was already in effect as RCW 9.94A.525(1)(b) at the time of this sentencing, the court refused to apply it, because it had not been in effect on the October 2021 date of offense. RP 978. This increased Mr. Brown-Lee's offender score by four points. RP 978-79.

The court added another point to Mr. Brown-Lee's offender score after concluding that he had been on community custody for a prior offense at the time this offense occurred. RP 969; CP 351. The judge concluded this personally. *Id*. Neither the State nor court ever presented the question of Mr. Brown-Lee's community custody status on the date of his offense to a jury.

Based on the addition of four points for the juvenile convictions, plus the one point for the judge-made finding of

community custody status, the sentencing court increased Mr. Brown-Lee's offender score from a four to a nine. RP 969, 979; CP 351.

Due to the chaotic and mutually combative circumstances surrounding the offense, Mr. Brown-Lee requested an exceptional sentence downward based on failed self-defense. RP 991. The sentencing court rejected this request and sentenced Mr. Brown-Lee to 84 months, the high end of Mr. Brown-Lee's range as the court had calculated it. RP 1006; CP 351, 353.

On appeal, Mr. Brown-Lee requested a new sentencing hearing. He argued that the sentencing court violated the Sixth and Fourteenth Amendments as recently interpreted by the United States Supreme Court in *Erlinger v. United States* by adding a community custody point based on judicial fact-finding. He also argued that that the statutory law in effect at the time of his sentencing hearing did not permit the scoring of his juvenile offenses.

The Court of Appeals reviewed the *Erlinger* issue on the merits due to the "potential relevance of new United States Supreme Court jurisprudence." App. A at 7, n.4. But it ultimately adhered to its own prior holding that *Erlinger* is "limited to resolving [the federal Armed Career Criminal Act (ACCA)]'s occasions inquiry," the particular statute at issue in *Erlinger* itself. App. A at 9 (quoting *State v. Anderson*, 31 Wn. App. 2d 668, 552 P.3d 803 (2024)) (brackets in this Court of Appeals opinion).

The Court of Appeals also held that RCW 9.94A.525(1)(b) does not apply to sentencing hearings held after the statutory amendment's effective date if the sentence is for a pre-act offense. App. A at 2-6.

The Court of Appeals affirmed Mr. Brown-Lee's sentence. App. A at 1

E. WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to harmonize its decisional law with *Erlinger*, and hold that a sentencing court cannot increase the accused's offender score based on community custody status without a jury finding.

A jury, rather than a judge, must find any fact which increases potential punishment, other than the fact of a prior conviction. *Erlinger*, 602 U.S. at 833 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

The United States Supreme Court in *Erlinger* recently clarified that the prior conviction exception does not extend to secondary or closely related facts, even if those facts can be ascertained through an identical factual inquiry, and using identical sources of information, as the inquiry into whether a prior conviction exists. *Id*. at 837-42.

Erlinger's holding upends this Court's earlier decision in *State v. Jones*, which held that a judge may find the fact that the accused was on community placement for a prior offense at the

time the current offense occurred. 159 Wn. 2d 231, 241-48, 149 P.3d 636 (2006). *Jones* based its holding precisely on the nature of the required inquiry and the sources of information that inquiry involves. *Id*. at 243-48. This Court should readdress *Jones*. RAP 13.4(b)(3), (4).

This Court should also grant review, even if it ultimately finds another theory on which to permit judicial fact-finding of community custody status, because the Court of Appeals' arbitrary and avoidant holding that *Erlinger* can never apply in state law cases is a dereliction of every court's duty to obey United States Supreme Court precedent on issues arising under the United States Constitution. RAP 13.4(b)(3), (4).

This Court should grant review to address this important issue, which will arise again and again until this Court places it on a reasoned footing.

a. The accused has the right to have a unanimous jury find, beyond a reasonable doubt, any fact which increases potential punishment.

The Sixth and Fourteenth Amendments guarantee the right to trial by jury. U.S. Const. amends. VI, XIV.

This guarantee extends no less to sentencing than to the adjudication of guilt. Under the Sixth and Fourteenth Amendments, "[o]nly a jury may find 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed."' *Erlinger*, 602 U.S. at 833 (quoting *Apprendi*, 530 U.S. at 490). This includes facts that increase the maximum sentence, *Apprendi*, 530 U.S. at 490, and those that increase the minimum sentence, *Alleyne v. United States*, 570 U.S. 99, 112-13, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The jury must be unanimous as to such facts and must find them beyond a reasonable doubt. *Erlinger*, 602 U.S. at 836.

This expansive jury right is not a "procedural formality," but a "fundamental reservation of power." *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S. Ct. 2531, 159 L. Ed.

2d 403 (2004). It is at once a check on the executive branch by limiting "the risk of prosecutorial overreach and misconduct," and a check on the judicial branch by ensuring that sentences are based on "laws adopted by the people's elected representatives and facts found by members of the community" rather than "a judicial 'inquisition.'" *Erlinger*, 602 U.S. at 832 (quoting *Blakely*, 542 U.S. at 307).

There is only one "narrow exception" to the jury guarantee as to facts that increase possible punishment. A judge, rather than a jury, may find the sole fact of a prior conviction. *Id*. at 837 (citing *Almendarez-Torrez v. United States*, 523 U.S. 224, 246-47, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)). "Under that exception, a judge may 'do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was [previously] convicted of.'" *Id*. at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 511-12, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)).

b. This Court previously held in Jones *that a judge, rather than jury, may find the fact that the accused was on community placement on the date of their offense, and may thereby increase the accused's punishment.*

This Court has interpreted the prior conviction exception to also extend to facts that are "directly related to and follow[ ] from" the fact of prior conviction. *Jones*, 159 Wn.2d at 233-34.

Jones addressed precisely the fact at issue in this case – the fact of the accused's community placement status on the date of his offense. *Id*. at 243-47. *Jones* held that a judge may find this fact, even if it is not strictly the fact of a prior conviction itself, for two related reasons.

First, the inquiry need only involve the same records and materials that a sentencing court relies on to ascertain the fact of a prior conviction itself. "[A] sentencing judge can readily determine a defendant's probation status on the date he committed the present crime merely by reviewing court records relating to that prior conviction." *Id*. at 244. Because a finding of community placement can be made using the identical

records and case materials, without reference to other extrinsic sources, *Jones* reasoned, it can be properly extrapolated from *Almendarez-Torrez*'s prior conviction exception. *Id*. at 244-47.

Second, the "nature of the inquiry" is extremely similar to that of ascertaining a prior conviction. *Id*. at 239. "**Like** the inquiry associated with the fact of a prior conviction," *Jones* reasoned, "**this** type of inquiry" into community placement is "reliable," "**arises out of** a prior conviction . . . ," and is "the type of inquiry traditionally performed by judges as part of the sentencing function." *Id*. at 245 (emphasis added).

c. The United States Supreme Court's recent decision in Erlinger *rejects this Court's reasoning in* Jones.

The United States Supreme Court's decision in *Erlinger* squarely addresses, and unmistakably rejects, precisely this Court's reasoning in *Jones*.

The *Erlinger* court first bemoaned that, due to the stubborn efforts of parties or courts to apply the prior conviction exception beyond its limits, the United States Supreme Court has had to "reiterate . . . 'over and over . . . to

the point of 'downright tedium"' that the "narrow exception" for prior convictions extends to nothing more than the bare fact of a prior conviction itself. 602 U.S. at 838 (quoting *Mathis*, 589 U.S. at 510-12, 519). Far from being a nucleus for secondary or closely related exceptions, the prior conviction exception is "expressly delimited" to the very fact that a prior conviction exists. *Id*.

The Court then specifically rejected two rationales set forth by the government in *Erlinger* for why a secondary fact might be effectively contained within the prior conviction exception – the same two rationales on which *Jones* rests.

Like *Jones*'s explanation that "a sentencing judge can readily determine a defendant's probation status on the date he committed the present crime merely by reviewing court records relating to that prior conviction," 159 Wn.2d at 244, the United States Supreme Court acknowledged that the same court records, or "*Shepard* documents," necessary for finding a prior conviction, would be sufficient for finding other closely related

facts relating to that conviction. *Erlinger*, 602 U.S. at 839. "None of that, however, means that a court may use *Shepard* documents or any other materials for **any other purpose**" than finding the bare fact of the conviction itself. *Id.* (emphasis added).[2] After *Erlinger*, even the fact that materials involved in ascertaining a conviction exists are necessarily adequate for finding a closely related fact is an unconstitutional rationale for judges finding that secondary fact.

And like *Jones*'s emphasis on the reliability of a sentencing court's inquiry into the fact of community placement status, 159 Wn.2d at 239, 245, *Erlinger* acknowledged that certain facts arising from a conviction are

[2] *Compare Jones*, 159 Wn.2d at 233-34 ("[B]ecause community custody is directly related to and follows from the fact of a prior conviction . . . such a determination is properly made by the sentencing judge.") *with Erlinger*, 602 U.S. at 837 ("On *amicus*'s telling, that [*Almendarez-Torrez*] exception permits a judge to find perhaps any fact related to a defendant's past offenses . . . We disagree . . . In *Almendarez-Torres*, the Court permitted a judge to undertake the job of finding the fact of a prior conviction – and that job alone.").

just as "straightforward" as the inquiry into the existence of the conviction itself. 602 U.S. at 842. But "none of that means that a judge rather than a jury should make the call." *Id*. "There is no efficiency exception to the Fifth and Sixth Amendments." *Id*. The "nature of the inquiry" or "type of inquiry" so central to *Jones*'s reasoning is, like the identical records and materials required for the inquiry, an unconstitutional rationale, after *Erlinger*, for finding anything secondary to the bare fact of conviction.

Jones does not survive *Erlinger*. Upon review, this Court may ultimately discern another theory, consistent with *Erlinger*, for holding that a judge may find the fact of community placement on the specific date of an offense. But that theory, if it exists, is nowhere in *Jones*. This Court should grant review to give its now-upended decision in *Jones* the renewed consideration *Erlinger* demands. RAP 13.4(b)(3), (4).

d. The Court of Appeals has avoided the issue by entrenching an arbitrary and incorrect holding that Erlinger*, a Sixth Amendment decision, is inapplicable in cases involving state law.*

Regardless of how this Court resolves this issue if it grants review, it will have at least left the issue on a clearer footing than the habit of summarily disregarding *Erlinger* which has calcified in the Court of Appeals.

"When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) (emphasis added) (citing *In re Habeas Corpus of Scruggs*, 70 Wn.2d 755, 760, 425 P.3d 364 (1967)).

In this case, the Court of Appeals largely responded to Mr. Brown-Lee's challenge by simply pointing to its own prior holdings about *Erlinger*. App. A. at 9. Namely, the Court of Appeals in several post-*Erlinger* opinions has declared the notion that *Erlinger* is "limited to resolving [the federal Armed Career Criminal Act (ACCA)]'s occasions inquiry," the

particular statute at issue in *Erlinger* itself. App. A at 9 (quoting *Anderson*, 31 Wn. App. 2d 668); *see also State v. Frieday*, No. 58467-1-II, slip op. at 26 (Wash. Ct. App. Mar. 11, 2025) ("We agree with *Anderson* that *Erlinger* should be limited to the ACCA and does not overrule existing Washington precedent.").

This unreasoned pronouncement seizes on an out-of-context quote from *Erlinger* as a basis for declining to actually engage with its reasoning or holding.

Erlinger, after casting doubt on *Almendarez-Torres* as "'at best an exceptional departure' from 'historic practice'" and "arguabl[y] . . . incorrect[t]," clarified that the facts before the *Erlinger* court did not present an opportunity to reconsider *Almendarez-Torres*'s narrow prior conviction exception. 602 U.S. at 837. "[N]o one in this case has asked us to revisit *Almendarez-Torres*," so there was no procedural justification for judicial review of the continued validity of the prior conviction exception itself. *Id*. at 838. Therefore, the *Erlinger* court "recognize[d] Mr. Erlinger was entitled to have a jury

resolve ACCA's occasions inquiry," but it could "decide no more than that." *Id*. at 835.

But the United States Supreme Court did not thereby designate *Erlinger* as somehow anomalously incapable of functioning as precedent in contexts beyond the ACCA. *Erlinger* simply explained why it had no basis to consider whether to overturn *Almendarez-Torres* itself.

Erlinger is a Sixth Amendment decision, not a decision concerning statutory interpretation of the ACCA. It is binding law on all courts, in all Sixth Amendment cases, to the extent that the legal principles and rules *Erlinger* relies on pertain to the controversy at hand. *See Radcliffe*, 164 Wn.2d at 906 (citing *Scruggs*, 70 Wn.2d at 760. The facts or circumstances need not be superficially identical to those in *Erlinger* for *Erlinger* to apply.

Almendarez-Torres, which spawned the prior conviction exception, concerned a particular federal statute enhancing criminal penalties for crimes committed after a person illegally

returns to the country following deportation. 523 U.S. at 229 (citing 8 U.S.C. § 1326). *Erlinger*'s binding precedent is no more limited to ACCA cases than the prior conviction exception itself is limited to 8 U.S.C. § 1326 cases.

Erlinger holds that, under the Sixth Amendment, a factual inquiry's straightforward nature, or the limited nature of the records and materials the inquiry involves, are unconstitutional bases for letting a judge find that fact instead of a jury. 602 U.S. at 837-42. *Erlinger* holds that it is the nature of the fact itself, and not the nature of the factual inquiry, which dictates whether that fact falls within the *Almendarez-Torres* exception to the jury right. *Id*. A fact secondary to that of a prior conviction, even if findable by identical means and sources of information as the prior conviction itself, requires a jury to find it. *Id*.

This holding sweeps *Jones*'s legs out from under it. And contrary to the Court of Appeals' entrenched holding, the superficial fact that *Erlinger* happened to involve a particular

federal statute does not negate *Erlinger*'s holding or render Washington courts somehow immune to it. *See* App. A. at 9.

This Court should grant review. RAP 13.4(b)(3), (4).

2. This Court should grant review to clarify whether the law prohibiting the inclusion of most juvenile convictions in an offender score applies at sentencings conducted after the law's effective date, regardless of the date of offense.

The trial court derives its sentencing authority entirely from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). "[T]he fixing of legal punishments for criminal offenses is a legislative function." *Id*. at 180.

The SRA directs the sentencing court to determine an offense's standard range sentence based on the seriousness level of the offense and the person's offender score. RCW 9.94A.510, 530(1).

The offender score is calculated primarily based on the number and nature of the person's qualifying prior convictions. RCW 9.94A.525. The statute requires the court to calculate the

offender score by counting qualifying prior convictions as of the date of sentencing. RCW 9.94A.525(1)(a).

Recognizing that indefinitely penalizing a person for their juvenile offenses is fundamentally unjust, the legislature amended the statute to prohibit courts from including most juvenile offenses in the offender score calculation. Laws of 2023, ch. 415. As of July 23, 2023, all but the most serious juvenile convictions "may not be included in the offender score." RCW 9.94A.525(1)(b).

The correct calculation of the offender score and standard range is a prerequisite to a valid sentence. *State v. Moeurn*, 170 Wn.2d 169, 176, 240 P.3d 1158 (2010). A sentence that is "based on an improperly calculated score lack[s] statutory authority" and "cannot stand." *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002)).

Although the amendment excluding juvenile priors took effect over a month before Mr. Brown-Lee's August 2023

sentencing hearing, the trial court, and later the Court of Appeals, declined to apply RCW 9.94A.525(1)(b)'s specific prohibition against scoring his juvenile convictions. App. A at 2-6. The Court of Appeals instead applied two earlier, more general statutes: RCW 9.94A.345 and RCW 10.01.040. *Id*.

The question before this Court is therefore primarily one of statutory interpretation. When interpreting a statute, the court is tasked with carrying out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning." *Id*. To determine a statute's plain meaning, courts examine the text of the statute, related statutory provisions, and the statutory scheme as a whole. *Id*. at 9-12.

This Court reviews the calculation of an offender score and issues of statutory interpretation de novo. *Moeurn*, 170 Wn.2d at 172; *Campbell & Gwinn*, 146 Wn.2d at 9.

RCW 9.94A.525(1)'s plain meaning is unambiguous: the date of sentencing is the operative date for the offender score calculation. RCW 9.94A.525(1)(a). For all sentencing hearings occurring on or after July 23, 2023, the court has no authority to score most juvenile convictions. RCW 9.94A.525(1)(b). The date the person committed the offense for which they are being sentenced is irrelevant for the purposes of RCW 9.94A.525. Construing the statute to require calculation as of any other date than that of sentencing would contravene the statute's plain language.

The two statutes the Court of Appeals prioritized over RCW 9.95A.525(1)(b) do not change RCW 9.94A.525(1)(b)'s meaning. RCW 9.95A.345 and RCW 10.01.040 merely articulate a general default that sentences should be determined based on the law in effect at the time of the offense.

Based on these general statutes, however, the Court of Appeals sanctioned the trial court's refusal to apply RCW 9.94A.525(1)(b), even though it was in effect at the time of Mr.

Brown-Lee's sentencing, because it was not in effect on his October 2021 date of offense. App. A at 2-6. The Court of Appeals concluded that a sentencing amendment must contain an '"express' or 'clear' statement of intent" to apply to subsequent sentencings involving a pre-act offense, and that the amendment enacting RCW 9.94A.525(1)(b) contained no such expression of intent. App. A at 6 (citing RCW 10.01.040).

However, it is well-established that a specific statute controls over a general statute. *In re Estate of Kerr*, 134 Wn.2d 328, 337, 949 P.2d 810 (1998) (citing cases). No general statute passed by one legislature can be afforded the effect of impeding or limiting a future legislature's authority to exercise its power. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142, 1151-52 (2007). And, contrary to the Court of Appeals' analysis, a statute need not have express language for it to operate at later sentencings. *State v. Jenks*, 197 Wn.2d 708, 720, 487 P.3d 482 (2021); *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004); *State v. Rose*, 191 Wn. App. 858,

865-66, 365 P.3d 756 (2015); *Dorsey v. United States*, 567 U.S. 260, 274, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012).

Accordingly, "[n]o magical passwords" or explicit statements of intent are required for the plain meaning of one statute to operate over the default set by an earlier statute. *Dorsey*, 567 U.S. at 274 (cleaned up). Rather, recent or more specific statutes need only express "an intent in words that fairly convey that intention." *Jenks*, 197 Wn.2d at 720 (cleaned up). The legislature is not, therefore, required to say, "This act shall apply to pending cases." *Rose,* 191 Wn. App. at 865-66. The Court of Appeals' unelaborated observation here that *Rose* involved a "rare case" is not a helpful distinction. App. A (quoting *Rose*, 191 Wn. App. at 871).

The amendment prohibiting the scoring of juvenile priors fairly conveys an intention that the amendment apply at all subsequent sentencings. The legislature explained that the purpose of the amendment is to:

> (1) Give real effect to the juvenile justice system's express goals of rehabilitation and reintegration;
>
> (2) Bring Washington in line with the majority of states, which do not consider prior juvenile offenses in sentencing range calculations for adults;
>
> (3) Recognize the expansive body of scientific research on brain development, which shows that adolescent's perception, judgment, and decision making differs significantly from that of adults;
>
> (4) Facilitate the provision of due process by granting the procedural protections of a criminal proceeding in any adjudication which may be used to determine the severity of a criminal sentence; and
>
> (5) Recognize how grave disproportionality within the juvenile legal system may subsequently impact sentencing ranges in adult court.

Laws of 2023, ch. 415, § 1.

Not one of these rationales hinges, to any extent, on whether an offense occurred before or after enactment of the amendment. *See*, *e.g.*, *State v. Grant*, 89 Wn.2d 678, 684, 575 P.2d 210 (1978) (language that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages" fairly conveyed intent to

apply immediately to all cases); *Rose*, 191 Wn. App. at 869 (legislature's stated intent that "the people intend to stop treating adult marijuana use as a crime" fairly conveyed intent to have law apply to pending cases). As this Court recognized in *State v. Ross*, where the legislature passed a scoring amendment but specified that it would "apply [only] to crimes committed on or after" a certain date, the legislature knows how limit the application of such an amendment. 152 Wn.2d at 239 (quoting Laws of 2002, ch. 290, § 29). The legislature chose not to do so here.

The Court of Appeals believed this Court's decision in *Jenks* supports the view that RCW 9.94A.525(1)(b) applies only to cases involving a date of offense after the amendment's effective date. App. A at 6 (citing *Jenks*, 197 Wn.2d at 714). But the amendment in *Jenks*, which pertained to Washington's "three strikes" law, had no statement of intent. *Compare* Laws of 2023, ch. 415, § 1 *with* Laws of 2019, ch. 187. Mr. Jenks had also been sentenced as a persistent offender two years prior to

the amendment, whereas Mr. Brown-Lee was sentenced after this juvenile scoring amendment was already in effect. *Jenks*, 197 Wn.2d at 714-15, 719-20.

Moreover, Mr. Brown-Lee's case concerns the operation of the offender score statute, not the persistent offender statute. Unlike the persistent offender statute, RCW 9.94A.525(1)(a) expressly provides that the only operative date for the offender score calculation is the date of sentencing, not the date of offense. Finally, RCW 9.94A.525(1)(b) creates no new sentencing procedure itself. It merely refers to the scoring scheme already in place in RCW 9.94A.525(1)(a). *See* Laws of 2023, ch. 415, § 2. Because the offender score statute plainly states that the only relevant date for the scoring calculation is "the date of sentencing," this amendment had no need to expressly declare again an operative date that was already designated by the statute. RCW 9.94A.525(1)(a).

The trial court exceeded its sentencing authority by scoring Mr. Brown-Lee's juvenile priors contrary to the

already-effective RCW 9.94A.525(1)(b). Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals' analysis conflicts with precedent. And this case "involves an issue of substantial public interest that should be determined by the Supreme Court," as underscored by the legislature's judgment that the operation of this amendment is necessary to ensure fairness and due process and to combat sentencing disproportionality. RAP 13.4(b)(4); *see* Laws of 2023, ch. 415, § 1.

F. CONCLUSION

The Court of Appeals' reductive holding that the binding United States Supreme Court precedent in *Erlinger* does not apply to state law cases, and *Erlinger*'s unsettling of this Court's own precedent in *Jones*, require this Court's resolution. RAP 13.4(b)(3), (4).

The Court of Appeals' consistent misconstruction of RCW 9.94A.525(1)(b) contrary to the legislature's intent, thus sustaining the unfairness and disproportionality that amendment

seeks to eliminate, also requires this Court's guidance. RAP 13.4(b)(1), (2), (4).

Mr. Brown-Lee respectfully asks this Court to grant review of both issues.

Per RAP 18.17(c)(10), the undersigned certifies this petition for review contains 4,750 words.

DATED this 21st day of May, 2025.

MATTHEW FOLENSBEE (WSBA # 59864)

Washington Appellate Project (91052)

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APPENDIX A:
COURT OF APPEALS OPINION

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. PRESTON BROWN-LEE, Appellant.	No. 85707-0-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — A jury convicted Preston Brown-Lee of assault in the second degree. He now claims the trial court should not have included his juvenile convictions in his offender score per RCW 9.94A.525(1)(b), which prohibits courts from including most juvenile convictions in adult offender scores. He also argues the Sixth Amendment and Washington constitution require that a jury, not the court, find he was on community custody at the time of his offense. We disagree with both contentions and affirm.

I. BACKGROUND

In May 2022, the State charged Brown-Lee with assault in the second degree after an altercation at a convenience store in October 2021. During trial, Brown-Lee stipulated that the Department of Corrections (DOC) had released him from prison on September 1, 2021. At the conclusion of the trial in May 2023, a jury found Brown-Lee guilty as charged. The jury further found a rapid recidivism

aggravator, as Brown-Lee committed the offense shortly after his release from incarceration.

At his sentencing in August 2023, Brown-Lee argued his two juvenile convictions should not be included in his offender score under RCW 9.94A.525(1)(b), which became effective July 23, 2023. LAWS OF 2023, ch. 415, § 1-2. The court disagreed, finding "the statute is not retroactive" to when Brown-Lee committed his offense in 2021. If the juvenile convictions were included, the parties agreed Brown-Lee's offender score would be nine. Specifically, Brown-Lee's offender score included four points for his adult history, four points for his juvenile history, and one point for being on community custody at the time of his offense.

Brown-Lee timely appeals.

II. ANALYSIS

A. Whether RCW 9.94A.525(1)(b) Applies to this Matter

RCW 9.94A.525 governs a court's calculation of an offender score. In 2023, the legislature added subsection (1)(b), which states that, "[f]or the purposes of this section, adjudications of guilt pursuant to Title 13 RCW which are not murder in the first or second degree or class A felony sex offenses may not be included in the offender score." LAWS OF 2023, ch. 415, § 2. Title 13 RCW governs "Juvenile Courts and Juvenile Offenders." Thus, except for the three exceptions listed above, RCW 9.94A.525(1)(b) prohibits the inclusion of juvenile convictions in a defendant's offender score, effective July 23, 2023.

Brown-Lee argues that the plain language of RCW 9.94A.525(1) evinces an

intent it apply to all sentencings occurring on or after July 23, 2023, and that the trial court should have so applied the law at his August 2023 sentencing. We disagree.

Sentences imposed under the "timing" statute of the Sentencing Reform Act, ch. 9.94A RCW, are generally determined "in accordance with the law in effect at the time of the offense." State v. Jenks, 197 Wn.2d 708, 714, 487 P.3d 482 (2021) (citing RCW 9.94A.345). And "we will apply a statutory amendment *retroactively* 'when it is (1) intended by the Legislature to apply retroactively, (2) curative in that it clarifies or technically corrects ambiguous statutory language, or (3) remedial in nature.'" State v. Mann, 146 Wn. App. 349, 360, 189 P.3d 843 (2008) (quoting Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002)). "Washington courts *disfavor* retroactive application of a statute, absent legislative direction to the contrary." Id. (emphasis added); State v. Brake, 15 Wn. App. 2d 740, 744, 476 P.3d 1094 (2020) ("statutes are presumed to be prospective unless there is a *clear* indication that the legislature intended a retroactive effect.") (emphasis added).

This determination presents a question of statutory interpretation which we review de novo. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). When we interpret a statute, we first "look to the text of the statutory provision in question, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" Id. (quoting Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 920–21, 969 P.2d 75 (1998)). "If the meaning of a statute is plain on its face, then the court must give effect to that

meaning." State v. Smith, 158 Wn. App. 501, 505, 246 P.3d 812 (2010).

Brown-Lee makes three overarching arguments, all of which are unavailing.

First, Brown-Lee relies on State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003), State v. Shilling, 77 Wn. App. 166, 173-174, 889 P.2d 948 (1995), and State v. Collicott, 118 Wn.2d 649, 665-67, 827 P.2d 263 (1992), for the proposition that "the date of sentencing is the operative date for offender score calculations" under various provisions of RCW 9.94A.525(1)*(a)*. These decisions are inapposite, as they each pre-date RCW 9.94A.525(1)(b) and none address how *exempted* convictions are considered under that separate section.

More to the point, this court has recently held at least twice that the legislature did not evince an intent for RCW 9.94A.525(1)(b) to apply retroactively. See State v. Troutman, 30 Wn. App. 2d 592, 594, 546 P.3d 458 (2024), review denied, 3 Wn.3d 1016 (holding that "the 2023 amendment conveys no legislative intent that it applies retroactively, under RCW 9.94A.345[1] and [under] the savings clause, RCW 10.01.040,[2] the law in effect at the time of the offense applies to

[1] Again, RCW 9.94A.345, the "timing" statute, requires that, "[e]xcept as otherwise provided in this chapter, any sentence imposed under this chapter shall be determined *in accordance with the law in effect when the current offense was committed*." (Emphasis added.)

[2] RCW 10.01.040, the "saving clause," requires that, "[w]henever 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*." (Emphasis added.) In seeking to explain away the applicability of the savings clause, Brown-Lee focuses only on when the penalty was "incurred' and not on when the offense was committed, here October 2021, or found to be committed, here May 2023, as

Troutman's sentence, so the amendment does not alter the calculation of Troutman's offender score"); State v. Gibson, No. 58962-1-II, slip op. at 4 (Wash. Ct. App. Feb. 19, 2025), https://www.courts.wa.gov/opinions/pdf/D2%2058962-1-II%20Published%20Opinion.pdf ("Nothing in the bill mentions retroactive application or indicates that it should apply to cases pending on the effective date").[3]

Second, Brown-Lee points to the legislature's statement of intent, including that RCW 9.94A.525(1)(b) seeks to "[f]acilitate the provision of due process by granting the procedural protections of a criminal proceeding in any adjudication which may be used to determine the severity of a criminal sentence" and also references the "grave disproportionality within the juvenile legal system" and "scientific research on brain development." LAWS OF 2023, ch. 415, § 1. From this, Brown-Lee argues that "where the legislation contained 'additional language that fairly conveys disapproval or concern about continued prosecution,' the new law applies to pending cases, despite the saving clause statute." (Quoting State v. Rose, 191 Wn. App. 858, 871, 365 P.3d 756 (2015)). This argument fails both because it disregards this court's admonition in Rose that it involved a "rare case," 191 Wn. App. at 871, and because this court in Troutman explicitly considered the

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the savings clause requires.

[3] This court in State v. Gibson also rejected Brown-Lee's alternative argument that RCW 9.94A.525(1)(b) applied because his direct appeal was "pending" at the time the law became effective. No. 58962-1-II, slip op. at 3-4 (Wash. Ct. App. Feb. 19, 2025), https://www.courts.wa.gov/opinions/pdf/D2%2058962-1-II%20Published%20Opinion.pdf; see also State v. Tester, 30 Wn. App. 2d 650, 656, 546 P.3d 94, review denied, 556 P.3d 1094 (2024) (holding "[t]he legislature did not express an intent that the 2023 amendment would apply to pending prosecutions for offenses committed before its effective date.").

same statements of intent and nonetheless held RCW 9.94A.525(1)(b) "does not evince a legislative intent for [the statute] to apply retroactively." 30 Wn. App. 2d at 599-600.

Third, Brown-Lee argues we should apply RCW 9.94A.525(1)(b) retroactively because it is remedial in nature. "'A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.'" State v. Pillatos, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) (quoting Miebach v. Colasurdo, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984)). However, this court again in Troutman already "rejected a similar argument" because, "'[a]bsent language indicating a contrary intent, an amendment to a penal statute – even a patently remedial one – must apply prospectively under RCW 10.01.040,'" i.e., under the savings clause. 30 Wn. App. 2d at 598 n.6 (quoting State v. Jenks, 12 Wn. App. 2d 588, 600, 459 P.3d 389 (2020)).

As the lack of intent for retroactivity is clear from the plain text of RCW 9.94A.525(1)(b), we need not consider secondary modes of statutory interpretation. See, e.g., Ervin, 169 Wn.2d at 820.

We hold the plain text of RCW 9.94A.525(1)(b) does not contain an "express" or "clear" statement of intent for retroactivity, or any other basis for retroactivity. RCW 10.01.040; Brake, 15 Wn. App. 2d at 744. We thus also hold RCW 9.94A.525(1)(b) was inapplicable to Brown-Lee's sentencing as it was effective after his offense occurred in October 2021. Jenks, 197 Wn.2d at 714; LAWS OF 2023, ch. 415, § 1-2.

B. Community Custody Finding

For the first time on appeal, Brown-Lee next argues the court violated his right to a jury trial as the judge, rather than the jury, found that Brown-Lee committed the current offense while he was on community custody for a prior offense.[4] We disagree.

It is true that the sentencing court, without an attendant jury finding, added one point to Brown-Lee's offender score "for offense(s) committed while under community placement," as permitted by statute. RCW 9.94A.525(19) ("If the present conviction is for an offense committed while the offender was under community custody, add one point").

And it is true that "[b]oth the Sixth Amendment and article I, sections 21 and 22 of the Washington Constitution guarantee a defendant's right to a jury trial."[5] State v. McKnight, 25 Wn. App. 2d 142, 147, 522 P.3d 1013 (2023). This right "entitle[s] a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 466-67, 120 S. Ct. 2348, 147 L. Ed. 2d 435

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[4] At sentencing, Brown-Lee did not object to the court adding a community custody point to his offender score. "[T]o raise an error for the first time on appeal, the error must be "'manifest'" and "truly of constitutional dimension," which can include claims relating to the right to a jury trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007) (quoting RAP 2.5(a)(3)). As we did in State v. Frieday, we utilize our discretion to consider Brown-Lee's claim as "the potential relevance of new United States Supreme Court jurisprudence is sufficiently important enough for us to exercise our discretion to reach his arguments" challenging his sentencing and offender score. No. 58467-1-II, slip op. at 23-24, 26 (Wash. Ct. App. Mar. 11, 2025), https://www.courts.wa.gov/opinions/pdf/D2%2058467-1-II%20Published%20Opinion.pdf (citing RAP 1.2(c)).

[5] Brown Lee makes clear in his reply brief that, "because the federal constitution guarantees this jury right, the state constitution guarantees it to at least the same extent," there is no need for an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

(2000). Further, as a logical corollary, "a unanimous jury ordinarily must find beyond a reasonable doubt any fact that increases a defendant's exposure to punishment." Erlinger v. United States, 602 U.S. 821, 836, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024).

But, the United States Supreme Court also has held that it could not "find . . . significant support for the proposition that the Constitution *forbids* a legislature to *authorize* a longer sentence for recidivism." Almendarez-Torrez v. United States, 523 U.S. 224, 246, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).[6] Our Supreme Court characterized this holding as a narrow "prior conviction exception" to the requirement that a jury find each element of a crime beyond a reasonable doubt. State v. Jones, 159 Wn.2d 231, 236, 149 P.3d 636 (2006); State v. Brinkley, 192 Wn. App. 456, 464, 369 P.3d 157 (2016) (same).

In other words, our Supreme Court held that "*a court*, rather than a jury, may . . . make, constitutionally, the former RCW 9.94A.525(17)[7] community placement determination."[8] Jones, 159 Wn.2d at 247. And, the court held that "the 'prior

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[6] As here, "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of the 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." Apprendi, 530 U.S. at 488.

[7] As noted in Jones, former RCW 9.94A.525(17) refers to the same provision as the current RCW 9.94A.525(19). 159 Wn.2d at 233 n.1; LAWS OF 2006, ch. 128, § 6; LAWS OF 2007, ch. 116, § 1.

[8] Specifically, "the community placement sentence determination is a determination about a defendant's status as recidivist, does not require the independent judgment of a fact finder about facts related to a defendant's commission of the current offense, and can be readily determined by a limited examination of the record flowing from the prior conviction." Jones, 159 Wn.2d at 247.

conviction' exception includes not only the fact of the conviction itself but also 'facts intimately related to the prior conviction.'" Brinkley, 192 Wn. App. at 464 (quoting Jones, 159 Wn.2d at 241).

It is true that the United States Supreme Court has also stated, while "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, [the petitioner] does not contest the decision's validity and *we need not revisit it* for the purposes of our decision today." Apprendi, 530 U.S. at 489-90 (emphasis added). In turn, our Supreme Court observed that while Apprendi "suggested that Almendarez-Torres might have been incorrectly decided" it "explicitly declined to reach the issue" and "confined its decision to factors *other than recidivism*." State v. Wheeler, 145 Wn.2d 116, 123, 34 P.3d 799 (2001) (emphasis added). Thus, Almendarez-Torres, while questioned, is still binding law.

In response, Brown-Lee cites Erlinger, 602 U.S. at 824, as overriding the above precedent. However, this court twice recently has held that Erlinger "is limited to resolving [the federal Armed Career Criminal Act (ACCA)]'s occasions inquiry and does not overrule our state's well-established precedent in Wheeler." State v. Anderson, 31 Wn. App. 2d 668, 552 P.3d 803 (2024); State v. Frieday, No. 58467-1-II, slip op. at 26 (Wash. Ct. App. Mar. 11, 2025), https://www.courts.wa.gov/opinions/pdf/D2%2058467-1-II%20Published%20Opinion.pdf ("We agree with Anderson that Erlinger should be limited to the ACCA and does not overrule existing Washington precedent."). In

other words, "[a]s noted in . . . Erlinger itself, Erlinger did 'no more' than impose a requirement that a jury resolve the ACCA's occasions inquiry." Frieday, slip op. at 26 (quoting Erlinger, 602 U.S. at 835).

In sum, neither Almendarez-Torres or our Supreme Court's related holdings in Jones and Wheeler have been overturned. Thus, we must follow this binding precedent upholding a trial court's ability to find the defendant was on community custody at the time of an offense without an attendant jury finding. As such, we hold the sentencing court here did not violate Brown-Lee's right to a jury trial.[9]

III. CONCLUSION

We affirm.

Díaz, J.

WE CONCUR:

Chung, J.

, ACJ

[9] While not dispositive in our decision here, a brief examination of the record supports the court's finding that Brown-Lee was on community custody at the time of his offense, and thus relieves any due process concerns, as in Apprendi, 530 U.S. at 488. On October 11, 2019, the court sentenced Brown-Lee for a separate robbery in the second degree conviction to 29 months of incarceration and 18 months of community custody. As Brown-Lee stipulated at trial, the DOC released him on September 1, 2021. A jury then convicted Brown-Lee for his actions on October 22, 2021, and further found a rapid recidivism aggravator. RCW 9.94A.729(3)(e) states that outside certain situations, "no other case shall the aggregate earned release time exceed one-third of the total sentence." Thus, even if Brown-Lee received the maximum earned release time, he would have been on community custody in October 2021.

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