No. 102131-3

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTOPHER OLSEN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF AMICI CURIAE WASHINGTON DEFENDER ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION, AND CIVIL SURVIVAL

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I. IDENTITY AND INTERESTS OF AMICI CURIAE

The identity and interests of Washington Defender Association, the American Civil Liberties Union of Washington, and Civil Survival are set forth in the Motion for Leave to File Brief of *Amici Curiae* filed concurrently with this brief.

II. INTRODUCTION

The reality of today's criminal legal system is one of a "system of pleas, not a system of trials." *Lafler v. Cooper*, 556 U.S. 156, 132 S. Ct. 1376, 1381, 182 L. Ed. 2d 398 (2012). 97 percent of all cases in large, urban state courts are resolved via plea rather than trial.[1] The overwhelming power of the state in plea negotiations drives this "system of pleas."[2] Prosecutors

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[1] Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining* (2020).

[2] *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 *Colum. L. Rev.* 1303, 1304 (2018); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. Crim. L. & Criminology 473, 480–81 (2016); Erik Luna et al., *Prosecutors as Judges*, 67 Wash. & Lee L. Rev. 1413, 1414–15

leverage a "fearsome array of tools"—including stringent sentencing regimes, collateral consequences, and trial penalties—to punish criminal defendants with "awesome consequences" if they choose to go to trial, rather than plead guilty.[3]

Facing multiple charges makes trial less appealing while increasing the potential consequences of a trial. Multiple charges make pretrial incarceration more likely, decrease the odds of prevailing at a trial in which the jury considers evidence of multiple alleged crimes, and massively increase the length of sentence if the accused is convicted. Simply put, facing more charges entails more risk. Furthermore, these risks are

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(2010); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1252 (2004).

[3] Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sent'g Rep. 284 (2019); *State v. Pettitt,* 93 Wn.2d 288, 294–95, 609 P.2d 1364 (1980) (quoting *United States v. Lovasco,* 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)).

heightened for Black, brown, and Indigenous people because of the racial disparities they face throughout the criminal legal system, and especially involving drug charges. Guilty pleas made pursuant to global resolutions must be considered within this context.

Christopher Olsen was subjected to these compound pressures when he accepted a global resolution[4] to resolve his two separate cases. His decision to accept the global resolution was the only rational choice when faced with the cumulative forces of the charges against him, each of which increased the punishment he would face on his most serious charges, if convicted. As with any defendant facing multiple charges, Mr.

[4] The resolution of several pending charges and cases is frequently referred to as a "global resolution" in the criminal legal system. *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020)(https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid).

Olsen faced coercive pressures in his cases that went beyond those in cases involving a single charge since even relatively minor charge—like drug possession—would seriously increase the possible punishment he faced on the more serious charges. His decision-making calculus when weighing a global resolution was necessarily heavily dependent on the charging discretion of the prosecutor, since each new charge, regardless of seriousness, might mean years of his life in prison.

Pleas to the possession charges invalidated by *State v. Blake* cannot be considered independently from the pleas to the other charges made pursuant to a global resolution. The drug statute found unconstitutional in *Blake* "affected thousands and thousands of lives,"[5] and one of its most powerful roles was as a lever to coerce indivisible plea agreements. The coercive pressures exerted by prosecutors to strike these plea bargains make each plea in this case inextricable from the others in the

[5] *State v. Blake*, 197 Wn.2d 170, 192, 481 P.3d 521 (2021).

plea agreement. People who were convicted under the statute found unconstitutional in *Blake* should be allowed to withdraw all guilty pleas made in global resolutions that involved the invalid statute.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case as stated in Petitioner's Supplemental Brief.

IV. ARGUMENT

A. Prosecutorial Charging Discretion, Mandatory Sentencing, and the Trial Penalty Allow the State to Coerce Plea Agreements Like the Indivisible Pleas in This Case

The ability to "control a defendant's sentencing exposure by manipulating the charges against him…is widely recognized by scholars as 'the core of prosecutorial power in the United States.'"[6] This is because the charges dictate so much of the proceeding that they are the impetus of the case from which all decision points for the accused flow. One of the primary tools

[6] Crespo, *supra* note 2, at 1310.

prosecutors use to leverage this power is bringing more than a single charge against a defendant. Even if the additional charges are not questionable, redundant, or superfluous, the prosecutorial decision to bring more than a single charge against the accused often severely increases pressure on the defendant to plead guilty. Sentencing exposure and pretrial incarceration are two avenues through which this pressure is exerted.

The adoption of mandatory minimums and other harsh sentencing laws shifted even more power to prosecutors by allowing them to threaten defendants with longer sentences.[7] The "inordinate pressures to enter into plea bargains" stemming from this sentencing exposure unfairly coerces guilty and innocent people alike.[8] Startingly, one survey found that over

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[7] Thea Johnson, *American Bar Assoc. Crim. Jus. Sect., Plea Bargain Task Force Report* 6 (2023).

[8] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; *see also* Vanessa A. Edkins et al.,

78 percent of the 189 criminal defense attorneys interviewed from across the country believe there are cases, given the current system, when innocent defendants should plead guilty.[9] In Washington, such pressure primarily stems from the Sentencing Reform Act (SRA), which sets stringent rules, with narrow exceptions, regarding the length of sentences in every felony case.[10] Under the SRA, prior criminal history and "other current offenses"—other charges for which the defendant is sentenced at the same time—result in assigning points to someone convicted of a crime. RCW 9.94A.525. Some offenses

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Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty., 24 Psych., Pub. Pol'y, & L. 204 (2018).

[9] *See* Rebecca K. Helm et al., *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 Psych., Crime & L. 915 (2018).

[10] Katherine Beckett, Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* 12, 74 (2020).

count as two or even three points. *Id.* Points are then cross referenced with the seriousness level of the offense to give a standard range, which is binding on the trial court, absent narrow exceptions. RCW 9.94A.510. In other words, every additional charge will add months or years to a defendant's sentencing exposure.

These stringent guidelines make prosecutorial charging decisions extremely consequential for sentencing exposure, allowing prosecutors to press defendants with even greater force to compel plea bargains.[11] Tough-on-crime sentencing enhancement legislation such as the Persistent Offender Accountability Act and drug-free zone statutes also worked to stack exorbitant pressure against defendants.[12] "Analysis of drug-free zone charges in Washington…from 1999-2005

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[11] *See id.* (citing David Boerner at al. *Sentencing Reform in the Other Washington*, 28 Crime and Just. 71-136 (2001)).

[12] *See id.* at 16, 74.

suggested that these charges were primarily being used to encourage guilty pleas[,] or, as one lawyer put it, "as a 'trial penalty' which helps to persuade defendants that they should plead guilty rather than risk facing an enhanced prison term."[13]

The effects of the prosecutor's ability to increase the defendant's potential sentence by simply adding more charges is stark. The average length of prison sentences increased by 12 percent from 2007 to 2017.[14] From 2011 to 2017, Washington had the fourth largest increase in prison population among states in the United States.[15] Between 1989 and 2008, the average offender score rose from 1.4 to 2.9, and scholars attributed this increase not to trends in crime, but "to legislated

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[13] Kelly Harris et al., *2021 Gender Justice Study* 702-3 (2021) (citing Judith Greene et al., *Disparity By Design: How Drug Free Zone Laws Impact Racial Disparity and Fail To Protect Youth* 39 (2006)).

[14] *See id.* at 4.

[15] *See id.* at 2 (citing Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?* 3 (2018)).

changes in the way score are calculated."[16] The average sentence length for drug felony convictions—which include convictions under the statute invalidated by *Blake*—grew by 125 percent from 1986 to 2016.[17] As these sentencing reforms fueled Washington's War on Drugs and consequent mass incarceration, the percentage of drug prosecutions in Washington grew 32 percent during this time period.[18]

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[16] Kate Stith, *Principles, Pragmatism, And Politics: The Evolution Of Washington State's Sentencing Guidelines*, 76 L. & Contemp. Probs. 105, 128 (2013) (citing State of Wash. Sentencing Guidelines Comm'n, *20 Years in Sentencing: A Look At Wash. State Adult Felony Sentencing Fiscal Years 1989 To 2008* 22-29 (2010); *see also* Beckett, *supra* note 10, at 6 ("Washington's crime rates have fallen steadily for decades."); Beckett, *supra* note 10, at 38 ("These increases in average offender score do not appear to stem from changes in criminal propensities either….The fact that these measures of crime severity did not increase suggest that rising offender scores resulted mainly from the many statutory changes to rules that govern the calculation of offender scores...").

[17] *See* Beckett, *supra* note 10, at 102.

[18] *See id.* at 89-90.

Escalating the sentencing regime also dramatically reduced the number of cases that went to trial.[19]

The decrease in criminal trials—and parallel increase in cases adjudicated by plea agreement—is also attributable to "the large differential between the pretrial plea offer and the sentence a defendant faces or receives after a trial[,]" also known as the "trial penalty."[20] While the trial penalty is a widespread issue throughout the country,[21] its coercive force has been wielded by prosecutors to great consequence in our state. In 1986, the average trial penalty in Washington was 46

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[19] *See id.* at 40.
[20] Johnson, *supra* note 7, at 17.

[21] *See* Mona Pauline Lynch, *Hard Bargains: The Coercive Power of Drug Laws in Federal Court* (2016); Richard A. Oppel, *Tough Sentences Help Prosecutors Push for Plea Bargains*, N.Y. Times (Sep. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html; Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. Times (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html.

months, which meant that people who were convicted at trial received sentences that were 46 months longer than those who pled guilty.[22] By 2016, the trial penalty was 65 months, after peaking at 113 months in 2007.[23] With such a daunting after-trial increase in sentencing exposure, it is perhaps no wonder that so many defendants find it irrational to exercise their constitutional right to a trial. The trial penalty's coercive effect is felt even stronger by defendants who face multiple charges, as the mere fact of facing more than one charge increases the length of sentence exposure though the threat of consecutive sentencing, moving up into a more severe sentencing range, or triggering a sentencing enhancement.

Bringing more than a single charge against a defendant also affects other stages of the criminal proceeding, which, in turn, heavily influences a person's decision-making when

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[22] *See* Beckett, *supra* note 10, at 40.

[23] *See id.*

weighing a plea agreement. For example, judges may take into account the presence of multiple charges when making bail decisions, making it more likely that the judge will set a bail the defendant cannot pay.[24] As this Court has noted, "[a]n individual detained pretrial is more likely to be convicted and more likely to plead guilty in light of the pressures of incarceration." *State v. Heng*, 2 Wn.3d 384, 396, 539 P.3d 13 (2023). Thus, facing multiple charges instead of a single charge increases a defendant's likelihood of pretrial incarceration, thus increasing the likelihood they will succumb to that coercive pressure to plead guilty.[25]

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[24] *See* Criminal Rule 3.2(c) (outlining facts the court shall consider in determining conditions of release, including "criminal record" and "the nature of the charge, if relevant to the risk of nonappearance").

[25] Subramanian, *supra* note 1, at 11 ("In a 2018 study looking at nearly 76,000 arrests in Delaware, researchers similarly uncovered that pretrial detention increased a person's likelihood of pleading guilty by 46 percent…").

The simple drug possession law invalidated by this Court in *State v. Blake* was a useful tool to coerce defendants to plead guilty to a global resolution. Mr. Olsen's 2005 case is an illustrative example—but for the drug possession charge, his offender score would have been much lower, and his sentence exposure would have been years shorter. *See* Pet'r's. Supp. Br. 23. Without the drug possession charge, he could have gone to trial on the gun charge without fear that the additional charge would increase his offender score and ultimately his standard range. The fact that Mr. Olsen faced a drug possession charge in addition to a firearms charge is thus inseparable from his decision to plead guilty to both charges as part of the global resolution.

In this context it is easy to see how defendants are driven to accept global resolutions, rather than risk the potential of additional years in prison at trial. While this type of coercion is typically allowed in situations where each statute is valid, if one of the charges is determined to be invalid, it calls into question

the entire structure of the plea deal. Each plea made pursuant to a global resolution requires that the defendant consider the charges as a whole, not separately.

B. The Racial Disparity in the Policing and Prosecution of Drug Charges Must Be Considered

The coercive forces discussed above fall most harshly on Black, brown, and Indigenous people (BIPOC), especially when it comes to the drug statute invalidated by *Blake*.[26] This historical racism must be considered when assessing the impact of *Blake* and whether it is in the interest of justice for defendants to withdraw pleas made based on pressures exerted through an unconstitutional statute that was enforced disproportionately. *See, e.g.*, *State v. Gregory*, 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018) (striking down the death penalty because it was administered in an arbitrary and racially biased manner); *State v. Berhe*, 193 Wn.2d 647, 665, 657, 444 P.3d

[26] *See Blake*, 197 Wn.2d at 192 ("The drug statute that they interpreted has affected thousands upon thousands of lives, and its impact has hit young men of color especially hard.").

1172 (2019) (using GR 37 framework to determine whether the Court should find that racial bias played an impermissible role in jury deliberations); *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 156, 471 P.3d 853 (2020); *State v. Sum*, 199 Wn.2d 627, 641, 511 P.3d 92 (2022).

BIPOC experience worse treatment at all stages of the criminal legal process, from arrest through sentencing. "[I]dividuals from marginalized communities may experience systematic and cumulative layers of disadvantage…For example, racial disparities in arrests negatively influence pretrial bail decisions, which influence plea deals, affect charging decisions, and create a higher likelihood of incarceration and longer sentences for both men and women of color."[27] For example, between 1960 and 2012 white people were more likely to be spared criminal charges because of prosecutorial charging discretion, while Black and Latinx

[27] Harris, *supra* note 13, at 681.

people had higher odds of being charged.[28] At bail hearings, "[B]lack people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges." *Heng*, 539 2 Wn.3d at 396.

Disparities in arrest rates are especially egregious for drug offenses like those invalidated in *Blake.* A 2006 study of drug arrests in Seattle found that over 64 percent of people arrested for drug offenses were Black, despite the majority of people who sold drugs being white.[29] The researchers of this study could not find a race neutral explanation for the disparity,

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[28] Harris, *supra* note 13*,* at 695-96.; *see also* Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 Criminology 175, 183 (1987) (finding evidence that Black and Latinx people are less likely to have felony charges against them dropped compared to white people).

[29] Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 Criminology 1, 105 (2006).

and concluded that it was due to the Seattle Police Department's racial bias as to "who and what constitutes Seattle's drug problem."[30] As of 2015, Black and Latinx people comprised 57 percent of all people incarcerated in state prisons for drug offenses, despite being approximately 30 percent of the U.S. population and using drugs at similar rates to white people.[31]

These disparities continue through plea negotiations and sentencing, especially in the context of drug offenses, like the statute invalidated in *Blake*. In Washington, prosecutors

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[30] *Id*.

[31] Drug Policy Alliance, *The Drug War, Mass Incarceration and Race* (2015); *see also* Ricky Camplain et al., *Racial/Ethnic Differences in Drug and Alcohol Related Arrest Outcomes in a Southwest County From 2009 to 2018*, 110 Am. J. Pub. Health (2020) ("Black persons were more likely than [w]hite persons to be booked into jail as opposed to cited and released…Black persons also were more likely than [w]hite persons to be convicted and serve time…Our results suggest that race…is associated with outcomes in drug-related arrests and that overrepresentation…cannot be attributed to greater use of drugs and alcohol").

recommend longer sentences of confinement for Black defendants and are 75 percent less likely to recommend alternatives sentences for Black defendants.[32] Specifically regarding drug cases, one study found that Black people are more than five times more likely to go to prison for drug possession than white people, and Black people are twelve times more likely to be wrongly convicted of drug offenses.[33] Another study found that Black people charged with drug felonies in Washington were 62 percent more likely to be sentenced to prison than white defendants.[34] Prosecutors were

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[32] *See* Robert D. Crutchfield et al., *A Study on Racial and Ethnic Disparities in the Prosecution of Criminal Cases in King County Washington: Final Report* (1995).

[33] *See* Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, Nat'l Reg. of Exonerations 1, 16 (2017).

[34] Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 Criminology 435-68 (2005).

twice as likely to pursue a mandatory minimum sentence for Black people as white people charged with the same offense.[35]

The available data on convictions under the statute addressed in *Blake* is consistent with these findings. Out of 126,175 drug possession cases between 1999 and 2019, Black people were convicted at disproportionately high rates.[36] For example, in King County, over 40 percent of drug possession convictions were of Black people despite King County being only 7 percent Black.[37]

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[35] Sonja B. Starr et al., *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L. J. 2 (2013).

[36] Rich Smith, *New Data Analysis Shows the Astonishing Breadth of the Racial Disparity in Washington's Drug Possession Convictions*, The Stranger (Mar. 17, 2021), https://www.thestranger.com/slog/2021/03/17/55910514/new-data-analysis-exposes-wide-racial-disparities-in-drug-possession-convictions-across-washington.

[37] *See id.*

C. Non-*Blake* Convictions Stemming from Indivisible Pleas Result in Collateral Consequences that Reinforce Racial Disparities and Burden Individuals for Years.

As outlined above, people of color suffered disproportionately under Washington's void possession statute that criminalized innocent nonconduct.[38] For example, previous research shows that Black residents of Washington State are incarcerated at 6.4 times the rate of White residents.[39] "[A]mong felony drug offenders, the odds that a Black defendant will be sentenced to prison are 62% greater than the odds for similarly situated White defendants."[40]

In addition to the immediate impact of incarceration, criminal-justice involvement has long-term impacts on every aspect of an individual's life. These collateral

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[38] *Blake*, 197 Wn.2d at 192.

[39] Task Force On Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623 (2012).

[40] *Id.* at 648.

consequences are compounded by race, disability status, sex, and other vulnerabilities. The criminal legal system has been likened to a tar pit: An individual falls in and then spends the rest of their life crawling back out and trying to remove the tar stains from their body. Each person with a criminal conviction faces barriers accessing services, obtaining employment, accessing education, obtaining stable housing, and even accessing healthcare.

Collateral consequences begin with the moment of conviction when the guilty plea is etched onto an individual's permanent record. Criminal history records in Washington State are maintained by both the Washington State Courts and the Washington State Patrol, each utilizing their own system. Unlike other states across the country, Washington State does not have a legal mechanism allowing for the complete erasure of a conviction from a person's criminal history. While certain convictions may be vacated, either pursuant to *State v. Blake* as is the case here, or

pursuant to statute, this does not remove the record of the conviction entirely.[41] Because these records remain open and accessible to the public, consumer reporting agencies are free to discover and utilize these conviction records.[42] While individuals technically have legal recourse to correct background checks that might erroneously include records of vacated convictions[43], the impetus is on the impacted

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[41] Pursuant to RCW 9.94A.640(4)(a), once a conviction is vacated "the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history…, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime." While the basis for vacatur under *Blake* at issue in the present case differs from that of statutory vacates under RCW 9.94A.640, the end result in terms of an individual's criminal history is the same. In both cases, while the Washington State Patrol may no longer include the vacation in its own criminal history records, the record remains visible on the Washington Courts database with the only change being a notation that the conviction has been vacated.

[42] American Civil Liberties Union of Washington, *Guide to Criminal Records and Employment in Washington State* (2013).

[43] *Id*.

individual to discover and pursue these avenues, which only repeats the same access to justice issues that people such as Mr. Olsen have experienced in other arenas.

Unsurprisingly, housing insecurity is especially prevalent among individuals with criminal justice involvement. "Persons with a criminal record often face barriers to housing. These barriers affect a range of housing types, including rental housing, student campus housing, federal and public housing under Department of Housing and Urban Development (HUD) programs, temporary housing at motels and hotels, and some congregate sheltered housing."[44] There are an estimated "5 million formerly incarcerated people living in the United States" without a

[44] Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People With Criminal Convictions*, Center for American Progress (2021), https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/.

home.[45] Formerly incarcerated individuals are "almost 10 times more likely to be homeless than the general public."[46] Moreover, "being homeless makes formerly incarcerated people more likely to be arrested and incarcerated again."[47]

In addition to housing insecurity, unemployment rate for formerly incarcerated people is much higher than the unemployment rate for the general population. Research shows that "the overall unemployment rate for formerly incarcerated people stands at a staggering 27 [percent] — higher than peak unemployment during the Great Depression . . . unemployment among those without a high

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[45] Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, Prison Policy Institute (2018), https://www.prisonpolicy.org/reports/housing.html.

[46] *See id.* (People who have been to prison once are 7 times higher than the general public to be homeless and people incarcerated more than once have rates 13 times higher than the general public).

[47] Couloute, *supra* note 45.

school credential is much worse, ranging from 25 [percent] among White men to 60 [percent] among Black women" and "formerly incarcerated people are nearly twice as likely to have no high school credential at all."[48] Additionally, "formerly incarcerated people are 8 times less likely to complete college than the general public."[49] "After submitting a job application, people with records on average are only half as likely to get a callback as those without a record."[50] Race compounds these dismal figures with

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[48] Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, Prison Policy Initiative (2018), https://www.prisonpolicy.org/reports/education.html.

[49] *Id.*

[50] Michelle Natividad Rodriguez and Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses For People With Records*, National Employment Law Project (April 26, 2016), https://www.nelp.org/insights-research/unlicensed-untapped-removing-barriers-state-occupational-licenses/.

justice-involved black men only receiving a callback one in three times.[51]

Currently "no national data exists as to the number of people denied [occupational] licenses because of the collateral consequences"; however, there are a number of ways that criminal justice involvement restrict access to occupational licenses.[52] In 2018, Washington joined ___ other states and "banned the box." Chapter 49.94 RCW. RCW 49.94 did not change any of the occupational licensing restrictions. Blanket bans and overly broad criminal record inquiries are still allowed for occupational licensing.[53]

Further exacerbating the problems outlined above, the imposition of LFOs disproportionally saddles people of

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[51] *Id.*

[52] *Id*.

[53] *Id*.

color with debt, leads to possible reincarceration, and destroys credit ratings, thus further "constrain[ing] opportunities and limit[ing] access to housing, education, and economic markets."[54] Recent Federal Reserve findings estimate that the median wealth of white families is approximately $190,000. Comparatively, Black families average around $24,000 and Latinx families about $36,100. At the same time, Black adults are 5.9 times as likely and Latinx adults are 3.1 times as likely to be incarcerated than white adults.[55] In conjunction, these statistics illuminate the potential for LFO debt to deepen these racial disparities. Furthermore, individuals such as Mr. Olsen whose convictions include both *Blake* and non-*Blake* charges, are not only ineligible for the refund on amounts paid towards

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[54] *Preliminary Report on Race and Washington's Criminal Justice System*, *supra* note 39.

[55] Brittany Friedman et al., *What is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, 8 (1) RSF: The Russell Sage Found. J. of the Soc. Sci., 228 (2022).

their LFOs but are also ineligible for waiver of any remaining LFOs under *Blake*. Thus, not only might these individuals be unable to ever get out from under their debt, but they would also be unable to vacate their other non-*Blake* convictions.

Finally, not only did the War on Drugs, which included Washington's void possession statute, affect the formerly incarcerated, but it also had consequences for their families. There are 79 million people in the United States with a criminal record, which in turn, amounts to 113 million people in the United States who have an immediate family member who was ever been to jail or prison.[56] This has a devastating impact on families, especially children, because 83 percent of those incarcerated "provided at least

[56] Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, Prison Policy Initiative (March 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html. (*see* chart, *Mass Incarceration Directly Impacts Millions Of People But Just How Many, And In What Ways?*).

half of their household's financial support. Additionally, criminal-justice involved individuals are ineligible for welfare benefits like Temporary Assistance to Needy Families (TANF).[57] Thus, the collateral consequences of conviction reverberate through generation after generation.

[57] Patricia McKernan, *Homelessness and Prisoner Reentry: Examining Barriers to Housing Stability and Evidence-Based Strategies That Promote Improved Outcomes*, 27 J. of Community Just. 1, 7 (2017).

V. CONCLUSION

Under the criminal rules, a defendant must be allowed to withdraw their guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). There is "manifest injustice" in keeping a defendant beholden to a global resolution that was struck on the basis of a charge that was found to be unconstitutional. Such injustice is patently "obvious, directly observable, [and] overt" in its prejudice, and defendants like Mr. Olsen should be allowed to withdraw all pleas that were entered subject to global resolutions that involved unconstitutional *Blake* charges. *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2023) (citing *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

The undersigned hereby certifies that this brief contains 4,763 words.

RESPECTFULLY SUBMITTED this 13th day of May, 2024.

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