No. 84015-1

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION 1

THE CIVIL SURVIVAL PROJECT, ET AL,

Appellants, v.

THE STATE OF WASHINGTON, ET AL.,

Respondents.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF REVERSAL

Robert S. Chang, WSBA #44083
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
901 12th Avenue
Seattle, Washington 98122
Telephone: (206) 398-4025

Joshua Matz, NY 5388962; DC 1045064
KAPLAN HECKER & FINK LLP
1050 K Street NW, Suite 1040
Washington, D.C. 20001
Telephone: (212) 763-0883

Additional counsel listed on next page

Amit Vora, NY 4894713; DC 1021685
Alysha M. Naik, NY 5544697
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, 63rd Floor
New York, New York 10118
Telephone: (212) 763-0883

Counsel for Amicus Curiae
Fred T. Korematsu Center for Law and Equality

La Rond Baker, WSBA No. 43610
John Midgley, WSBA No. 6511
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
Telephone: (206) 624-2184

Counsel for Amicus Curiae
American Civil Liberties Union of Washington

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IDENTITY AND INTEREST OF AMICI CURAE

The identity and interest of amici are set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

Following *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521 (2021), the State has retained legal financial obligations (LFOs) to which it has no legitimate legal entitlement. The question here is whether every single *Blake*-affected person must file an individual case seeking redress, or whether their claims may be heard in an aggregate proceeding. The Superior Court held that there can be no civil remedy. This holding was mistaken. The doctrine of restitution provides a cause of action through which *Blake*-affected individuals may seek a remedy for LFOs the State improperly retained despite their void criminal convictions. That conclusion is strengthened by the presumption of innocence, which affirms that *Blake*-affected individuals stand in the same shoes as any other free person. Holding to the contrary would not

only be inconsistent with precedent, but would also exacerbate barriers to access to the courts for those affected by *Blake*, thus perpetuating racial disparities at odds with a commitment to equality for all persons under the law. [1]

ARGUMENT

I. *Blake*-affected individuals are entitled to obtain LFO refunds through a civil case

A. The Right to Restitution

Following *Blake*, the State remains in possession of funds to which it has no legal right, and to which the individuals from whom the funds were taken have a clear legal right of return. This circumstance is not unknown to the law. Rather, it is a textbook case for application of the doctrine of restitution, which exists

[1] While Amici do not believe that a civil remedy is the exclusive pathway for *Blake*-affected individuals to seek relief, and that other pathways exist, including hybrid models as discussed by Appellants in their Opening Brief at 63 – 68, and as discussed by the Washington Defender Association in its amicus brief, the primary issue before this Court is whether the lower court erred in dismissing at this stage in the proceedings the pathway chosen by Appellants, a civil cause of action.

precisely to avoid such unjust enrichment. *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011) ("A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution as necessary to avoid unjust enrichment."). Because restitution is a civil remedy—and because it fits this fact pattern like a glove—the Superior Court erred in holding that *Blake*-affected persons could not seek relief in this aggregate civil proceeding.

The law of restitution has deep moorings in the Anglo-American legal tradition. As Blackstone wrote: "when judgment, pronounced upon conviction, is falsified or reversed, … the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseior." 4 William Blackstone, *Commentaries* 391. This view was widely shared among English

thinkers of the nineteenth century. *See* 2 Hawkins, *A Treatise of Pleas of the Crown* 655 (John Curwood, ed., 8th ed. 1824) ("[I]f the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a Scire facias against the patentee."); Joseph Chitty, *A Practical Treatise on the Criminal Law* 756 (1816).

From the earliest days of the United States, our courts have embraced the equitable principle of restitution, and have applied it in civil and criminal domains. The United States Supreme Court thus noted in 1832: "On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost." *Bank of the United States v. Bank of Wash.*, 31 U.S. 8, 15, 8 L. Ed. 299 (1832); *see also United States v. Morgan*, 307 U.S. 183, 197, 59 S. Ct. 795, 83 L. Ed. 1211 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its

judgment has been set aside and justice requires restitution.").

This principle has long applied when the government itself has been unjustly enriched. In 1920, the U.S. Supreme Court held that "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Ward v. Bd. of Cty. Comm'rs*, 253 U.S. 17, 24, 40 S. Ct. 419, 64 L. Ed. 751 (1920) (quoting *Marsh v. Fulton Cty.*, 77 U.S. 676, 684, 19 L. Ed. 1040, (1870)); *see also, e.g.*, *Musial Offs., Ltd. v. Cnty. of Cuyahoga*, 163 N.E.3d 84, 93 (Ohio Ct. App. 2020) (recognizing that governmental entities can be held liable for unjust enrichment); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1113 (D.C. Cir. 1988); *N. Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281 (D. Mont. 1991) ("Considerations of equity and fairness therefore unequivocally require that this Court order the government to refund [plaintiffs'] bonus and rental payments.").

The right to bring a claim for restitution of an invalid

monetary exaction is well settled in Washington State: "[u]njust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, 484–85, 191 P.3d 1258 (2008). To sustain a claim for unjust enrichment, a plaintiff must satisfy three familiar legal elements: "a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Id.* (cleaned up).

Here, each of the *Blake*-affected individuals could readily satisfy the elements of unjust enrichment under Washington law. *First*, they conferred a benefit on the State when they were forced to incur LFOs. *Second*, the State appreciated and understood the nature of that benefit. *Finally*, and most importantly, as to every single *Blake*-affected individual, it would be inequitable for the

State to retain the LFO where the criminal conviction that forced the individual to incur the LFO occurred pursuant to a statute that has since been declared unconstitutional and void. *See Blake*, 197 Wn.2d at 195 (holding that a conviction under the strict liability drug possession statute "violates the due process clauses of the state and federal constitution and is void").

Because restitution affords a civil cause of action, and because a restitutionary remedy is warranted on these facts as to each *Blake*-affected individual, the Superior Court erred in its conclusion that the only available remedy is for affected persons to file individual motions under Criminal Rule 7.8.

B. The Presumption of Innocence

The conclusion that a restitutionary remedy is appropriate here is only confirmed by precedent addressing the presumption of innocence. In the American legal tradition, that presumption is "the undoubted law, axiomatic and elementary." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895); *see also* James Bradley Thayer, *The Presumption of*

Innocence in Criminal Cases, 6 Yale L.J. 185, 185–87 (1897). As the General Court of Massachusetts put the principle in 1657: "in the eye of the law every [person] is honest and innocent, unless it be proved legally to the contrary." *Id.* (quoting Records of Massachusetts, III., 434-35).

The presumption of innocence is no legal formality; it is also a moral maxim with deep and abiding power in American law. "The duty to treat a person as innocent, as long as her guilt has not been determined by a court of competent jurisdiction, constitutes an essential element for the retention of her dignity and reflects the perception of the individual as an end in and of herself." Rinat Kitai, *Presuming Innocence*, 55 Okla. L. Rev. 257, 284 (2002). Indeed, the presumption of innocence "ensures that an individual's personal liberty will be disrupted only if the government has demonstrated its case beyond a certain threshold." Hon. J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 Va. L. Rev. 589, 603 (2018).

That is the law in Washington State, too: the Washington

Supreme Court has long emphasized that the "presumption of innocence remains with [the individual] until [] guilt is established beyond a reasonable doubt," *State v. Freidrich*, 4 Wash. 204, 228, 31 P. 332 (1892), lest society "endanger[] the liberty of the subject," *State v. Gifford*, 19 Wash. 464, 468, 53 P. 709 (1898).

The Superior Court's decision is squarely at odds with this presumption of innocence. *Blake* held that convictions were "void," rather than merely voidable. 197 Wn.2d. at 195. And it is settled that once a "conviction has been reversed, unless and until [an individual] should be retried," that person "must be presumed innocent of that charge." *Johnson v. Mississippi*, 486 U.S. 578, 585, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). Put differently, "an invalid conviction is no conviction at all," and "once those convictions [are] erased, the presumption of [individual] innocence [is] restored." *Nelson v. Colorado*, 137 S. Ct. 1249, 1256 & n.10, 197 L. Ed. 2d 611 (2017) (cleaned up).

In the aftermath of *Blake*, all convictions under the strict

liability drug possession statute were rendered unconstitutional and void. By definition, a "void" conviction lacks legal effect. So every *Blake*-affected individual is restored to the presumption of innocence—and thus to a presumption that they stand in the same position as any other Washington citizen whom a court of competent jurisdiction has never adjudicated guilty. Treating them as anything less would constitute an affront to their dignity. Consequently, as innocent and free citizens, they must share in the same rights as all other free and innocent Washingtonians, including the right to seek restitution for wrongs through the civil justice system (including in class action proceedings). *See, e.g.*, *Ingebrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 433, 436, 139 P. 188 (1914) (holding that "one, who in good faith believes that he has been wronged" may "threaten the wrongdoer with a civil suit"). In this respect, the Superior Court's order—which prevents *Blake*-affected individuals from seeking civil relief, and which requires burdensome and individualized procedures through the criminal system—is at odds with precepts of

individual liberty.

This conclusion is supported by the decision of the United States Supreme Court in *Nelson v. Colorado*, 137 S. Ct. at 1256. *Nelson* held that the United States Constitution forbade Colorado from requiring persons whose convictions were reversed to employ a burdensome, state-mandated process to obtain refunds of conviction-related financial assessments. *See id.* at 1255-56. As *Nelson* highlighted, "once [their] convictions were erased, the presumption of their innocence was restored." *Id.* at 1255. As a result, they "should not be saddled with any proof burden" to "get their money back." *Id.* at 1256 (emphasis added). After all, Colorado had "zero claim of right" to those funds. *Id.* at 1257.

So too here. *Blake* rendered void all convictions under the strict liability drug possession statute. On that premise, there is no sound basis to deny *Blake*-affected individuals a civil remedy designed to ensure the State is not unjustly enriched (including in circumstances where it improperly retains benefits from a void conviction). Those who were convicted have the right to take

steps to obtain the relief to which they are entitled without unnecessary barriers to efficient relief.

II. Denying *Blake*-affected individuals the ability to obtain aggregate relief as in this case risks perpetuating substantial injustice

The Counties assume that the individual use of CrR 7.8 as a remedy for *Blake* convictions and *Blake*-related convictions is "quite simple." *See* Counties' Answer at 25–26. The Counties are wrong. Designing, filing, and litigating a case requires skills and resources that aren't readily available to many individuals who are affected by *Blake*. Requiring every single *Blake*-affected individual to file their own individual action to obtain redress from an unconstitutional conviction is an invitation to disparate access and outcomes that dishonor Washington's justice system.

For starters, individuals still in prison for other reasons will face steep barriers to accessing the courts. The ability to build a case, strategize in accordance with a case theory, avoid pleading and discovery pitfalls, engage in motion practice, and

make a compelling argument are skills that are particular to lawyers. *See* Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 Fordham L. Rev. 1219, 1225-25 (2011). A growing body of evidence demonstrates that prisoners have a high incidence of literacy, language deficits, and mental health issues, which hamper their abilities to marshal evidence and advocate on their own behalf. *Id*. Coupled with their lack of access to libraries, the internet, legal materials, and telephones, prisoners have a particularly difficult time navigating the complex legal system. *Id*. at 1227. For example, many lose their cases on procedural grounds even before a decision on the merits and fail to adequately plead a cause of action. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U.L.J. 417, 421 (1993).

The high cost of accessing lawyers creates barriers, too. And as many studies have proven, these costs have the greatest impact on single mothers, Black women, indigenous women, women of color, LGBTQ+ people, and people with disabilities.

In Washington, for example, 76% of low-income individuals with legal problems do not get adequate legal support. *See* Washington Supreme Court Gender and Justice Commission, *2021: How Gender and Race Affect Justice Now*, at 4, 14.[2]

Legal language is also complex, which creates barriers for many individuals to understand and exercise their legal rights. *Id*. at 65. Court websites are not always accessible, let alone navigable, and different courts have different local rules to follow. Studies show that not only do self-represented litigants lack legal training, but they are also often confused, frightened, and lacking the confidence to navigate what is a complicated system. *See* Nino C. Monea, *The Administrative Power: How State Courts Can Expand Access to Justice*, 53 Gonz. L. Rev. 207, 238 (2018). Pro se litigants describe their experiences with the legal system as humiliating and oppressive. *Id*. They are often

[2] https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf.

bogged down by interactions with court staff and feelings that the legal system is structurally stacked against them. *Id*.

Further, the increasing use of technology in courts creates barriers for people of limited means who have less access to such technology. For example, courts increasingly use e-filing. *See* Hon. Tori R.A. Kricken, *The Justice Gap: The Impact of Self-Representation on the Legal System and Judicial System (and Beyond)*, 41-OCT Wyo. Law. 16, 21 (2018). Indigent people have fewer resources, including access to technology, and lack the experience to use such technological resources. *Id*.

In *Blake* itself, the Washington Supreme Court recognized that the drug statute at issue "affected thousands upon thousands of lives, and its impact has hit young men of color especially hard." 197 Wn.2d at 192 (citing Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 651-56 (2012)). A recent study by the Washington State Supreme Court Minority and Justice Commission also

showed that Latinx, Blacks, and Native Americans are sentenced to LFOs more frequently and at higher rates than Whites. Cynthia Delostrinos, Michelle Bellmer & Joel McAllister, *The Price of Justice: Legal Financial Obligations in Washington State*, at 10 (2022)[3]; *see also* Research Working Grp. of Task Force 2.0, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court* at 2.[4] And LFOs perpetuate poverty and future involvement with the criminal justice system disproportionately for Black people, indigenous people, and people of color. Research Working Grp. of Task Force 2.0, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court* at 2, 22. Thus, minority and indigent defendants are more likely to be negatively affected by the lack of a systemic remedy to address their *Blake* convictions.

[3] https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_\Justice_Report_Final.pdf.
[4] https://digitalcommons.law.seattleu.edu/korematsu_center/116/.

LFOs also impede defendants' abilities to reenter society. For example, Washington's excessive interest rate for LFOs creates insurmountable debt for people who are already impoverished, which prolongs their involvement with the criminal justice system and imposes severe barriers to reentry into their communities. *Id*. at H-13. Studies show that carrying court-imposed debt negatively affects people's abilities to access housing, employment, and education, and furthers their involvement with the legal system. *Id*. at 22. Black people, indigenous people, and people of color are overrepresented in Washington State prisons, and disproportionally face obstacles to successfully re-establish themselves in society. *Id*. at H-12.

Only a uniform statewide solution that does not require individuals to file separate actions will provide relief to everyone who is entitled to it. Without one, many people entitled to relief will never know that they are. Those who know will unlikely be able to navigate the court system. Mandating individualized Criminal Rule 7.8 motions will lead to the certainty that many

people in Washington will never receive what *Blake* promised—and that the inequalities identified in *Blake* are perpetuated.

CONCLUSION

This Court should reverse the Superior Court's Order and allow Appellants' case to proceed.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 2956 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 5,000 words for amicus briefs as required by RAP 18.17(c)(6).

DATED this 7th of July 2022.

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
By: /s/ Robert S. Chang
Robert S. Chang, WSBA #44083

901 12th Avenue
Seattle, Washington 98122
Telephone: (206) 398-4025

KAPLAN HECKER & FINK LLP
Joshua Matz, NY 5388962; DC 1045064
1050 K Street NW, Suite 1040
Washington, D.C. 20001
Telephone: (212) 763-0883

Amit Vora, NY 4894713; DC 1021685
Alysha M. Naik, NY 5544697
350 Fifth Avenue, 63rd Floor
New York, New York 10118
Telephone: (212) 763-0883

Counsel for Amicus Curiae
Fred T. Korematsu Center for Law and Equality

La Rond Baker, WSBA No. 43610
John Midgley, WSBA No. 6511
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
Telephone: (206) 624-2184

Counsel for Amicus Curiae
American Civil Liberties Union of Washington

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on July 7, 2022, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Mercer Island, Washington, this 7th day of July, 2022.

By: /s/ Robert Chang
Counsel for Amicus Curiae
Fred T. Korematsu Center for
Law and Equality

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

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- timl@harriganleyh.com
- tkranz@snoco.org

Comments:

Sender Name: Melissa Lee - Email: leeme@seattleu.edu

Filing on Behalf of: Robert S Chang - Email: changro@seattleu.edu (Alternate Email:)

Address:
901 12TH AVE
KOREMATSU CENTER FOR LAW & EQUALITY
SEATTLE, WA, 98122-4411
Phone: 206-398-4394

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