Investigating and Preparing for a Blake Resentencing Hearing – OUTLINE

- Communication with client
  - JPay messages
    - Not confidential
    - Costs minimum $0.17/message
    - Best to use to give quick, non-confidential updates and to set time for phone call
    - Quick turnaround time, but sometimes can be delayed by the mail room that reviews messages
  - Letters
    - Mark envelope as "LEGAL MAIL"
    - Use law firm stationary
    - Anecdotally, the more frequently the attorney uses the mail system, the less often the mail gets delayed by the mail room for review
      - Mail room will sometimes contact attorney's office to verify mail came from the attorney
  - Phone
    - Need to contact DOC to get phone number added to the do-not-record list; free call for inmates
      - Main DOC contact:
        - (360) 725-8213
        - DOCCorrespondenceUnit@doc.wa.gov
    - Usually have to use the phone number that is on the WSBA web site for purposes of verification
      - Issue with phone numbers with voice prompts that require numerical selection because person called has to accept the call first
    - Inmates cannot leave voice mail; no ability to call back
    - Best to set up time to call via JPay
  - In-person visitation
    - Professional visits largely closed due to COVID restrictions
      - Recently opened up
    - Contact the facility to arrange visitation
      - Need to make arrangements to meet in a private room
        - Personal visits take place in an open area
- Considerations before proceeding with resentencing
  - Risk-benefit analysis of the following:
    - Withdrawal of plea
      - Best practice to review discovery
        - Are witnesses still available?
        - Legal issues that were not litigated previously?
      - Advise about State refiling dismissed charges/enhancements/aggravators
    - Resentencing with additional points
      - Advise about potentially higher offender score
    - Resentencing with same range
      - Open question: time barred because range is the same (e.g. not facially invalid) and can't show prejudice?
        - State's argument:

        - when a judgment and sentence recites an incorrect offender score or offense seriousness level, the judgment and sentence is not invalid on its face where the trial court still sentences the defendant to an appropriate sentence within what would have been the correct sentencing range. *Toledo-Sotelo*, 176 Wn.2d at 761, 768; See *State v. Chambers*, 176 Wn.2d 573, 588-89, 293 P.3d 1185 (2013). As our Supreme Court has recognized, what is important, for the purposes of determining facial validity, is that "the trial court reached the result required by the SRA, even if it made an error in the process leading up to that result." Toledo-Sotelo. 176 Wn.2d at 768 (emphasis in original).
    - Time bar exception argument: *Blake* is material change in law that materially affects defendant
        - Under the statutory exemption for "significant change[s] in the law," RCW 10.73.100(6), a significant change in the law occurs if an intervening appellate opinion effectively overturns a prior appellate decision that was originally determinative of a material issue. *In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 619, 80 P.3d 504 (2016); In re Pers. Restraint of Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). The change must affect a materially determinative issue in the petition. In re Pers. Restraint of Turay, 153 Wn.2d 44, 83, 101 P.3d 854 (2004); Greening, 141 Wn.2d at 697.
        - In determining whether an appellate decision applies retroactively to final judgments for purposes of RCW 10.73.100(6), the Washington Supreme Court follows the analysis set forth in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). See Colbert, 186 Wn.2d at 623-26; In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 100, 351 P.3d 138 (2015). Under the Teague analysis, if an appellate decision established a "new" rule of law it applies retroactively to previously final decisions if it announced a substantive rule that places certain behavior beyond criminal law-making authority to proscribe, or if it announced a watershed rule of criminal procedure implied in the concept of ordered liberty. Teague, 489 U.S. at 311; Colbert, 186 Wn.2d at 624. It should also be noted that a decision claimed to be a change in the law may be "retroactive" if the decision involves the interpretation of a statute, under the principle that construction of a statute by the state Supreme Court is deemed to relate back to the effective date of the statute. Colbert, 186 Wn.2d at 620.
- Plea agreements with prohibitions on post-conviction litigation
    - Open question: plea agreement is invalid because premised on improper offender score?

- Example:
    - If the defendant fails to appear for sentencing, commits any additional crimes between pleading guilty and sentencing, or otherwise breaches this agreement, or if the defendant later moves to withdraw this plea, moves for amendment or arrest of the judgment pursuant to CrR 7.8, appeals, or otherwise collaterally attacks the conviction or sentence under this cause number, the defendant understands and agrees that this will constitute a breach by the defendant of the plea agreement/offer of settlement and further the defendant agrees as a remedy for said breach, the State will be free to make any recommendation(s) it deems appropriate and/or to re-file any dismissed or withheld counts, enhancements, or aggravating factors, but that the defendant may not withdraw his/her guilty plea in the event the State elects any of these remedies.
- If plea agreement is invalid, then parties are free to argue any sentence authorized by law?
    - Example: plea agreement was for a specific number that happened to be the high end of range; corrected range doesn't allow for that sentence any more; does that mean that the plea agreement is implicitly altered so that the parties have to recommend the high end of the range for the corrected range?
    - In re Goodwin, 146 Wash. 2d 861, 873–74, 50 P.3d 618, 625 (2002)
        - A sentence in excess of statutory authority is subject to collateral attack, a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and a defendant cannot agree to punishment in excess of that which the Legislature has established. In general, a defendant cannot waive a challenge to a miscalculated offender score.

- Open question: Can State unwind plea agreement based on invalid offender score?
    - Defendant gets to control the remedy
        - "A defendant must understand the sentencing consequences for a guilty plea to be valid." *State v. Miller*, 110 Wash.2d 528, 531, 756 P.2d 122 (1988). Where a defendant has entered a guilty plea pursuant to a plea agreement based on misinformation, the defendant may choose between two possible remedies: " 'to withdraw his plea and be tried anew on the original charges, or [ ] specific performance of the agreement.' " Miller, 110 Wash.2d at 531, 756 P.2d 122 (quoting State v. Tourtellotte, 88 Wash.2d 579, 585, 564 P.2d 799 (1977)). "[T]he defendant's choice of remedy controls, unless there are compelling

reasons not to allow that remedy." Miller, 110 Wash.2d at 535, 756 P.2d 122.

- *In re Goodwin*, 146 Wash. 2d 861, 877, 50 P.3d 618, 627 (2002):
  - The State contends that the usual remedy is the defendant's withdrawal of his guilty plea, leaving the State free to reinstate the original charges.
  - We conclude that the fact that a negotiated plea agreement was involved here does not require any other conclusion. First, that holding is in keeping with this court's precedent. As explained, the court has granted relief to personal restraint petitioners in the form of resentencing within statutory authority where a sentence in excess of that authority had been imposed, without regard to the plea agreements involved. See Gardner, 94 Wash.2d 504, 617 P.2d 1001; Moore, 116 Wash.2d 30, 803 P.2d 300. Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed. Carle, 93 Wash.2d at 34, 604 P.2d 1293. The court has also recognized, on direct appeal, that the erroneous portion of a sentence in excess of statutory authority must be reversed, and a plea agreement to the unlawful sentence does not bind the defendant. Eilts, 94 Wash.2d 489, 617 P.2d 993.

- Documents to gather for review
  - Evidence of post-conviction rehabilitation
    - DOC infraction history
    - DOC behavioral logs
    - Certificates
    - Treatment records
    - Schooling
    - Correspondence school
    - Work history
    - Former gang affiliation?
      - Look at classification records
    - [Client will usually have these items to mail to attorney. If not, can subpoena them / request through release of information]
  - Background information of the defendant
    - Adverse childhood experiences / childhood trauma
      - DCYF/DSHS/CPS records of defendant as minor
        - Need release of information / may subpoena
      - Juvenile court records
        - Need release of information
      - School records
        - IEP?
          - Need release of information
      - Interviews with family/friends

        - Chemical dependency
            - Treatment records
                - Need release of information
        - Mental health issues
            - Treatment records / institutional commitments
                - Need release of information
    - Professional evaluations
        - 10.77 evaluations in court file
        - Psychological/psychosexual/juvenile mitigation evaluations from prior counsel
        - Setting up a new evaluation in prison:
            - Indigent defense request for funds / *Punsalan* request for funds
                - Evaluator can visit in person or set up meeting through counselor via Zoom
    - Community support
        - Letters of support
        - Release plan
    - Information about the case
        - Court file documents
            - Original and amended information(s)
            - Probable cause statement
            - Guilty plea
            - Judgement and sentence
            - Sentencing memoranda / Pre-sentence investigation
            - Victim impact statement
            - Filed evaluations
                - 10.77
                - Dim cap
        - Discovery
            - From PA / prior defense counsel
                - Release of information for prior defense counsel
        - Pretrial witness interviews
        - Trial transcripts (if applicable)
            - From PA / prior appellate counsel
        - Sentencing transcript / court recording
- Resentencing hearing
    - See if client has a preference for remote vs. in person
    - Remote Zoom hearing
        - [DOC process]
            - Need 7 days' notice
            - Email the legal liaison the Zoom information
            - Send any documents that the court requires to be signed ahead of time
            - DOC doesn't have printers where Zoom hearings are conducted, so sentencing paperwork can't be sent at the time of the hearing
        - In-person process
            - See if can get court to order a direct transport to local jail
            - May be preferred to do in-person for more serious cases
    - Legal authorities for resentencing

- *Kilgore*: full resentencing; courts have discretion, not ministerial
    - The Washington State Supreme Court has held that when there is an error in a defendant's offender score affecting the applicable standard range "resentencing is required." *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009); *see also State v. Toney*, 149 Wn. App. 787, 793, 205 P.3d 944 (2009) (trial court has discretion to conduct a full, adversarial resentencing proceeding, giving both sides the opportunity to be heard); *State v. McEvoy*, No. 50026-4-II, 2018 WL 2688272, at *2 (June 5, 2018) (a resentencing court has broad authority to conduct a new sentencing hearing)(unpublished); *State v. Ramos*, 171 Wn.2d 46, 49, 246 P.3d 811 (2011) (resentencing that would include imposing conditions of placement would not be ministerial).
- Real facts doctrine still applies
    - State should not raise information about dismissed/unfiled charges
        - "The real facts doctrine requires sentences be based upon the defendant's current conviction, his criminal history, and the circumstances of the crime." *State v. Coats*, 84 Wn. App. 623, 626, 929 P.2d 507 (1997) (citing *State v. Tierney*, 74 Wn. App. 346, 350, 872 P.2d 1145 (1994)). A sentencing court "may not impose a sentence based on the elements of a more serious crime that the State did not charge or prove." *State v. Wakefield*, 130 Wn.2d at 475-76, 925 P.2d 183 (citing RCW 9.94A.370(2); *State v. Barnes*, 117 Wn.2d 701, 708, 818 P.2d 1088 (1991)). The real facts doctrine is based on former RCW 9.94A.370(2), which has been amended and recodified as RCW 9.94A.530:
            - In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.
        - Under the plain terms of the statute, the sentencing court may not consider facts probative of a more serious crime unless (1) the

defendant stipulates to those facts, or (2) the facts fall within certain exceptions not relevant here.

- How court applies evidence of rehabilitation
  - Juvenile context
    - *State v. Haag*, 198 Wash. 2d 309, 321, 495 P.3d 241, 247 (2021): court must consider rehabilitative factors information about rehabilitation relevant because it pertains to likelihood of re-offense (but is not basis for exceptional downwards)
      - the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*
      - "courts 'must *meaningfully* consider how juveniles are different from adults[and] how those differences apply to the facts of the case.' " *Delbosque*, 195 Wash.2d at 121, 456 P.3d 806
      - in our **state** the "resentencing courts *must* consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole." *Delbosque*, 195 Wash.2d at 121, 456 P.3d 806
      - retribution cannot take precedence in juvenile sentencing
  - Adult context
    - *State v. Wright*, 19 Wash. App. 2d 37, 40, 493 P.3d 1220, 1222 (2021), review denied, 199 Wash. 2d 1001, 506 P.3d 1230 (2022)
      - Defendant presented impressive evidence of rehabilitation at resentencing, but found it could not base an exceptional sentence downwards based on that rehabilitation
        - the SRA "requires factors that serve as justification for an exceptional sentence to relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant." *Id.* at 89, 110 P.3d 717. It continued, "Factors which are personal *45 and unique to the particular defendant, but unrelated to the crime, are not relevant under the SRA."
- Judicial vindictiveness
  - Generally, a trial judge may impose a new sentence that is greater or less than the sentence originally imposed based on events subsequent to the first trial that may throw new light on the defendant's life, health, habits, conduct, and mental and moral propensities. *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). But the "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy [is] a violation of due process of law." Id. at 724. The Court in *Pearce* held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for . . .

doing so must affirmatively appear." Id. at 726. Such reasons must be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id.

- In *State v. Parmelee,*11 this court, relying on *Texas v. McCullough*12 and related authority, concluded that there is "not a reasonable likelihood that actual vindictiveness plays a role in sentencing when a different judge imposes the more severe sentence."13 The court also noted that even if the presumption arises, it may be rebutted if the second sentencing judge provides nonvindictive reasons for the sentence.

▪ Opportunity for courts to correct over-sentencing
  - Focus on rehabilitation, especially for juvenile defendants and youthful defendants
    - Make your *Houston-Sconiers* arguments for juvenile defendants
    - Make your *O'Dell* arguments for your youthful defendants that not juvenile (age 25 and under)
    - Make your exceptional sentence arguments
    - Include your forensic psychological evaluation / psychosexual evaluation / juvenile mitigation evaluation
    - Address infirmities of racial disparities and its history
      - *State v. Gregory*, 192 Wn. 2d 1, 427 P.3d 621 (2018), our Supreme Court recognized the severity of racial biases inherent in our criminal justice system. The court recognized that "special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants after the impact of the other variables included in the model has been taken into account". Gregory, 192 Wn. 2d at 19. The court took "judicial notice of implicit and overt racial bias against black defendants in this state". Gregory, 192 Wn. 2d at 22.
      - *State v. Blake*, 197 Wn.2d 170, 208, 481 P.3d 521 (2021) (Justice Stephens concurring):
        - Finally, and perhaps most importantly, "[t]he fact of racial and ethnic disproportionality in our criminal justice system is indisputable." Research Working Grp. of Task Force on Race and the Criminal Justice Sys. Preliminary Report on Race and Washington's Criminal Justice System, 35 SEATTLE U.L. REV. 623, 627 (2012). "[S]cholars have shown that the poor, people of color, sexual minorities, and other marginalized populations have borne the brunt of criminal punishment and police intervention."

Benjamin Levin, Mens Rea Reform and Its Discontents, 109 J. CRIM. L. & CRIMINOLOGY 491, 530 (2019). Given that criminal laws are enforced against marginalized communities at disproportionate rates, this court's past decisions divesting the possession statute of mens rea created a constitutional harm that has hit these vulnerable communities hardest.

- Several studies following the Sentencing Reform Act of 1981 find that race shapes confinement sentence outcomes in Washington State—that is, those sentences that lead to jail time. Research Working Group & Task Force on Race, the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, 35 Seattle U. L. Rev. 623, 648 (2012). For example, a 2003 study by Engen, Gainey, Crutchfield, and Weis found that defendants of color are moderately less likely than similarly situated white defendants to receive sentences that fall below the standard range. Id (citing Rodney L. Engen et al., Discretion and Disparity Under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives, 41 CRIMINOLOGY 99, 116-17 (2003)).
    - Example: some statistics compiled for Pierce County
        - Pierce County Board of Commissioners tasked the Pierce County Superior Court with reviewing its policies and procedures as they relate to issues of racial injustice and inequity. See Council Resolution R2020-43.

- Sentencing from time of offense
    - Sentences imposed under the SRA are generally meted out in accordance with the law in effect at the time of the offense. See RCW 9.94A.345; RCW 10.01.040. *State v. Jenks*, 197 Wash. 2d 708, 714, 487 P.3d 482, 487 (2021)
    - Need to review SRA manual in place at the time of the offense
        - Manuals found here: https://www.cfc.wa.gov/Publications.htm
    - Need to review sentencing statutes in place at the time of the offense
        - Example: RCW 9.94A.510 (sentencing grid)
            - [2014 c 130 § 1; 2002 c 290 § 10. Prior: 2000 c 132 § 2; 2000 c 28 § 11; prior: 1999 c 352 § 2; 1999 c 324 § 3; prior: 1998 c 235 § 1; 1998 c 211 § 3; prior: 1997 c 365 § 3; 1997 c 338 § 50; 1996 c 205 § 5; 1995 c 129 § 2 (Initiative Measure No. 159); (1994 sp.s. c 7 § 512 repealed by 1995 c 129 § 19 (Initiative Measure No. 159)); 1992 c 145 § 9; 1991

c 32 § 2; 1990 c 3 § 701; prior: 1989 c 271 § 101; 1989 c 124 § 1; 1988 c 218 § 1; 1986 c 257 § 22; 1984 c 209 § 16; 1983 c 115 § 2. Formerly RCW 9.94A.310.]

- After resentencing:
  - Make sure that court or attorney sends copies of filed documents to docamendedorders@doc.wa.gov
  - Credit for time served
    - Usually DOC has accounted for credit from local jail and time served solely on offense at DOC
      - Make sure that good time policies in effect at time of offense are imposed; e.g. serious violent offense from 1999 has 15% god time instead of 10%