



Washington State
Office of
Public
Defense

Blake Resentencing Checklist

This checklist was developed in collaboration between Pierce County Department of Assigned Counsel, Redemption Project of Washington, and Washington State Office of Public Defense. Questions, corrections, or proposed revisions should be directed to blake@opd.wa.gov. This checklist was developed based on the law as of June 2023. If filing a motion, please first conduct research to determine whether the law has changed in any material respects. Remember that Blake is an ever-evolving landscape; this checklist should not supplant your own professional judgment. Please also note that a longer, more detailed Training Manual for Resentencing Cases is available through [Redemption Project of Washington](#).

Client:
Attorney:

Cause No:
Date of review:

I. Analysis

- ☐ **Score each conviction from scratch as if this is a first sentencing.** It is not best practice to take the original score and subtract. If there is one thing we have learned from 24 months of doing these cases it is that cases were *constantly* scored incorrectly in the first instance. If you score by subtracting, you might think a person is eligible when in fact they are not or vice versa.
- ☐ **Look for washouts.** UPCS as enacted before 2021 is/was unconstitutional. A conviction/jail/prison term for UPCS no longer interrupts a washout, the same is true for PCS related misdemeanors and inchoate felony offenses of attempt, solicitation, and conspiracy.
- ☐ **Look for no-longer-comparable out-of-state convictions.** UPCS is now only (maybe) comparable to a misdemeanor and was previously comparable only to something *Blake* held unconstitutional. Don't allow the court to score an out-of-state possession.
- ☐ **Look for differences in the SRA.** If you are scoring an older conviction, remember that (subject to occasional exceptions) RCW 9.94A.345 calls for the law in effect on the date of incident to apply. Occasionally, you will find that the ranges have changed.¹ No matter if this is for better or for worse, you need to be able to advise your client. Prior copies of the Adult Felony Sentencing Manuals can be found [here](#).
- ☐ **Consider Procedural Wrinkles For Clients Who Are Not Serving a Current Sentence for UPCS.** Post-*Richardson*, analysis of the viability of resentencing for clients who not serving a

¹ For example, standard ranges changed for some drug offenses in 2004 when the legislature created a separate sentencing grid for drug crimes. The legislature passed a resentencing provision in 2021 to correct any more severe punishment, see RCW 9.94A.519. This resentencing statute expired July 1, 2022. Laws of 2021, ch. 286 sec 1.

current sentence for UPCS is more complicated. See **Appendix A** for an outline of issues to consider. Caselaw and briefing for the issues discussed therein is available; reach out to [Redemption Project of Washington](#) for assistance. Note that *Richardson* only speaks to the availability of the facial invalidity exception to the one-year time bar on CrR 7.8 motions. There are other timeliness exceptions that may apply to your case. Resource attorneys at Redemption Project of Washington can help you if you have timeliness issues because of *Richardson*.

☐ **Review LFOs.** The laws pertaining to LFOs have changed significantly in recent years, and LFOs that were mandatory in the past may not be anymore. Resentencing is an opportunity to correct and reduce the LFO burden for any indigent client. See **Appendix B** for more info.

☐ Is your client a non-citizen? If your client is not a U.S. citizen, this can have a substantial impact on outcome in your case. Even if you don't think it is relevant to your case, please reach out to an attorney who is experienced in the intersection of criminal and immigration law or [WDA's Immigration Project](#).

II. Consultation

☐ **Reach out.** You can email the facility LLO and ask for a kiosk message to be sent, you can reach out by snail mail, or you can reach out by Securus mail (formerly JPay). The method is up to you, but the client needs to be able to call you on a confidential line. Have your phone registered as an attorney line with DOC so that you can have a confidential conversation.

☐ **Introductions.** Explain what *Blake* is in broad terms. Also explain what *Blake* is *not*. Post-*Richardson*, explain that we may need to overcome a time-bar issue to have a realistic shot at resentencing. (Don't forget that a non-citizen who was not advised of the immigration consequence of a plea deal may have grounds to overcome a time-bar problem if the conviction was before 2015. Reach out [WDA's Immigration Project](#) if you think this might apply to your client).

☐ **Review criminal history.** Tell the client your scoring analysis and why/why not they are a realistic candidate for re-sentencing. Give your client an opportunity to review criminal history and challenge anything they don't agree with, but also, be aware of prior stipulations to criminal history as well as any potential plea bargain restrictions. The extent to which this is important is jurisdiction specific. Be sure to confirm with client that they have no subsequent criminal history, because the scoring statute provides for this to be included in the offender score now. There is a possibility of a *higher* range in these rare circumstances. A client may choose to simply vacate and forego resentencing, see *State v. Hall*, 162 Wn.2d 901 (2008). Finally, look for community custody points stemming from UPCS supervision. These cannot be counted. *State v. Rahnert*, 24 Wn. App. 2d 34 (2022); *State v. French*, 21 Wn. App.2d 891 (2022). Also consider whether you could argue that juvenile points or points for unlawful possession of a firearm based on drug possession felony could be subtracted. See [HB 1324](#) (juvenile points) and *In re PRP of Gonzales*, 19 Wn.App.2d 1039 (firearm points, unpublished). Because it is a common question, it is worth noting that the law is not currently on our side with respect to *escape* and *bail jumping* convictions stemming from a UPCS conviction or charge (but petitions for review are pending before the WSSC).

☐ **Review new score and range.** This is the numbers discussion. Be prepared to present your score and range for each conviction, including any washout analysis or any comparability analysis.

☐ **Discuss remote appearances.** Discuss with the client whether they want to appear in person or prefer to appear in a remote appearance, assuming your jurisdiction can hold one. Remote appearances can be accomplished much faster than in-person appearances as a general rule. Transport to court for an in-person hearing can be very disruptive to the client; they may lose a housing assignment or disrupt important programming. Some jurisdictions may have a policy that strictly calls for fingerprinting in each case, and if so, you need to explain the fingerprinting methodology to the defendant (email form to LLO).

☐ **Rehabilitation and Mitigation.** The court will likely consider how the client has spent their time inside DOC thus far. Ask your client to provide a “resume” with their completed classes, programs, work history, and other accomplishments. Ask your client if they have any special talents or hobbies and what they have done to build community inside. Review Sample Interview Questions in **Appendix C** as a starting point for generating your own list of questions. Many clients will have documentation of significant programming/education/treatment available for you to use to their benefit at the hearing. You should ask client to make copies of any documentation and send to you so you can file with your resentencing motion if you determine it is appropriate. If client has a de minimis infraction history while serving a long sentence, you can also make a DOC public records act request for this information but be aware that it can take a long time to receive the information. Discuss with client whether it is something that is worth waiting for. See **Appendix D** for more information on communicating with DOC.

☐ **Family and Community Support.** Discuss with client whether they wish to have supporters or family attend the hearing and reach out to those people if appropriate for support letters for you to file. Then email a general letter with support letter instructions/best practices to the supporters. Also advise client family and supporters that they can attend the hearing in demonstrate support which can be very impactful to the judge. Depending on judge and jurisdiction, court may also allow defense supporters and witnesses to address judge at resentencing on behalf of client to discuss their growth, transformation since offense, this is also very impactful.

☐ **DOC Reentry Services.** Washington State Department of Corrections has a large internal reentry team and two reentry specialists who assist with the entire state with the actual release transition: one for the western side and one for the eastern side. The sooner DOC knows your client is eligible for a resentencing that may result in release, the more your client will be able to take advantage of the DOC resources. DOC tracks virtual hearings forms for *Blake* resentencings, but otherwise receives no notice from the court system that an individual is eligible for a resentencing hearing and does not always know when the estimated release date will be, so if you do not notify DOC about the possible release, DOC will not know to begin planning until the actual resentencing date—in some cases, too late for useful planning. As a result, it can be very beneficial to your client if you email DOC reentry to let them know your client has a resentencing case, **may** be released, and you would like to begin the reentry support process. Get your client’s consent first, they may not want to notify DOC. Once you have consent, email that message to: docresentenceplanning@doc1.wa.gov.

☐ **Consider other changes in the law.** *O’Dell*, *Houston-Sconiers*, *Blakely*, *Mulholland* and *McFarland* are common examples but there are others. Many individuals sentenced long ago may have *additional* forms of relief available to them. See **Appendix D** for a more complete list. If *Blake* gets you back into court, you can argue *O’Dell* issues even though *Light-Roth* didn’t allow it to be retroactive in and of itself because this is a new sentencing! The same goes for *Mulholland/McFarland* issues.

☐ **Expert consultation (optional/depends on case).** Determine if you need an expert- depending on case and relief avenue available i.e., youthfulness or *Mulholland* you may want an expert to opine on youthfulness, risk to community or a general mitigation evaluation or report. If your client is a non-citizen, consider retaining an expert in the intersection of criminal and immigration law. If you take this avenue, it is something to diligently prepare your client for because the answers to questions in an expert interview will determine their risk level on any risk assessment tools that do not rely on static factors.

☐ **Follow-ups.** In more complex cases, you will often have several of these phone consultations. If your schedule doesn't allow for unscheduled calls, it's a good idea to send a letter with a specific appointment time that you and the client can both block out on your schedules.

III. Preparing for the Hearing

☐ **DOC Virtual Hearing Form/Transport Order.** If the client assents to a virtual hearing, you MUST submit the DOC virtual hearing form to the facility LLO at least five business days before the hearing. Best practice is to ask the LLO to confirm receipt and that the hearing is on their schedule. If this will be an in-person hearing, you should get a transport order signed at the time you calendar your hearing. If your jurisdiction requires fingerprinting be sure to mark that box on the form and send the print sheet to the LLO.

☐ **Discuss with prosecutor/7.8 motion.** These hearings go much more smoothly if the prosecutor agrees with your scoring analysis and that defendant is entitled to be resentenced (see **Appendix A**). But as with many things this depends on your jurisdiction. In jurisdictions where prosecutors are more difficult to work with, you may need to file a 7.8 motion and have a preliminary hearing to determine eligibility prior to the actual re-sentencing hearing. If so, advise client and arrange for a remote appearance for this separate hearing as well, if appropriate (see above).

☐ **File your brief and materials.** You should endeavor to put the law and all of your mitigation information in front of the court. While this matters less for a short sentence, or for a post-*Blake* offender score that will certainly result in immediate release, for a long sentence where you are taking a chance at a significant reduction, it is important to both make the law and the mitigation part of the record, and to make sure that the sentencing judge considers it all.

☐ **Include the release plan.** Trial courts want to know what will happen upon release. At any resentencing where release may be possible in the near future, begin preparing a solid plan for the client's release and reentry early. Though DOC has resources and staff that will help prepare a client for release and reentry, that may not be enough. It is helpful for the defense attorney/team and client build and present the plan as part of the sentencing hearing.

☐ **Victims/emotional toll.** Make sure client knows what to expect in these hearings and that victims have a right to be present and to address the court. Some might still be very angry and be even more angry to have to be back in court under circumstances where your client is likely getting a reduction to their sentence. They may also say upsetting things. Prepare your client for this. Some of these are very difficult.

☐ **Allocution.** Prepare client to address the court. Depending on case you may want several conversations about this, and the client might want to share some thoughts/ideas with you for

your feedback. Allocations are always important, but we have found even more so in resentencing hearings. This is the time for client to take responsibility, address any harm/discuss how sorry they are for their actions, and how they have used the time since to improve their life and transform.

IV. The Hearing

☐ **Scoring.** Make a record of your scoring analysis with the court and make your sentencing recommendation.

☐ **Paperwork.** While these re-sentencings aren't really *nunc pro tunc* actions, be aware of the potential impact that a new sentence might have on somebody serving time for a serious violent offense committed before 2000. They used to get 15% good time, and now it is only 10%. It might be worth asking the court to use *nunc pro tunc* language anyway to avoid potential negative consequences. Make sure to strike community custody terms for UPCS. Make sure the order language clearly reflects the intent of the judge with regard to any direction to DOC about calculations for credit for time served, including any pre-trial county jail credit. Make sure to vacate any UPCS conviction from your jurisdiction that has not already been done, and don't forget to think about LFOs. Even if the court is not considering such a conviction because it is obviously constitutionally invalid, if you don't get it vacated now it will be more work for later. Check the language in the order and make sure it specifically states that the vacated conviction was unconstitutional pursuant to *Blake*.

☐ **Post-sentencing consultation.** A client may appeal a resentencing hearing. Follow up with client about any appellate issues from the re-sentencing hearing. If the client is likely to be immediately released, discuss common DOC/county clerk's office processing times and other potential delays e.g., victim notification and approved release plans to community custody.

APPENDIX A

Procedural Issues Outline



Outline of Procedural Issues for Motions to Vacate a Judgement and Sentence under *Blake*

Disclaimer: This outline was developed by Redemption Project of Washington, and focuses only on the procedural aspects to obtain a new sentencing hearing pursuant to CrR 7.8 for an individual whose current sentence is for a crime other than VUCSA-possession but who has a prior conviction for VUCSA-possession that was included in the offender score. This outline does not address the local rules/procedures for the setting and conduct of motions to vacate. As always, check the local rules. This outline does not address Personal Restraint Petitions (PRPs). It is based on the law as of May 19, 2023. If filing a motion, please first conduct research to determine whether the law has changed in any material respects. It also does not address the various issues that arise in preparation for and at a new sentencing hearing. Instead, it is designed to assist in identifying the sometimes complex and confusing procedural issues that can be raised in opposition to such a motion. Case law supports a number of these propositions; reach out to [Redemption Project of Washington](#) for more information. Briefing from RPW is also available for most of the issues discussed herein.

Is the criminal history now incorrect due to *Blake*?

1. Was a prior VUCSA conviction included in the criminal history?
 - a. Was it drug possession?
 - b. Not delivery, possess with intent, or possess in custody
 - b. If out of state, is the conviction comparable to WA drug possession? If so, there was no comparable WA felony.
2. Has the prior VUCSA conviction itself been vacated? If not, is there a reason? Otherwise, vacate the conviction and get a copy of the order vacating. This may be helpful later.

Is an appeal a better procedural route?

3. Did defendant appeal? If not, was defendant given accurate advice about his right to appeal? In some cases (for example, where the judgment is more than one year old and where the standard range does not change due to the subtraction of a prior VUCSA-possession) it may be advantageous to file an appeal given in order to avoid the time bar for collateral attacks.

Is my motion timely?

4. When did the current sentence become final? If less than one year, make sure motion/petition seeking vacation is filed before one year expires. RCW 10.73.090 and .100 establish the one-year time bar and its various exceptions.
5. If more than one year since finality, was defendant given notice of one year limitation at sentencing as required by RCW 10.73.110. If notice was not given, then the time bar does not start running.

If untimely, what are exceptions to time bar?

6. For cases subject to the time bar, there are various exceptions, including where the current judgment is invalid on its face and where the law has changed in a manner that is both retroactive and material. Caselaw has also recognized a due process right to resentencing where the current sentence was based on a prior conviction that has been vacated and where that conviction was material to the sentence.
7. Does the standard range change when the drug possession is subtracted?
 - a. If “yes,” then, in addition to the other exceptions discussed below, you can argue that the judgment is “invalid on its face” and therefore not subject to the time bar.
 - b. If “no,” arguments to avoid timeliness include:
 - i. Invalid on its face likely does not apply when the standard range does not change. However, if an

exceptional sentence was imposed make the argument anyway, especially if the exceptional was imposed due to the criminal history.

- ii. Retroactive and material change in the law.
 - iii. Criminal history includes a prior conviction that is invalid on its face (the prior, not current conviction) and has been vacated.
8. Does the score change based on subtraction of the prior VUCSA and re-calculation of score/range?
- a. For example, does other criminal history now wash out resulting in a change to the standard range? If so, make sure to include the invalid on its face exception.
 - b. You may find other errors in scoring in the current judgment. If you are arguing that any such error provides an additional ground for relief, you will likely need to establish why raising that error is not time barred. If you are entitled to a new sentencing hearing based on *Blake* alone, then sentencing is de novo and you can raise all sentencing issues.

Establishing Prejudice

7. Where the standard range *does/does not* change
- a. In both instances and if possible, obtain a transcript of sentencing. You are looking for any clues as to how the individual's criminal history in general, and VUCSA-possession convictions in particular influenced the sentence imposed. Did the judge say anything about criminal history as a reason to impose the sentence? Did the prosecutor? Did defense counsel say anything?
 - b. *Where the range changes*, prejudice is established according to CrR 7.8(c)(2). A defendant is entitled to relief under subsection (i) where the person (A) is serving a sentence for

a conviction under a statute determined to be void, invalid, or unconstitutional by the United States Supreme Court, the Washington Supreme Court, or an appellate court where review either was not sought or was denied or (B) is serving a sentence that was calculated under RCW 9.94A.525 using a prior or current conviction based on such a statute.

- c. *Where the range does not change*, the court rule also supports relief given that it only requires that standard range was “calculated” “using” the now-vacated VUCSA-possession, as opposed to requiring an increase in the range.
- d. Additionally, you can attempt to show prejudice where the current sentence is more than the bottom of range or where the judge remarked that they used the criminal history in general or the VUCSA-possession as a reason to impose more than the bottom of the range.
- e. Did the judge reject a defense request for an exceptional downward departure? If so, was the prior VUCSA-possession part of the judge’s reasoning?

APPENDIX B

Legal Financial Obligations at Felony Resentencing



PRACTICE ADVISORY | May 22, 2023 | Cindy Arends Elsberry

Addressing Legal Financial Obligations (LFOs) at Felony Resentencing Hearings

Legal Financial Obligations (LFOs) are financial obligations that a defendant owes upon a criminal conviction. LFOs may include court-imposed costs, fines, fees, penalties, assessments, and restitution. In recent years, the law around court imposed criminal legal financial obligations (LFOs) has undergone a significant transformation. In the past, trial courts routinely imposed numerous LFOs, often on indigent defendants, and often without consideration of an individual's ability to pay.

Now, trial courts must conduct an individualized inquiry in each case at the sentencing hearing prior to imposing LFOs, considering the person's current ability to pay.¹ Most LFOs are now discretionary, and individuals may come back to court to seek LFO relief through post convictions motions to remit,² or they can be litigated at resentencing, where courts can reduce or waive previously imposed LFOs for individuals who are unable to pay them.

At a resentencing hearing, carefully examine the LFOs originally imposed on all counts involved at the resentencing hearing; ask that all discretionary LFOs be waived if the client is currently unable to pay them. [RCW 10.01.160\(3\)](#). Most LFOs are now discretionary.

Mandatory LFOs

Mandatory LFOs are fees that the court must impose without consideration of the defendant's financial circumstances. The legislature has greatly reduced the list of mandatory LFOs in the past two years.³ The criminal filing fee and the crime lab fee are no longer mandatory. As of July 1, 2023, the DNA collection fee is no longer required for anyone, regardless of ability to pay, and the VPA is no longer mandatory. Restitution cannot be waived based on indigency pursuant to the SRA, however there are some changes to restitution statutes allowing courts to reduce obligations for indigent clients (see below). The remaining mandatory LFOs are limited to restitution, and some crime specific fines or assessments.

Discretionary LFOs

Discretionary LFOs are the remaining fees, fines and costs that a court may, but is not required, to impose. Trial courts may not impose any discretionary costs on an indigent defendant.⁴ Even when a defendant is not indigent, before imposing costs the trial court must first consider the

¹ *State v. Blazina*, 182 Wn.2d 827, 883, 344 P.3d 680 (2015). (“[T]he court must do more than sign a judgment and sentence with boilerplate language stating it engaged in the required inquiry”).

² See GR 39, found [here](#).

³ [HB 1412, Ch. 260, Laws of 2022](#), effective date Jan. 1, 2022; [HB 1169, Ch. 446, Laws of 2023](#), effective date 7.23.23.

⁴ RCW 10.01.160(3).

defendant's financial resources and the nature of the burden that payment of costs will impose.⁵

Fines

Fines are generally discretionary, but there are some mandatory crime specific fines. Some crime specific fines can be waived in full or in part for an indigent defendant.⁶

Restitution

Restitution is an amount the court orders the defendant to pay to restore or repay the victim for their losses or expenses that are related to the crime.⁷ When interest accrues on restitution, it begins on the date of judgment and accrues at the same rate as civil judgments (currently 12%).⁸

- A court may waive or reduce interest on restitution once the principle is paid in full.⁹
- A court may waive or reduce interest on restitution that accrued during a period of total confinement, once a person is released, if they do not have the current ability to pay.¹⁰

While most restitution in felony cases may not be waived based on indigency, there are two recently added provisions related to restitution that can help an indigent defendant.

- A court can waive restitution to an insurer or state agency, other than the Department of Labor and Industry, if the defendant lacks the current and likely future ability to pay.¹¹
- A court may elect not to impose interest on restitution after considering certain factors.¹²

Indigency

In 2022, the legislature expanded the definition of indigency for purpose of LFOs. See RCW [10.101.010\(3\)\(a\)-\(c\)](#).

⁵ *Id.*

⁶ See RCW 69.50.401(2)(b) (court may impose fines for convictions for manufacture, possession, or delivery of amphetamines, \$3000 of which may not be suspended). Trial judges are strongly urged to consider a defendant's ability to pay before imposing fines. *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 209 (2015).

⁷ RCW 9.94A.030.

⁸ RCW 10.82.090(1).

⁹ RCW 10.82.090(3)(b).

¹⁰ RCW 10.82.090(3)(c).

¹¹ RCW 9.94A.750(1).

¹² RCW 10.82.090(2). Factors are:

(a) Whether the individual is indigent as defined in RCW 10.01.160(3) or general rule 34; (b) the individual's available funds, as defined in RCW 10.101.010(2), and other liabilities including child support and other LFOs; (c) whether the individual is homeless; and (d) whether the individual has a serious mental illness. The court shall also consider the victim's input, if any, as it relates to any financial hardship caused to the victim if interest is not imposed. The court may also consider any other information that the court believes, in the interest of justice, relates to not imposing interest on restitution.

Appealing Imposition of LFOs:

Prior to the decision in *State v. Blazina*, the prevailing view was that an appeal requesting relief from LFOs was not ripe until after the State began to collect the LFOs. The *Blazina* court rejected this ripeness argument.¹³ An appellate court may use its discretion to review unpreserved claims of error.¹⁴ If the client is sentenced or resentenced with discretionary LFOs and you have reason to believe they are indigent or an individualized inquiry did not take place, encourage the client to appeal.

Advising Clients to Seek Additional LFO Relief

Give your clients information about how to seek LFO relief in other cases beyond the matter before the court for resentencing.¹⁵ Numerous civil legal aid and nonprofit legal organizations are available to assist individuals with a request to reduce or waive LFOs. A quick internet search will help you locate organizations providing this assistance.¹⁶

Resources

- [Sample Declaration of Indigency Motion to Remit or Waive LFOs](#)
- LFO Calculator (created by the WA State Minority and Justice Commission), NOTE: DO NOT use internet explorer any other program will work- edge, safari, firefox, etc.).
 - <https://beta.lfocalculator.org>,
- Bench Guides for LFOs (currently these links take you to 2018 Reference Guides)
 - <https://www.courts.wa.gov/content/manuals/Superior%20Court%20LFOs.pdf>
 - <https://www.courts.wa.gov/content/manuals/CLJ%20LFOs.pdf>
- [WDA Practice Advisories on LFOs](#) and [WDA Brief Bank on LFOs](#)

¹³ *State v. Lyle*, 188 Wn.App. 848, 852 (2015).

¹⁴ *Id.*

¹⁵ [GR 39](#).

¹⁶ Civil Survival, Living with Conviction, and The Way to Justice are just three of these organizations.

APPENDIX C

Sample Client Interview Questions

Sample Interview Questions

Preparing for Client Meeting

1. Building trust is your priority and it might take time
2. Read through client file and fill in available information
3. Check criminal history
4. Check infraction history
5. Outline questions
6. Consider sharing questions in advance and/or delegating some information gathering to your client (e.g., sending you descriptions of programs, jobs, infractions, supporters and contact information, etc.)
7. If meeting in person, review the prison visit rules

Basic Information

1. Name
2. Date of birth
3. Citizenship status - if not US citizen and there are deportation concerns, contact SCP
4. Current conviction
 - a. County
 - b. Date of crime
 - c. Date of conviction
 - d. Date of sentencing
 - e. Judge
 - f. Defender
 - g. Sentence
 - h. Age at time of crime
 - i. Years served
 - j. Release date
 - k. Co-defendants and their sentences (if different, why?)
 - l. If plea bargain was offered, was it turned down? If so, why?
 - m. Pending appeals? PRP? Any other attorney(s) involved at this point?
5. Criminal history (consider pulling criminal history in advance of client meeting)

Trial Issues (as relevant)

1. How was the communication with your attorney?
 - a. Did they explain things effectively?
 - b. Were there language barriers?
 - c. Did they meet with you and talk with you regularly?
2. Did your attorney investigate your defense and present evidence in your defense?

3. Was evidence presented at sentencing to mitigate your sentence?
4. Did the judge indicate a desire to give you a shorter sentence if they had the discretion?

Crime

1. Summary of what happened
 - a. Client's version
 - b. State's version
 - c. Defense counsel's version
2. Victim(s)
 - a. Known or unknown
 - b. Position of victim(s) or victim(s) family at original sentencing
3. If client's version and state's version are different, why?
4. How do you think about your crime today?
 - a. Are you remorseful? If so, for what? Has this changed over time? If so, why?
 - b. Have you participated in victim awareness classes/groups? Have you submitted a letter to the DOC Victims Letter Bank?
 - c. What does accountability mean to you? What does it look like for you in relation to your conviction?

Childhood

1. Who was your family? (e.g., biological parents, foster family, group home, adoptive parents, extended family, friends, on your own, etc.)
2. What was home like?
3. What was school like? (e.g., was learning easy, hard, fun, stressful? Learning disabilities? Tough time getting to school on time or at all?)
4. What were adults up to? (e.g., what behavior did they role model? Who did you admire? Do you still admire them?)
5. Who cared for you? How?
6. Were you physically/sexually/emotionally safe at home? At school? In the neighborhood? In church?
7. Was there substance use around you? Violence?
8. Religion?
9. Interests?

Health

1. How was your physical health growing up? Now?
2. How was your mental health growing up? Now?
3. Did you need/receive any accommodation in school for learning disabilities?
4. Did/do you take any medications?
5. Is there addiction in your family history?

6. Describe your history with drugs and alcohol. Have you received any treatment? What was the role of substances in your criminal history?

Prison Experience

1. Describe the early years
2. Is there a difference between who you were when you walked in and who you are today? What accounts for the change? Was it all at once or gradual?
3. Have you been the victim of crime in prison?
4. Have you affiliated with a gang? If so, what is that relationship today?
5. Infraction history
6. Employment history
7. Programming
8. Hobbies
9. Religion
10. Education
11. Have you maintained sobriety in prison? If so, how? Have you participated in NA/AA?
12. Who has mentored you? Who have you mentored?
13. Leadership roles

Support (have client provide contact information)

1. Who supports you in prison? (e.g., other incarcerated people, mentors, DOC staff, volunteers, teachers, etc.)
2. Who supports you from the outside? (e.g., family, friends, intimate partners, etc.)
3. Do your supporters know about your conviction? Have you expressed your remorse?
4. Are you married? Children? How are those relationships?
5. Who visits you and how often?
6. If released, who might help you with housing, employment, money, transportation, sobriety, spiritual guidance, mental health, education, goal setting, etc.

Goals

1. Where do you want to live?
2. What work do you want to do?
3. Are you interested in education?
4. Do you (want to) have a family?
5. What hobbies do you see yourself enjoying? (e.g., music, sports, travel, nature experiences, fishing, kayaking, hiking, cooking, etc.)
6. Where do you see yourself in 5 years? 10? 20?

Documents to collect

1. Judgment and sentence
2. Certificate of probable cause

3. Pre-sentence reports if available
4. Infraction history
5. Medical history, if relevant

APPENDIX D

Communicating with DOC

PRACTICE ADVISORY | 1/30/2023 | Cindy Arends Elsberry

Preparing for Resentencing Hearings: Tips for How and When to Communicate with DOC

In resentencing cases, clients are usually incarcerated in the Department of Corrections (DOC). An attorney will likely need to get information from DOC, and will sometimes a need to share information with DOC to coordinate with DOC on reentry planning or to support the client's resentencing goals.

Below is a quick primer on where to send questions, where to request DOC agency records, and what information to consider sharing with DOC.

Practice Tip/RPC 1.16 – Only share information with DOC after consulting with your client. It is possible your client will not want DOC to be aware of an upcoming hearing date or pending matter seeking post-conviction relief.

Where to Send Questions:

DOC has two email addresses related to resentencing cases:

- DOCResentencing@doc1.wa.gov is intended for attorneys to reach out ***for questions regarding records related questions such as sentence calculations, tolling, etc.*** The records staff members monitor this mailbox.
- DOCResentenceplanning@doc1.wa.gov is intended for defense attorneys/teams, Seattle Clemency/RPW staff, and internal DOC staff to reach out ***regarding a potential resentence or release so DOC can assist with reentry planning and appropriate programming prior to release.*** DOC Resentencing and Release planning staff monitor this box.

Types of Questions:

Examples of the type of information DOC can provide (but not limited to):

- Information about other sentences that are also being served or consecutive sentences;
- Information about detainers that might impact a release;
- Confinement time start date, earned release date, and maximum expiration date;
- Earned early release time losses;
- Information about community supervision; and
- Notification requirements prior to release (people DOC must notify).

How to Request DOC Agency Records:

If you need DOC agency records for the resentencing hearing, request the records through the DOC on line portal. DOC will expedite attorney requests [here](#).

Information Defense Teams Can Provide to DOC (with Client's Consent)

- You can notify DOC that your client has a resentencing hearing by sending an email to DOCResentenceplanning@doc1.wa.gov. Here is information to include:
 - The hearing date (if known),
 - The client's current facility,
 - Whether the client will remain at DOC or request a transfer to a local jail while awaiting a hearing (***NOTE: Discuss a transfer with your client before taking any action a transfer can significantly disrupt their lives and be harmful to resentencing goals***).
- Ask DOC to provide access to DOC programs:
 - If your client has a life sentence or long sentence, access to programs within DOC may be limited by a far away or non-existent early release date (ERD). See the WDA Practice Advisory **Understanding Limits on Access to DOC Programming**, found [here](#).
 - Defenders can request that a client be granted access to all available programs and applicable treatment. This will get the client added to the priority list, not instant access to programming.

APPENDIX E

Other Resentencing Pathways

PRACTICE ADVISORY | 10/27/2022 | Cindy Arends Elsberry

Pathways to Felony Resentencing in Washington State (2022)

There are many ways a person may become eligible for a resentencing hearing – examples include scoring errors and miscalculation of the standard range, misinformation or misapplication of the law, ineffective assistance, prosecutorial misconduct, and many more. This practice advisory discusses major developments in the law leading to a significant number of individuals going back to court for a resentencing hearing and a second chance.

Miller Resentencing

In 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), holding that mandatory life sentences for youth convicted of homicide violates the Eighth Amendment ban on cruel and unusual punishment. Following *Miller*, the Washington Legislature amended RCW 10.95, the aggravated murder statute, adding language to RCW 10.95.030 to comply with *Miller* and directing resentencing for all individuals previously sentence to mandatory life without parole for aggravated murder crimes committed before their 18th birthday. RCW 10.95.035.

State v. Blake

On February 25, 2021, the Washington Supreme Court decided *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), holding that RCW 69.50.4013, the statute prohibiting simple possession of a controlled substance (PCS), unconstitutional. Individuals previously convicted of PCS are eligible to vacate these prior convictions and individuals with a PCS conviction that counted in their offender score for other crimes are entitled to a resentencing hearing with a corrected offender score and standard range. See the WDA *Blake* page [here](#) for additional information and related resources. **Many individuals who are eligible for resentencing pursuant to *Blake* may have other resentencing issues and arguments as well.**

Three Strikes Reform – “5164”/Robbery 2 Removed from “Three Strikes” [RCW 9.94A.647](#)

In 2019, the Washington Legislature passed bill 5288, removing of robbery in the second degree from three strikes by removing it from the definition of “most serious offense” in RCW 9.94A.030. In 2021, the Washington Legislature passed bill 5164 making this change retroactive. The legislation adds a new section to the SRA requiring a resentencing hearing in any case in which an individual has been sentenced as a persistent offender “if a current or past conviction for robbery in the second degree was used as a basis for the finding that the offender was a persistent offender.” See the full WDA Practice Advisory [here](#).

6164 Petitions- Prosecutor Initiated Resentencing in the Interest of Justice [RCW 36.27.130](#)

In 2020, the Washington Legislature passed SB 6164, creating a new procedure for prosecutors to petition a sentencing court (or the court’s successor) to resentence an individual previously convicted and already sentenced for a felony “if the original sentence no longer serves the interests of justice.” The trial court has discretion to grant or deny the petition. If the court grants the petition, the individual

receives a new sentencing hearing. The court will resentence the individual “as if they have not previously been sentenced.” The new sentence cannot be greater than the original sentence. The bill did not provide for appointment of defense counsel. See the full WDA Practice Advisory [here](#).

In re Domingo-Cornelio, In re Ali: State v. Houston-Sconiers is retroactive

On Sept. 25, 2020, the Washington Supreme Court decided these two landmark cases, holding that *State v. Houston-Sconiers* (2017) is a significant and material change in the law that must be applied retroactively. *Houston-Sconiers* held that trial courts have and must exercise discretion when sentencing a child in adult court. Trial courts have discretion to depart from mandatory sentencing provisions of the SRA such as enhancements and mandatory minimum terms. Trial courts must consider the impact of youth and adolescent development prior to imposing sentence. Individuals sentenced prior to March 2, 2017, can petition for a resentencing hearing where the trial court considers the important factors established in *State v. Houston-Sconiers* and exercises discretion to impose a fair and constitutional sentence. See the full WDA Practice Advisory [here](#).

In re Monschke/In re Bartholomew

On March 11, 2021, the Washington Supreme Court decided *In re PRP Monschke*, 197 Wn.2d 305, 482 P.3d 276 (consolidated with *In re PRP Bartholomew*) (2021) holding that mandatory life without parole (LWOP) for aggravated murder is unconstitutional for young adults who are 18-20 years old at the time of offense. The court stated, “Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. For some purposes, we defer to the legislature’s decisions as to who constitutes an “adult.” But when it comes to mandatory LWOP sentences, *Miller’s* constitutional guarantee of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes.” *In re PRP Monschke*, 197 Wn.2d at 306-307. Individuals sentenced to LWOP for aggravated murder crimes committed as young adults ages 18-20 can petition the trial court for a resentencing hearing where the trial court considers the important factors established in *State v. Houston-Sconiers* and exercises discretion to impose a fair and constitutional sentence.

Drug Crime Resentencing: SSB [5361](#) effective May 12, 2021 amended RCW 9.94A.519 and allows anyone serving a current sentence who was under the custody of the DOC on June 11, 2020, for a violation of RCW 69.50 or 69.52 that was committed prior to July 1, 2004, to a resentencing hearing. The prosecutor or the individual may make a motion for relief to the original sentencing court. The court shall expedite the hearing and shall resentence as if the person had not previously been sentenced, provided the new sentence is no greater than the original sentence. Notwithstanding RCW 9.94A.345, the court shall sentence an individual according to the guidelines in effect May 2021. This statute expired July 1, 2022.