

PRACTICE ADVISORY | 6/3/2022 | 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 sentenced to mandatory life without parole for aggravated murder crimes committed before their 18<sup>th</sup> 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**

In 2021, the Washington Legislature passed [5361](#), amending the SRA , adding RCW [9.94A.519](#). This new statute provides that 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, may have a resentencing hearing. This law addresses changes to drug crime sentencing that went into effect in 2004, resulting in lower sentences but not made retroactive at that time. Either the prosecutor or the individual may bring 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.