No. 39144-2-III

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION THREE

IN RE POST-SENTENCE REVIEW OF

CHRISTOPHER MARK BLYSTONE,

Respondent.

REGARDING PETITION FOR POST-SENTENCE REVIEW
FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Harold D. Clarke, III

BRIEF OF RESPONDENT

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A. INTRODUCTION

Respondent Christopher Blystone accepts this opportunity to respond to the briefing submitted by the Department of Corrections ("Department") and State regarding the Department's petition for post-sentence review.

B. SUMMARY OF ARGUMENT

Mr. Blystone agrees with the Department's petition. No statutory authority exists to support the trial court's imposition of 36 months of community custody. This case should be remanded to strike this provision for community custody.

Mr. Blystone does not agree with the State's position, however, that he must be subjected to a full resentencing to serve a version of life with parole. The issues raised by the State in its response brief are not only not properly before this Court—they also have no merit. The State cites no authority on which to base its request, but rather, bases its request upon speculation about what action the legislature might take at some point in time. No legal authority gives this Court, nor any other

in the State of Washington, the ability to sentence *Monschke*-class[1] defendants to life with parole. This Court should not entertain the State's theoretical briefing.

The case should be remanded for the sole purpose of striking the 36 months of community custody imposed on Mr. Blystone.

C. STATEMENT OF FACTS

Mr. Blystone agrees with and adopts the Department's recitation of facts in this case. (Pet. Brief, pgs. 2-5). Mr. Blystone also accepts this opportunity to expand upon the facts.

Mr. Blystone's "development was severely impaired starting from an early age" with alcohol use beginning in first and second grade. (State's Resp., Attach. C, pg. 7). Eventually, this led to drug usage, and he appeared to have "no

[1] "*Monschke*-class" defendants in this brief refers to those individuals aged 18-, 19-, or 20-years-old at the time of committing aggravated first degree murder, and sentenced to life in prison without parole (LWOP), but later released due to the mitigating qualities of youth. *Matter of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).

parenting other than from his peers," thus failing to develop a strong conscious or value system. (State's Resp., Attach. C, pgs. 6-7).

But over time, things changed. After he was sentenced to life in prison, Mr. Blystone rehabilitated himself and became a "voice of reason" and "a man that has a heart." (State's Resp., Attach. C, pgs. 34-36). One of his supporters, a retiree from the Department of Corrections, observed Mr. Blystone almost every day for 30 years, stating: "We have a lot of inmates, probably thousands over the years, and he was like one of three individuals that I would give testimony for and I would give it to him without regard." (State's Resp., Attach. C, pgs. 30-31).

After learning about Mr. Blystone's youth at the time of the crime and assessing his rehabilitation to date, the trial court resentenced Mr. Blystone to a determinate sentence of 480 months and 36 months of community custody pursuant to *Monschke*. (Dept. Petition, Ex. C, pg. 3); (State's Resp.,

Attach. C, pgs. 1-73); *Matter of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).

D. ARGUMENT

1. Whether the sentencing court erred in imposing 36 months of community custody when the law in effect on the date of the crime did not authorize it.

Mr. Blystone agrees with the Department's position: that at resentencing, the trial court did not have statutory authority to impose 36 months of community custody due to the attendant statutes in effect at the time of the crime. (Dept. Petition, pgs. 5-13). The State appears to agree, as well. (State's Brief, pgs. 9-11).

The Department may bring a petition to review sentences of offenders pursuant to RCW 9.94A.585(7). RCW 9.94A.585(7); *In re Bercier*, 178 Wn. App. 148, 149, 313 P.3d 491 (2013). The statute provides a means for the Department to seek correction of a judgment and sentence it believes is unlawful, as the Department is "not authorized to correct an erroneous judgment and sentence" on its own. *Dress v. Wash.*

State Dept. of Corrections, 168 Wn. App. 319, 325-326, 279 P.3d 875 (2012).

The scope of review in a post-sentence review petition "shall be limited to errors of law." *Matter of Milne*, 7 Wn. App. 2d 521, 523, 435 P.3d 311 (2019) (citing RCW 9.94A.585(7)). Whether a sentencing court exceeded its statutory authority under the Sentencing Reform Act of 1981 (SRA), RCW Chapter 9.94A, is an issue of law this Court reviews de novo. *Milne*, 7 Wn. App. 2d at 523.

Where the issue implicates a question of statutory interpretation, review is also de novo. *Milne*, 7 Wn. App.2d at 523; *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Milne*, 7 Wn. App.2d at 523. Unambiguous statutes are applied according to their plain language. *Leach*, 161 Wn.2d at 185. "No construction should be accepted that has unlikely, absurd,

or strained consequences." *Leach*, 161 Wn.2d at 185 (internal citation and quotations omitted).

"If the language of a criminal rule is susceptible to more than one meaning, the rule of lenity requires that we strictly construe it against the State and in favor of the accused." *State v. Quintero Morelos*, 133 Wn. App. 591, 596, 137 P.3d 114 (2006).

A sentence for community custody may be imposed only when authorized by statute. *Leach*, 161 Wn. 2d at 184; *Milne*, 7 Wn. App. 2d at 526; (Dept. Petition, pgs. 6-8). When community custody is not authorized by statute, it must be excised from an otherwise valid sentence. *Leach*, 161 Wn.2d at 189 (remanding defendant's case for resentencing without community custody because conviction for attempted assault of a child in the second degree was not part of an exhaustive list of "crimes against persons").

Prior to 1988, the SRA did not authorize nor require community placement or community supervision.[2] *State v. Skillman*, 60 Wn. App. 837, 839-840, 809 P.2d 756 (1991). And as such, "since the inception of the SRA neither community placement nor community supervision has been authorized as an element of a prison sentence, either standard or exceptional, except in those situations where community placement is required." *Skillman*, 60 Wn. App. at 840-841.

In *Skillman*, a Division II case, the court held that because the offense of attempted kidnapping in the second degree was not an offense listed by statute which required community placement, the trial court could not impose an exceptional sentence including community placement as part of the offender's sentence. *Skillman*, 60 Wn. App. at 841. Likewise, Division I recognizes that "*when a statute authorizes*

[2] The terms of "community placement," "community supervision," and "community custody" are treated as essentially having the same meaning in this briefing since they all encompass post-confinement supervision in the community. *See also* (Dept. Petition, pg. 6 at fn. 3).

community custody, trial courts may impose community custody terms longer or shorter than the amount set by statute…." *State v. Hudnall*, 116 Wn. App. 190, 197, 64 P.3d 687 (2003) (emphasis added). *In re Smith*, another Division I case, also holds exceptional sentences of community custody are permitted but only when community custody is authorized by statute. *In re Smith*, 139 Wn. App. 600, 604, 161 P.3d 483 (2007), *as amended* (July 13, 2007). *See In re Breedlove*, 138 Wn.2d 298, 304, 979 P.2d 417 (1999) (recognizing imposition of a sentence which is not statutorily authorized by the SRA is a fundamental defect); *also* (Dept. Petition, pgs. 6-8).

Sentencing courts are required to look to the statute in effect at the time the crime was committed when imposing a sentence. *State v. Varga*, 151 Wn.2d 179, 191 P.3d 139 (2004); (Dept. Petition, pg. 8).

As stated by the Department, the SRA in effect did not authorize community custody at the time of Mr. Blystone's offense on June 4, 1986. (Dept. Petition, pgs. 8-9). As

acknowledged by the State, no provision in either RCW Chapters 9.94A nor 10.95 in effect at the time of the crime authorized community custody for aggravated first degree murder. (State's Resp., pgs. 9-10); (Dept. Petition, pgs. 8-9); (Appx. A, RCW Chap. 9.94A (1985)); (Appx. B, RCW Chap. 10.95 (1985 & Supp. 1986)). Mr. Blystone agrees with these conclusions.

And to date, the legislature has not enacted any new provisions that apply to *Monschke*-class defendants. RCW 10.95.030 & 10.95.035 (current). While the current statutory scheme provides for post-release supervision of juvenile, aggravated first degree murder offenders, no such legislation exists for 18-, 19-, or 20-year-olds who have been resentenced to a sentence of less than LWOP pursuant to *Monschke*. RCW 10.95.030 & 10.95.035 (current). Nor has our Supreme Court read into those statutes a requirement of community custody for defendants released under *Monschke*. *Matter of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).

Only the legislature may authorize imposition of community custody on a *Monschke*-class defendant. At this time, the plain language of the statute is clear. No statutory authority existed at the time of the offense to authorize community custody under the SRA or Chapter 10.95. (Exs. A & B). And where any ambiguity exists, the rule of lenity should apply in favor of Mr. Blystone. Mr. Blystone's term of community custody must be excised from his judgment and sentence.

Mr. Blystone respectfully requests the Department's petition be granted.

2. Whether the State may ask this Court to vacate the imposed determinate sentence when: (a) the issue is not properly raised before this Court, and (b) there is no statutory authority or case law to support the State's suggested alternative of resentencing to an indeterminate life sentence.

For the first time in this action and in the State's response briefing, it raises several new issues, particularly in hopes of obtaining a full resentencing.

(State Brief, pgs. 1-47). The State claims it did not file a direct appeal of Mr. Blystone's sentence because it was unaware until December 1, 2022, that resentencing courts did not have unfettered sentencing discretion when it came to *Monschke*-class defendants. (State Resp. Brief, pgs. 1-2). The State also argues the sentencing court should have imposed an indeterminate life sentence as a prophylactic measure and in anticipation of new legislation which has yet to be enacted or moved forward. (State's Resp. Brief, pgs. 1-47). Although the State's arguments are without support or merit and this Court should not consider them, Mr. Blystone takes this opportunity to address them.

a. The State raises new issues in its response briefing which are not properly before this Court.

The State asks this Court to vacate Mr. Blystone's entire sentence as unlawful. (State's Resp. Brief, pgs. 1-47). The State cannot raise new issues in its response to

this post-sentence review petition. Mr. Blystone requests this Court disregard the State's newly raised issues. *See also* (Dept. Reply to State's Resp., pgs. 1-5).

"An offender may not raise a new issue in response to a postsentence review petition; instead, the offender must raise the new issue in a collateral attack, if at all." *In re Bercier*, 178 Wn. App. 148, 151, 313 P.3d 491 (2013); *also Wandell v. State*, 175 Wn. App. 447, 452-453, 311 P.3d 28 (2013). If a defendant is precluded from raising a new issue in its response to a post-sentence review petition, it is only fair the State cannot do so, either. *Id*.; *see State v. Sims*, 171 Wn.2d 438, 442, 256 P.3d 285 (2011) (it would be "incongruous" to allow State to raise issues in response to defendant's appeal when defendant is deemed to have waived all issues except those raised in defendant's direct appeal).

Although nonbinding authority, the unpublished decision of *Matter of Post-Sentence Petition of Lucio* is

persuasive. This Court held that while RCW 9.94A.585(7) allows the Department to petition the court for review to resolve errors found in a judgment and sentence, it does not allow an offender to assert a petition or new argument. *Matter of Post-Sentence Petition of Lucio*, 2017 WL 6388992, *2 (Wash. Ct. App. Dec. 14, 2017) (2017); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). This Court acknowledged review of the defendant's newly raised sentencing issue could save time and expense if addressed during the pendency of the Department's petition. *Id*. at *2. However, this Court concluded the defendant must explore alternative avenues for correcting any erroneous sentence, as the Department's petition was solely based on one issue and not the affirmance of the judgment and sentence as a whole. *Id*. at *2.

Similarly, when a defendant raises a single sentencing issue in direct appeal the State may not use that opportunity to add new issues or seek affirmative relief when it chose not to file a cross-appeal. *Sims*, 171 Wn.2d at 442-449. RAP 2.4(a) limits circumstances in which a respondent may seek affirmative relief, and "affirmative relief" includes requesting a "change in the final result at trial" or "partial reversal of the trial court's decision." *Id*. at 442-443 (citations omitted). In general, affirmative relief can only be granted when the "petitioner's claim cannot be considered separately from issues a respondent raises in response." *Id*. at 444.

In this case, the State seeks to raise brand new issues in hopes of seeking total vacation of Mr. Blystone's sentence. (State's Resp., pgs. 1-47). But the State is not excused from failing to take necessary steps to challenge the imposed sentence under the appropriate methods. RAP 2.2(b)(6), 5.2(a); CrR 7.8(b). It cannot

now use the Department's petition in an attempt to fully resentence Mr. Blystone for a third time. The State had ample opportunity at two resentencing hearings on May 27 and June 3, 2022, to raise any issues it deemed appropriate. (State's Resp., Attach. C, pgs. 1-73). And the prosecutor at Mr. Blystone's resentencing apparently consulted with the appellate unit to determine how to handle aspects of the case. (State's Resp., pgs. 1-2, 11-12, Attach. C, pgs. 62).

The State asserts that until December 1, 2022, it did not know the law would change. (State's Resp., pgs. 1-2, 11-12). It cites to *Matter of Forcha-Williams*, 200 Wn.2d 581, 520 P.3d 93 (Dec. 1, 2022) and *Matter of Williams*, 200 Wn.2d 622, 520 P.3d 933 (Dec. 1, 2022), for the proposition that these were changes in the law that made Mr. Blystone's determinate sentence unlawful and as such "remand is therefore required to vacate the entire 2022 judgment and sentence and to impose a new

sentence that does not exceed the authority conferred upon it by the legislature in chapter 10.95 RCW, i.e., to resentence Mr. Blystone to either non-mandatory LWOP or life with parole." (State's Resp., pgs. 11-12). But the holdings in these cases do not apply here. *Forcha-Williams* and *Williams* do not apply to Mr. Blystone's case because Mr. Blystone was not sentenced according to an indeterminate sentencing scheme.

In *Forcha-Williams*, our Supreme Court held that *Houston-Sconiers* does not give trial courts discretion to impose determinate sentences where statutes mandate an indeterminate sentence. *Forcha-Williams*, 200 Wn.2d at ___, 520 P.3d at 945; *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). "Rather, *Houston-Sconiers* gives judges the discretion to impose an indeterminate sentence with a minimum term below the minimum term set by the legislature when required by the mitigating qualities of the offender's youth." 520

P.3d at 945. The Court reasoned that risks of disproportionate punishment were different because the offender is not mandated to serve the maximum term. 520 P.3d at 948. "[T]here is a statutory presumption of release upon serving the minimum term unless the ISRB finds the offender likely to commit sex offenses if released." 520 P.3d at 948 (citing RCW 9.95.420(3)(a)). The same was found by the Court in *Williams*. 520 P.3d at 937. The Court held the defendant's challenge to his sentence of the mandatory indeterminate maximum of life in prison did not run the risk of disproportionate application to youthful offenders because there is a statutory presumption of release unless the ISRB finds the defendant is likely to commit new sex offenses if released. *Williams*, 520 P.3d at 937-938.

Forcha-Williams and *Williams* do not involve determinate sentences and the State's argument that their holdings make Mr. Blystone's "entire sentence" unlawful

is without support or merit. (State's Resp., pgs. 2-3). Mr. Blystone was not convicted of a sex offense and is not subject to any sort of indeterminate sentence. (Appx. A, RCW Chap. 9.94A (1985)); (Appx. B, RCW Chap. 10.95 (1985 & Supp. 1986)). The State cites no statutory authority—and has none—under which to request this Court to "vacate [Mr. Blystone's sentence] and instruct the trial court to impose at a minimum an indeterminate life sentence as required by chapter 10.95 RCW." (State's Resp., pgs. 2-3, 11-12, 23). That is not what chapter 10.95 of the RCW says. (Appx. B, RCW Chap. 10.95 (1985 & Supp. 1986)).

Even if the holdings of *Forcha-Williams* and *Williams* were to somehow apply to this case, the State had ample opportunity to be aware of any cases post-*Monschke* which may have modified that holding. Both *Forcha-Williams* and *Williams* were argued before the Washington Supreme Court on May 26, 2022. *Forcha-*

Williams, 200 Wn.2d 581; *Matter of Williams*, 200 Wn.2d 622. These pending cases and the issues presented were available to the State prior to Mr. Blystone's resentencing hearings on May 27 and June 3, 2022. The State could have filed a notice of appeal, which it did not do. (State's Resp., pgs. 1-2, 11-12, Attach. C, pgs. 1-73).

The new issues the State seeks to address are not properly before this Court and should be disregarded.

b. There is no statutory authority or case law to support the State's suggested alternative of resentencing to an indeterminate life sentence.

Although this Court should not consider the State's improperly raised issues, Mr. Blystone takes this opportunity to briefly address the substantive arguments made by the State.

First, Mr. Blystone agrees with and adopts the Department's analysis: currently, Mr. Blystone's offense is not eligible for parole and the ISRB lacks statutory authority over

Mr. Blystone even were this Court to order an indeterminate sentence. (Dept. Reply to Resp., pgs. 6-7).

Second, even if this Court were to consider the State's request for full resentencing and imposition of a new sentence under the term of life with the possibility of parole, the State's argument fails under current case law.

The State asserts the trial court did not have authority to resentence Mr. Blystone because no legislative authority exists for resentencing. (State's Brief, pgs. 15-20). In a bold move, the State further argues *Monschke* does not permit the trial courts to impose determinate sentences, and requests this Court read into the statutory scheme the option of life with parole where there is no statutory authority to do so. (State's Resp., pgs. 19-24).

Using the State's logic, no sentencing scheme currently exists under which to sentence those LWOP offenders who qualify for a mitigated sentence pursuant to *Monschke*. To approach the *Monschke*-class situation this way would be to

completely ignore the holding in *Monschke* and make Mr. Blystone's former sentence a nullity. The State's argument that this Court must now remand the case for resentencing to hold Mr. Blystone in confinement pending legislation is without authority and would be unconstitutional under *Monschke*. (State's Brief, pgs. 15-20).

No portion of the SRA in effect at the time of the crime in this case in 1986 provides for an alternative sentence for aggravated first degree murder. (Appx. A, RCW Chap. 9.94A (1985); *also* (Appx. B, RCW Chap. 10.95 (1985 & Supp. 1986)). And RCW 10.95.030 at the time only provided the option of LWOP or death. (Appx. B, RCW 10.95.030 (1985)). There was no direct statutory scheme under which to sentence Mr. Blystone once the trial court determined he qualified for release per *Monschke*. 197 Wn.2d 305, 329; (Appx. A, RCW Chap. 9.94A (1985)); (Appx. B, RCW Chap. 10.95 (1985 & Supp. 1986)).

But several times in its briefing the State overlooks the fact that *Monschke* expressly invalidated LWOP for those 18-, 19-, and 20-year-olds who qualified for a mitigated sentence based on youthfulness. *Monschke*, 197 Wn.2d at 329. The state and federal constitutions prohibit mandatory LWOP sentences for juvenile offenders and require the courts to "exercise complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even when faced with mandatory statutory language." *Monschke*, 197 Wn.2d at 311 (quotations omitted) (citing *Houston-Sconiers*, 188 Wn.2d at 21). *Monschke* took that one step further, finding state courts must have discretion to consider the mitigating qualities of youth when sentencing juveniles and 18-, 19-, and 20-year-olds, as "no meaningful neurological bright line exists between age 17 and age 18 . . . or ages 19 and 20." *Monschke*, 197 wn.2d at 326. The Supreme Court stated RCW Chapter 10.95's requirement of LWOP for "*all* defendants 18 and older, regardless of individual

characteristics, violates the state constitution." *Id*. The Supreme Court expressly directed that sentencing courts exercise their discretion when sentencing an 18-, 19-, or 20-year-old. *Id*. at 329. That is what the trial court did here, in Mr. Blystone's case. The State cannot now argue the trial court in this case acted without authority when sentencing Mr. Blystone to a sentence other than LWOP.

The Washington Supreme Court has a "long history of restraint in compensating for legislative omissions." *Leach*, 161 Wn.2d at 186 (citation and quotation omitted). The Court acknowledges it "cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission." *Id*. at 186.

Yet the State insists that since RCW 10.95.030(3)(a) contains new sentencing provisions for juveniles convicted of aggravated first degree murder, the trial court was not allowed to release Mr. Blystone until the "legislature decides otherwise." (State's Resp., pgs. 35, 36-37, 40, 45). The State

proposes: "Until the legislature adopts specific sentencing provisions that implement a post-*Monschke* life with possibility of parole sentence, [the Department] may not actually release anyone who committed aggravated first degree murder between their eighteenth and twenty-first birthdays." (State's Resp., pg. 40).

The State admits the legislature has not yet enacted new statutes nor amended existing ones to provide an alternative sentencing option for *Monschke*-class defendants. (State's Resp., pgs. 16-19). RCW Chapter 10.95 did not impose an indeterminate sentence on Mr. Blystone's conviction in 1986. (Appx. A, RCW Chap. 9.94A (1985); *also* (Appx. B, RCW Chap. 10.95 (1985 & Supp. 1986)). No current legislation imposes an indeterminate sentence at this time on a *Monschke*-class defendant. (State's Resp., pgs. 24-47); RCW Chap. 10.95 (current).

To date the Washington legislature has only proposed two bills on the matter—H.B. 1396[3] and H.B. 1325[4]—neither of which have moved any further forward in the legislative process. H.B. 1325, 68th Leg., Reg. Sess. (Wash. 2023); H.B. 1396, 68th Leg., Reg. Sess. (Wash. 2023). Given there is limited time for bills to be voted on in this session[5], the lack of progress is notable and unlikely to result in any legislative action that will affect this case. These bills would not alter Mr. Blsytone's sentence, either. For instance, if H.B. 1396 were passed as written, it would not apply to Mr. Blystone. H.B. 1396, sec. 7 (changes to RCW 10.95.030 would apply to sentences imposed *after* July 1, 2023). Ultimately, even if new legislation is enacted there is no guarantee it will apply to Mr.

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[3]Bill summary available at: https://app.leg.wa.gov/billsummary?BillNumber=1396&Initiative=false&Year=2023.

[4] Bill summary available at: https://app.leg.wa.gov/billsummary?BillNumber=1325&Initiative=false&Year=2023.

[5] The 20223 Session Cutoff Calendar is available at: https://leg.wa.gov/legislature/pages/cutoff.aspx.

Blystone. Any new legislation is more likely to apply prospectively. *See* H.B. 1396 sec. 7. This Court cannot wait for a legislative fix to fill in any gaps the State perceives are at issue here. *Leach*, 161 Wn.2d at 186.

The State's interpretation of the applicable laws and its notion the trial court has authority to continue to confine a *Monschke*-class defendant until legislation is passed is draconian. Nowhere in the *Monschke* opinion does our Supreme Court give trial courts the authority to impose indefinite confinement or supervision on an individual who qualifies for release in hopes the legislature will codify a "*Monschke*-fix". *Monschke*, 197 Wn.2d 305.

Finally, the State cites to *State v. Hofstetter* for the same unsupported ideas it puts forth in its briefing—that the sentence imposed here by the trial court was invalid. *State v. Hofstetter*, No. 45614-1-II, 2015 WL 4456218 (Wash. Ct. App. July 21, 2015); (State's Resp., pgs. 17-19). The problem with *Hofstetter*, however, is that the case progressed during the

implementation of the *Miller*-fix legislation. *Id*. at *1. At the time, RCW 10.95.030(3) was amended before the parties filed their appellate briefs. *Id*. at *1. Once that legislation was in place, the sentence challenged by both parties was inconsistent with the new, statutory directive of the *Miller*-fix. It is likely there was no perceived need to conduct a close examination of the resentencing, which was understandable since the new legislation had a retroactive application. *Hofstetter* is also an unpublished case, meaning it has persuasive but not precedential value. 2015 WL 4456218; GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). Mr. Blystone's case is different because no such legislative fix currently exists.

The trial court here had the discretion to impose 480 months in Mr. Blystone's case once the court determined he was a part of the *Monschke*-class. *Monschke*, 197 Wn.2d at 329. Courts are not otherwise permitted to fill in gaps where legislative holes exist. *Leach*, 161 Wn.2d at 186. This Court

should not consider the State's newly raised arguments as they are not only improperly raised, but also because they are unpersuasive and unsupported. The State's arguments requesting a full resentencing should be disregarded.

E. CONCLUSION

For the reasons stated herein, Mr. Blystone respectfully requests this Court grant the Department's petition. The judgment and sentence should be remanded to remove the 36 months of community custody. This Court should decline to entertain the State's unsupported and improper arguments and only excise the portion of Mr. Blystone's sentence that unlawfully imposed community custody.

I certify this document contains 4,339 words, excluding the parts of the document exempted by RAP 18.17.

Respectfully submitted this 21st day of February, 2023.

Laura M Chuang

Laura M. Chuang, WSBA #36707

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Post-Sentence Review of:	)	COA No. 39144-2-III
	)	
CHRISTOPHER MARK BLYSTONE,	)	PROOF OF SERVICE
	)	
	)	
Defendant/Respondent.	)	

I, Laura M. Chuang, assigned counsel for the Respondent herein, do hereby certify under penalty of perjury that on February 21, 2023, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Respondent's response brief, addressed to:

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Having obtained prior permission, I also served the following by email using the Washington State Appellate Courts' Portal:

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Dated this 21st day of February, 2023.

/s/ Laura M. Chuang
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