NO. **101269-1**

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL CHARLTON,
Petitioner.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

ANSWER TO PETITION FOR REVIEW

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2. **Even assuming, *arguendo,* that Petitioner's second court appearance was a critical stage of the proceeding, and it was an error of constitutional magnitude for the court to set bail in the absence of counsel, should this Court accept review when the error was harmless beyond a reasonable doubt and the Court of Appeals applied the correct harmless error analysis; if this Court does accept review, should the Court of Appeals be affirmed on this issue?**

COUNTERSTATEMENT OF THE CASE

Michael Charlton, Petitioner herein, first appeared in Grays Harbor County Superior Court on December 31, 2019, having been arrested the night before on probable cause for the crimes of rape of a child in the third degree, indecent liberties,

and child molestation in the third degree. Mr. Charlton was advised of the charges and asked if he understood them, to which he replied, "I guess so." 12/31/19 RP 5. The prosecutor requested a 72-hour hold (such a hold is authorized by CrR 3.2.1(f)(1)) and Judge David Edwards set bail at $25,000. 12/31/19 RP 6-7.

Mr. Charlton next appeared in court, in custody, on January 3, 2020. 01/03/20 RP 9 et seq. By that time, Mr. Charlton had been charged by information in Grays Harbor County cause number 19-1-826-14 with rape of a child in the third degree, indecent liberties and child molestation in the third degree. CP 6-7. The court appointed attorney Michael Nagle to represent Mr. Charlton. 01/03/20 RP 12; Mr. Nagle was not present at this hearing. Arraignment was set for the next Monday, January 6, 2020. 01/03/20 RP 12.

On January 6, 2020, Mr. Nagle was not present and the prosecutor indicated he had spoken to Mr. Nagle, who had

requested that arraignment be set over one week. 01/06/20 RP 22.

On Monday, January 13, Mr. Nagle was present in court. Mr. Nagle told the court that he had had the opportunity to meet with Mr. Charlton and review the information; Mr. Nagle then entered a plea of not guilty on Mr. Charlton's behalf. 01/13/20 RP 23. Mr. Charlton was released from custody on his personal recognizance, 01/13/20 RP 26, and remained out of custody until trial. Mr. Charlton was in custody for fourteen days from the time of his arrest to his release following his arraignment.

On November 9, 2020, Mr. Charlton waived jury, 11/9/20 RP 4 et seq, CP 16, and the case proceeded to a bench trial before Judge Edwards on November 17, 2020, 11/17/20 RP 36 et seq., approximately ten months after his arraignment and release from custody. Mr. Charlton was found guilty of rape of a child in the third degree and child molestation in the third degree, and not guilty of indecent liberties. 11/17/20 RP

141-143. The court imposed a standard range sentence, 01/19/21 RP 162, CP 72-89, and Petitioner appealed.

In a published opinion the Court of Appeals, Division II, held that Petitioner's second court appearance on January 3, 2020, was a critical stage of the proceedings:

> The State had formally charged him and the court's bail decision not longer was temporary. Unless modified later, the bail the trial court set would remain until trial. And unless Charlton could post bail, he would remain in jail until the time of trial. As a result, the trial court's discussion of bail at the second preliminary hearing had very significant consequences for Charlton's liberty.
>
> We conclude that Charlton's second court appearance was a critical stage in the criminal proceedings because bail was addressed and imposed.

State v. Charlton, 23 Wn. App. 2d 150, 165, 545 P.3d 537 (2022) (footnote omitted). The court went on to hold that the absence of counsel at the second court appearance was not structural in that it did not pervade and contaminate the entire case. *Charlton* at 167. The court then applied harmless error

analysis and found that the absence of counsel at his second court appearance was harmless. *Id.* at 168-69.

In his petition to this Court Mr. Charlton seeks review of the Court of Appeals' harmless error analysis; he does not seek review of the court's analysis and holding that his second appearance was a critical stage of the trial court proceeding. Appellate counsel herein also represents the petitioner in *State v. Heng*, 22 Wn. App. 2d 717, 512 P.3d 942 (2022), also before this Court on a petition for review, No. 101159-8, wherein Division One of the Court of Appeals held that a court appearance by Mr. Heng, virtually identical to Mr. Charlton's second appearance below, *was not* a critical stage of proceedings. Appellate counsel requests that review be accepted in both cases and that they be consolidated for purposes of review. Petition for Review, pp. 15-16.

ADDITIONAL ISSUE FOR REVIEW

Pursuant to RAP 13.4(d) (if a party filing an answer seeks review of an issue not raised in the petition it must be raised in the answer) the State seeks review of the Court of Appeals holding that Mr. Charlton's second appearance was a critical stage of the proceedings. Review should be granted on this issue pursuant to RAP 13.4(b)(1), (2), (3) and (4) in that the decision below conflicts with decisions of this Court and published decisions of the Court of Appeals, it presents a significant question under the State and U.S. constitutions, the right to counsel, and involves a question of substantial public interest, in that if not addressed it is likely to reoccur; additionally, review should be granted in light of the decision in *State v. Heng*, *supra,* and given Petitioner's request that this case be consolidated with *Heng* on review.

ARGUMENT

1. Should this Court grant review of the Court of Appeals decision that Petitioners's second court

appearance was a critical stage of the proceedings because bail was set, when no rights were lost, no defenses or privileges were waived, nor was the outcome of the case substantially affected, said decision being contrary to settled case law, and otherwise presenting a significant question of constitutional law and an issue of substantial public interest under RAP 13.4(b)?

Not all error involving the right to counsel amounts to a complete deprivation of that right. *See Satterwhite v. Texas,* 486 U.S. 249, 257, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988). However, the complete denial of counsel at a "critical stage" in the proceedings is generally considered to be structural error. *State v. Heddrick,* 166 Wn.2d 898, 910, 215 P.3d 201 (2009). A "critical stage" is one where "a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *Id.,* (quoting *State v. Agtuca,* 12 Wn. App. 402, 403-04, 529 P.2d 1159 (1974)). In determining whether a proceeding is a critical stage, appellate courts look at the substance of the hearing, not merely the type of hearing, to assess the possibility

of prejudice to the defendant. *In re Pers. Restraint of Sanchez,* 197 Wn. App. 606, 703, 391 P.3d 517 (2017). Only where "the deprivation of the right to counsel affected – and contaminated – the *entire criminal proceeding"* do appellate courts forego a harmless error analysis in favor of per se reversal as structural error. *Satterwhite*, 486 U.S. at 257 (emphasis added).

In *Sanchez, supra,* the defendant was charged with several crimes, including aggravated first-degree murder, and appeared at group arraignment without an attorney. *Sanchez,* 197 Wn. App. at 690-91. The court advised Mr. Sanchez of his rights, entered a plea of not guilty on his behalf and set new court dates. *Id.* at 691 (although not mentioned in the opinion, given the nature of the offense it must be assumed that the court also set bail). On appeal, Mr. Sanchez argued that his lack of counsel at arraignment was a structural error requiring reversal. *Id.* at 697-98. The Court of Appeals disagreed, concluding that any infringement on Mr. Sanchez's right to counsel at

arraignment did not amount to structural error because the arraignment hearing was not a critical stage. *Id.* at 702-03. The court reasoned that Mr. Sanchez did not "lose important rights that might affect the outcome of his case" at the hearing. *Id.* at 702 (citing *Heddrick*, 166 Wn.2d at 910). Rather, the hearing merely involved " 'ascertaining the defendant's name, advising the defendant of certain rights including the right to counsel, and informing the defendant of the charges that have been filed.' " *Id.* at 702, (quoting *State v. Frazier*, 99 Wn.2d 180, 184, 661 P.2d 126 (1983)).

This Court denied review. *In re Pers. Restraint of Sanchez*, 189 Wn.2d 1023, 408 P.3d 1089 (2017). In denying review, the Supreme Court commissioner's ruling stated as follows:

> First, Mr. Sanchez contends that the trial court committed structural error by allowing him to be arraigned without the presence of counsel. *See Hamilton v. Alabama*, 368 U.S. 52, 54-44, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (holding that Alabama arraignment was critical stage of criminal

> proceeding where right to counsel applied). This court has held that failure to appoint counsel for a preliminary hearing at which the defendant pleaded not guilty and where nothing substantive occurred did not constitute denial of the right to counsel. *State v. Jackson*, 66 Wn.2d 24, 29-30, 400 P.2d 774 (1965). Whether the pretrial hearing is called a preliminary hearing or an arraignment or an appearance is irrelevant. "The name of the stage of the criminal proceeding is not controlling." *Id.* at 28. If there is no possibility the defendant will be prejudiced by the pretrial hearing in the absence of counsel, there is no constitutional violation. *Id.* In contrast, "[a] complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." *State v. Hedrick*, 166 Wn.2d 898, 910-11, 215 P.3d 201; *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

408 P.3d at 1089.

The commissioner noted that the trial court had "merely conducted an informal pretrial hearing" for a group of defendants, including Mr. Sanchez; that when his case was called no attorney was present; Mr. Sanchez said he understood the charges; and though he was not asked to enter a plea, the court apparently entered a blanket not guilty plea for the entire

group of defendants. "The State subsequently twice amended the charges, and Mr. Sanchez never sought to revoke his not guilty plea or to plead an insanity defense." *Id.* at 1090. The commissioner went on to say:

> Under these circumstances, the Court of Appeals correctly held that the pretrial hearing was not a critical stage of the prosecution. No irrevocable plea was entered, no evidence was submitted, and no admissions were made. The Court of Appeals applied the correct and long-established legal test for determining whether a pretrial hearing was a critical stage of the proceedings. Because it was not a critical stage, there was no error, much less structural error, in conducting the hearing outside of the presence of counsel.

Id.

United States Supreme Court cases are in accord with Washington law as to what constitutes a critical stage of the proceedings.

Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) addressed a preliminary hearing where evidence was presented and defenses were waived if not

asserted. The Court of Appeals in *Sanchez, supra*, rightly rejected the application of *Hamilton*:

> Unlike in *Hamilton,* Sanchez stood no risk of waiving any rights or foregoing any defenses at his arraignment. Nor did he make admissions of guilt like the defendant in *White.*
>
> **********
>
> Thus, unlike in *Hamilton,* Sanchez makes no showing that any right or defense he possessed prearraignment was forfeited or went unpreserved by his attorney's absence at arraignment. We conclude that any Sixth Amendment or rule-based deprivation/absence of counsel at Sanchez's arraignment did not contaminate the entire trial proceeding so as to bring this case within the purview of *Hamilton, White,* or other previously noted cases of presumed prejudice.

Sanchez, 197 Wn. App. at 702.

Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) similarly involved a preliminary hearing where evidence was presented to determine whether there was sufficient evidence to present to a grand jury. The court held that in that case the preliminary hearing was a "critical stage"

where an attorney could have, perhaps, persuaded the judge not to bind the defendant over to the grand jury and thus protect the accused from "an erroneous or improper prosecution" or taken advantage of the presentation of evidence in other ways to benefit the defendant. *Coleman*, 399 U.S. at 9. *Coleman* does not hold that once the right to an attorney attaches, structural error occurs any time an attorney is absent; rather, it holds that the attorney's absence must occur at a critical stage in the proceedings in order for there to be structural error, "where counsel's absence might derogate from the accused's right to a fair trial." *Coleman*, 399 U.S. at 7 (quoting *United States v. Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Unlike in *Coleman*, no evidentiary hearing was held in Mr. Charlton's case.

In *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) Mr. Rothgery was erroneously arrested for being a felon in possession of a

firearm. He was brought before a magistrate, probable cause was determined and bail was set. No attorney was appointed. Mr. Rothgery later posted bail; following release he made several requests for court appointed counsel which went unheeded. Approximately six months later he was indicted on the same charge, rearrested and jailed; an attorney was then appointed who was able to get the indictment dismissed. Mr. Rothgery brought a 42 U.S.C. sec. 1983 action alleging that, had an attorney been appointed within a reasonable time after he had initially appeared in court, he would not have been indicted, rearrested, or jailed.

The U.S. District Court granted the county's motion for summary judgment and the Fifth Circuit affirmed. The Supreme Court reversed, holding that the Sixth Amendment right to counsel "attaches" when he appears before a magistrate, learns of the charges and his liberty is restricted. Importantly,

the Court did not abandon the "critical stage" analysis, and held as follows:

> Our holding is narrow. *We do not decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this.* We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Rothgery, 554 U.S. at 213 (emphasis added).

The question of when the right to counsel attaches " 'is distinct from the question whether the [proceeding] itself is a critical stage requiring the presence of counsel.' " *Rothgery*, 554 U.S. at 212 (quoting *Michigan v. Jackson*, 475 U.S. 625, 629 n.3, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), *overruled on other grounds, Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 631 (2009)). In his concurrence, Justice

Alito wrote to reaffirm that "the term 'attachment' signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel." *Id.* at 213.

Rothgery does not hold that just because the right to an attorney "attaches", the absence of an attorney at future court hearings, regardless of the nature of the hearing, results in structural error and presumed prejudice.

Washington law is in accord with *Rothgery* as to when the right to counsel "attaches":

> Washington court rules confer on a defendant an early right to counsel. CrR 3.1(b)(1) (right to counsel accrues as soon as feasible after defendant is taken into custody, appears before committing magistrate, or is formally charged, whichever occurs earliest).

Sanchez, 197 Wn. App. at 698.

The court in *Sanchez* noted several other U.S. Supreme Court cases as "examples of presumed prejudice when counsel

was absent or prevented from assisting the defendant *at a critical stage"* consistent with Washington law:

> *Penson v. Ohio*, 488 U.S. 75, 88-89, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) (complete denial of counsel on appeal); *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (conflict of interest in representation throughout entire proceeding); *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (denial of access to counsel during overnight recess); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (accused confronted by prosecuting authorities who obtained incriminating statements by ruse and in the absence of defense counsel); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (total deprivation of counsel throughout entire proceeding);

Sanchez, 197 Wn. App. at 701, fn. 1.

The Court of Appeals decision below is also in conflict with *State v. Heng*, 22 Wn. App. 2d 717, 512 P.3d 942 (2022), also before this Court on a petition for review, No. 101159-8. Mr. Heng was charged with murder in the first degree and arson in the first degree and made his first appearance in court on January 20, 2017. Heng confirmed his name and date of birth

and requested court appointed counsel. The court appointed counsel; however, counsel was not present. The trial judge told Heng that "[w]e put word out to [defense counsel] trying to get him here this morning, but just not enough time. So, he's not here right now. But he'll be – he's already been notified. So he'll be getting in touch with you very shortly." *Heng* at 724. The court then set bail at two million dollars, telling Heng that the issue of bail could be reviewed. *Id.* At arraignment on February 1, 2017, defense counsel told the court, as to bail, that "[a]t some point in the future I may address it, but I'm not gonna [sic] address it now." *Id.* at 724-25. Heng remained in custody pending trial and was convicted as charged.

On appeal, Heng argued that his preliminary appearance was a critical stage of the trial, that the trial court denied him his constitutional right to counsel which was a structural error requiring automatic reversal. *Id.* at 739. The Court of Appeals, Division One, disagreed:

> Here, Heng's preliminary appearance was limited in scope: Heng confirmed his name and date of birth, and the court appointed counsel and set bail, indicating that it would be willing to revisit the issue later. Heng did not forfeit any rights or defenses that would substantially affect the outcome of his trial. Although the trial court did set bail, it also indicated it would be willing to revisit the issue later, and Heng could have asked the court to do so at any time. *See* CrR 3.2(j)(1) ("At any time after the preliminary appearance, an accused who is being detained due to failure to post bail may move for reconsideration of bail."). Thus, Heng's counsel's absence did not cause Heng to waive any right related to bail, nor did counsel's absence "by [its] very nature cast so much doubt on the fairness of the trial process that, as a matter of law, [it] can [not] be considered harmless." *See Satterwhite,* 486 U.S. at 256, 108 S. Ct. 1792. For the foregoing reasons, we conclude that Heng's preliminary appearance was not a critical stage of trial such that counsel's absence therefrom requires automatic reversal. *Cf. In re Pers. Restraint of Sanchez,* 197 Wn. App. 686, 702, 391 P.3d 517 (2017) (arraignment not a critical stage of trial where petitioner made no showing "that any right or defense he possessed prearraignment was forfeited or went unpreserved by his attorney's absence at arraignment.").

Heng at 740.

The court in *Heng* also rejected Appellant's reliance on *Hamilton, Coleman* and *Rothgery, supra,* in arguing that his appearance was a "critical stage" because the trial court set bail, for much the same reasons as set forth herein, *supra*.

Mr. Charlton's second appearance in Grays Harbor County Superior Court was not a critical stage of the proceeding and the Court of Appeals was incorrect to hold otherwise. No Washington case holds that the imposition of bail converts a hearing into a critical stage of the proceedings. Indeed, the Court of Appeals' observation that "[u]nless modified later, the bail the trial court set would remain until trial" and "unless Charlton could post bail, he would remain in jail until the time of trial," *Charlton* at 165, was speculative and irrelevant. Mr. Charlton posted bail. Appellate courts look to whether the alleged error contaminated the entire proceeding, not whether it could have. The absence of appointed counsel was not structural error resulting in presumed prejudice.

Nothing that occurred at those proceedings affected "the framework within which the trial proceed[ed]", *In re Detention of Reyes,*184 Wn.2d 340, 345, 358 P.3d 394 (2015) (closing of courtroom not structural error in commitment proceeding), which rendered Mr. Charlton's trial 'fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *State v. Momah,*167 Wn.2d 140, 155-56, 217 P.3d 321 (2009) (narrowly tailored closure of voir dire not structural error).

The decision below is contrary to Washington case law. This Court should accept review of this issue.

2. Even assuming, *arguendo,* that Petitioner's second court appearance was a critical stage of the proceeding, and it was an error of constitutional magnitude for the court to set bail in the absence of counsel, should this Court accept review when the error was harmless beyond a reasonable doubt and the Court of Appeals applied the correct harmless error analysis; if this Court does accept review, should the Court of Appeals be affirmed on this issue?

"A constitutional error does not require reversal where it is harmless beyond a reasonable doubt." *Heng* at 742 (citing *State*

v. Vasquez, 200 Wn. App. 220, 225, 402 P.3d 276 (2017)). "[M]ost constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); structural errors subject to automatic reversal are found in only a "limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

Structural error is error which " 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *Reyes*, 184 Wn.2d at 345, (quoting *Fulminante*, 499 U.S. at 310). An error is structural when it "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Momah*, 167 Wn.2d at 155-56; *see also State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012) (with structural error " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal

punishment may be regarded as fundamentally fair' " (citing *Fulminante*, 499 U.S. at 310, quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)).

If structural error is found, prejudice is presumed and the case is remanded for a new trial. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004) (remedy for counsel's failure to raise violation of defendant's right to a public trial on appeal is remand for new trial). When an error is not structural, appellate courts apply harmless error analysis to determine whether reversal is appropriate. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). When an error involves a constitutional right, the State must show it was harmless beyond a reasonable doubt. *Id.* That is, the State must prove beyond a reasonable doubt that the violation did not prejudice the defendant. *State v. Sherman*, 59 Wn.App. 763, 768, 801 p.2d 274 (1990).

This is in accord with U.S. Supreme Court jurisprudence:

> United States Supreme Court jurisprudence establishes that constitutional harmless error analysis applies to the denial of the Sixth Amendment right to counsel at all stages of criminal proceedings, except for those where "the deprivation of the right to counsel affected – and contaminated – the entire proceeding."

Sanchez, 197 Wn. App. at 699-700, quoting *Satterwhite*, 486 U.S. at 257. The court in *Satterwhite* (decided subsequent to *Chronic)* refused to adopt an automatic rule of reversal for violations of the Sixth Amendment right to counsel, noting that structural error only occurs when the deprivation of the right to counsel affects, and contaminates, the entire criminal proceeding. 486 U.S. at 257.

Petitioner argues that the state and federal focus on a "fair trial" when it comes to structural versus harmless error has been "rejected," citing *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 128 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). Petition for review, p. 14. Those cases are

inapplicable to the case at hand. *Lafler* addressed the right to effective assistance of counsel in plea negotiations. *Lafler*, 566 U.S. at166. And *Gonzalez-Lopez* dealt with a trial court's erroneous deprivation of the right to *choice* of counsel. *Gonzalez-Lopez*, 548 U.S. at 150-52. Neither case "rejected" well settled case law on structural versus harmless error.

Under constitutional harmless error analysis, there was no prejudice to the defendant beyond a reasonable doubt. Petitioner was only in custody for 14 days; thereafter he remained free on his personal recognizance pending trial. His brief detention as the result of bail being set in the absence of counsel did not contaminate the entire proceeding or affect the verdict.

The holding of the Court of Appeals on this issue was correct. None of the considerations in RAP 13.4(b) have been met. If this Court accepts review, the Court of Appeals should be affirmed on this issue.

CONCLUSION

The Court of Appeals analysis and decision that Mr. Charlton's second appearance where bail was set in the absence of counsel conflicts with both decisions of this Court and published decisions of the Court of Appeals. It involves a significant question of constitutional law under both the state and federal constitution, the right to counsel, and involves an issue of substantial public interest which should be decided by this Court.

On the other hand, the court's harmless error analysis below is correct.

Mr. Charlton was in custody for fourteen days prior to his release, from December 30, 2019, to January 13, 2020. At his second appearance on January 3, 2020, bail was set and an attorney, Michael Nagle, was appointed to represent him, but was not present. At the arraignment on January 13, 2020, Mr.

Nagle appeared and entered a not guilty plea on Mr. Charlton's behalf and secured his release.

The January 3, 2020, hearing was not a "critical stage" of the proceedings and the Court of Appeals decision below is wrong. No witnesses testified, nor was any evidence presented. No defenses or privileges were waived and/or lost nor was the outcome of the case substantially affected, *Agtuca*, 12 Wn. App. at 403-04, so as to cast doubt on the very fairness of the trial process. *Satterwhite*, 486 U.S. at 256. Mr. Charlton did not "lose important rights that might affect the outcome of his case." *Sanchez*, 197 Wn. App. at 702. Nothing occurred that affected confidence in the trial or its outcome. That being the case, there was no structural error (it is the State's position that there was no error at all) and thus prejudice is not presumed; constitutional harmless error analysis applies.

Furthermore, no Washington case holds that the setting of bail in and of itself converts a hearing into a critical stage of

the proceeding. Indeed, the Court of Appeals' observation that "[u]nless modified later, the bail the trial court set would remain until trial" and "unless Charlton could post bail, he would remain in jail until the time of trial," *Charlton* at 165, was speculative and irrelevant. Mr. Charlton posted bail. Appellate courts look to whether the alleged error *actually* contaminated the entire proceeding, not whether it *could* have.

Washington and federal law are consistent with each other. Both look to whether the hearing or event in question was a critical stage of the proceeding such that the error contaminating the entire proceeding resulting in structural error and presumed prejudice and, if not, both engage in harmless error analysis.

There is nothing in the record, which indicates that the Appellant suffered any prejudice resulting from his appearing in court without his attorney that affected the pretrial and trial process or the verdict; his second appearance was not a critical

stage of the proceeding. Beyond a reasonable doubt the error, if any, was harmless.

This court should accept review of the Court of Appeals holding that Mr. Charlton's second appearance in court was a critical stage of the proceedings and reverse. The holding in *Heng* is correct. If this Court accepts review of the court's harmless error analysis, it should affirm the Court of Appeals.

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DATED this 13th day of January, 2023.

Respectfully Submitted,

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WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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