Supreme Court No. _____
NO. 39191-4-III

THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES OLSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

At James Olson's preliminary appearance on a felony charge, he was in-custody, in jail attire, and without counsel. The State ignored the presumption of release and requested he be held without bail. Mr. Olson made incriminating statements—practically confessing to the crime. The superior court orally set exorbitant bail, claiming it was for Mr. Olson's safety. Later the court denied him bail all together in its written order. At a subsequent revocation hearing for two sentences, the State exploited Mr. Olson's incriminating statements he made at the initial appearance. Review is necessary because the Court of Appeals misconstrues *Heng* and *Charlton*. Mr. Olson demonstrated his first appearance was a critical stage that affected the outcome of the trial, he unwittingly waived his privilege against self-incrimination, and he

was unfairly denied the right to presumptive release. Contrary to *Heng*, the State did not show beyond a reasonable doubt that the prosecution's exploitation of Mr. Olson's uncounseled statements to secure a revocation of his sentence was not harmless. Mr. Olson's case warrants review under RAP 13.4(b)(1).

B. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, James Olson asks this Court to review the opinion of the Court of Appeals in *State v. Olson*, No. 39191-4-III (attached in the appendix).

C. ISSUE PRESENTED FOR REVIEW

The right to a lawyer accrues as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest. The court violated CrR 3.1, the Sixth Amendent, and Article 1. Sec. 22 of the Washington Constitution, by not providing Mr. Olson

counsel at his first appearance, where he appeared in jail clothes over video, he argued against presumptive release, he waived his right to remain silent and the court set bail he could not afford. The Court of Appeals incorrectly holds the first appearance was not a critical stage. Additionally, the Court of Appeals incorrectly holds that denial of counsel was harmless beyond a reasonable doubt. Is review necessary under RAP 13.4(b)(1) because the Court of Appeals opinion conflicts with this Court's precedent in *Heng* and *Charlton*?

D. STATEMENT OF THE CASE

Mr. Olson suffers from mental illness. There is no dispute Mr. Olson has battled drug addiction for 12 years; he needs treatment to recover. RP 71, 152.

1. Mr. Olson pleads guilty to two counts and receives alternative sentences.

In September 2021, Mr. Olson was charged with violating a no-contact order prohibiting him from contacting Malina Powers. CP 82. In January 2022, Mr. Olson was charged with violating a no-contact order prohibiting him from contacting Malina Powers. CP 8.

Mr. Olson pleaded guilty to those two counts. CP 10-22; 84-94. At sentencing, the Court granted Mr. Olson an out-of-custody Drug Offender Sentencing Alternative (DOSA) for each count. CP 96-106.

2. Mr. Olson misses the bus to the treatment center.

The court ordered Mr. Olson to report on time for a bus to transport him to the treatment center. RP 116-19. The court released Mr. Olson on his own recognizance so he could pick up personal items before going to the treatment center. RP 117-19. Mr. Olson missed the bus. *Id.*

On July 1, 2022, the prosecution alleged Mr. Olson absconded from supervision, as he was not on the bus going to the treatment center and had not turned himself in. RP 120. Mr. Olson's counsel was in court without him. RP 121. The prosecutor requested a bond of $25,000. RP 121.

3. Mr. Olson is arrested on a new charge and denied bail at hearing where he is unrepresented.

Before he was arrested for missing the bus, Mr. Olson was once again arrested for violating the no-contact order with Ms. Powers. RP 122, 125. At the initial appearance on the new charge, Mr. Olson appeared through Zoom from jail adorned in prison garb. RP 122.

Mr. Olson could not afford counsel and the court indicated it would appoint his current counsel for the DOSA cases. RP 124. Despite recognizing Mr. Olson

had appointed counsel, who appeared when the arrest warrant was issued for the DOSA violations, the judge proceeded without counsel present for Mr. Olson. The court informed Mr. Olson he was being formally charged with a single violation of the no-contact order. RP 122-23.

The prosecutor reminded the court it resolved two cases by requiring Mr. Olson to attend residential DOSA. RP 125. The prosecutor argued the "presumption of release" was gone and the court was required to hold Mr. Olson without bail on the present felony charge. RP 126. The prosecutor added that he was not surprised at Mr. Olson's behavior. RP 126.

According to the prosecutor, as to the new charge, Mr. Olson "retreated" inside Ms. Powers' home, and barricaded himself inside the home, hiding from police. RP 126. Ms. Powers was in danger inside her home

with him. RP 126. Mr. Olson then opened the front door and attempted to flee from police. RP 126.

The prosecutor told the court Mr. Olson was a flight risk because he has demonstrated he would not participate in the DOSA program or come to court as ordered. RP 126. The prosecutor also claimed that although Mr. Olson was not charged with assault the present case involved a domestic assault. RP 126. The prosecutor told the court Mr. Olson was looking at significant time in jail on just one charge if the DOSAs were revoked. RP 127. Despite advocating for a "no bail" hold, however, the prosecutor requested $75,000 bond. RP 127-28.

The court orally imposed a $75,000 bond and reasoned it was for Mr. Olson's own safety: "Well, you're in custody now so you're there safe from further

activity." RP 129. However, the July 22 written order stated Mr. Olson was held without bond.

4. Mr. Olson makes incriminating statements.

Before imposing bail, the court allowed Mr. Olson to speak on his own behalf: "Yeah, I'm not even going to ask for release." RP 128. He explained he missed the bus by 10 or 15 minutes because he could not verify what time he was supposed to get on the bus. RP 128, 152. He could not reach his attorney's office to verify the bus time. RP 128. After he missed the bus, he called the jail several times to turn himself in. RP 128. The jail did not seem to know what he was talking about. When he turned himself in the jail turned him away as there was no order remanding him into custody. RP 128, 144.

Mr. Olson spoke incoherently. On the allegations in the new charge, Mr. Olson explained Ms. Powers

had his wallet because somebody dropped it off at her home. RP 128. Mr. Olson walked around in the sun for hours and hours, ill, scared, and disoriented; he needed help, he needed some water, and a place to go. RP 128-29. Knowing it was the only place he knew he would receive help, he went to Ms. Powers' house to get his wallet and water. RP 128-29.

The court questioned him:

> **THE COURT:** Don't you live with your father and Albion?
> **[Mr. Olson]:** Yeah. My phone doesn't work so I had – I actually hadn't been staying with my father. I've been staying with my friend Patrick. But I couldn't call my brother or my dad because my phone doesn't have service. So I was in Pullman.
> **THE COURT:** Okay. All right.
> **[Mr. Olson]:** I still don't know what's wrong with me because I still (sic) very, very sick, very disoriented.
> **THE COURT:** Yeah, you appear to be. You appear to be disoriented. Something --

RP 129.

5. The prosecutor exploits Mr. Olson's uncounseled statements as evidence supporting the revocation of his sentences.

At the revocation hearing, the prosecution exploited Mr. Olson's uncounseled statements made at the preliminary hearing. Arguing for revocation, the prosecutor pointed to Mr. Olson's statements at the initial appearance as proof of guilt and to impeach him.

> He now claims that he was on his way -- he was on his way to the jail, he had a ride, he was on his ride there but they just found him at her homestead. Well, that's not what he said at his first appearance. What he told you at his first appearance was he had no ride, he had nowhere to go, it was hot, so he had to go to her home and then become allegedly assaultive toward her.

RP 156.

The prosecutor argued Mr. Olson could have gone anywhere else and had no reason to go to Ms. Powers' home. RP 157. He went there because he had a habit of victimizing Ms. Powers because domestic violence is

a personal problem and not a drug problem. RP 158. The prosecutor urged the court to revoke the DOSAs as the only way to keep Ms. Powers safe from Mr. Olson. RP 158.

Despite claiming Mr. Olson was clearly guilt the prosecutor had previously dismissed the pending charge of violating a no-contact order. RP 168-69. Because the prosecutor had dismissed that felony charge, which carried double the sentence, the prosecutor claimed Mr. Olson was actually receiving a great "benefit" if the court revoked his two DOSAs. RP 168-69.

6. Based on the uncounseled statements the court revokes his sentences.

In response to the prosecutor, the court challenged Mr. Olson's explanations based on the same line of questioning it employed in the initial appearance:

> **THE COURT:** Couldn't you go to the local gas station and borrow somebody's cell phone to call your dad or your brother?
> **[Mr. Olson]:** Like I said, I was -- I had passed out, I was very disoriented, I was scared. But, anyways, many of those facts really aren't very true or -- or fair.

RP 159.

The Court revoked Mr. Olson's two DOSAs reasoning he could get clean in prison where he would unable to contact Ms. Powers. 161-62.

E. ARGUMENT

The Court should accept review because during Mr. Olson's first appearance without counsel, he unwittingly waived his right to self-incrimination and the prosecution exploited his uncounseled statements to secure a revocation of his sentence.

Both the state and federal constitutions guarantee the right to counsel for all "critical stages" of a criminal proceeding. *City of Tacoma v. Heater*, 67 Wn.2d 733,737-8, 409 P.2d 867 (1966); *State v. Heddrick*, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009);

Missouri v. Frye, 566 U.S. 134, 138, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); U.S. Const. Amend. VI; Amend. XIV; Art. 1, § 22. The right to counsel attaches under the Sixth Amendment at a defendant's "first appearance before a judicial officer" where "a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *State v. Heng*, 2 Wn.3d 384 389, 539 P.3d 13 (2023).

Under CrR 3.1,"[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest." CrR 3.1(b)(1). This rule-based right extends to "all criminal proceedings" and requires counsel at "every stage of the proceeding." CrR 3.1(a), (b)(2)(A). Simply put, defendants must have counsel present at their first preliminary appearance before a judge unless it is

simply not feasible for some extraordinary reason. *Heng*, 2 Wn.3d at 390.

A person facing criminal charges needs counsel at their first preliminary appearance to protect their constitutional rights while the court decides bail and other important questions. *See Coleman v. Alabama*, 399 U.S. 1, 9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) (plurality portion) (highlighting the importance of counsel to argue for procedural safeguards like "early psychiatric examination or bail"). Bail hearings "are frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged." *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004).

CrR 3.2 provides the rule for pretrial release. Under the rule, except in death penalty or life without parole cases, there is a presumption not just of pretrial

release but of release without conditions, on "personal recognizance." *Butler v. Kato*, 137 Wn. App. 515, 521, 154 P.3d 259 (2007); CrR 3.2(a).

Article 1, § 20 provides for a right to bail "by sufficient sureties" for all cases except those involving a capital crime or the possibility of life without parole. *State v. Barton*, 181 Wn.2d 148, 152-53, 331 P.3d 50 (2014); see ESHJ Res. 4220, 61st Leg., Reg. Sess. (Wash. 2010).

At the first appearance Mr. Olson's rule-based right to counsel and constitutional right to counsel attached. CrR 3.1(b)(1); *Heng*, 2 Wn.3d at 389; *State v. Charlton*, 2 Wn.3d 421, 428, 538 P.3d 1289, 1292–93 (2023). Mr. Olson was entitled to have counsel present. Yet he appeared alone, the prosecutor argued against presumptive release, he waived his privilege against self-incrimination, and the court set unaffordable bail.

Id. Counsel would have been helpful in avoiding any cash-bail setting, and avoiding the unwitting waiver of the right to remain silent. The denial of counsel was error.

a. Mr. Olson's first appearance, from jail in jail attire, at a hearing where he waived his right to remain silent and lost the right to presumptive release was a critical stage.

In *Heng* and *Charlton*, after concluding that denial of counsel was error, the Supreme Court reduced the question to whether it should automatically reverse for structural error or whether the constitutional harmlessness standard applied.

In determining whether automatic reversal is required, the Court decides whether this preliminary hearing was a critical stage of the prosecution. *Heng*, 2 Wn.3d at 391-92. If so, the failure to have Mr. Olson's counsel present was structural error requiring automatic reversal. *Id*. *citing Heddrick*, 166 Wn.2d at

910, 910 n.9 (*citing United States v. Cronic*, 466 U.S. 648, 658-59, 659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).). Here, Mr. Olson's first appearance without counsel in jail attire, where he waived his right to self-incrimination, and where the court set unaffordable bail, was structural error.

A critical stage is one where a defendant's rights were lost, defenses were waived, privileges were claimed or waived, or where the outcome of the case was otherwise substantially affected. *Heng*, 2 Wn.3d at 395 (*citing Heddrick*, 166 Wn.2d at 910.). A person the State accuses of a crime needs counsel to navigate court rules. *Id.* at 17 *citing Coleman*, 399 U.S. at 9.).

Here, Mr. Olson at his first appearance gave up his privilege against self-incrimination along with his right to a fair trial. Mr. Olson was forced to appear alone from the jail in jail attire.

Under CrR 3.2 and Article 1, § 20, Mr. Olson was presumptively entitled to release with no conditions. *See State v. Rose*, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008).

In this case, the deprivation of counsel at a "critical stage" of the proceedings is "structural error," which compels reversal with no requirement of showing further prejudice. *Heddrick*, 166 Wn.2d at 910; *see also, Bell v. Cone*, 535 U.S. 685, 696 n. 3, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

That deprivation of counsel at this critical stage of Mr. Olson's prosecution is structural error which compels reversal. *Heddrick*, 166 Wn.2d at 910.

b. Regardless, reversal is required because the State did not prove beyond a reasonable doubt that Mr. Olson was not prejudiced by the denial of counsel.

At the very least, where Mr. Olson's constitutional right to counsel had attached by his first

appearance, the absence of counsel violated the Sixth Amendment, and constitutional harmless error applies. *Charlton*, 2 Wn.3d at 428 (*citing Satterwhite v. Texas*, 486 U.S. 249, 252-53, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988)) (applying constitutional harmless error to pretrial denial of counsel).

With such error, the State must prove beyond a reasonable doubt it was "harmless." *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Our court places a heavy burden on the State to "deter ... conduct" that "undermines the principle of equal justice and is so repugnant to the concept of an impartial trial that its very existence demands that appellate courts set appropriate standards to deter such conduct." *Heng*, 2 Wn.3d at 395 (*citing State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011).).

The prejudice to Mr. Olson was irrefutable. Mr. Olson was prejudiced at this bail hearing where he appeared alone in jail attire without counsel to defend his rights. *Heater*, 67 Wn.2d at 735. Despite a presumption of release, *Rose*, 146 Wn. App. at 450-51, the prosecutor argued that the "presumption of release" was gone from Mr. Olson and the court was required to hold him without bail. RP 126. Mr. Olson did not have counsel to rebut this contention.

Curiously, three weeks earlier when counsel was present, the prosecutor requested only a bond of $25,000. RP 121. With no counsel to advocate on Mr. Olson's behalf, the emboldened prosecutor alone hotly contested the bail issue and gave the court a host of factors to consider about Mr. Olson and his crimes while asking the court to impose bond of $75,000. *See Abuhamra*, 389 F.3d at 323.

The prosecutor told the court it was not surprised that Mr. Olson had committed another felony offense. RP 126. The prosecutor insinuated that during Mr. Olson's latest crime he barricaded himself with his victim inside her home and described it as an almost hostage situation. RP 126.

The prosecutor argued, unchallenged, that Mr. Olson was looking at a lengthy sentence if both his DOSA sentences were revoked. RP 126. The prosecutor argued that he was a flight risk, with every incentive to abscond from supervision as he did when he did not get on the bus to treatment. RP 126. The prosecutor further argued from the evidence of his refusal to participate in his DOSA or his failure to appear, the court should determine him to be a flight risk and a threat to the public. RP 126.

Mr. Olson had no counsel to put in context his 12 year battle with addiction and how he had successfully managed months of treatment already without a relapse. He had no counsel to bolster his statement by presenting evidence to prove Mr. Olson had the wrong time for the bus or that after he missed the bus he tried several times to call the jail and turn himself in, as he said. RP 140-49. Nor did he have counsel who could have argued that his brother drove him to the jail to turn himself in but the jail turned him away as it did not have an order to remand Mr. Olson. RP 146, 149.

Unchallenged, the prosecutor argued Mr. Olson presented a danger to Ms. Powers specifically, and insinuated he could be rightly charged with assaulting her repeatedly. RP 126. The prosecutor backed away

from his previous argument for the court to hold Mr. Olson without bond and requested $75,000 bond.

Mr. Olson is not trained in law. When he heard from the prosecutor that his "presumption of release" was gone he did not ask to be released on his own recognizance. RP 128. Then he practically confessed to the crime by explaining how he found himself at Ms. Powers' house. 128-29.

Before he responded to the prosecutor's allegations, neither the court nor the prosecutor warned Mr. Olson of his constitutional right against self-incrimination. The prosecutor later exploited Mr. Olson's statements against him during the revocation hearing. RP 156. The prosecutor argued Mr. Olson practically confessed he committed the crime: "What he told you at his first appearance was he had no ride, he had nowhere to go, it was hot, so he had to go to her

home and then become allegedly assaultive toward her." RP 156. The prosecutor impeached Mr. Olson with his own statement: "Well, that's not what he said at his first appearance." RP 156.

The presiding judge was familiar with Mr. Olson's 12-year struggle with addiction and his desire to receive treatment. The judge had "furloughed" Mr. Olson until he was sentenced, and released him on his own recognizance to gather his clothes. RP 99, 100, 102. Other judges always continued Mr. Olson's case until this judge was on the docket to address it because was much more familiar with Mr. Olson's struggle with addiction over the years. RP 99, 100, 122, 140.

In previous court appearances, before this judge Mr. Olson was dressed in a suit and tie and the judge was sympathetic and commended him as "very positive" and for his "professional demeanor." RP 88.

Here, Mr. Olson appeared on Zoom without assistance of counsel, adorned in prison garb, looking disheveled and disoriented and seemingly suffering from withdrawal from drugs. RP 128-29. This time the same judge lost sight of the "very positive" professional demeanor Mr. Olson always had. The court orally imposed $75,000 bond to keep him "safe from further [drug and criminal] activity." RP 129. In the written order, it denied him bail all together.

Later at the revocation hearing, when Mr. Olson appeared in court with counsel presumably dressed in a suit and tie, the court commended Mr. Olson for his sincerity and his "court demeanor." RP 162. This suggests that Mr. Olson's appearance on Zoom from jail, and not in person, dressed in prison garb, and not a suit, looking poorly had something to do with why he was denied bail.

In short, the denial of Mr. Olson's right to counsel was not harmless. *Heater*, 67 Wn.2d at 735.

c. The Court of Appeals opinion conflicts with this Court's precedents in Heng and Charlton.

This Court reasoned that a critical stage is one where a defendant's rights were lost, defenses were waived, privileges were claimed or waived, or where the outcome of the case was otherwise substantially affected. *Heng*, 2 Wn.3d at 395 (*citing Heddrick*, 166 Wn.2d at 910); *State v. Charlton*, 2 Wn.3d 421, 427, 538 P.3d 1289 (2023). To prevail, an appellant need only show at least one of three *Heddrick* situations applied in his case: either he lost a right; waived a privilege; or in some other way the deprivation of counsel substantially affected the outcome of the case. *Id.*

The Court of Appeals overlooked that Mr. Olson showed all three *Heddrick* situations: he waived the

privilege against self-incrimination, he lost his right to presumptive release and languished in jail on bail he could not afford, and the State used his uncounseled statements to secure a revocation of his sentence. *Heng* and *Charlton* teach that Mr. Olson's first appearance was a critical stage.

Moreover, the Court of Appeals also incorrectly concludes that the erroneous deprivation of counsel was harmless beyond a reasonable doubt. It minimizes and downplays the prejudicial effect of Mr. Olson's uncounseled statements and claims it was only a small part of the evidence against him. App. 7 *citing Heng*, 2 Wn.3d at 397. This is also a misapplication of *Heng*. For such an error of constitutional magnitude, the Court of Appeals was required to analyze whether the unfairly exploited uncounseled statements did not affect the outcome of the revocation beyond a

reasonable doubt. Instead, the Court of Appeals downplayed that evidence as not the "main reason" why Mr. Olson's sentence was revoked. App. 7. But this only begs the question whether the uncounseled statements were any part of the reason why Mr. Olson's sentence was revoked. The court must grant review and reverse Mr. Olson's conviction.

F. CONCLUSION

Mr. Olson respectfully requests this Court to accept review and vindicate Mr. Olson's right to counsel at all stages in the proceedings.

This brief complies with RAP 18.17 and contains 4,503 words.

DATED this 8th day of April 2024.

Respectfully submitted,

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Appendix

FILED
APRIL 4, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JAMES S. OLSON, Appellant.	)	No. 39191-4-III (consolidated with No. 39192-2-III) UNPUBLISHED OPINION

PENNELL, J. — James Olson appeals from orders revoking his drug offender sentencing alternative (DOSA), and imposing a standard range term of confinement. We affirm.

FACTS

Mr. Olson pleaded guilty to one count of felony violation of a domestic violence protection order in 2021.[1] The protected party was a woman identified by the initials M.P. At sentencing, the court imposed a residential DOSA. The State did not object. The DOSA specified Mr. Olson was to be released from custody to inpatient treatment on October 18, 2021.

[1] The original charges also included first degree burglary and obstruction of a law enforcement officer. Those charges were later dismissed.

Mr. Olson apparently was released as expected and complied with inpatient treatment. But on January 25, 2022, he was arrested and charged with a new protection order violation based on contact with M.P. The State filed a new felony charge but did seek to revoke Mr. Olson's DOSA.

Mr. Olson entered a guilty plea to the new protection order violation. At sentencing, he asked the court to continue his DOSA. Mr. Olson explained he wanted to participate in treatment and had cut things off with M.P. He asked for a "second chance." 1 Rep. of Proc. (RP) (May 20, 2022) at 104. The State objected to a second DOSA, but the court decided it would award a DOSA and give Mr. Olson "one last chance." *Id.* at 110. The court's DOSA order specified Mr. Olson was to be held in custody until he could be released to a residential treatment facility.

Mr. Olson secured an inpatient bed with a start date of June 13, 2022. The treatment facility was located outside of the county, so a bus ticket was procured to facilitate travel. At a hearing on June 10, Mr. Olson asked to be released before June 13 so he could go home and pack up his things. Mr. Olson said his brother would help take him to the bus. The court gave Mr. Olson the benefit of the doubt and ordered his release on June 12 with the requirement that he report for inpatient treatment on June 13.

Mr. Olson did not report for treatment on June 13 as required. According to Mr. Olson, his brother drove him to the bus stop, but he missed the bus by about 10 minutes. Mr. Olson tried contacting his attorney, but his attorney's office was not yet open. He then tried to turn himself in at the jail, but the jail would not admit him because there was no court order remanding him to custody.

After unsuccessfully trying to turn himself in, Mr. Olson apparently relapsed. Mr. Olson's attorney worked with the prosecutor's office to arrange for a remand order, but Mr. Olson never turned himself into the jail. A warrant was issued based on Mr. Olson's DOSA violations and on July 19, 2022, Mr. Olson was arrested. At the time of his arrest, Mr. Olson was inside of M.P.'s apartment in violation of his outstanding domestic violence protection order.

Mr. Olson was brought before the court for a preliminary hearing on July 20, 2022. Mr. Olson appeared via video conferencing from the jail, but his attorney was not present. The court advised Mr. Olson of the reasons for his arrest and informed him of his rights.

During the July 20 hearing, the court addressed the topic of bail. The State requested bail be set at a $75,000 bond or $7,500 cash. When provided an opportunity to speak, Mr. Olson stated he was "not even going to ask for release." 1 RP (Jul. 20, 2022) at 128. He told the court about missing the bus and explained his brother could vouch for

him because "he [was] the one who drove me." *Id*. Mr. Olson said he went to M.P.'s apartment because he needed help and did not know where to go after wandering around in the sun for hours, disoriented. He testified to being very sick and disoriented. The court imposed bail consistent with the State's recommendation.

The State charged Mr. Olson with a new protection order violation. It also moved to revoke both his DOSAs. Mr. Olson was arraigned on the new protection order violation on July 22, 2022. Mr. Olson's attorney was present for the arraignment hearing.

At the revocation hearing, Mr. Olson asked to be given "one final chance" at a DOSA. 1 RP (Aug. 19, 2022) at 154. Mr. Olson again explained how he missed the bus on June 13 and subsequently relapsed. Mr. Olson stated he was working on turning himself in, and even had a ride to turn himself in, but then was arrested.

The State urged the court to revoke the DOSAs and pointed out the court had already given Mr. Olson a second chance. The State also took issue with some of Mr. Olson's prior statements to the court. The State argued Mr. Olson could have turned himself to the jail once a remand order was issued, but he did not do so. The State also argued that Mr. Olson's statements regarding having a ride to turn himself in was "not what [Mr. Olson] said at his first appearance [on July 20]." *Id*. at 156. According to the

State, Mr. Olson's statement at his initial appearance was that he "had no ride, he had nowhere to go." *Id*.

The court decided to revoke Mr. Olson's DOSAs. In so doing, the court focused on the colloquy it had with Mr. Olson at the time it imposed the most recent DOSA. The court explained it had made a "clear-cut statement to Mr. Olson" that "[t]his is your last chance on that second DOSA." *Id*. at 161. The court found compelling evidence to revoke the DOSAs and impose a standard range sentence.

Mr. Olson received a total sentence of 25.5 months' imprisonment as a result of the DOSA revocations. The most recent protection order violation charge was voluntarily dismissed. Mr. Olson separately appealed from the court orders revoking his residential DOSA. We have consolidated those appeals for review.

ANALYSIS

Mr. Olson argues that the DOSA revocations must be reversed because he was denied his constitutional right to counsel at his July 20, 2022, hearing. Mr. Olson had counsel present at all his other hearings. But he argues the July 20 hearing was a critical stage of his criminal prosecution and, as such, denial of the right to counsel constituted structural error requiring reversal.

The briefing in this case was submitted prior to our Supreme Court's decisions in *State v. Charlton*, 2 Wn.3d 421, 538 P.3d 1289 (2023), and *State v. Heng*, 2 Wn.3d 384, 539 P.3d 13 (2023). After the close of briefing, we stayed this appeal pending the Supreme Court's disposition in *Charlton*. *Charlton* and *Heng* were decided on December 7, 2023, and mandates were issued on January 18, 2024. We have therefore lifted the stay and now decide Mr. Olson's case on the merits.

As recognized in *Charlton* and *Heng*, the right to counsel is guaranteed by the federal and state constitutions and by court rule. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22; CrR 3.1(b)(1). If counsel is denied during a critical stage of a criminal prosecution, structural error will apply requiring automatic reversal. *Charlton*, 2 Wn.3d at 427; *Heng*, 2 Wn.3d at 392. But "not all pretrial stages are necessarily critical." *Charlton*, 2 Wn.3d at 427. Instead, we assess "whether the accused's rights were lost, defenses were waived, privileges were claimed or waived, or the outcome of the case was otherwise substantially affected." *Id*.

The July 20, 2022, hearing was not a critical stage of the prosecution of Mr. Olson. At the hearing, Mr. Olson did not lose any rights. Nor did he waive any defenses or privileges. Although the court set bail at the hearing, Mr. Olson did not lose any future right to challenge the bail decision. While Mr. Olson should have been provided counsel

at the July 20 hearing, the Supreme Court's recent cases in *Charlton* and *Heng* make clear that this hearing was not a critical stage of the prosecution. *See Charlton*, 2 Wn.3d at 427-28; *Heng*, 2 Wn.3d at 394-95.

When a defendant is denied the right to counsel at a noncritical stage of a prosecution, relief turns on a constitutional harmless error analysis. *Charlton*, 2 Wn.3d at 428-29. Under this standard, reversal is required unless the State shows, beyond a reasonable doubt, that the error did not impact the disposition of the case. *Id*.

The failure to provide counsel at the July 20 hearing was harmless beyond a reasonable doubt. While the presence of counsel at the July 20 hearing might have helped Mr. Olson argue for a lower bail, the existence of bail did not impact the final outcome of his case. Mr. Olson argues that had counsel been present, he likely would not have made statements that were used against him at his later DOSA revocation hearing. But even if that were true, Mr. Olson's statements "were only a small part of the evidence against him." *Heng*, 2 Wn.3d at 397. The main reason Mr. Olson's DOSA sentences were revoked was that he had already been given a second and final chance at a DOSA. There is no reason to believe the outcome of Mr. Olson's case would have been different if counsel would have been present on July 20.

CONCLUSION

Mr. Olson should have been provided counsel at his July 20, 2022, hearing. Nevertheless, the hearing did not constitute a critical stage of the prosecution and the absence of counsel was harmless beyond a reasonable doubt. The orders on appeal are therefore affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Staab, A.C.J.

Fearing, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39191-4-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: April 8, 2024

WASHINGTON APPELLATE PROJECT

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