From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment on Proposed Amendment to CrR 3.1
Date: Thursday, September 16, 2021 9:31:12 AM

From: Teresa Chen [mailto:teresa.chen@piercecountywa.gov]
Sent: Thursday, September 16, 2021 9:15 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendment to CrR 3.1

Writing in opposition to the post-conviction appointment of counsel under proposed amendment to CrR 3.1.

The proposal would appoint counsel for incarcerated persons serving sentences resulting from convictions or criminal history "determined" to be void, invalid, or unconstitutional. The proposal is unnecessary, duplicative of the existing law, and falsely represents that it would "also provide[s] a basis for representation for other similarly situated persons, such as those entitled to relief under *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021), *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 474 P.3d 524 (2020), and *In re Personal Restraint of of Ali,*196 Wn.2d 220, 474 P.3d 507 (2020)." It does not.

This proposed amendment primarily intends to address *Blake*. In my own county, we have a prosecution team which has identified persons serving a sentence affected by *Blake* and which works together with defenders in resentencings. We have done so without any need for a change in court rule or law. There is already a right to counsel at sentencing (resentencing). Therefore, the rule is unnecessary.

Blake is not the first case to have resulted in a need for post-conviction hearings of a large class. There are adequate procedures to address changes in law. The existing court rule, CrR 3.1(b)(2), provides a right to counsel for sentencings or resentencings. For post-conviction PRPs, RCW 10.73.150(4) provides the path to appointment of counsel. The proposed amendment to the rule is unnecessary.

The proponents mislead that their proposal "also provides a basis for representation" for persons "entitled to relief" under *Monschke*, *Domingo-Cornelio*, and *Ali.* It does not. None of these cases held any conviction to be void, invalid, or unconstitutional.

Only one of three opinions discussed the constitutionality of a statute of conviction. *Monschke* was a plurality opinion. The lead opinion would have bypassed the time bar under RCW 10.73.100(2) which allows an exception where the statute of conviction is unconstitutional. In order to do so, the lead opinion would have conflated the sentencing statute with the statute of conviction. It had no issue with the actual statute of conviction, but only the sentencing statute. But the lead opinion was the minority on this matter. Five other justices explicitly held that RCW 10.73.100(2) did not apply. The sentencing statute is not the same as the statute of conviction. Monschke and Bartholomew did not challenge their *convictions* in this consolidated case. And the opinion did not decide that Monschke's or Bartholomew's "conviction[s] [were] based on a statute determined to be void, invalid, or unconstitutional." Therefore, this proposed amendment to CrR 3.1 has no application to *Monschke*-type claims.

In *Domingo-Cornelio* and *Ali*, the question was the meaning of *Houston-Sconiers* and whether it was a substantial change in law with retroactive effect so as to permit an exception to the time bar under RCW 10.73.100(6). Subsection (2) did not enter into the discussion or holding. Domingo-Cornelio was convicted of child rape and child molestations. And Ali was convicted of first-degree robbery, attempted robbery in the first degree, and first-degree assault. Neither petition challenged any conviction. None of their convictions were held "to be based on a statute determined to be void, invalid, or unconstitutional." The rape, robbery, and assault statutes remain constitutional. The proposed amendment to CrR 3.1 has no application to claims raised under these cases.

Insofar as the proponents suggest their proposal would be helpful in juvenile offender sentencing, they have misled the Court. It is not the amendment which provides the right to counsel at resentencings, but the existing rule and law. The amendment is not necessary.

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