The Washington Association Of Prosecuting Attorneys

September 24, 2021

Hon. Erin L. Lennon
Clerk of the Supreme Court
PO Box 40929
Olympia, WA 98504-0929

[Sent via email to supreme@courts.wa.gov]

Re: Suggested Amendment to CrR 3.1, Right to and Assignment of Lawyer

Dear Clerk Lennon:

The Washington Association of Prosecuting Attorneys (WAPA) appreciates this opportunity to submit this comment to the Court in opposition to the proposed amendment to CrR 3.1. The amendment to CrR 3.1 that is proposed by the Office of Public Defense, the Washington Defender Association, and the Washington Association of Criminal Defense Lawyers (collectively "OPD") deals with an issue of substantive law, rather than a procedural issue. *See, e.g., State v. Pavolich*, 153 Wash. 379, 385 (1929)(characterizing the right to counsel as a substantive right rather than a procedural right). The proposal, moreover, violates separation of powers, the prohibition upon expending public funds without a necessary appropriation, and the prohibition upon gifts of public funds. The legislature, not this Court, possesses the authority to grant OPD's request for an expanded right to publicly funded counsel.

It is black letter law that court rules, like statutes, must comply with our constitution. *See Auburn v. Brooke*, 119 Wn.2d 623, 632-33 (1992) The Washington Constitution prohibits the expenditure of public funds in the absence of an appropriation. Const. art. VIII, § 4 (amendment 11) (no funds can be disbursed from the public treasury except upon appropriation). In compliance with this provision, this Court has refused in the past to authorize the expenditure of money for indigent litigants absent statutory authority. *See, e.g.*, *In re Marriage of King*, 162 Wn.2d 378, 398 (2007) (denying request for publicly funded counsel in a dissolution case, stating that "the decision to publicly fund actions other than those that are constitutionally mandated falls to the legislature. Outside of that scenario, it is not for the judiciary to weigh competing claims to public resources."); *Moore v. Snohomish County*, 112 Wn.2d 915 (1989) (fees of expert witness appointed by court pursuant to court rule could not be paid out of public funds in the absence of express language authorizing the expenditure); *Honore v. State Board of Prison Terms*, 77 Wn.2d 660, 678 (1970) (courts have no power over public funds collected for public purposes absent legislative authorization); *Housing Authority v. Saylors*, 87 Wn.2d 732, 741 (1976) ("It is certain that this court cannot provide for the financing of appeals in every case of probable merit where the appellant is not able to afford the expense of further litigation, absent a legislative appropriation.").

This Court has repeatedly determined that the question of when the public should pay for appeals or counsel that are not constitutionally mandated rests with the Legislature. *See, e.g., In re Marriage of King, supra*; *Dependency of Grove*, 127 Wn.2d 221, 228, 897 P.2d 1252 (1995); *Housing*

Authority v. Saylors, 87 Wn.2d at 740-41. The legislature fully recognizes its obligations to appropriate funds for constitutionally mandated counsel and is also committed to providing counsel where it has created a statutory right. *See generally* RCW 2.70.005.[1] The legislature, however, in light of competing demands for public funds limits the provision of counsel at public expense beyond the constitutional requirements to specific limited circumstances. *See* Laws of 1995, ch. 275, § 1.[2]

The legislature has appropriated funds for counsel for individuals seeking post-conviction relief other than through a direct appeal secured to them by article I, § 22 of the Washington Constitution only when the following conditions precedent have been met:

1. The individual must be indigent as that term is defined in RCW 10.101.010
2. The defendant must file and prosecute the collateral attack as a personal restraint petition.
3. The collateral attack must not be frivolous as determined by the chief judge pursuant to RAP 16.11.
4. The collateral attack must be the first one related to that judgment and sentence.

RCW 10.73.150(4).[3] Whether the appellate court appoints counsel to an individual who satisfies

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[1]RCW 2.70.005 states that:

> In order to implement the constitutional and statutory guarantees of counsel and to ensure effective and efficient delivery of indigent defense services funded by the state of Washington, an office of public defense is established as an independent agency of the judicial branch.

[2]Laws of 1995, ch. 275, § 1 contains the following legislative finding:

> The legislature is aware that the constitutional requirements of equal protection and due process require that counsel be provided for indigent persons and persons who are indigent and able to contribute for the first appeal as a matter of right from a judgment and sentence in a criminal case or a juvenile offender proceeding, and no further. There is no constitutional right to appointment of counsel at public expense to collaterally attack a judgment and sentence in a criminal case or juvenile offender proceeding or to seek discretionary review of a lower appellate court decision.
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> The legislature finds that it is appropriate to extend the right to counsel at state expense beyond constitutional requirements in certain limited circumstances to persons who are indigent and persons who are indigent and able to contribute as those terms are defined in RCW 10.101.010.

[3]RCW 10.73.150(4) provides that

> Counsel shall be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:
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> . . .

these four conditions precedent rests in the court's discretion. See RAP 16.15(h) ("the court may provide for the appointment of counsel at public expense for services in the appellate court"). When the government concedes that the individual is entitled to the relief requested or when the collateral attack clearly lacks merit, counsel is rarely appointed.

The legislative conditions precedent for the expenditure of public funds for counsel in collateral attacks contained in RCW 10.73.150(4) are presumed to be constitutional, and this Court has denied appointment of counsel to individuals who did not satisfy the requirements. *See In re Personal Restraint of Markel*, 154 Wn.2d 262, 275 (2005) (refusing to appoint counsel for a second PRP).A robust body of law supports both the constitutionality of RCW 10.73.150(4) and this Court's fidelity to the statute. *See generally Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 , 95 L. Ed. 2d 539(1987) (neither the Due Process Clause of the Fourteenth Amendment nor the Equal Protection Clause require a State to appoint counsel for indigent prisoners seeking state post-conviction relief); *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (same; capital case); *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 390 (1999) ("There is no constitutional right to counsel in postconviction proceedings").

The legislature has not appropriated funds to pay for counsel for individuals who file collateral attacks in the trial courts. Nor is there any statute that compels counties to provide counsel for individuals who wish to file collateral attacks in the trial courts. *See generally State v. Winston*, 105 Wn. App. 318, 323-24 (2001) (statutory right to counsel in RCW 10.73.150 does not apply to collateral attacks filed in the trial court).[4] Courts cannot usurp the legislature's authority with respect to the public fisc and order funds to be made available where no appropriation exists unless clear, cogent, and convincing evidence exists that the superior courts cannot fulfill its duties without the increased funding. *In re Salary of Juvenile Director*, 87 Wn.2d 232, 252 (1976). OPD cannot satisfy this burden of proof as over 10,000 *Blake*-related orders have been entered in superior court CrR 7.8 proceedings under the existing court rules. *See* Department of Corrections, Resentencing Situation Data Summary 9.2.2021;[5] Cowlitz County tackles cases affected by drug ruling, The Columbian, Jul. 28, 2021;[6] 1,000 Drug Possession Cases Dismissed So Far in Lewis County After

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> (4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11. Counsel shall not be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence.

[4]While this Court held in *State v. Robinson*, 153 Wn.2d 689 (2005), that a court may appoint counsel at public expense to an indigent defendant who files a CrR 7.8(b) motion for collateral relief in the superior court once the superior court determines that the motion is not time-barred, successive or abusive, and should not be transferred to the court of appeals, the opinion did not address the lack of an appropriation to pay for counsel.

[5]A copy of this document is attached to this letter.

[6]Available athttps://www.columbian.com/news/2021/jul/28/cowlitz-county-tackles-cases-affected-by-drug-ruling/ (last accessed Sep. 13, 2021).

Court Decision, The Chronicle, May 13, 2021.[7]

OPD's proposal ignores the legislature's primacy in this area and its policy determinations. OPD's proposal also eliminates the condition that the individual seeking relief must be indigent before being provided with counsel at public expense. The elimination of this requirement violates the prohibition in articles VIII, §§ 5 and 7 of the Washington Constitution upon the gifting of public funds. *Cf. State v. Guaranty Trust Co.*, 20 Wn. 2d 588, 592-93 (1944) (amounts paid to a decedent's estate for funeral expenses was an unconstitutional gift of public funds where the estate had sufficient assets to pay the expense itself).[8]

An indigent individual who is granted collateral relief pursuant to the *Blake* decision in the superior court *will* be appointed counsel pursuant to the Sixth Amendment whenever resentencing is required. S/he will also be provided with counsel at public expense whenever the constitution or a statute grants him or her such a right.

Whether individuals whose convictions or sentences may be impacted by *Blake* and other cases should be provided with counsel at public expense prior to the filing of any collateral attack is a matter for the legislature and the case for public funding must be made there. Only the legislature is in a position to decide whether it is better allocate funds to this purpose, to the improvement of public education, prisoner reentry services or other needs, or to leave more money in the hands of taxpayers.

Sincerely,
s/ Pamela B. Loginsky
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cc: Justices Charles Johnson and Mary Yu, Co-Chairs, Supreme Court Rules Committee

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[7]Available at https://www.chronline.com/stories/1000-drug-possession-cases-dismissed-so-far-in-lewis-county-after-court-decision,265376 (last visited Sep. 13, 2021).

[8]While the Superior Court Judges' Association–Criminal Law and Rules Committee's alternative proposal retains an indigency requirement, its presumption of continued indigency ignores the fact that someone with a prior conviction under a void, invalid or unconstitutional law may have overcome their past and may now have accrued assets, education or training, or the ability to pay for their own counsel. *See, e.g., In re Bar Application of Simmons*, 190 Wn.2d 374 (2018) (individual with prior drug related convictions overcame her criminal and substance abuse history to be admitted to the practice of law).

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment re proposed amendment to CrR 3.1
Date: Friday, September 24, 2021 11:27:58 AM
Attachments: 2021 comment re proposed OPD amendment to CrR 3.1.pdf

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From: Pam Loginsky [mailto:pamloginsky@waprosecutors.org]
Sent: Friday, September 24, 2021 11:19 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Johnson, Justice Charles W. <Charles.Johnson@courts.wa.gov>; Yu, Justice Mary <Mary.Yu@courts.wa.gov>; Russell Brown <rbrown@waprosecutors.org>
Subject: Comment re proposed amendment to CrR 3.1

Dear Clerk Lennon:

Attached is a letter commenting on the OPD amendment to CrR 3.1.

Please do not hesitate to contact me if you should have any problem opening the document or if you have any questions.

Sincerely

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