

KING COUNTY PROSECUTING ATTORNEY'S OFFICE



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JUSTICE
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September 29, 2021

Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendments to CrR 7.8

Dear Justices Johnson and Yu,

Thank you for seeking comments to the proposed amendments to the Superior Court Criminal Rule (CrR) 7.8. I share some of the concerns that others have articulated in the comments submitted. However, I write to emphasize two particular areas of concern.

First, the proposal targets motions where the defendant claims to have been convicted or sentenced under a statute “determined to be void, invalid, or unconstitutional.” This language should be refined to make clear that the determination was in the appellate courts. Otherwise, trial courts could be inundated by motions premised on trial court or appellate court decisions that are subject to revision or outright reversal. A recent example is illustrated by State v. Waller, 197 Wn.2d 218, 481 P.3d 515 (2021), where a defendant sought to overturn his exceptional sentence based on a court of appeals decision. This Court later reversed the court of appeals. Had Waller and hundreds of similarly situated defendants been granted hearings and relief based on the court of appeals decision, trial and appellate courts would have been flooded by motions for relief where relief was not legally available, and hundreds of victims and survivors would have endured painful, yet fruitless, litigation. With a modest amendment set forth below, finality of criminal convictions can be respected while maintaining a defendant’s right to relief. CrR 7.8 should guarantee prompt, but not premature, relief.

Second, to the extent this rule and the changes to CrR 3.1 are driven by State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), I respectfully suggest that the unique circumstances created by Blake can be managed by rule or orders tailored to that novel situation, rather than with a rule of general application. Blake invalidated decades of convictions under a frequently-charged statute. Even if the superior courts had completely paused work on the myriad other obligations of the court, it would have taken months, if not years, to unwind all the legal and financial implications of the Blake decision. The superior courts obviously cannot suspend their obligations to litigants across the board in order to deal with one issue, so it was simply unavoidable that entanglements caused by Blake would take considerable time to manage.

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The King County Prosecutor's Office worked with the King County Superior Courts and with defense counsel to develop a tiered approach that prioritized defendants most at risk of adverse consequences from the decision. This included defendants currently serving prison or jail time based on a possession charge and those with pending charges. Thousands of cases were efficiently and cooperatively processed using this model.

The proposed rule would, by contrast, have mired post-Blake efforts in a well-meaning but ultimately self-defeating bureaucratic morass. The logistics of considering individual motions, appointing counsel, and setting show cause hearings would have hampered rather than sped the process.

I respectfully recommend the following amendments – both substantive and stylistic – to the proposed rule:

a defendant ~~necessarily makes a substantial showing that they are~~ is entitled to relief under subsection (i) where ~~the motion contends~~ the person (A) is serving a sentence for a conviction ~~based on~~ under a statute determined to be void, invalid, or unconstitutional, ~~by the Supreme Court, the Washington Supreme Court, or an appellate court where review was either not sought or was denied,~~ or (B) is serving a sentence that was calculated under RCW 9.94A.525 using a prior or current conviction based on such a statute, ~~determined to be void, invalid, or unconstitutional.~~

Sincerely,



James M. Whisman, WSBA 19109
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
Office of the King County Prosecuting Attorney

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Dear Supreme Court Clerk,

Please find attached my comments to the proposed amendments to CrR 7.8.

Sincerely,

Jim Whisman
King County Deputy Prosecuting Attorney