From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment on Proposed Amendment to CrR 7.8
Date: Thursday, September 16, 2021 9:31:00 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 7.8

Writing in opposition to the proposed amendment to CrR 7.8(c)(2):

I strongly oppose the proposed amendment to CrR 7.8 which would require the unlimited appointment of post-conviction counsel based solely on the defendant's allegation. Under the rule, the court may not consider anything other than the allegation. That means, in expending public funds, the court may not consider for example whether (1) the identical matter is currently under review by a higher court; (2) the identical matter has already been decided; or (3) the matter is patently frivolous.

This proposal would require the superior court, rather than the court of appeals, to decide post-conviction motions if only the convicted, incarcerated person "contends" the statute of conviction is void, invalid, or unconstitutional. The proposal does not provide for any judicial determination that the contention is non-frivolous.

The denial of a CrR 7.8 motion may be appealed as a matter of right. RAP 2.2(a)(1). And there is a right to appointment of counsel in that appeal. Wash. Const. art. I , sec. 22. In other words, under this proposal and contrary to RCW 10.73.150(4), an incarcerated person need only throw this magic language ("I contend the statute of my conviction is void, invalid, or unconstitutional") into a filing and would obtain an attorney at public expense to litigate and relitigate any number of frivolous and possibly time-barred post-conviction claims. Without any judicial determination that the contention is non-frivolous, this proposed amendment invites abuse.

A PRP, on the other hand, does not automatically result in the appointment of counsel. The current procedure transfers most CrR 7.8 motions as PRPs where the chief judges may summarily dismiss facially frivolous petitions at minimal cost under RCW 10.73.140 ("If frivolous, the court of appeals

shall dismiss the petition on its own motion without first requiring the state to respond to the petition."). Where the matters are not patently frivolous, the court invites briefing. And the court may appoint counsel as appropriate under RCW 10.73.150(4).

Under the proposal, the only factor determining appointment is a lay person's contention as to a matter of law. This would permit a defendant unlimited access to an attorney at public expense so long as the defendant remains incarcerated. Even after the highest court had decided the validity of the statute of the defendant's conviction, the rule would continue to allow the defendant appointment of counsel whether on the same matter or a mixed petition.

The proposed amendment intends to address *Blake*. It is not needed. In the past, we have addressed situations like *Blake* without the need for such a rule. And currently we are and have been addressing *Blake* in our county without the need for such a rule. Prosecutors have identified *Blake* cases and defenders have been and continue to be appointed for resentencing. Attorneys should NOT be appointed at public expense to litigate <u>frivolous</u> post-conviction claims.

The proponents falsely represent that the proposed amendment 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.

None of these three 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 opinion on this matter. A majority of signators to the *Monschke* decision 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 7.8 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 first-degree child rape and child molestations. And Ali was convicted of first-degree robbery, attempted robbery in the first degree, and first-degree assault. Neither petitioner challenged any of their convictions. 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 7.8 has no application to claims raised under these cases.

This false suggestion that *Monschke*, *Domingo-Cornelio*, and *Ali* determined statutes of conviction to be void, invalid, or unconstitutional makes the proposal all the more offensive. It suggests that proponents will be advocating for incarcerated persons with potential claims under *Monschke*, *Domingo-Cornelio*, and *Ali* to utter the magic words in order to obtain attorneys at public expense prior to any finding under RCW 10.73.150(4).

I urge rejection of this proposed amendment. The post-conviction appointment of an attorney in a long final matter must require a finding by the chief judge that the matter is not frivolous. It cannot hinge upon an interested lay person's mere contention as to a question of law.

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