WASHINGTON STATE
BAR ASSOCIATION
Office of the Executive Director

August 31, 2021

Justice Charles Johnson
Justice Mary Yu
Co-Chairs, Supreme Court Rules Committee
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314

Dear Justices Johnson and Yu,

I write to share the Washington State Bar Association Council on Public Defense's comments and support for the proposed amendments to CrR 3.1 and CrR 7.8. The Council's full comment on the amendment is attached. This position has been approved through the WSBA's Legislative and Court rule comment policy and is the position solely of the Council on Public Defense.

The Council on Public Defense unites members of the public and private defense bar, impacted persons from the criminal and family law courts, the bench, elected and appointed officials, prosecutors, and the public to address new and recurring issues impacting the public defense system.

The Council appreciates the Court's consideration of this comment.

Sincerely,

Terra Nevitt
Executive Director

CC: Kyle Sciuchetti, President
Travis Stearns, Council on Public Defense Chair
Bonnie Sterken, Staff Liaison to the Council on Public Defense

Comments to Proposed Amendments to CrR 3.1 and CrR 7.8

The Washington State Bar Association Council on Public Defense supports the proposed amendments to CrR 3.1 and CrR 7.8. The proposed rule will result in greater access to justice to those with a legal right to relief and assist in the proportionate administration of the public defense function throughout the State. Despite commendable efforts by clerks, courts, prosecutors, public defenders, their respective professional organizations, and the Washington State Department of Corrections, many persons remain incarcerated who are entitled to release and resentencing under State v. Blake. We must not lose sight that those entitled to relief are disproportionately Black, Indigenous, and other Persons of Color. Many are also indigent, persons with disabilities, and unable to read or write English.

CrR 3.1 requires the appointment of counsel for post-conviction review, including a motion under CrR 7.8. State v. Robinson includes the additional requirement that the trial court determine whether the motion has merit before counsel is appointed. 153 Wn.2d 689, 107 P.3d 90 (2005). As a practical matter, pro se incarcerated people are disadvantaged from this process. Incarcerated persons have limited access to proper forms, little knowledge of local court rules for filing and calendaring, and limited access to the court file needed to prepare such a motion. Even if an unconstitutionally convicted petitioner were able to successfully navigate the processes necessary to file a CrR 7.8 motion properly, they must still correspond with the Court or State to arrange their presence in Court and final orders, all of which can take months to determine whether the motion is meritorious and the defendant entitled to counsel for a resentencing.

For those serving an unconstitutional sentence for possession of a controlled substance, their judgment is void. They are entitled to relief under CrR 7.8(b)(4). Any person serving a sentence for an offense other than possession but includes a conviction for possession of controlled substance as part of an offender score is also entitled to relief under CrR 7.8(b)(5). There is no dispute among judges and jurists that these individuals are entitled to relief and that a petition brought under CrR 7.8 is meritorious and not frivolous. Amending CrR 3.1 and CrR 7.8 would not extend a right or privilege to any person who is not already entitled to it; rather, it would expedite the administration of justice. There can also be no doubt that Court Clerks and Judges statewide would prefer correctly noted and cited petitions for relief from appointed counsel rather than hand-written pro se petitions. Public defenders statewide have created and implemented processes to prioritize those the Blake decision will most immediately impact. Thousands of persons are entitled to relief; it would be an administrative challenge to force pro se petitioners to dictate the administration of justice in courts statewide simply because they could navigate the hurdles of CrR 7.8 better than another inmate.

The amended changes to CrR 3.1 and CrR 7.8 allow for the efficient administration of the public defense function. Under the proposed rule, any court stakeholder could initiate the appointment of counsel for a person entitled to relief under Blake. A prosecutor, judge, pro se litigant, or the public defender could petition the appointing authority for appointment upon notice of a meritorious petition. This is an important evolution in the dissemination of the public defense function. Washington's public defense system is decentralized and unique from county to county. Many larger counties utilize public defense agencies within county government; some employ an attorney administrator employed by the executive branch or Court to contract public defense services with a larger non-profit firm. In these counties, the decision to appoint counsel is delegated to a lawyer administrator through county code. In these counties, public defense administrators, and not judges, are responsible for the lawful appointment of counsel. The current rule prevents these administrators from appointing counsel without a court order, adding an additional hurdle to the efficient administration of justice and the public defense function. The proposed change

would provide guidance to those administrators to appoint counsel upon notice of a meritorious petition without waiting for the parties to brief and the judge to rule on a motion to appoint counsel.

Unlike the systems in larger Washington counties, public defense is administered by a non-lawyer county employee who contracts with individual lawyers to provide constitutionally required services in most counties. In the face of ambiguity about whether counsel is constitutionally required and without a court order, non-lawyer county administrators opt not to appoint counsel. The proposed rule would provide clear guidance to these administrators about when the appointment of counsel is appropriate.

In short, the proposed amendment would provide for an efficient system to appoint counsel for those who clearly have a right to counsel for a hearing for vacation or release. The amendment relieves unconstitutionally convicted and incarcerated defendants from the burden of filing pro se motions and creates a mechanism for swift and fair access to relief that will result in a greater administration of relief in the courts and in the administration of public defense statewide.

Thank you for your consideration of these amendments. They are important to the constitutional administration of public defense and essential to amend an injustice that has disproportionally impacted indigent persons.

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Subject:	FW: Council on Public Defense Comments to CrR 3.1 and CrR 7.8
Date:	Wednesday, September 1, 2021 1:44:16 PM
Attachments:	image001.png 2021.8.31.CPD Comments CrR 3.1 and CrR 7.8.pdf

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From: Bonnie Sterken [mailto:bonnies@wsba.org]
Sent: Wednesday, September 1, 2021 1:40 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Travis D. Stearns <Travis@washapp.org>; Schwarz, Jason <Jason.Schwarz@co.snohomish.wa.us>; Diana Singleton <dianas@wsba.org>; kyle.s@millernash.com
Subject: Council on Public Defense Comments to CrR 3.1 and CrR 7.8

Good afternoon,

Attached, please find comments from the WSBA Council on Public defense regarding CrR 3.1 and CrR 7.8.

Take care

Bonnie Middleton Sterken | Equity and Justice Specialist
Washington State Bar Association | bonnies@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org
Pronouns: She/Her

The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact bonnies@wsba.org.