The Washington Association Of Prosecuting Attorneys

September29, 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 7.8, Relief From Judgment or Order

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 7.8. The amendment to CrR 7.8 that is proposed by the Office of Public Defense, the Washington Defender Association, and the Washington Association of Criminal Defense Lawyers (collectively "OPD") will slow down the process of vacating *Blake*-impacted convictions and will clog the courts with unnecessary hearings. Moreover, to the extent the rule proposal is intended to create a right to publicly funded counsel for collateral attacks at the superior court, the proposal violates separation of powers, the prohibition upon expending public funds without a necessary appropriation, and the prohibition upon gifts of public funds. *See generally* Letter to the Hon. Erin L. Lennon commenting on the suggested amendment to CrR 3.1 (Sep. 24, 2021).

The proposed amendments to CrR 7.8 are unnecessary. Since the Washington Supreme Court issued its opinion in *State v. Blake* on February 25, 2021, over 10,000 *Blake*-related orders have been entered in superior court CrR 7.8 proceedings under the existing court rule. *See* Department of Corrections, Resentencing Situation Data Summary 9.2.2021; Cowlitz County tackles cases affected by drug ruling, The Columbian, Jul. 28, 2021;[1] 1,000 Drug Possession Cases Dismissed So Far in Lewis County After Court Decision, The Chronicle, May 13, 2021.[2] Additional orders are being entered on a daily basis.

OPD's proposal largely eliminates the superior court's screening function with respect to a large number of vaguely defined CrR 7.8 motions. All a petitioner must do to force the superior court to retain a case is to allege that s/he is entitled to relief from "a conviction based on a statute determined to be void, invalid, or unconstitutional."

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

[2]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).

- This proposal does not indicate when or who must have determined the statute to be void, invalid, or unconstitutional.

- This proposal does not require that the petitioner establish by substantial evidence that s/he actually has been convicted under the statute declared to be infirm, rather than another crime. Since *Blake*, a large number of motions for resentencing and/or for vacation of convictions have been received from individuals who have been convicted of possession of drugs with the intent to deliver, rather than simple possession.

- The proposal makes no provision for mixed, time-barred motions in which the petitioner seeks relief from a conviction for violating the infirm statute at any time as authorized by RCW 10.73.100(2), and is also asking for relief as to other counts that do not fall within any exception to RCW 10.73.090. *See generally In re Personal Restraint of Smalls*, 182 Wn. App. 381, 335 P.3d 381 (2014), review denied, 182 Wn.2d 1015 (2015) (defendant who pled guilty to both murder and assault was entitled to withdraw his guilty plea to assault as that conviction was "invalid on its face" (outside the SOL), but the murder conviction stands because he identified no facial error relating to that count); *In re Personal Restraint of Fuamaila*, 131 Wn. App. 908 (2006) (Andress makes the defendant's motion to withdraw guilty plea to felony murder predicated upon assault timely under an exception to RCW 10.73.090, but his petition is mixed because Andress creates no exception to the one year time bar).

- This proposal will significantly increase the number of frivolous appeals by requiring the superior court to retain a motion based upon a "contention," rather than a substantial showing. Upon discovering that the "contention" is unsupported by evidence, the superior court will deny the motion. While the order denying the motion is appealable as a matter of right, the appellate court will have but one option–to affirm.

The proposed amendment to CrR 7.8(c)(2), read in conjunction with CrR 7.8(c)(3) would require a show cause hearing in every case retained in the superior court. Requiring such hearings in cases in which the State agrees that the defendant is entitled to all of the relief being sought is unnecessary and needlessly clogs court calendars.

Sincerely,

Pamela Beth Loginsky

Pamela B. Loginsky
Staff Attorney

cc: Justices Charles Johnson, and Mary Yu, Co-Chairs, Supreme Court Rules Committee

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment re Proposed Amendment to CrR 7.8
Date: Wednesday, September 29, 2021 2:14:46 PM
Attachments: 2021 comment re proposed OPD amendment to CrR 7.8.pdf

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From: Pam Loginsky [mailto:pamloginsky@waprosecutors.org]
Sent: Wednesday, September 29, 2021 2:09 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Yu, Justice Mary <Mary.Yu@courts.wa.gov>; Johnson, Justice Charles W. <Charles.Johnson@courts.wa.gov>
Subject: Comment re Proposed Amendment to CrR 7.8

Dear Clerk Lennon:
Attached is a letter commenting on the OPD proposed amendment to CrR 7.8.

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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