**From:** OFFICE RECEPTIONIST, CLERK
**To:** Linford, Tera
**Subject:** FW: Comment to June 2021 Proposed Amendment to CrR 7.8
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**From:** Andrew Van Winkle [mailto:avanwinkle8@gmail.com]
**Sent:** Thursday, September 23, 2021 6:17 PM
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
**Subject:** Comment to June 2021 Proposed Amendment to CrR 7.8



I am writing to comment on the proposed amendment to CrR 7.8, published for comment in June 2021. I write in my private capacity to express my personal opinions, and not in my capacity as an employee of the State of Washington. However, my comments are inextricably informed by my experience as a staff attorney for the Washington State Court of Appeals, reviewing hundreds of motions and petitions for post-conviction relief filed every year.

Comment regarding proposed amendment to CrR 7.8

The stated primary purpose of the proposed amendment is to provide swift relief to every person with a conviction for UPCS or relief to every person who is currently serving a sentence with an offender score enhanced by a prior UPCS conviction. As presently drafted, the proposed amendment fails to fully achieve these purposes and would have ramifications far beyond these stated purposes.

The phrase "is serving a sentence" implies the person is presently subject to total or partial confinement or still subject to LFOs. As phrased, the amendment fails to include individuals who are not "serving a sentence." The SRA defines sentence completion based on receipt of or eligibility to receive a certificate of discharge (CoD). *See* RCW 9.94A.637(1) (defining eligibility for CoD based on sentence completion). Considering the lengthy lookback period for *Blake* relief, I assume that the large majority of individuals entitled to relief will not be "serving a sentence," as that term is normally understood.

While an argument could be made that the phrase "is serving a sentence" should have a different meaning in this context, and should instead be equated with the existence of the conviction, the fact remains that the present phrasing is either under-inclusive or ambiguous. Thus, the proposed amendment—if adopted—should be altered to clearly reflect what I believe to be the authors' intent of including every person with a conviction for UPCS.

The language of the proposed amendment also extends far beyond *Blake*, to any conviction involving "a statute determined to be void, invalid, or unconstitutional." The primary problem with this phrasing is that it fails to define who must have determined the statute's invalidity. Is it enough that the defendant or the defendant's counsel have "determined" the statute to be void? Or must it be a judicial determination and if so, from what court level? Must a judge in Pierce County retain a CrR 7.8 motion concerning a statute that a King County judge determined to be unconstitutional? What if the Governor issues a proclamation or the Attorney General issues an opinion finding a criminal statute void, must the superior court then retain the motion?

In short: whose determination of invalidity are the superior courts supposed to look to? With UPCS convictions, the answer is easy, but outside of *Blake*, the answer to these questions is unknowable without future appellate litigation, which can be easily avoided by a simple clarification prior to adoption.

Another latent ambiguity is the type of "invalidity" and "unconstitutionality" encompassed by the proposal. A conviction and statute may be facially invalid or invalid as-applied. The same applies to unconstitutionality. *Blake* was a matter of facial unconstitutionality and is easy to apply and determine entitlement to relief. But, as-applied challenges require a thorough review of the facts in every case and briefing applying those facts to the law; thus, a determination of invalidity/unconstitutionality is not binding or necessarily precedential from one case to the next. Because the purpose of the amendment appears to be expedited review in cases where entitlement to relief is fairly certain or obvious, the amendment should be clarified to state that it only applies to facial determinations.

Furthermore, CrR 7.8(c)(2) only addresses transfer/retention, not entitlement to relief. To be entitled to relief, the petitioner needs to show more than just a likelihood of success on the merits—the claim must also fit within one of the categories of relief listed in CrR 7.8(a) or (b). As-applied challenges do not fit within any of the enumerated categories in CrR 7.8(a) or (b). The only arguable category is (b)(5) "Any other reason justifying relief." But, this catchall only applies to situations involving "extraordinary circumstances not covered by any other section of the rule." *State v. Keller*, 32 Wn. App. 135, 140 (1982). As-applied challenges have never been, to my knowledge, considered "extraordinary." Requiring superior courts to retain as-applied challenges even though such challenges are not a ground for relief under subsections (a) and (b) will make the rule internally inconsistent. If the intent is to extend the scope of 7.8 to as-applied challenges, CrR 7.8(b) will have to be correspondingly amended.

Finally, any amendment to CrR 7.8 should only be adopted after careful consideration of whether funneling extra non-*Blake* cases to the superior court is the best way of expediting *Blake* relief. Historically, post-conviction proceedings were all handled in the court of conviction under Washington's habeas procedures. In 1973, we enacted CrR 7.7, which formalized many of the common law post-conviction procedures. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 153 n. 18 (2011) (C.J. Madsen, concurring). It also funneled all post-conviction matters to the court of appeals for initial review. CrR 7.7(a). 82 Wn.2d 1165 (1973). Only after the CoA determined the petition to be non-frivolous would the petition be transferred to the superior court for a decision on the merits. CrR 7.7(b). Three years later (1976), CrR 7.7 was repealed and replaced with RAP Title 16.

In the almost 50 years since adoption of CrR 7.7 and RAP Title 16, the appellate courts have cultivated an expertise in post-conviction proceedings, both legally and in case processing, while the superior courts have not. At Division III, most PRPs are given preliminary review within days of receipt, and if there appears to be any merit, the matter is internally expedited. But, in superior court, it is unfortunately common for CrR 7.8 motions to sit in a judge's inbox for months with no action. In some instances, that inaction can persist for a year or more. Several times a year, a person will file a CrR 7.8 motion, wait several months, and then refile the same as a PRP in the court of appeals. Only after the appellate court directs the superior court to either dismiss or transfer the CrR 7.8 motion does any action occur below.

Furthermore, superior court judges do not receive regular training on post-conviction legal standards. Division III regularly receives CrR 7.8 motions transferred under the pre-2007 "ends of justice" standard, rather than the current standard that has been in effect for over a decade. The procedural history recounted in Division II's recent opinion in *State v. Holt*, No. 53122-4-II (July 20, 2021), typifies what appears to be widespread confusion in the superior courts concerning post-conviction standards and procedures. While granting relief under *Blake* and similar decisions should be simple and fast, reality shows that is not happening due to a lack of judicial training in this area. The author of this comment has personally seen several, and is aware of dozens more, cases where superior courts transferred to the CoA meritorious CrR 7.8 motions premised on *Blake*. Amending CrR 7.8 to force superior courts to retain more cases will only exacerbate the existing problems at the superior court level.

Instead of amending CrR 7.8 in a way that makes the transfer provisions more confusing, the Supreme Court should adopt a general order tailored to *Blake* that exempts CrR 7.8 motions from transfer and mandates retention when (1) the defendant seeks vacation of a UPCS conviction pursuant to *Blake* or (2) the defendant is presently incarcerated and seeks resentencing to exclude a UPCS conviction from the defendant's offender score. The superior court judges' association should also follow up by organizing a recorded training that superior court judges can access on-demand to help them understand how to apply CrR 7.8. If the Supreme Court and the SCJA took these two steps, there would be no need to amend CrR 7.8 at this time.

In the alternative, the proposed amendment to CrR 7.8 should be changed and clarified as follows:

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud;**

(4) The judgment is void, facially invalid, or facially unconstitutional; or

**(c) Procedure on Vacation of Judgment.**

(2) *Transfer to Court of Appeals*. The court shall transfer a motion filed . . . . The court shall not transfer a motion where the defendant (A) seeks relief regardless of the passage of time from a conviction for violating a statute that the Washington State Supreme Court or the United States Supreme Court has determined to be void, facially invalid, or facially unconstitutional, or (B) is presently serving a sentence and seeks resentencing to exclude from the defendant's offender score calculation a current or prior offense based on a conviction for violating a statute that the Washington State Supreme Court or the United States Supreme Court has determined to be void, facially invalid, or facially unconstitutional.