

FILED
SUPREME COURT
STATE OF WASHINGTON
12/14/2021 8:00 AM
BY ERIN L. LENNON
CLERK

No. 100331-5

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

THE CIVIL SURVIVAL PROJECT,
Plaintiffs,

v.

STATE OF WASHINGTON, et al.,
Defendants.

On Appeal from the Superior Court of the State of Washington
for King County
Cause No. 21-2-03266-1 SEA
The Hon. Judge Michael Scott

BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITIONERS' MOTION FOR DIRECT APPEAL
WASHINGTON DEFENDER ASSOCIATION

WASHINGTON DEFENDER ASSOCIATION

Alexandria "Ali" Hohman. WSBA No. 44104

110 Prefontaine Pl. South, Ste. 610
Seattle, WA 98104
Phone: (206) 623-4321
ali@defensenet.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

I. INTRODUCTION1

II. IDENTITY OF AMICUS3

III. STATEMENT OF THE CASE.....4

IV. ARGUMENT4

 1. PRO SE LITIGANTS USING CRR 7.8 FOR REIMBURSEMENT OF LFOS ARE FRUSTRATED BY SYSTEMATIC BARRIERS AND PROCESS.....4

 A. THE CRR 7.8 PROCESS DOES NOT PROVIDE NOTICE AND WILL RESULT IN DENIAL OF CONSTITUTIONALLY AFFORDED RELIEF.7

 B. DIRECT REVIEW MUST BE GRANTED TO AVOID FURTHER DELAYS.....11

V. CONCLUSION12

CERTIFICATE OF SERVICE AND WORD COUNT DECLARATION14

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Nelson v. Colorado</i> , 581 U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017).	3, 14
--	-------

Washington State Cases

<i>Carver v. State</i> , 147 Wn. App. 567, 197 P.3d 678 (2008).....	5
<i>Doe v. Fife Mun. Court</i> , 74 Wn. App. 444, 874 P.2d 182 (1994).....	14
<i>In re Personal Restraint of Ali</i> , 196 Wn.2d 220, 474 P.3d 507 (2020)	7
<i>In re Personal Restraint of Domingo-Cornelio</i> , 196 Wn.2d 255, 474 P.3d 524 (2020)	7
<i>In re Personal Restraint of Monschke</i> , 197 Wn.2d 305, 482 P.3d 276 (2021),.....	6
<i>In re PRP Gonzales</i> , 2021 WL 4860031 (2021).....	9
<i>Matter of Rhem</i> , 188 Wn.2d 321, 394 P.3d 367 (2017).....	5
<i>Nelson v. Colorado</i> , 581 U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017).	3, 14
<i>State v. A.L.R.H.</i> , 2021 WL 5783356 (2021)	9
<i>State v. Blake</i> , 197 Wn.2d 170, 481 P.3d 521 (2021).....	<i>passim</i>
<i>State v. Hecht</i> , 2 Wn. App. 2d 359, 409 P.3d 1146 (2018).....	10
<i>State v. Palmer</i> , 2021 WL 5321056 (2021)	9
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005).	2, 13

Rules

CrR 3.1 6
CrR 7.8 *passim*
RAP 4.2 3, 14

Statutes

RCW 69.50.4013 1
RCW 69.50.4014 9
RCW 9.94A.030 1
RCW 9.94A.525 8

Other Authorities

CrR 31 and CrR 7.8 Proposals by WDA, OPD, and
WACDL (May 24, 2021)..... 6, 7
Elly Park and David McConnell, *Experiences of people
with learning disabilities in the criminal justice system*,
British Journal of Learning Disabilities (John Wiley &
Sons Ltd, October 2013)..... 12
Language Access in State Courts, Dep’t of Justice
(September 2016)..... 12
OPD Responsive Letter in Support of Proposed Rule
Changes to CrR 3.1 and CrR 7.8 (September 30, 2021) 9
Order In the Matter of the Proposed Amendments to CrR
3.1 and CrR 7.8, December 1, 2021. 7
Washington Supreme Court Gender and Justice
Commission, 2021 Gender and Justice Study 12

I. INTRODUCTION

Courts across this state are facing the unprecedented challenge of unwinding tens of thousands of convictions, including reimbursements of legal financial obligations¹ (LFOs) under *State v. Blake*.² The trial court’s holding that Criminal Court Rule 7.8 (CrR 7.8) is the exclusive remedy for those affected by *Blake* to access their constitutionally afforded relief is problematic.

The trial court ignores the complicated process of CrR 7.8 that requires pro se litigants to draft a motion stating, “the

¹ “‘Legal financial obligation’ means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction....” RCW 9.94A.030(31).

² *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (RCW 69.50.4013 held unconstitutional because it criminalized mere possession of a controlled substance with no mens rea).

grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.” CrR 7.8(c)(1). This threshold requirement means pro se individuals who have limited English proficiency, intellectual disabilities, and suffering from poverty have a slim chance to successfully traverse CrR 7.8. Counsel is appointed only if the pro se individual demonstrates that the petition is not frivolous. *State v. Robinson*, 153 Wn.2d 689, 695, 107 P.3d 90 (2005). Failure to satisfy the rule means an individual is denied both constitutionally afforded rights and representation by counsel to protect those rights.

Without the guiding hand of counsel during the CrR 7.8 process, the promised relief of erasing the devastating impact of a felony conviction and reimbursement of LFOs will run afoul of minimal due process requirements in *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1249, 1257-58, 197 L. Ed. 2d 611 (2017). A systemic approach would also alleviate important due process concerns such as notice.

Finally, the case at bar is of great public importance under RAP 4.2(4) because thousands of people are entitled to constitutionally owed reimbursements for all LFOs with no meaningful way to access to this relief. It is neither practical nor promotes justice to shift the burden to the impacted individual without counsel or the option for systemic relief. Therefore, Amicus joins the Petitioners/Appellants, Civil Survival et al., in their request for direct review of the trial court's decision and respectfully moves this Court to grant review.

II. IDENTITY OF AMICUS

The Washington Defender Association (“WDA”) is a statewide organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense. WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent clients and their families. The Washington Court of Appeals and the Washington Supreme Court have granted WDA leave to file

amicus briefs on many prior occasions. WDA represents 30 public defender agencies and has over 1,600 members, many of whom represented the Petitioner's identified class of plaintiffs impacted by the decision in *State v. Blake*.

III. STATEMENT OF THE CASE

Amicus adopts and incorporates by reference the Procedural History and Statement of the Facts set forth by the Petitioner.

IV. ARGUMENT

1. Pro se litigants using CrR 7.8 for reimbursement of LFOs are frustrated by systematic barriers and process.

The complexity of skills a pro se individual³ is expected to have to properly effectuate relief under CrR 7.8 is arduous. A person is expected to write a motion demonstrating relief

³ "... [P]ro se petitioners must comply with applicable rules and statutes and, importantly, we hold them to the same standard as an attorney." *Matter of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367 (2017). A narrow exception is, "when a pro se plaintiff also suffers from a significant mental disability." *Carver v. State*, 147 Wn. App. 567, 575, 197 P.3d 678 (2008).

pursuant to *Blake*, know the cause number(s), draft a note for calendar, including knowing the correct calendar to note the hearing on, file the motion and note for calendar at the superior court clerk's office, and serve the State with the motion and note for calendar without an attorney. These complexities are further compounded if pro se litigants are incarcerated.

The experiences of those seeking recalculations of their prison sentences and the inequity that resulted under CrR 7.8 was the impetus of Amicus, statewide Office of Public Defense (OPD), and the Washington Association of Criminal Defense Lawyers (WACDL) to seek modification of appointment of counsel under CrR 3.1 and CrR 7.8.⁴ The mosaic of approaches by superior courts in responding to *Blake* and other

⁴ CrR 31 and CrR 7.8 Proposals by WDA, OPD, and WACDL (May 24, 2021) https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=5841 (last accessed December 8, 2021)

advancements in caselaw⁵ ranged from counsel being appointed proactively and other jurisdictions requiring a pro se litigant to use the CrR 7.8 process without the aid of counsel. *Id.* The result is justice by geography.

On December 1, 2021, this Court adopted the proposals in part to aid in the prompt and orderly administration of justice.⁶ This significant and positive change to the rules will reduce the barriers to counsel for those serving a sentence for a void or invalid convictions or serving sentences that was calculated under RCW 9.94A.525 using a prior or current

⁵ This approach also provides 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 Ali*, 196 Wn.2d 220, 474 P.3d 507 (2020). *Id.*

⁶ Order In the Matter of the Proposed Amendments to CrR 3.1 and CrR 7.8, December 1, 2021. https://www.courts.wa.gov/court_rules/adopted/pdf/25700-A-1397.pdf (last visited December 9, 2021) (adopted but not yet into effect).

conviction based on such an invalid statute. *Id.* The presumption of indigency extends to the resentencing if there was a finding indigency at sentencing. *Id.*

While these important changes to CrR 7.8 will assist those who are incarcerated and seeking resentencing, pro se litigants seeking LFO reimbursement are at risk of falling between cracks to access courts. The processes contained in CrR 7.8 will disenfranchise individuals because the burden is on pro se litigants to establish grounds for relief. Vulnerable populations impacted by *Blake* will be further excluded from relief under CrR 7.8 unless counsel is appointed, or a systemic approach is adopted.

A. The CrR 7.8 process does not provide notice and will result in denial of constitutionally afforded relief.

At least 50 years of convictions must be readdressed by the courts. Conservatively, at least 126,000 cases are subject to

constitutional relief under *Blake*.⁷ Moreover, the holding in *Blake*⁸ has impacted other statutes. This has increased the number of cases requiring reimbursement of LFOs.

This is an unparalleled challenge faced by superior courts. CrR 7.8 inherently places the burden on the aggrieved party to show why they are entitled to relief. There is no notice under this procedure. Without notice, the State is in a position

⁷ The Caseload Forecast Council estimates that 126,000 individuals are impacted *Blake*. However, the estimate only applies to people convicted since 1999. OPD Responsive Letter in Support of Proposed Rule Changes to CrR 3.1 and CrR 7.8, pg. 6 (September 30, 2021) https://www.courts.wa.gov/court_Rules/proposed/2021Jun/CrR%203.1/OPD%20-%20WDA%20-%20WACDL%20-%20%20CrR%203.1%20and%20CrR%207.8.pdf (last visited November 3, 2021).

⁸ *Blake* has impacted other statutes, however a majority of the cases from court of appeals are largely unpublished. *In re PRP Gonzales*, 2021 WL 4860031 (2021) (unpublished opinion) (conviction for unlawful possession of a firearm based on a predicate PCS conviction is also void); *State v. A.L.R.H.*, 2021 WL 5783356 (2021) (RCW 69.50.4014, possession of 40 grams or less of marijuana while under 21 years of age, also fails under *Blake*); *State v. Palmer*, 2021 WL 5321056 (2021) (unpublished opinion) (possession of a controlled substance by a jail inmate statute fails under *Blake*).

to be unjustly enriched. *See State v. Hecht*, 2 Wn. App. 2d 359, 368, 409 P.3d 1146 (2018) (case overturned on appeal entitled the defendant reimbursement of all costs paid towards the now invalid conviction).

Thousands of people may never know they could receive reimbursements for LFOs paid decades ago. Even if litigants are in the position of knowing about *Blake* and their rights, the process is complex. Pro se litigants must know the cause numbers of their unconstitutional convictions and the amount of money they paid pursuant to each. They must draft and file a motion, get a court to put the motion on its calendar, properly serve the State and appear in court, all to wait for repayment sometime after the court hearing. Use of CrR 7.8 is even more complicated for people with unconstitutional PCS convictions out of multiple superior courts. Those individuals must navigate each court's requirements for noting hearings and filing and serving documents. They may receive short notice of when they must attend court to present their motions.

CrR 7.8 exacerbates known obstacles to relief such as those who do not speak or read the English language⁹, learning disabilities¹⁰, and literacy abilities¹¹. The lack of pattern forms or translated forms for reimbursement under *Blake* results in de facto denial of relief. Furthermore, barriers related to poverty such as less than ideal public transit systems to file pleadings in court or via mail and being able to print or research case(s) requires the assistance of counsel and systemic approach.

⁹ “Translations are often necessary for signs inside and outside the courtroom, for letters sent by the court to LEP [limited English proficiency] individuals, and for forms and other court documents that an LEP person may need to complete in order to participate in court proceedings.” Language Access in State Courts, Dep’t of Justice, pg. 5 (September 2016) <https://www.justice.gov/crt/file/892036/download> (last visited November 3, 2021).

¹⁰ Elly Park and David McConnell, *Experiences of people with learning disabilities in the criminal justice system*, British Journal of Learning Disabilities, 2 (John Wiley & Sons Ltd, October 2013) (those who have learning disabilities are overrepresented in the criminal systems in United States, United Kingdom, and Canada).

¹¹ Washington Supreme Court Gender and Justice Commission, 2021 Gender and Justice Study at 109.

Counsel would be able to assist those from vulnerable populations and reduce barriers to accessing relief. However, under the current procedure, a pro se litigant would have to first draft a legally sufficient motion outlining why relief is owed and then if a court finds it is not frivolous, counsel may be appointed. *Robinson*, 153 Wn.2d at 695, 107 P.3d 90 (2005). Delays or denials of counsel renders CrR 7.8 an inadequate tool that runs afoul with minimum due process requirements pursuant to *Nelson*.¹² Without counsel or a systemic approach, individuals seeking reimbursements of LFOs will be frustrated.

B. Direct review must be granted to avoid further delays.

This matter is of great public importance under RAP 4.2(4). The large number of those impacted presents a situation of first impression. Direct review will help to expediate and

¹² “To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.” *Nelson*, 137 S.Ct. at 1258, 197 L.Ed.2d 611 (2017).

clarify how those affected by *Blake* can experience tangible relief. As noted in amicus briefing by the ACLU-WA, et al., the racial disparities will intensify without intervention by this Court. Moreover, *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 874 P.2d 182 (1994) was decided at the court of appeal level thus the need for this Court to weigh in is great. Finally, the need for a timely answer is crucial to expediate the path forward for LFO reimbursements.

V. CONCLUSION

Complex procedural requirements set forth under CrR 7.8 act as barriers to access to counsel, which frustrates the promise of relief for those unjustly convicted under this unconstitutional statute. For this reason, amicus respectfully recommends that the Supreme Court to grant direct appeal of the trial court's decision.

DATED this 13th day of December 2021.

Respectfully submitted,

s/Alexandria "Ali" Hohman
Alexandria "Ali" Hohman
WSBA No. 44104
Washington Defender Association

110 Prefontaine Pl. South, Ste. 610
Seattle, WA 98104
Phone: (206) 623-4321
Email: ali@defensenet.org

Counsel for Amicus Curiae Washington Defender Association

**CERTIFICATE OF SERVICE AND WORD
COUNT DECLARATION**

I hereby certify that on December 13, 2021, I served true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts' Secure Portal.

I further certify that the foregoing document has a word count of 2,082/2,500 as required under RAP 18.7. Signed electronically in Mill Creek, Washington under the penalty of perjury of the State of Washington.

s/Alexandria "Ali" Hohman
Alexandria "Ali" Hohman, WSBA
No. 44104
Washington Defender Association
110 Prefontaine Pl. South, Ste. 610
Seattle, WA 98104
Phone: (206) 623-4321
Email: ali@defensenet.org

WASHINGTON DEFENDER ASSOCIATION

December 13, 2021 - 6:17 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 100,331-5
Appellate Court Case Title: Civil Survival Project et al. v. State of Washington et al.

The following documents have been uploaded:

- 1003315_Briefs_20211213181449SC152802_3808.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was FINAL 12.13.21 Civil Sur PDA Blake Amicus Brief WDA.pdf
- 1003315_Motion_20211213181449SC152802_4638.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was FINAL 12.13.21 Civil Sur PDA Blake Mtn for Leave to Join Amicus WDA.pdf

A copy of the uploaded files will be sent to:

- ATK@outtengolden.com
- ComCEC@atg.wa.gov
- MHG@outtengolden.com
- SGunderson@frankfreed.com
- bcasey@co.snohomish.wa.us
- calburas@kingcounty.gov
- changro@seattleu.edu
- cmcnerney@outtengolden.com
- corey.guilmette@defender.org
- david.hackett@kingcounty.gov
- florinef@harriganleyh.com
- jaimehawk@hotmail.com
- jhawk@aclu-wa.org
- jmidgley@aclu-wa.org
- kristinb@harriganleyh.com
- lbaker@kingcounty.gov
- leeme@seattleu.edu
- levinje@seattleu.edu
- lisa.daugaard@defender.org
- mrojas@outtengolden.com
- msubmit@frankfreed.com
- paul.crisalli@atg.wa.gov
- pleadings@aclu-wa.org
- prachi.dave@defender.org
- randallt@harriganleyh.com
- talner@aclu-wa.org
- timl@harriganleyh.com
- tkranz@snoco.org

Comments:

Sender Name: Alexandria Hohman - Email: ali@defensenet.org

Address:

110 PREFONTAINE PL S STE 610

SEATTLE, WA, 98104-2626

Phone: 206-623-4321

Note: The Filing Id is 20211213181449SC152802