

WSR 23-03-028
RULES OF COURT
STATE SUPREME COURT
[January 5, 2023]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENT TO RAP) NO. 25700-A-1489
16.8—PERSONAL RESTRAINT)
PETITION—FILING AND SERVICE)

Attorney Kelly Vomacka, having recommended the suggested amendment to RAP 16.8—Personal Restraint Petition—Filing and Service, and the Court having approved the suggested amendment for publication; Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as shown below is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2023.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2023. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 5th day of January, 2023.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

REQUEST TO AMEND RAP 16.8

Date: September 4, 2022
Proponent: Kelly Vomacka, WSBA #20090
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Purpose: The purpose of the amendment is to relieve defendants from paying a filing fee if their motion for relief from judgment under CrR 7.8 is transferred from Superior Court to the Court of Appeals. Currently, defendants must pay a filing a fee of \$250 even though they did not file a case in either court and even if they objected to the transfer.
Public Hearing: Not requested.
Expedited Consideration: Not requested.

SUGGESTED RULE

RAP 16.8

PERSONAL RESTRAINT PETITION—FILING AND SERVICE

(a) Filing Fee. A personal restraint petition will be filed by the clerk of the appellate court only if the statutory filing fee is

paid, unless the appellate court determines that the petitioner is indigent or the case is transferred from Superior Court under CrR 7.8. The statute governing payment of a fee for filing a petition for writ of habeas corpus is controlling.

(b) Filing in Court of Appeals. A personal restraint petition filed in the Court of Appeals must be filed in the division that includes the superior court entering the decision on the basis of which petitioner is held in custody or, if petitioner is not being held in custody on the basis of a decision, in the division in which the petitioner is located.

(c) Deficient Petitions. If the clerk of the appellate court determines that a petition submitted does not conform with this rule or with rule 16.7 (a)(1), (3), (4), (5), (6), or (7), the petition should be filed and the clerk will direct the petitioner to correct the deficiency within 60 days.

(d) Service of Petition. If petitioner's restraint is imposed by the state or local government, the clerk of the appellate court will reproduce a copy of the petition and serve the petition on the officer or agency under a duty to respond to the petition. If petitioner's restraint is imposed by a person or agency other than the state or local government, the petitioner must prepare and serve a copy of the petition on the proper respondent.

(e) Amendment of Petition. The appellate court may allow a petition to be amended. All amendments raising new grounds are subject to the time limitation provided in RCW 10.73.090 and 10.73.100.

SUPPLEMENTAL MATERIAL

I. Introduction

A criminal defendant may move the Superior Court for relief from judgment under CrR 7.8, such as to withdraw a guilty plea or to be re-sentenced. In some circumstances, the Superior Court may transfer the motion to the Court of Appeals for consideration as a Personal Restraint Petition. If it does, the defendant then has to pay a filing fee in the Court of Appeals, even though he never filed any case in any court. The filing fee is currently \$250. This amendment would remove the unfair requirement that a party pay a filing fee for a case he did not file.

II. Support

After conviction, defendants' lives go on. Whether they serve a prison sentence or not, they grow older, start families, get jobs, heal from addiction and trauma, and move away from their earlier errors. At the same time, the law itself continues to evolve, sometimes correcting past injustices and making new relief available for previous defendants. In recent years, for example, courts and legislators have changed sentencing laws for juveniles and young adults. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018); *In re Pers. Restraint of Forcha-Williams*, 18 Wn. App. 2d 167, 490 P.3d 255 (2021). They have abolished drug possession convictions and the offender points that come with them. *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). They have limited which crimes are "most serious offenses," commonly called "strikes." Laws 2019, ch. 187, sec. 1. They have recognized that defense attorneys must advise their clients of the immigration consequences of guilty pleas. *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). They have changed the requirements for restitution and other legal financial obligations. Laws 2018, ch. 269;

Laws 2022, ch. 260. And the list goes on. As a result, defendants have many reasons to challenge their convictions and sentences.

Defendants can generally use one of two procedures to seek a new trial or a new sentence. They can file a Personal Restraint Petition (PRP) in the Court of Appeals, or they can file a motion for relief from judgment under CrR 7.8 in Superior Court. In deciding which to file, defendants and their attorneys consider many factors. For example, CrR 7.8 motions are usually decided within a few weeks, and PRPs can take years. CrR 7.8 motions are heard by the same judge who heard the original case, and PRPs go to a panel of appellate judges who have no prior connection to the case. If the motion requires that testimony be taken, the testimony can be taken only in Superior Court. CrR 7.8 motions require less briefing and easier argument than PRPs. Because they are easier, CrR 7.8 motions generally carry lower legal fees. For these reasons and more, deciding which type of procedure to use is often a strategic consideration.

If the defendant files a CrR 7.8 motion, he files it into the original criminal case. If he files a PRP, he must pay a filing fee of \$250 to the Court of Appeals, because he is initiating a new case. RAP 16.8(a); RCW 2.32.070. (Note that RCW 2.32.070 refers to this as a "docket fee," but the court itself refers to it as a "filing fee." See attached letter from the Court of Appeals.)

However, one rule lets the courts treat CrR 7.8 motions differently than all other criminal motions. Under certain conditions, the Superior Court can transfer the CrR 7.8 motion to the Court of Appeals for consideration as a PRP. CrR 7.8 (c)(2). If the case is transferred, the Court of Appeals then has a new case to consider and seeks its usual \$250 filing fee. It cannot seek this fee from the State, because RCW 2.32.070 says, "No fees shall be required to be advanced by the state or any municipal corporation, or any public officer prosecuting or defending [in the appellate courts] on behalf of such state or municipal corporation." Therefore, the court seeks the filing fee from the defendant.

The court seeks the filing fee even though the defendant did not file the case in the Court of Appeals and in fact may have objected to transfer. The defendant also did not file the original criminal case in Superior Court. And yet in order to access the relief that may be available to him—for example, a lawyer who tells him up front that he will lose his green card if he pleads guilty, or a sentence that considers the particular qualities of youth, or that is not based on a void law—he must pay \$250. If the defendant is indigent or incarcerated, the fee can be waived. RAP 16.8(a); RCW 4.24.430. But if he is not indigent—if he is living his life, raising his family, working his job, all many years after conviction—then he must pay.

Other kinds of cases can be transferred from Superior Court to the Court of Appeals, with no filing fee. If a party in an administrative or land-use proceeding appeals to Superior Court, the Superior Court can transfer the case to the Court of Appeals as a direct appeal. In both of those situations, the filing fee is waived. RCW 34.05.518 (administrative); RCW 36.18.018(2) (land use).

The proponent of the amendment is an attorney whose practice includes post-conviction relief, often for immigrants. Her clients are almost never incarcerated or indigent and are seeking relief from conviction many years—sometimes decades—after conviction. Two of her clients have been required to pay the fee. For the second client, counsel moved the Court of Appeals to waive the fee, which it declined

to do. Counsel then moved to modify that ruling, which the court also declined to do. Counsel believes the only way to relieve defendants from paying the fee is to amend RAP 16.8.

A defendant should not have to pay a filing fee for a case he never filed. He should not have to pay a fee for a transfer he neither sought nor agreed to, and that he might have resisted. Although many defendants are indigent and eligible for a waiver, the fee lands on people who have been rehabilitated, who are stable and have left their past behind them, who are not indigent but are seeking relief they never should have been denied in the first place. To require them to also pay a filing fee for a case they did not file is unfair.

III. Conclusion

RAP 16.8(a) should be amended to relieve defendants from paying a filing fee for a case they never filed.