

No. 36858-7-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION TWO

KEVIN SMITH,
Appellant,

v.

STATE OF WASHINGTON,
Respondent.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Theodore Spearman, Judge

BRIEF OF APPELLANT ON EFFECT OF CrR 7.8(c)(2)

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A. ASSIGNMENTS OF ERROR

This brief contains no assignments of error because counsel has not yet been appointed to brief the merits of an appeal from the trial court's order denying the postjudgment motion.

Issues Related to Narrow Scope of Appointment

1. Did the trial court err in denying the motion to dismiss without first determining whether the judgment was facially valid?

2. Assuming arguendo the judgment was facially valid, did the trial court err in deciding the motion was untimely, where the state has not established that the mandate concluding appellant's direct appeal was properly issued?

3. Is it impossible to determine whether the dismissal order complies with CrR 7.8(c)(2) as recently amended, where the state has not shown the judgment was facially valid or the mandate was properly issued?

4. Assuming arguendo the dismissal order properly found the motion untimely, does the order violate CrR 7.8(c)(2) as recently amended?

5. What remedies are available to this Court in the above scenarios?

6. Should this Court follow persuasive and analogous precedent from the United States Supreme Court in requiring notice

and an opportunity to voluntarily dismiss a postjudgment motion before a motion is transferred to this Court as a personal restraint petition (PRP)?

B. STATEMENT OF THE CASE¹

This case started with an information filed November 9, 1995, when the Kitsap County prosecutor charged appellant Kevin Smith with delivering a controlled substance. On March 25, 1996, the trial court entered judgment on three counts of delivering a non-controlled substance in lieu of a controlled substance. The court sentenced Smith to three 57-month terms, to be served consecutively for an exceptional sentence of 171 months.

On November 26, 1997, this Court issued a revised unpublished decision affirming Smith's convictions but remanding for resentencing. The opinion directed the trial court to correct Smith's offender score from 13 to 12, and to resentence. State v. Smith, 88 Wn. App. 1026, 1997 WL 709419 (No. 20510-6-II, 11/26/07).

Smith was resentenced and appealed. By decision dated April 7, 2000, this Court again vacated Smith's sentence and remanded for

¹ The facts are summarized from the several appellate decisions entered on appeals from State v. Kevin Smith, Kitsap County Superior Court No. 95-1-00998-9, and from counsel's review of the ACORDS dockets for this Court's cause numbers 20510-6-II, 23740-7-II, 26258-1-II, and the Washington Supreme Court's cause number 72052-5.

resentencing. State v. Smith, 100 Wn. App. 1020, 2000 WL 358303 (No. 23740-7-II, 4/7/00).

Smith again was resentenced and appealed. On November 9, 2001, the Court affirmed Smith's sentence in an unpublished decision. State v. Smith, 109 Wn. App. 1011, 2001 WL 1408648 (No. 26268-1-II), rev. granted, 147 Wn.2d 1019 (2002).

After the Supreme Court granted review, Smith was resentenced by agreement on April 25, 2003. The third amended judgment and sentence imposed concurrent 51-month sentences. Brief of Resp., Appendix D. The parties then filed a joint motion to permit entry of the new judgment and sentence. The Supreme Court deputy clerk granted the motion and dismissed review by ruling dated May 28, 2003. The mandate issued May 29, 2003.

In September 2007, Smith filed a motion to dismiss, alleging violations of CrR 3.3 and the Code of Judicial Conduct. The trial court denied the motion by order dated September 6, 2007. The order found "pursuant to CrR 7.8 and RCW 10.73.090, Defendant's motion is untimely. Therefore, it is hereby ORDERED that the Motion to Dismiss is DENIED." A copy of the order is attached as appendix A.

Smith filed a notice of appeal on September 18, 2007. The trial court entered an order of indigency on October 1, 2007, authorizing the appeal and appointment of counsel at public expense.

By order dated November 7, 2008, this Court appointed counsel to address the "narrow issue" whether the September 6, 2007 dismissal order complies with the new rule and, if not, what remedy this court should provide."

C. ARGUMENT

1. BECAUSE THE STATE HAS NOT SHOWN THE MOTION WAS UNTIMELY, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR CONSIDERATION UNDER CrR 7.2(c)(2) (i) AND (ii).

CrR 7.8(b) allows a party to seek relief from criminal judgment in a variety of circumstances. State v. Hall, __ Wn.2d __, __ P.3d __ (No. 78658-5, January 31, 2008). Subsection (c) governs the procedural consideration of such motions.²

Effective September 1, 2007, the rule was amended to read as follows:

(c) Procedure on Vacation of Judgment.

(1) *Motion*. Application shall be made by motion stating the 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.

² Before the 2007 amendment, subsection (c)(2) provided:
(2) *Initial Consideration*. The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief. The court may transfer a motion to the Court of Appeals for consideration as a personal restraint petition if such transfer would serve the ends of justice. Otherwise, the court shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

(2) *Transfer to Court of Appeals.* The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) *Order to Show Cause.* If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c).

By using the word "shall," the rule appears to require the trial court to transfer a CrR 7.8 motion to the Court of Appeals if the motion is barred by RCW 10.73.090. Sorenson v. Dahlen, 136 Wn. App. 844, 855, 149 P.3d 394 (2006) ("As a general rule, the use of the word "shall" in a statute or court rule is mandatory and operates to create a duty). One key foundation question, then, would be whether the trial court correctly relied on RCW 10.73.090 to find the motion untimely.

RCW 10.73.090 functions as a statute of limitation, not a jurisdictional bar. In re Restraint of Hoisington, 99 Wn. App. 423, 431, 993 P.2d 296 (2000). The statute does not bar PRPs or

postjudgment motions if the judgment and sentence is facially invalid or rendered by a court lacking competent jurisdiction.³

The trial court order does not determine whether the judgment is facially valid. Smith therefore could argue the order is inadequate to invoke dismissal under RCW 10.73.090.

Assuming arguendo the state could establish facial validity, the statute sets a one-year time limit from the date after a facially valid judgment "becomes final." RCW 10.73.090(1). In pertinent part, "a judgment becomes final on . . . [t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction[.]" RCW 10.73.090(3)(b).

Although the trial court did not explain its September 6th order, it appears likely the trial court considered the date to be May 29, 2003, when the Supreme Court clerk issued the mandate in No. 72052-5.⁴ But it is not at all clear that the mandate was properly issued.

³ In re Restraint of Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004); In re Hankerson, 149 Wn.2d 695, 701, 72 P.3d 703 (2003); In re Restraint of Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002); In re Restraint of Stoudmire, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000).

⁴ The state's brief assumes this date is the start of the one-year period. Br. of Resp. re: Effect of Amendments, at 3 n.3.

A department of five Supreme Court justices unanimously granted Smith's petition for review. State v. Smith, 147 Wn.2d 1019 (2002). This ensured that "the Court" – i.e. a majority of the justices – voted to accept review. Const. art. 4, § 2 (a majority of the judges are "necessary to form a quorum, and pronounce a decision"); RCW 2.04.070 (there are nine Supreme Court justices).

The ACORDS docket from No. 72052-5, however, reveals review was dismissed by ruling signed by a deputy clerk. Counsel has found no legal authority granting the deputy clerk authority to dismiss an appeal where review was unanimously granted by a five-justice department. Cf., Const. art. 4, § 2; RCW 2.04.150 (discussing en banc review); RCW 2.04.180 (the court has authority to adopt procedural rules); RAP 13.4(i) (the "Supreme Court" decides to grant or deny a petition); SAR 6 (dividing the court into two five-justice departments); SAR 15(b) (granting the Commissioner authority to decide motions "authorized by the Rules of Appellate Procedure and any additional motions that may be assigned to the commissioner by the court"); SAR 16(g) (authorizing the clerk to "perform any and all other duties as may be prescribed by the Supreme Court"); SAR 16(b) (authorizing the clerk to appoint one or more deputies).⁵

⁵ See also, Appendix B (a letter ruling in a different case dated December 7, 2007, from the Supreme Court Deputy Clerk, . . . (cont'd)

For this reason, Smith could argue the mandate was wrongly issued in 2003 and the state cannot establish a starting date for purposes of RCW 10.73.090(1). Smith could argue the trial court therefore erred in finding the motion untimely. The remedy for that error is to remand to the trial court for consideration of the motion under the CrR 7.8(c)(2)(i) and (ii) criteria.

2. COUNSEL IS IN NO POSITION TO ASSIST SMITH IN LITIGATING THE MERITS OF THE APPEAL AT THIS TIME.

Assuming arguendo the trial court erred in denying the motion as untimely, this Court's limited appointment places counsel in a difficult position. Counsel has different obligations when appointed to represent a client who has the right to appeal. Counsel would be obligated to secure the record and research potential issues to raise on appeal. If counsel determines the record reveals no issues of arguable merit, counsel would be required to file a brief that complies with RAP 15.2(i) and 18.3(a)(2), State v. Theobald, State v. Hairston, and Anders v. California.⁶ Division One of this Court has made it clear it is the state's job, not appointed counsel's, to raise arguments

recognizing that a motion for dismissal may only be properly acted on by the Court after review is granted).

⁶ Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967); State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997); State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970).

showing why potential defense arguments are frivolous. State v. Pollard, 66 Wn. App. 779, 790, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992).

Here, however, counsel has no idea whether Smith's pro se postjudgment motion has arguable merit.⁷ Counsel does not have the record of the trial proceedings necessary to make that determination. It also is not clear that counsel's obligation to an appellate client in this situation would be limited to raising the issues raised in the pro se CrR 7.8 motion.

Counsel therefore is in no position to argue or concede that the trial court properly or improperly denied the motion on its merits or as untimely.

Assuming arguendo the trial court wrongly denied the motion as untimely, Smith should have the right to appeal the trial court's determination. The rules grant trial courts the authority to consider motions to vacate and arrest judgments. CrR 7.8. The rules grant the right to appeal the denial of those motions. RAP 2.2(a)(10), (11); State v. Larranaga, 126 Wn. App. 505, 508-10, 108 P.3d 833 (2005);

⁷ The motion cited CrR 3.3 and the Code of Judicial Conduct. These claims might arguably encompass state and federal constitutional claims of ineffective assistance of counsel, or actual bias by the trial court judge. Without a record of the trial proceedings, counsel cannot know.

State v. Thompson, 93 Wn. App. 364, 368-69, 967 P.2d 1282 (1998).

The remedy for the erroneous denial of the motion is to permit Smith's appeal with the appointment of counsel and preparation of the record at public expense. Larranaga, at 508-09; Thompson, at 368-69.

3. A TRIAL COURT MUST GIVE NOTICE AND AN OPPORTUNITY TO VOLUNTARILY DISMISS A POSTJUDGMENT MOTION WHERE THE TRIAL COURT TRANSFERS IT UNDER CrR 7.8(c)(2).

Assuming arguendo the trial court properly determined the motion was untimely, it still failed to follow CrR 7.8(c)(2) as amended. It did not enter a transfer order or give Smith notice that his motion would be considered as a PRP.

Smith is entitled to notice because the rule's operation may limit Smith's ability to seek collateral relief in the future. If the trial court is required to consider the motion, rather than transfer it to this Court as a PRP, Smith is less likely to be barred by RCW 10.73.140 and its limitation on subsequent petitions. Cf., In re Restraint of Bailey, 141 Wn.2d 20, 27-28, 1 P.3d 1120 (2000) (because a postjudgment motion filed in trial court was not a previously filed PRP, a successive PRP was not barred by RCW 10.73.140); with, In re Restraint of Vasquez, 108 Wn. App. 307, 313-14, 31 P.3d 16 (2001) (prior CrR 7.8 motion that is transferred to and retained by the Court of Appeals as a PRP will bar successive PRPs under RCW 10.73.140), rev. denied, 152 Wn.2d 1035 (2004).

The state is well aware of the preclusive effect that follows the transfer of a postjudgment motion to this Court as a PRP.⁸ Not surprisingly, the state suggests this Court should simply issue the transfer order itself "and dispose of the case without further briefing." Br. of Resp. at 4. But the amended rule should not be applied to Smith without fair notice. Smith did not file a PRP; he filed a postjudgment motion in the trial court. The trial court considered it and denied it without transfer. If transfer is required under the rule and the statute may operate to limit Smith's future rights to seek collateral relief, he should be given notice. Then he may make a knowing and intelligent decision whether to proceed with the recharacterized PRP, or move to amend or voluntarily withdraw it so as to avoid the procedural bar of RCW 10.73.140.

In similar circumstances, the Supreme Court required notice and an opportunity to withdraw or amend. United States v. Castro, 540 U.S. 375, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003). Castro filed a

⁸ This Court can take judicial notice of the state's diligent pursuit of procedural bars. Some things are not subject to reasonable dispute. ER 201(b); K. Tegland, 5 Wash. Pract. Evidence, § 201.17 (appellate court can take judicial notice). In addition, the GR 9 Cover Sheet for the 2007 amendment of CrR 7.8(c) reveals: (1) the amendment was proposed by the Washington Association of Prosecuting Attorneys (WAPA), and (2) the opportunity to procedurally bar successive PRPs was the key reason for the amendment. See appendix C (GR 9 Cover Sheet).

pro se motion for a new trial under Fed. Rule Crim. Proc. 33. The government argued the claim would be more properly considered under the federal habeas corpus statute, 28 U.S.C. § 2255. The District Court then recharacterized the motion as a habeas petition and denied it. Castro appealed and the Court of Appeals summarily affirmed. Castro, 540 U.S. at 378.

Castro filed a habeas petition several years later. The government asserted the petition was barred as a successive petition. The district court dismissed the petition as barred and the Eleventh Circuit affirmed. Castro, 540 U.S. at 379.

The Supreme Court granted certiorari and vacated the Eleventh Circuit's decision. The court held a lower court may recharacterize a rule 33 motion when it: (1) notifies the pro se litigant that it intends to recharacterize the pleading, (2) warns the litigant of the potential preclusive effect of recharacterization on successive motions, and (3) provides the litigant the opportunity to withdraw the motion or amend it to include all potential habeas claims the litigant believes he has. Castro, 540 U.S. at 383. If the court fails to do so, the first motion cannot trigger the procedural bar on successive habeas petitions. Id.

The analogies with Castro are obvious. Washington courts recharacterize a trial court motion as a PRP through the transfer

provision of CrR 7.8(c)(2). Once transferred, the potential preclusive effect of RCW 10.73.140 applies to successive PRPs. Cf. Bailey, 141 Wn.2d at 27-28, with Vasquez, 108 Wn. App. at 313-14. The trial court therefore should be required to comply with simple notice requirements like those set forth in Castro. 540 U.S. at 383.

Basic due process principles also support this remedy. U.S. Const. amend. 14; Const. art. 1, § 3. The ability to seek collateral review is of vital importance in our justice system. Bailey, 141 Wn.2d at 25. "In the criminal context, due process requires that a criminal defendant be given notice *prior* to deprivation of a substantial right." City of Seattle v. Klein, 161 Wn.2d 554, 566, 166 P.3d 1149 (2007) (court's emphasis, citing City of Seattle v. Agrellas, 80 Wn. App. 130, 136-37, 906 P.2d 995 (1995) and State v. Fleming, 41 Wn. App. 33, 35-36, 701 P.2d 815 (1985)).

Requiring such notice also is fair and makes sense in the context of Washington postconviction law. Situations arise where a person may file a single-issue motion under CrR 7.8 seeking narrow relief.⁹ That same person, at the same time, might be preparing to file

⁹ There are times when appellate courts prefer such motions, as they may result in securing relief more quickly and efficiently, without appellate court involvement. State v. Rowland, 97 Wn. App. 301, 305-06, 983 P.2d 696 (1999) (noting Rowland would have been "better served" if counsel had filed a postjudgment motion in the trial court).

a PRP raising multiple claims, because the PRP allows review of broader issues than the CrR 7.8 motion. A trial court nonetheless might transfer the narrow CrR 7.8 motion to this Court. Citing Vasquez (but not Castro), some prosecutors might welcome the unfair windfall such a transfer might have in barring the future PRP.¹⁰ Courts, however, should recognize that fairness requires either the transferring court or the receiving court to provide notice and an opportunity to amend or withdraw.

As the Castro court held, a fair system demands no less. This Court therefore should decline the state's invitation to sacrifice notice and fairness at the altar of one-sided efficiency.

D. CONCLUSION

If this Court finds the trial court erred in denying the motion as untimely, this Court should remand so the trial court may consider the prerequisites of CrR 7.2(c)(i) and (ii) before making its transfer decision.

If this Court determines the trial court properly found the motion untimely, but erred in denying the motion without first transferring it to this Court as a PRP, the case should be remanded to the trial court so it may enter a transfer order, notify Smith, and provide Smith the

¹⁰ Castro was decided two years after Vasquez. The Vasquez court did not address the notice arguments raised herein.

opportunity to withdraw or amend the motion. Under Castro, that order should give Smith sufficient time to weigh his options and make a knowing and intelligent decision whether to pursue the motion despite its potential preclusive effect on future requests for collateral relief.¹¹

DATED this 11th day of February, 2008.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

¹¹ Since this Court's appointment, counsel has made efforts to contact Smith and inform him of this appellate proceeding. To date, those efforts have not succeeded.

APPENDIX A

No. 36858-7-II

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DAVID W. PETERSON

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY**

STATE OF WASHINGTON,,
Plaintiff,

No. 95-1-00998-9

vs.

ORDER ON MOTION TO DISMISS

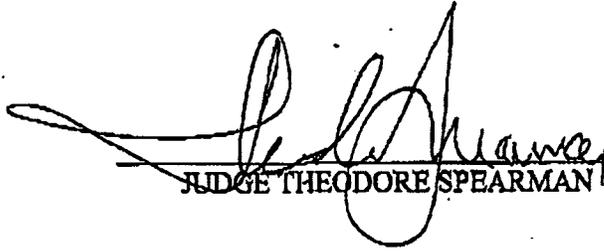
KEVIN J. SMITH,

Defendant.

THIS MATTER comes before the Court upon Defendant's Motion to Dismiss for Violation of Criminal Court Rule 3.3 and the Code of Judicial Ethics. Having reviewed Defendant's motion, the Court finds that pursuant to CrR 7.8 and RCW 10.73.090, Defendant's motion is untimely. Therefore, it is hereby

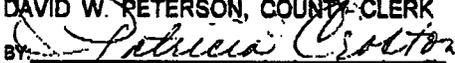
ORDERED that the Motion to Dismiss is **DENIED**.

Dated: September 4, 2007.


JUDGE THEODORE SPEARMAN

STATE OF WASHINGTON, }
COUNTY OF KITSAP } ss }

I, DAVID W. PETERSON, Clerk of the above-entitled County do hereby certify that the foregoing instrument is a true and exact copy of the original now on file in my office.

ORDER In witness whereof, I hereunto set my hand and the seal of said Court this 1st day of October 2007.
DAVID W. PETERSON, COUNTY CLERK
BY: 
Deputy

JUDGE THEODORE SPEARMAN
Kitsap County Superior Court
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

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APPENDIX B

No. 36858-7-II

RONALD R. CARPENTER
SUPREME COURT CLERK

THE SUPREME COURT
STATE OF WASHINGTON



SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

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Re: Supreme Court No. 79721-8 - In re the Interest of: Elija Lee Joseph Przespolewski
Court of Appeals No. 24098-3-III

Counsel:

On November 16, 2007, a Deputy Clerk's ruling was entered dismissing this matter at the request of the parties. Upon further review of the matter, it has come to my attention that since the petition for review had been granted by the Court, any motion for dismissal could only properly be acted upon by the Court. Accordingly, since the mandate has not yet issued on this matter, the November 16, 2007, Deputy Clerk's ruling of dismissal has been vacated.

The motion for voluntary withdrawal of review has now been scheduled for consideration by the Court at the January 10, 2008, En Banc Conference. The motion will be considered without oral argument.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:bbm

APPENDIX C

No. 36858-7-II

GR 9 Cover Sheet

Suggested Amendment to Superior Court Criminal Rule (CrR) 7.8 *concerning Relief from Judgment or Order*

Submitted by the Board of Governors of the Washington State Bar Association

- (A) **Name of Proponent:** Washington State Bar Association.
- (B) **Spokesperson:** David D. Swartling, Chair, WSBA Court Rules and Procedures Committee.
- (C) **Purpose:** This suggested amendment is based on a recommendation originally submitted by the Washington Association of Prosecuting Attorneys (WAPA). The suggested amendment to CrR 7.8 provides that a motion to vacate a criminal judgment will be transferred to the Court of Appeals for consideration as a personal restraint petition rather than decided by the superior court, except in enumerated circumstances.

A CrR 7.8 motion to vacate is a form of collateral attack on a criminal judgment. Most such motions are not subject to a definite deadline but can be made “within a reasonable time.” In many cases, these motions are filed by pro se defendants after the direct appeal and personal restraint processes have been exhausted. Because such motions are classified as collateral attacks, they are subject to a number of procedural restrictions imposed by statute, including the restriction that a collateral attack may not be filed more than one year after judgment (unless an exception applies). See RCW 10.73.090(2); see also RCW 10.73.100; RCW 10.73.140. In many cases, such a pro se motion is clearly procedurally barred and should be denied, but if the superior court denies the motion, the defendant is entitled to appointed counsel because such an order is appealable under RAP 2.2. An abuse of discretion standard applies on appeal; hence, in the case of procedurally barred motions, there is little appointed counsel can do. Substantial time and effort can be consumed in these abortive appellate proceedings.

Currently, CrR 7.8 permits transfer of a motion to vacate to the Court of Appeals “if such transfer would serve the ends of justice.” The WSBA Court Rules and Procedures Committee was advised that the transfer procedure is routinely and successfully invoked in King County Superior Court. The suggested rule will require the superior court to transfer all motions directly to the Court of Appeals for initial disposition as personal restraint petitions. Excepted are motions not barred by RCW 10.73.090 if either (1) the defendant makes a substantial showing that he or she is entitled to relief or (2) resolution of the motion requires a factual hearing. These situations are appropriately addressed by the superior court. In all other cases, once transferred, the more flexible procedures for initial consideration of a personal restraint petition will apply. See RAP 16.11.

- (D) **Hearing:** A public hearing is not recommended.
- (E) **Expedited Consideration:** Expedited consideration is not requested.

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STATE OF WASHINGTON
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NO. 36858-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

KEVIN SMITH,

Appellant.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On February 11, 2008, I deposited in the US mail, a properly stamped and addressed envelope containing a true and correct copy of the following document on the parties below:

Documents Served:

1. Brief of Appellant on Effect of CrR 7.8(c)(2)
2. Motion to Extend Time and Strike Sanctions

Via Mail to:

Randall Sutton
Kitsap County Prosecutors Office
MSC 35
614 Division St
Port Orchard WA 98366-

Dated this 11th day of February, 2008.

By: *Amy Cox*
Amy Cox, Legal Assistant
Nielsen, Broman and Koch, PLLC
1908 East Madison Street
Seattle, WA 98122