

FILED  
Court of Appeals  
Division II  
State of Washington  
12/20/2017 4:16 PM

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

In re the Personal Restraint Petition of:	COURT OF APPEALS NO. 50657-2-II
DAVID A. TROUPE,	PIERCE COUNTY NO. 09-1-02724-4
Petitioner.	AMENDED MOTION TO MODIFY COURT CLERK'S RULING REGARDING COURT FILING FEE

**1. IDENTITY OF MOVING PARTY**

Moving Party/Petitioner David Troupe, by and through his attorney of record, Peter B. Tiller, of the Tiller Law Firm, asks for the relief designated in Part 2 of this Motion.

**2. STATEMENT OF RELIEF SOUGHT**

Pursuant to RAP 17.7, Moving Party/Petitioner David Troupe requests modification of the Court Clerk's Letter Ruling dated June 28, 2017, that he is required to pay a court filing fee in order to proceed with a personal restraint petition (PRP) filed May 12, 2017. A copy of the Ruling

is attached to this amended motion as Appendix A. This Court should reverse the Court Clerk's ruling and permit waiver of the filing fee.

**3. STATEMENT OF THE CASE**

David Troupe filed a PRP on May 12, 2017, and on June 28, 2017, the Clerk of the Court issued a letter ruling that Mr. Troupe is required to pay a \$250.00 filing fee or face dismissal of the PRP. The letter ruling cites RCW 4.24.430 and *In re Pers. Restraint of Troupe*,<sup>1</sup> in support of the notice that Mr. Troupe is not permitted to proceed in *forma pauperis* and that the court filing fee is required. Appendix A.

On July 21, 2017, Mr. Troupe filed a Motion to Waive Filing Fee and attached a copy of the Court Clerk's letter of June 28, 2017. In his motion, Mr. Troupe argues, *inter alia*, that inmate/petitioners are not given notice that each disqualifying dismissal under RCW 4.24.430 ("strikes") would include dismissal of personal restraint petitions, that no evidence was presented that he had three disqualifying "strikes" under the statute, that the terms "frivolous" and "malicious" are not sufficiently clear and that a petition filed by an inmate unskilled in the preparation of a PRP should be dismissed as an "improper" filing rather than a disqualifying frivolous or malicious "strike," and that he was not given notice that a dismissed PRP

would constitute a “strike.” Motion to Waive Filing Fee, July 21, 2017 at 1-2.

On September 5, 2017, this Court appointed undersigned counsel and directed that counsel prepare and file an amended motion to modify the ruling of the Court Clerk and address issues raised in Mr. Troupe’s motion.

**4. GROUNDS FOR RELIEF AND ARGUMENT**

**A. This Court Should Modify The Court Clerk’s Letter Ruling Requiring Payment of the Court Filing Fee**

Petitioner David Troupe filed a personal restraint petition (PRP) challenging certain conditions of his confinement in cause no. 47299-6-II. This Court waived the \$250 filing fee and the State moved to revoke the fee waiver, which was denied by a Commissioner of this Court. The State moved to modify the Commissioner's ruling denying the State’s motion to revoke the waiver of the filing fee, arguing that waiver of Mr. Troupe's filing fee is barred by RCW 4.24.430. Mr. Troupe appealed and argued that the legislature cannot constitutionally limit the courts’ inherent authority to waive fees, that RCW 4.24.430 does not apply to PRPs, and waiver of PRP filing fees is governed by RAP 16.8 and RCW 7.36.250. This Court, in an Opinion published on June 21, 2016, granted the State's motion to

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<sup>1</sup>194 Wash.App. 701, 378 P.3d 239 (2016).

modify the Commissioner's ruling, and ordered Mr. Troupe to pay the filing fee before his PRP could proceed. *In Re Troupe*, 194 Wn.App. 701, 708, 378 P.3d 239 (2016). More germane to the present motion, this Court held that RCW 4.24.430 applies to PRPs, in conjunction with RAP 16.8 and RCW 7.36.250. *In Re Troupe*, 194 Wn.App. at 707, 708.

Mr. Troupe filed a PRP on May 12, 2017, and on June 28, the Court Clerk issued a letter to Mr. Troupe stating in part:

Under *In re Personal Restraint of Troupe* [citation omitted] and RCW 4.24.430, you are required to pay a filing fee. If you do not submit the \$250 filing fee within 30 days of the date of this ruling, we will dismiss this petition without further notice from this court.

Appendix A.

RAP 17.7 allows this court to modify a ruling of a Court Commissioner or Court Clerk. RAP 17.7 provides in pertinent part:

An aggrieved person may object to a ruling of a commissioner or clerk including transfer of the case to the Court of Appeals under rule 17.2(c), only by motion to modify the ruling directed to the judges of the court served by the commissioner or clerk. The motion to modify the ruling must be served on all persons entitled to notice of the original motion and filed in the appellate court not later than 30 days after the ruling is filed.

1. **RCW 4.24.430 violates Mr. Troupe's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment because it is void for vagueness as applied.**

The due process clause of Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct and ensures that citizens receive notice as to what conduct the law proscribes and prevents the law from being arbitrarily enforced. *State v. Sullivan*, 143 Wn.2d 162, 181, 19 P.3d 1012 (2001). Absent this requisite notice, a statute is void for vagueness. *Id.* This vagueness doctrine serves two important purposes: first, it provides citizens with fair warning of what conduct they must avoid; and second, it protects them from arbitrary, ad hoc, or discriminatory law enforcement. *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993). A statute fails to provide constitutionally adequate notice if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007) (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed 322 (1926)).

A statute can be unconstitutionally vague in two ways. First, it may

provide inadequate notice, so that ordinary people cannot understand what conduct it prohibits. Second, it may authorize arbitrary or discriminatory application by law enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *State v. Williams*, 144 Wn.2d 197, 203-04, 26 P.3d 890 (2001). A statute is unconstitutionally vague if either element is satisfied. *Id.* at 203-04.

*a. The statute is unconstitutionally vague because it fails to define "frivolous or malicious"*

A statute is void for vagueness and unenforceable if it is too vague for the average citizen to understand. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute is unconstitutionally vague when an average person cannot generally determine which persons are regulated, what conduct is prohibited, or what punishment is imposed. *Watson*, 160 Wn.2d at 6; *Williams*, 144 Wn.2d at 203. In order to be constitutional, a law must state explicitly what it mandates, and what is enforceable. *State v. Richmond*, 102 Wn.2d 242, 248, 683 P.2d 1093 (1984). Potentially vague terms must be defined. *Id.*

The interpretation of a statute is a question of law reviewed *de novo*. *Marquez v. Cascade Residential Design, Inc.*, 142 Wn. App. 187, 191, 174 P.3d 151 (2007). Unless the statute involves a First Amendment challenge, a

vagueness challenge requires analysis of the statute as applied to the facts of the case. *State v. Jenkins*, 100 Wn. App. 85, 89, 995 P.2d 1268 (2000); *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Statutes are presumed to be valid, but this presumption is overcome where it is established beyond a reasonable doubt that the statute is unconstitutionally vague. *Watson*, 160 Wn.2d at 11.

RCW 4.24.430, the statute in question, is based on the federal Prison Litigation Reform Act (PLRA) of 1995, 28 U.S.C. § 1915(g). Section 1915(g) contains the PLRA's "three-strikes" rule. This provision bars prisoners from proceeding *in forma pauperis* if the prisoner has accrued "three strikes" under the statute.<sup>2</sup> "Not all unsuccessful cases qualify as a strike under § 1915(g). Rather, § 1915(g) should be used to deny a prisoner's IFP status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious, or failed to state a claim." *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005).

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<sup>2</sup> § 1915(g) of the PLRA's "three-strikes" rule provides:  
In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails

RCW 4.24.430, which was enacted in June, 2011, prohibits courts from waiving filing fees for inmates who seek to file *in forma pauperis* in any “civil action or appeal” against the State and has, on three or more occasions while incarcerated, brought an action or appeal against a state agency, or state official not involving duration of confinement, and that was dismissed on grounds that it was frivolous or malicious may not have court filing fees waived in future civil actions or appeals. The statute provides that “[o]ne of the three previous dismissals must have involved an action or appeal commenced after July 22, 2011.” RCW 4.24.430. The statute states:

If a person serving a criminal sentence in a federal, state, local, or privately operated correctional facility seeks leave to proceed in state court without payment of filing fees in any civil action or appeal against the state, a state or local governmental agency or entity, or a state or local official, employee, or volunteer acting in such capacity, except an action that, if successful, would affect the duration of the person's confinement, the court shall deny the request for waiver of the court filing fees if the person has, on three or more occasions while incarcerated or detained in any such facility, brought an action or appeal that was dismissed by a state or federal court on grounds that it was frivolous or malicious. One of the three previous dismissals must have involved an action or appeal commenced after July 22, 2011. A court may permit the person to commence the action or appeal without payment of filing fees if the court determines the person is in imminent danger of serious physical injury.

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to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Neither RCW 4.24.430 nor any other part of chapter RCW 4.24 defines “frivolous” or “malicious.” See RCW 4.24 generally.

If a word is undefined in a statute, the court may use a standard dictionary definition to find the term's plain and ordinary meaning. *Audit & Adjustment Co. v. Earl*, 165 Wn. App. 497, 503, 267 P.3d 441 (2011); *State v. Kintz*, 169 Wash.2d 537, 547, 238 P.3d 470 (2010). Webster's defines “frivolous” as “of little weight or importance: having no basis in law or fact.” Webster's Third New International Dictionary (2002) at 913. Black's Law Dictionary (Ninth Edition) at 739 defines “frivolous” as “[l]acking a legal basis or legal merit; not serious; not reasonably purposeful.”

Although it concerns the award of attorney fees for frivolous litigation, RCW 4.84.185 defines a “frivolous action” as “one that cannot be supported by any rational argument [i]n the law or facts.” *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 131 - 32, 783 P.2d 82 (1989); see also *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339 (2012).

Black's Law Dictionary defines “malicious” as “1. Substantially certain to cause injury. 2. Without just cause or excuse.” Black's, 977 (8th ed. 2004). Webster's Third New International Dictionary 1367 (1961) defines

“malice” as “intention or desire to harm another usu[ally] seriously through doing something unlawful or otherwise unjustified; willfulness in the commission of a wrong; evil intention ...” .

A statute is void for vagueness if it “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” *Douglass*, 115 Wn.2d at 181; *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In this case, the use of the undefined terms does not provide adequate notice of proscribed conduct and allows for arbitrary interpretation. One judicial authorities’ definition of “frivolous” or “malicious” may differ widely from another’s. This is particularly true in the area of personal restraint petitions and suits involving conditions of confinement, access to records, access to legal mail, return of property, interpretation of regulations, challenges to infractions, and a variety of other potential claims.

In the absence of a definition, the statute is unconstitutionally vague.

First, persons of common intelligence must guess at the meaning of the words “frivolous” and “malicious” and will differ as to its applicability. Second, there are no standards for administrative bodies, judges, and juries to decide what conduct is proscribed. The absence of standards makes it impossible to predict what conduct will fall within the definition of “frivolous” and “malicious,” and gives courts and reviewing bodies virtually unfettered discretion in enforcing the statute. Of particular concern, the rule is readily open to mischief in the form of unconstitutional arbitrary use of the “strike” provision in order to reduce the number of personal restraint petitions filed by inmates. Where one court may think a suit is well-founded, another may more stringently interpret the undefined terms “malicious” and “frivolous,” and dismiss petitions and other civil actions as “strikes.” Because of this, the Clerk’s ruling must be modified and waiver of the filing fee should be granted.

*b. The statute prohibiting inmates from proceeding in forma pauperis in civil cases after having three prior disqualifying dismissals does not provide adequate notice that it applies to PRPs*

As noted above, a statute is unconstitutionally vague “if persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *State v. Glass*, 147 Wn.2d 410, 421, 54 P.3d 147 (2002). As used

here, petitioner-inmates had to guess at the meaning of “civil actions” and reasonably differed as to its interpretation. Until Mr. Troupe’s previous litigation in *In Re Troupe, supra*, decided in June, 2016, no Washington case had determined whether PRPs were “civil actions” within the meaning of the statute and that RCW 4.24.430 applies to PRPs. Until this Court’s opinion, petitioner-inmates were not apprised nor could they have reasonably been expected to know that their civil actions or appeals that were dismissed as frivolous or malicious constituted “strikes” under the statute. *A priori*, Mr. Troupe was not provided notice that dismissal of PRPs constituted a “strike.”

The statute is unconstitutionally vague insofar as it does not provide adequate notice that dismissal of some PRPs would result in disqualifying strikes. Accordingly, this Court should modify the Clerk’s ruling requiring payment of the filing fee.

- 2. RCW 4.24.430 violates equal protection because it has a disparate effect on petitioner-prisoners who are less skilled or experienced in the preparation and filing of civil actions including PRPs.**

Imposition of a mandatory denial of a request for waiver of the court filing fees for petitioner-prisoners with three “strikes” under RCW 4.24.430 violates equal protection when applied to petitioners who have had actions or

appeals dismissed by a state or federal court as frivolous or malicious.

Under the equal protection clause, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. Const. amend. 14; Wash. Const. Art. 1, § 12. The core purpose of the Equal Protection Clause is to ensure that similarly situated persons are treated in a similar fashion. *State v. Berrier*, 110 Wn.App. 639, 648, 41 P.3d 1198 (2002). A statute is constitutionally invalid “as applied” when it deprives an individual of a protected right (even if the statute is not unconstitutional on its face). *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

Before an equal protection analysis may be applied, an appellant must establish he or she is similarly situated with other affected persons. The level of scrutiny to be applied under an equal protection analysis depends on whether a suspect or semi-suspect classification has been drawn or a fundamental right is implicated; if neither is involved, rational basis review is appropriate. *Andersen v. King County*, 158 Wn.2d 1, 18, 138 P.3d 963 (2006) citing *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *State v. Harner*, 153 Wn.2d 228, 236, 103 P.3d 738, 742 (2004). Where a legislative classification does not involve a suspect class or threaten a fundamental right, it need only be rationally related to a legitimate state objective. *Berrier*, 110

Wn.App. at 649.

In this case, the relevant group is petitioner-inmates who may choose to seek waiver of court filing fees under RCW 7.36.250 in order to proceed IFP. Mr. Troupe, having previously filed civil litigation in state and federal court not affecting the duration of his confinement, is similarly situated to other persons within this affected group.

Here, RCW 4.24.430 does not apply equally to all petitioner-prisoners because those who possess a more sophisticated knowledge of court rules, and in particular, knowledge of which issues are time-barred under RCW 10.73.090 as well as exceptions to the one year time bar under RCW 10.73.100, are likely to have fewer or no dismissed PRPs counting as “strikes” under the statute.

There is no legitimate state objective served by permitting the class of those who have successfully negotiated the complex areas of law, for instance the rule pertaining to the one year limit for collateral attack codified in RCW 10.73.090, and avoided having multiple PRPs dismissed to proceed IFP, while those who are less skilled or less knowledgeable and who have had three or more dismissals due to a PRP or civil action being determined to be “frivolous or malicious” being precluded from proceeding IFP after three disqualifying dismissals.

RCW 4.24.430 discriminates against indigent inmate-litigants who

improperly file PRPs or other civil actions in good faith, but who run afoul of the time-bar or other procedural rules, or fail in their attempt to qualify their claims as exceptions under RCW 10.73.100. As such, RCW 4.24.430 as applied here violates equal protection, and this Court should modify the Clerk's ruling denying waiver of the filing fee.

**3. The Clerk's ruling does not identify Mr. Troupe's disqualifying "strikes"**

The Clerk's letter ruling (Appendix A) does not explain the disqualifying dismissals relied on in reaching its decision that he is ineligible to proceed IFP under RCW 4.24.430. Although it is evident that Mr. Troupe has had previous petitions or other civil actions dismissed—hence his initial collateral attack in *In Re Troupe*, supra, the identity of the specific cases upon which the Clerk relied is necessary to (1) determine whether the dismissals qualify under the statute, and (2) evaluate a potential challenge based on state and federal prohibitions against *ex post facto* laws. Where the Clerk's ruling does not refer to the factual basis of its decision, the Court did not comply with the due process requirements necessary before denying IFP status.

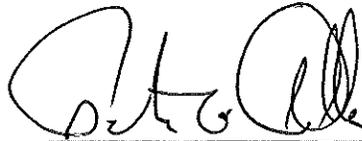
**5. CONCLUSION**

Based on the arguments, records and files contained herein David Troupe respectfully requests that this Court modify the ruling of the Court

Clerk and permit waiver of the filing fee.

Dated: December 20, 2017.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER - WSBA #20835

[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)

Of Attorneys for David Troupe

CERTIFICATE

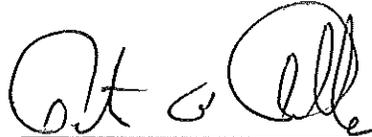
The undersigned certifies that on December 20, 2017 that this Amended Motion to Modify Court Commissioner's Ruling Court Filing Fee was sent via JIS link to the Clerk of the Court, Court of Appeals, Division II and to Timothy Feulner at the Pierce County Attorney General's Office, and copies were mailed to appellant by U.S. mail, postage prepaid, to the following:

Timothy John Feulner  
Pierce County Attorney General's Office  
TimF1@atg.wa.gov

Mr. Derek M. Byrnes  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

David Allen Troupe  
DOC #765714  
Washington Correction Center  
PO Box 900  
Shelton, WA 98584  
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 20, 2017.



PETER B. TILLER, WSBA NO. 20835

**APPENDIX A**

AMENDED MOTION TO  
MODIFY COURT CLERK'S  
RULING REGARDING  
COURT FILING FEE



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

June 28, 2017

David Allen Troupe, Jr.  
#765714  
Stafford Creek Corr Cntr  
191 Constantine Way  
Aberdeen,, WA 98520

**CASE #: 50657-2-II/Personal Restraint Petition of: David Allen Jr. Troupe**

Mr. Troupe:

We have opened your Personal Restraint Petition under the above-referenced case number. Under *In re Personal Restraint of Troupe*, 194 Wn. App. 701 (2016) and RCW 4.24.430, you are required to pay a filing fee. If you do not submit the \$250 filing fee within 30 days of the date of this ruling, we will dismiss this petition without further notice from this court.

Very truly yours,

A handwritten signature in black ink, appearing to be "Derek M. Byrne", with a long horizontal line extending to the right.

Derek M. Byrne  
Court Clerk

DMB:saf

**THE TILLER LAW FIRM**

**December 20, 2017 - 4:16 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 50657-2  
**Appellate Court Case Title:** Personal Restraint Petition of: David Allen Jr. Troupe  
**Superior Court Case Number:** 99-1-02498-4

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**Filing on Behalf of:** Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

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