

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of: DAVID ALLEN TROUPE, Jr., Minors.	COURT OF APPEALS NO. 50657-2-II REPLY TO STATE'S RESPONSE TO AMENDED MOTION TO MODIFY
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1. ARGUMENT IN REPLY

a. RCW 4.24.430 is unconstitutionally vague because it does not define the terms "frivolous" or "malicious"

Two basic requirements comprise the Fourteenth Amendment due process guarantee against vague statutes: laws must provide fair warning to persons of ordinary intelligence of the persons covered and the conduct prohibited and must provide ascertainable standards of guilt to protect against arbitrary, erratic, and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct.

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839, 843, 31 L.Ed.2d 110 (1972) A statute or ordinance may run afoul of the vagueness doctrine even though it does not impose criminal sanctions, because the fundamental defect is not the penalty but rather “the exaction of obedience to a rule or standard ... so vague and indefinite as really to be no rule or standard at all.” *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925).

The void-for-vagueness doctrine finds its origin in the constitutional principle of procedural due process. As noted above, the primary issue raised by the doctrine is whether the particular statute is sufficiently definite to give fair notice to one who would avoid its sanctions, and ascertainable standards to the factfinder who just adjudicate guilt under it. Although vagueness or indefiniteness has been variously defined, perhaps the classic expression of this concept is to be found in *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), wherein the Supreme Court stated that ‘a statute which 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, violates the first essential of due process of law.’ The vagueness doctrine, then, is rooted in a ‘rough idea of fairness.’

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Impermissibly vague laws offend this standard of fairness because they may trap an unwary individual and encourage arbitrary and capricious enforcement. *Smith v. Sheeter*, 402 F.Supp. 624, 628-29 (S.D.Ohio 1975).

The challenged statute provides:

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.

Washington's statute is based on the federal Prison Litigation Reform Act ("PLRA").

Congress subsequently enacted the Prison Litigation Reform Act ("PLRA" or "Act"), . . . , largely in response to concerns about the heavy volume of frivolous prisoner litigation in the federal courts. See 141 Cong. Rec. S14408-01, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (explaining that the number of prisoner suits filed

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“has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994”). In enacting the PLRA, Congress concluded that the large number of meritless prisoner claims was caused by the fact that prisoners easily obtained I.F.P. status and hence were not subject to the same economic disincentives to filing meritless cases that face other civil litigants. See 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) (“Filing frivolous civil rights lawsuits has become a recreational activity for long-term residents of prisons.”); 141 Cong. Rec. S7498-01, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) (“[P]risoners will now ‘litigate at the drop of a hat,’ simply because they have little to lose and everything to gain.”). To curb this trend, the PLRA instituted a number of reforms in the handling of prisoner litigation.

Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (2001)(citations omitted).

Congress also added § 1915(g), the “three strikes rule,” to the PLRA, which limits a prisoner's ability to proceed IFP if the prisoner abuses the judicial system by filing frivolous actions.

The central question is whether a dismissed case “rang the court’s bells” of what it considered a frivolous or malicious claim. Although what constitutes a frivolous claim may be clear to a reviewing court or administrator, what constitutes a frivolous matter is often in the “eye of the beholder.”

The infirmity is not resolved in the case of prisoner/litigants, where

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the statute leaves the term undefined. The State in its response argues that the statute provides sufficient definiteness because “an incarcerated person would understand based on this statutory language that he cannot repeatedly bring lawsuits that are either legally baseless or that are motivated by bad intentions without potentially incurring the consciousness of RCW 4.24.430.” Response at 10. While what may be a meritorious or at least colorable claim may be clear to persons trained in the law, the measure of what is legally frivolous is inherently subjective, particularly when assessing claims brought IFP by prisoners, many of whom are unskilled and untutored in civil litigation.

Federal courts have held that a claim lacking a basis in law or fact is frivolous. See, e.g., *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1190 (2011) (“A frivolous issue is one lacking in any basis in law or fact.”). Incarcerated litigants, however, are not apprised by the Washington statute that a claim brought in apparent good faith and that may seem reasonable to the prisoner/litigant, may be determined to be frivolous or malicious by a reviewing authority. The broad nature of terms “frivolous or malicious” threaten to sweep up claims brought in good faith by prisoners along with the wholly frivolous claims that the legislature seeks to curtail.

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The fact of incarceration does not deprive a prisoner of his or her right to access to the courts. Moreover, a party should not be penalized for maintaining an aggressive litigation posture, nor should good faith assertions of colorable claims or defenses be discouraged. *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 180 (D.C.Cir.1980) “(O)ne should not be penalized for merely defending or prosecuting a lawsuit.” *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, supra note 12, 417 U.S. at 129, 94 S.Ct. at 2165, 40 L.Ed.2d at 713, quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475, 478 (1967).

The definition of “frivolous” is elusive. “Numerous courts encounter[] difficulty defining the term, articulating consistent standards for identifying it, and providing clear guidance to counsel and litigants.” *Carl Tobias, The 1993 Revision to Federal Rule* 11, 70 Ind. L.J. 171, 196 (1994). One court has supplied the following definition:

“Frivolous” is of the same order of magnitude as “less than a scintilla.” It is defined in Webster's Third New International Dictionary (1967) as “of little weight or importance: having no basis in law or fact: light, slight, sham, irrelevant, superficial.” The Oxford English Dictionary (1971) defines it as “[o]f little or no weight, value or importance; paltry; trumpery; not worthy of serious attention; having no reasonable ground or purpose ... In

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pleading: Manifestly insufficient or futile.”

Eastway Constr. Corp. v. City of New York (Eastway II), 637 F.Supp. 558, 565 (E.D.N.Y.1986).

In enacting the statute, our Legislature supplied no definition of what constitutes a frivolous civil action. Claims can be dismissed for any number of reasons. Can it mean that any case dismissed for inadequate evidence or legal support will be deemed frivolous? Does it pertain to claims in which service was not affected, or dismissed due to a technical violation such as improper formatting? In every instance where a cause of action is dismissed on summary judgment or a purely procedural grounds, for example, will the dismissal result in a finding that the claim was frivolous or malicious? A strict interpretation of the statute would include such a result.

“Frivolous” implies something more nefarious than simply failing for lack of merit or dismissal as the result of a procedural infirmity. Washington case law does not provide a bright line definition of the term. Division One held that an action is frivolous if it “cannot be supported by any rational argument on the law or facts.” *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 132, 783 P.2d 82, review denied, 113 Wash.2d

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1001, 777 P.2d 1050 (1989). Similarly, “A frivolous action is one that cannot be supported by any rational argument on the law or facts.” *Rhinehart v. Seattle Times, Inc.*, 59 Wash.App. 332, 340, 798 P.2d 1155 (1990).

The same problem is presented by the term “malicious.” “A separate standard for maliciousness is not as well established.” *Abdul - Akbar v. Department of Corr.*, 910 F.Supp. 986 (D.Del.,1995), aff’d, 111 F.3d 125 (3d Cir.) (table decision), cert. denied, 522 U.S. 852, 118 S.Ct. 144, 139 L.Ed.2d 91 (1997).

Some federal circuit courts illustrate objective instances of malicious claims. For example, a complaint is malicious when it “duplicates allegations of another [] federal lawsuit by the same plaintiff.” *Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir.1993). A district court may dismiss a complaint as malicious if it threatens violence or contains disrespectful references to the court. *Crisafi v. Holland*, 655 F.2d 1305 (D.C.Cir.1981). Additionally, a district court may dismiss a complaint as malicious if it is plainly abusive of the judicial process or merely repeats pending or previously litigated claims. *Crisafi*, 655 F.2d at 1309; *Van Meter v. Morgan*, 518 F.2d 366 (8th Cir.1975); *Duhart v. Carlson*, 469

F.2d 471 (10th Cir.1972).

The State argues that applying the due process void for vagueness doctrine to a civil statute would lead to challenges based on claimed “vagueness” of virtually any statute, citing the statute of limitations as an example. Response at 15-16. This *reductio ad absurdum* is unpersuasive. The majority of statutes are not subject to constitutional challenge, despite the State’s argument that even the most settled area of the law could be subject to challenge. The concept and terms of the statute of limitations are easily understood and not inherently subject to challenge, whereas a statute, albeit civil in origin, using undefined terms predictably generates significant litigation, as evidenced by the extensive federal litigation regarding the PLRA.

The statute is unconstitutional because it fails to provide reasonable notice as to what is considered frivolous and exposes prisoners to arbitrary enforcement. No criteria or standards are set forth whereby even a wary individual could know what will be considered frivolous pleading or suit. The statute requires too much from a litigant/prisoner. In addition, it appears that the prohibition imposed of the statute may have a chilling effect on those seeking to file legitimate grievance or claims as IFP. An individual is forced to decide, without guidance from the statute, under

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what circumstances a claim is frivolous or malicious. The condition therefore does not meet the requirements of due process. The vague wording of the statute renders it subject to misunderstanding by prisoner/litigations, and subject to prisoners to difficulty in access to courts if arbitrary or unreasonably applied by judicial authorizes. As such, under the authority cited in this section, the statute should be found to unconstitutionally void for vagueness.

b. Failure of the Court Clerk to specify prior strikes

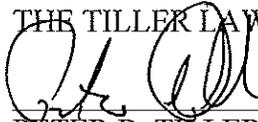
The Court Clerk found that Mr. Troupe had three prior strikes, but did not specify which cases constituted those strikes. In its response, the State chooses four dismissed cases as “strikes” under the statute and argues that those may be considered evidence of Mr. Troupe’s prior strikes. The State’s proposal of those cases, however, misapprehends the thrust of Mr. Troupe’s argument. While he does not contest that he has qualifying strikes, the Clerk’s ruling does not specify which of the dismissals the Court Clerk considered in making his ruling, depriving him of the ability to challenge the validity of the Clerk’s finding that three of the petitioner’s prior convictions constitute “strikes” within the meaning of the statute. The State elected four cases, but which specific cases the Clerk relied on is not shown in this record.

2. 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: February 14, 2018.

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CERTIFICATE

The undersigned certifies that on February 14, 2018, that this Reply to the State's Response to the Amended Motion to Modify Court Commissioner's Ruling 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:

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