No. 93306-5

(Court of Appeals Case No. 46797-6-II)

COURT OF APPEALS, DIVISION I, STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION 775NW,
Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and
FREEDOM FOUNDATION,
Respondents.

RESPONDENT FREEDOM FOUNDATION'S ANSWER TO SEIU 775NW'S PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

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I. IDENTITY OF PARTY

Respondent Freedom Foundation (the "Foundation") responds to SEIU 775NW's ("SEIU") Petition for Review by the Supreme Court.

II. STATEMENT OF RELIEF SOUGHT

The Foundation respectfully requests that this Court deny SEIU's Petition for Review.

III. STATEMENT OF THE CASE

On June 30, 2014, the U.S. Supreme Court held that states and labor unions cannot force partial-public employees such as home healthcare providers to financially support labor unions because doing so violates the First Amendment. *See Harris v. Quinn*, 134 S. Ct. 2618 (2014). As part of its mission to advance individual liberty, free enterprise, and limited, accountable government, the Foundation instituted its program to educate Washington's partial-public employees, including Individual Providers ("providers"), about their newly-acknowledged right to cease financial support of SEIU. CP 802, 809-810, 829. The Foundation's outreach to providers also responds in part to many reports from public workers concerning the abuse and misconduct perpetrated against them by the public employee unions that forcibly represent them. CP 809.

The Foundation made a public records request that has been unfulfilled for over two years. In July 2014, the Foundation requested from the Washington State Department of Social and Health Services ("DSHS") public records containing the names of Washington's individual providers. CP 613. DSHS informed SEIU of the Foundation's request, providing a detailed step-by-step list describing how SEIU may enjoin disclosure. CP 610-11. DSHS informed SEIU that DSHS would release the records on September 3, 2014 unless SEIU obtained a court order by that date enjoining their release. *Id.* At the request of SEIU, DSHS gave SEIU multiple extensions to acquire an injunction, eventually pushing the deadline back to October 3, 2016 for the sole purpose of allowing SEIU to acquire an injunction. CP 619-26.

SEIU waited until October 1, 2014 to file its lawsuit seeking an injunction prohibiting disclosure of the public records. CP 596-602. On October 3, 2016 the trial court granted a Temporary Restraining Order without performing a *Tyler Pipe* analysis. CP 78-79; RP 10/3/2014. On October 16, 2016, the trial court denied SEIU's application for preliminary and permanent injunctions. CP 288-90, 337-68; RP 3/16/2016. The trial court extended the TRO to allow SEIU to yet again acquire further injunctive relief, which SEIU did from the Commissioner of the Court of Appeals Division II. *Id.*

The Court of Appeals upheld the trial court's decision requiring disclosure of the public records in a published, unanimous decision issued April 12, 2016 which focused on the "commercial purposes" provision of the Public Records Act ("PRA") under RCW 42.56.070(9). *See SEIU Healthcare 775NW v. DSHS and Freedom Foundation*, 193 Wn. App. 377, ¶ 71, ___ P.3d ___ (2016). It was the only case ever deciding a case based on the commercial purposes provision of the PRA.[1] SEIU seeks review by this Court under RAP 13.4(b)(4) ("issue of substantial public interest").

IV. GROUNDS FOR RELIEF AND ARGUMENT

"A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Pers. Restraint of Flippo*, 2016 LEXIS 814, *3, No. 92616-6 (Wn. May 18, 2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)).

That is not the case here because the "commercial purposes" exception to the PRA is raised in only a tiny fraction of PRA cases. It is worth noting that in the 458 pages of the WSBA Public Records Act Deskbook, the commercial purposes exception is referred to four times by

[1] One unreported Washington decision mentions (but does not analyze) the commercial purposes provision of the PRA. *See Daugherty v. Dept' of Revenue*, 116 Wn. App. 1074, 2003 WL 21061331 *2 (May 13, 2003).

merely mentioning that the statute exists or giving a one-sentence summary. *See* PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS (2d ed. Wash. State Bar Assoc. 2014) at 5.14, 6.21, 7.6, 7.8. No analysis is provided in the Deskbook because none is necessary for such a rarely invoked provision of the PRA.

In *Watson*, this Court granted discretionary review pursuant to RAP 13.4(b)(4), stating that the Court of Appeals holding in that case would "invite[] unnecessary litigation" and "create[] confusion generally." *Watson*, 155 Wn.2d at 577. This Court also held that the Court of Appeals holding created the "potential to chill policy actions" by those similarly situated in the future. *Id.* The Court of Appeals holdings in the instant case will not invite unnecessary litigation, create confusion generally, or chill policy actions by those similarly situated in the future.

In *Watson*, a case involving the criminal prosecution of a defendant by the Pierce County prosecutor's office, the Court of Appeals held a letter written years before by the Pierce County Prosecuting Attorney to all Pierce County Superior Court Judges to be an ex parte communication when a prosecutor attached the letter to his brief at the sentencing stage of a later unrelated case. *Watson*, 155 Wn.2d at 575-76. The County Prosecutor had announced in the previous letter that, as a general policy, the prosecuting

attorney's office would no longer recommend drug offender sentencing alternatives. *Id.*

Clearly, the Court of Appeals decision in *Watson* would *invite* unnecessary litigation because every defendant in current and future Pierce County criminal cases would bring new arguments "on that point," *id.* at 577, *i.e.*, that the Pierce County Prosecuting Attorney's letter constituted error. In other words, the *holding itself invited* unnecessary litigation and caused confusion. It did much more than simply affect current or future litigation in the general sense. In addition, litigation over criminal sentencing is much, much more common than the very rare PRA commercial purposes case.

The Court of Appeals holdings which SEIU appeals in the instant case do not themselves invite unnecessary litigation—or any litigation at all. SEIU argues in its Petition that the Court of Appeals holding which rejects SEIU's broad definition for "commercial purposes" "involves an issue of substantial public interest" under RAP 13.4(b)(4). SEIU Petition at 9-16. SEIU argues the same for the Court of Appeals holding which rejects SEIU's linkage argument relating to Medicare beneficiaries. SEIU Petition at 17-20.[2]

[2] SEIU does not argue in its Petition how the Court of Appeals holding related to consolidation of the preliminary injunction hearing with the trial on the merits pursuant to

A. The Absence of Case Law on the Commercial Purposes Provision Illustrates the Small Likelihood That Future Cases Will Arise Outside the Narrow Facts of the Instant Case.

Prior to the Court of Appeals decision in the instant case, there was **no** Washington case law concerning "commercial purposes" under RCW 42.56.070(9). This is because the commercial purposes exemption is rarely invoked by government agencies or third-party objectors; the dearth of case law confirms this. Clearly, the PRA's commercial purposes provision is not a pressing issue on the minds of the Washington public, requesters under the PRA, or government agencies. The Court of Appeals holding does nothing to change this.

The absence of cases dealing with the PRA's commercial purposes provision is most likely due to the fact that the definition of "commercial purposes" is obvious and easily applicable to the scenarios it is designed to encompass. SEIU's argument in the instant case attempts to turn a straight-forward definition into a convoluted mess. *See SEIU 775NW*, 193 Wn. App. at ¶¶ 63-80. The facts of the instant case, as well as the six other cases cited by SEIU in which the Foundation is a defendant or respondent[3] (*see* SEIU Petition at 15) clearly do not involve an entity seeking to fulfill commercial

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CR 65(a)(2) involves an issue of substantial public interest. Presumably, this is because it clearly does not.

[3] SEIU cited five trial court cases and one in the Court of Appeals.

goals with public records.[4] The Court of Appeals in the instant case simply defined the PRA's commercial purposes provision as it obviously should be, especially in light of the PRA's policy and language. A nonprofit organization seeking to inform workers of their constitutional rights is obviously not fulfilling a commercial purpose. This is neither Earth-shattering nor something requiring the limited resources of the Supreme Court.

B. The Court of Appeals Decision on Commercial Purposes Does Not Invite Unnecessary Litigation, Cause Confusion, or Chill the Actions of Similarly Situated Actors in the Future.

1. The Court of Appeals Decision on Commercial Purposes Will Actually Decrease Litigation and Reduce Confusion.

The Court of Appeals defined "commercial purpose" as the intention "to generate revenue or financial benefit from the direct use of the lists." *SEIU 775NW*, 193 Wn. App. at ¶ 71. Far from inviting unnecessary litigation, this holding defines the commercial purposes provision with precision and provides clear direction to government agencies, requesters, and would-be third party objectors. The Court of Appeals even provides guidance to agencies on when and how an agency may investigate a requester's purpose. *Id.* at ¶ 69 ("the agency must investigate when it has

[4] On July 29, 2016, the trial court in the five cases ordered the disclosure of the records, rejecting the same commercial purposes argument at issue in the instant Court of Appeals decision.

some indication that the list might be used for commercial purposes."). Under the Court of Appeals guidance, if an agency has an indication that a requester has a commercial purpose, the agency "must at least require a party requesting a list of individuals to state the purpose of the request." *Id.* at ¶ 70. Factors to be used include the "identity of the requester, the nature of the records requested, and any other information available to the agency." *Id.* at ¶ 69. As a result of the Court of Appeals holding and guidance, *less* litigation will be necessary.

As the Court of Appeals recognized, SEIU's broad definition for "commercial purposes" would confuse parties, cause extensive discovery battles, and bring "a wide range of requests" under the commercial purposes provision thus "thwart[ing]" the PRA's policy of full disclosure. *Id.* at ¶ 69. The Court of Appeals holding would decrease the need for future litigation by 1) properly narrowing the number of requests which fall under this provision, and 2) decreasing the need for litigation attempting to define the commercial purposes provision's boundaries (*i.e.*, it minimizes confusion).

2. The Court of Appeals Decision on Commercial Purposes Does Not Chill Future Actions by Similarly Situated Actors in the Future.

The Court of Appeals holding does not have the potential to "chill" future actions by government agencies because they are no longer left to

guess the definition of "commercial purposes" or the scope of discovery related to the PRA's commercial purposes provision. The Court of Appeals decision provides agencies with clear guidance upon which they can establish commercial-purposes policies, and the decision provides trial courts with direction on the permissible scope of discovery available to a party resisting disclosure.

C. The Court of Appeals Decision on Linkage Does Not Invite Unnecessary Litigation, Cause Confusion, or Chill the Actions of Similarly Situated Actors in the Future.

The Court of Appeals linkage holding similarly does nothing to increase unnecessary litigation, cause confusion, or chill policy actions taken by those similarly situated. *SEIU 775NW*, 193 Wn. App. at ¶¶ 83-90. The Court of Appeals declined to apply the "linkage" argument to extend RCW 42.56.230(1) (Medicaid beneficiary exemption) to the Foundation's request by relying on the well-established precedent of *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) (rejecting the "linkage" argument that an agency can withhold disclosure of a record if a requester can use that record to "link" to information in a non-disclosable record). *See id.* at 183. The Court of Appeals also discussed *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002), another case rejecting the linkage argument SEIU attempts to resurrect. *See id.* at 346.

Koenig and *Sheehan*—and now the Court of Appeals decision—provide clear guidance to requesters, agencies, third parties resisting disclosure, and trail courts on the "linkage" topic. This decreases the need for future litigation and minimizes potential confusion in the future for the same reasons the Court of Appeals decision related to commercial purposes does; namely, it decreases the need for future litigation by 1) properly narrowing the number of requests which fall under this provision, and 2) decreasing the need for litigation attempting to define the boundaries regarding how close or how far the "linkage" must be to render otherwise disclosable public records undisclosable (*i.e.*, it minimizes confusion).

For the same reasons, the Court of Appeals decision on linkage does not have the potential to "chill" future actions by agencies, requesters, or parties resisting disclosure because they need not guess the scope of the "linkage." Much like the comprehensive guidance on commercial purposes, the Court of Appeals decision on linkage provides agencies with clear guidance upon which they can establish linkage policies, and provides trial courts with direction on the permissible scope of discovery relating to linkage. The Court of Appeals decision simply reinforced the *Koening* and *Sheehan* standard. No further rulings by this Court are needed on this issue.

The five Thurston County trial court cases identical to the instant one (*see* SEIU Petition at 15-16) were decided on July 29, 2016.[5] These cases illustrate the clarity provided by the Court of Appeals decision in the instant case. The trial court in those cases very easily applied the Court of Appeals decision and ordered the release of the records. If anything, the Court of Appeals decision was an asset to the trial court, not a liability.

SEIU claims that the preliminary injunctions in the five Thurston County cases were based on "alleged facts that are at least arguably not materially different from those at issue in the instant dispute." *Id.* at 16. SEIU then concludes that "Supreme Court review in the instant case will provide much-needed authoritative guidance" in these cases and other similar cases. *Id.* However, the trial court in those five cases concluded on the merits that the Court of Appeals decision in the instant case controlled and required her to deny the permanent injunctions based on the PRA's commercial purposes provision. Once again, the Court of Appeals decision in the instant case provided a clear standard which the trial court in those five cases applied to the narrow and unusual facts of these cases (facts identical to the instant case).

[5] The Foundation is a defendant in each of these cases and, as in the instant case, seeks to notify public workers of their constitutional rights.

D. SEIU Argues the Wrong Standard for RAP 13.4(b)(4).

SEIU's formulation of the rule for RAP 13.4(b)(4) is based on the wrong standard. Every case SEIU cites in its Petition relates to the "substantial public interest" *exception to the normal standing requirements*; the cited cases do *not* relate to RAP 13.4(b)(4). SEIU's cases relate to the mootness doctrine—an entirely different context with different policy considerations.[6] Under *that* mootness exception, lack of standing does not defeat appellate review so long as one of the exceptions to the normal standing requirements is met. *See, e.g. Hart v. Department of Social and Health Services*, 111 Wn.2d 445, 448-49, 759 P.2d 1206 (1988). Standing is not at issue in the instant case, and neither are mootness policy considerations.

RAP 13.4(b)(4) is different than the standard for the public interest mootness exception. It is not enough to simply allege a Court of Appeals or Supreme Court decision will affect many people or cases (although the Foundation disagrees with SEIU's argument here). To accept review of the instant case, however, the Court of Appeals decision must *invite* unnecessary litigation and *cause* confusion for those similarly situated in the future. *See Watson*, 155 Wn.2d at 577. As *Flippo* puts it, accepting

[6] *Watson* discusses RAP 13.4(b)(4), but the principle SEIU cites from *Watson* relates to the mootness exception, *not* RAP 13.4(b)(4). *See Watson*, 155 Wn.2d at 577-8.

review of the instant case must help avoid unnecessary litigation and confusion in cases with a common issue. *See Flippo*, 2016 LEXIS 814, *3. Neither of these things are true in the instant case. For the reasons discussed above, the Court of Appeals decision does not invite unnecessary litigation or cause confusion for those similarly situated in the future. In fact, the Court of Appeals decision does the opposite by offering clarity and guidance.

E. Even If the "Substantial Interest" Test for Mootness Is Used, the Instant Case Still Should Not Be Reviewed by this Court.

Even if the "substantial interest" test for mootness is used, the instant case still does not satisfy the requirements of this doctrine. In *Hart* this Court applied the following three criteria to determine if a case satisfied the "substantial public interest" prong of the mootness exception to the normal standing requirements: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Hart,* 111 Wn.2d at 448. "The public interest exception has not been used in statutory or regulatory cases that are limited on the facts." *Id.* at 449.

1. The Issues in the Instant Case Are of a Private Nature.

First, the issues in the instant case are of a private nature because the "real dispute" does not relate to the PRA. This Court held in *Hart* that the issue was a private dispute because the plaintiff's "real dispute" was with a private actor, not the Washington Administrative Code ("WAC") provision challenged in the case. *Id.* at 450. In *Hart*, the plaintiff ("Hart") sought renewal of her paramedic certification pursuant to the WAC regulations. *Id.* at 446. WAC 248-15-080(2)(c) required Hart to submit a recommendation from her director. *Id.* In that letter, Hart's director recommended DSHS issue her a six-month modified certificate, which DSHS did. *Id.* Although Hart challenged the WAC requiring the recommendation letter, this Court held that her "real dispute" was with the recommendation she received from her director, not the WAC she challenged. *Id.* at 450. In *Hart*, this Court looked beyond the presented issue of the case to discover what the case was *really* about at its core. *Id.* at 450-51.

This Court should do the same in the instant case. As in *Hart*, SEIU's "*real* dispute" is with private actors, not the PRA. SEIU opposes providers who exercise their constitutional right to cease the payment of union dues, as well as the Foundation's goal of informing providers of that

right—a right about which DSHS remains silent. SEIU is not challenging the validity of the PRA.[7]

Far from being a genuine dispute about the PRA, SEIU instituted this litigation as a tactic in its "grudge match" against the Foundation. RP 10/10/14 at 27. The dispute SEIU has with the providers it forcibly represents and the nonprofit organization who informs them of their constitutional rights is obviously noncommercial in nature. Further review of this case only serves to indulge SEIU's political grudge match with the Foundation and providers who opt out. Further review also potentially delays the disclosure of public records. The Foundation has been waiting over two years for the records so far; another year or more is unwarranted.

Far from being a genuine dispute about the sanctity of the PRA, SEIU seeks review to further its private dispute with the Foundation and providers by delaying this case in its attempt to change the law to get around a commercial purposes provision and exemption related to Medicaid beneficiaries that obviously do *not* exempt the requested public records in this case.

[7] After all, the practice of acquiring providers' information and using it to contact them about a host of topics unrelated to collective bargaining is common practice for SEIU. This includes, inter alia, directly soliciting political donations from providers which SEIU uses, of course, to injure its political opponents. *See,* CP 166-74 (Boardman Decl.); CP 157-65 (Aurdal-Olson Decl.); CP 175-80 (Schulte Decl.).

The instant case does not satisfy the first criterion because the issue at its core is private. SEIU's true concern is the effect of providers learning of, and exercising, their constitutional rights. Similar to *Hart*, where the case was ruled to be private in nature despite the WAC involved, here the issue is similarly private in nature despite the fact that the PRA is involved.

2. Determination of the Issues in this Case by this Court Would Not Provide Future Guidance to Public Officers Outside the Narrow Facts of the Instant Case and Is Not Likely to Recur Outside of This Context.

"The public interest exception has not been used in statutory or regulatory cases that are limited on the facts." *Hart*, 111 Wn.2d at 449. Such cases rarely, if ever, provide guidance to public officers or are likely to recur. *See id.* at 450-51. In *Hart*, this Court held that the case would provide little guidance to public officers or be likely to recur because the case was the "only instance where DSHS has ever issued a modified [six-month] certificate" and "any future challenges to a recommendation or use of a modified certificate...will have to be examined and fully litigated on the facts of that particular case." *Id.* at 451.

Similarly, in the instant case, no evidence was presented showing that any government agency has ever had to invoke the commercial purposes provision at all. There is also no evidence that a third-party requester has ever challenged the potential disclosure of a list under the

commercial purposes provision. Indeed, as in *Hart*, this is the *first time* such a dispute has arisen.[8]

Also similar to *Hart*, the facts of this case are highly specific. A nonprofit organization desires to contact quasi-public workers[9] to inform them of their constitutional rights. Some of these workers, though not all, then choose to exercise their constitutional rights. A third-party objector claims doing so constitutes a "commercial purpose" because the exercise of this constitutional right by providers has a financial effect on SEIU, the nonprofit's educational program somehow increases its membership and funds, somehow assists "commercial businesses with which it is associated," and brings attention to the nonprofit's political views. *SEIU 775NW*, 193 Wn. App. at ¶ 64.[10] Furthermore, SEIU bases its arguments on citations to specific alleged acts and statements made by the Foundation, *e.g.*, "fundraising goals," "efforts to economically injure," "goals and missions," emails, and even employee structure—all of which limit this case to the facts at issue. *See* SEIU Petition at 2, 4-5, 14. Needless to say, these are highly specific facts and they are unlikely to recur outside the context

[8] The Court of Appeals case and the five identical Thurston County trial court cases are the only time this issue seems to have arisen.

[9] The Foundation seeks to inform full-fledged public workers of their constitutional rights in the Thurston County Superior Court cases cited by SEIU.

[10] SEIU also argues that, "Certain records are exempted to protect individual privacy and to safeguard essential governmental functions." SEIU Petition at 10. However, the commercial purposes does not relate to privacy or essential governmental functions. Other provisions in the PRA protect those interests.

of the Foundation's specific education program related to public workers' constitutional rights.

As shown above, the Court of Appeals decision provides guidance to agencies and third-party objectors should the commercial purposes provision be an issue again. But the absence of such a conflict prior to this case, and the small likelihood of disputes centering around the commercial purposes provision arising again outside the context of the Foundation's mission, shows that the "substantial public interest" principle, even as formulated by SEIU, does not apply to the instant case. *See also Tri-State Constr. Co. v. Seattle*, 14 Wn. App. 476, 479, 543 P.2d 353 (1975) (refusing to apply the doctrine even where it was possible "the statute in question...g[a]ve rise to the identical controversy which is now before this court").

Additionally, this Court declined to apply this doctrine in *Harvest House Rest. v. City of Lynden*, 102 Wn.2d 369, 685 P.2d 600 (1984), a case interpreting as valid a city ordinance which set limitations on the right of persons to dance on premises licensed to serve alcoholic beverages. *Id.* at 372-73. This Court held that "although the issue is undoubtedly of great interest to its residents" and "of notable academic interest," the issue did not meet the test because Lynden was "the only city in Washington State to prohibit ballroom dancing where liquor by the drink is sold." *Id.* at 373.

Similarly, in the instant case, although thousands of providers may be interested in learning of their constitutional rights, the fact that the Foundation is the only entity informing workers of their constitutional rights, as well as the fact that the Foundation is the only entity that has *ever* used public records to this end, illustrates clearly that this case "is not of sufficient importance to the public at large to warrant [this Court's] review under the circumstances." *Id.*

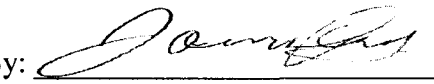
Review of the linkage issue similarly would do nothing to provide guidance to public officials because *Koenig* and *Sheehan* already provide all the guidance necessary on this issue. This issue is also not likely to recur for the same reasons stated above.

The second and third criteria for the substantial public interest doctrine are not met. Review of this case by this Court would provide little, if any, guidance to public officials, and the issues in this case are unlikely to recur.

V. CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that this Court deny SEIU's Petition for Review.

Respectfully submitted this 1st day of August, 2016.

By: 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 1, 2016, I served a copy of the foregoing by email pursuant to an e-service agreement:

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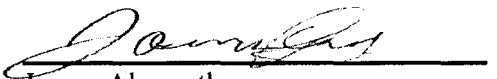

James Abernathy

APPENDIX

Neutral
As of: August 1, 2016 5:57 PM EDT

In re Pers. Restraint of Flippo

Supreme Court of Washington

May 18, 2016, Decided

No. 92616-6

Reporter
2016 Wash. LEXIS 814

In the Matter of the Personal Restraint of EARL OWEN FLIPPO, *Petitioner.*

Notice: DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Reported at ***In re Pers. Restraint of Flippo, 2016 Wash.*** *LEXIS 815 (Wash., May 18, 2016)*

Prior History: [*1] (COA No. 33619-1).
In re Pers. Restraint of Flippo, 191 Wn. App. 405, 362 P.3d 1011, 2015 Wash. App. LEXIS 2918 (2015)

Core Terms

sentence, discretionary, time limit, purposes, public interest, ability to pay, one year, petitions, raising, costs, appointing counsel, significant change, appointed counsel, judgment rendered, superior court, boilerplate, convictions, remission, invalid, issues

Opinion

RULING GRANTING REVIEW

Earl Flippo filed a personal restraint petition in Division Three of the Court of Appeals seeking relief from discretionary legal financial obligations (LFOs) that he was ordered to pay as part of a sentence imposed for his 2008 Walla Walla County Superior Court convictions on four counts of first degree child molestation. The judgment and sentence was final on March 16, 2010, when the mandate issued disposing of his direct appeal from the convictions. The judgment and sentence includes $2,619.20 total LFOs, including both mandatory and discretionary LFOs. The discretionary LFOs include $775 for appointed counsel, $286.05 in witness fees, a $250 jury demand fee, and $508.15 to be paid to the Walla Walla County Sheriff's Office.[1] The court required Mr. Flippo to pay $50 on a monthly basis towards satisfying the LFOs commencing 60 days after his release. Mr. Flippo claimed the superior court failed to make an individualized inquiry into his current and future ability to pay before the court imposed the discretionary LFOs. Further, he claimed he was found indigent for purposes of his trial and appeal, and that he continues to meet the *GR 34* indigency standards. [*2] Mr. Flippo contended his personal restraint petition was not barred as untimely under *RCW 10.73.090(1)* because it was exempt from the one year time limit on personal restraint petitions on the following alternative bases: (1) that the time limit is inapplicable under *RCW 10.73.100(6)* because this court's decision in *State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)*, is a significant change in the law; (2) that the time limit does not apply under *RCW 10.73.090(1)* because the boilerplate finding of ability to pay renders the judgment and sentence invalid on its face; and/or (3) that the judgment and sentence imposing LFOs is not "final" for purposes of the one year time limit because defendants are allowed under *RCW 10.01.160(4)* to petition the sentencing court at any time for remission of the payment of LFOs. The Court of Appeals held that *Blazina* does not constitute a significant change in the law under *RCW 10.73.100(6)*, that the boilerplate finding of

[1] These costs were evidently imposed under *RCW 9.94A.760* and *RCW 70.48.390* (costs of incarceration and booking fee).

his ability to pay did not render the judgment and sentence invalid on its face for purposes of the time bar exception in RCW 10.73.090(1), and that nothing in the statute that allows postconviction remission of costs changes the date a judgment and sentence becomes final for purposes of collateral attack under RCW 10.73.090. In re Flippo, 191 Wn. App. 405, 362 P.3d 1011 (2015). The court dismissed the petition as time barred. Mr. Flippo now [*3] seeks this court's discretionary review.

To obtain discretionary review in this court, Mr. Flippo must demonstrate that the Court of Appeals decision conflicts with a decision of this court or with another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *See* State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Here, the Court of Appeals noted that there are numerous now-pending personal restraint petitions challenging the imposition of LFOs more than one year after judgments became final and making claims similar to those asserted by Mr. Flippo. Flippo, 191 Wn. App. at 409 n.1. I am aware that petitions raising some of these issues are pending in other divisions of the Court of Appeals. *See, e.g., In re Pers. Restraint of Dove*, No. 47796-3-IL In these circumstances, review by this court is warranted on the basis the motion raises an issue of substantial public interest [*4] under RAP 13.4(b)(4).

The Court of Appeals denied Mr. Flippo's request for appointed counsel. Flippo, 191 Wn. App. at 413 n.2. Consequently, he is proceeding pro se. If this court determines it is proper, it may provide for the appointment of counsel at public expense for services related to a personal restraint petition in the appellate court. RAP 16.15(h). The acting clerk of the court is requested to place this matter on the June 28, 2016, motion calendar of a department of this court to determine if it is appropriate to appoint counsel for Mr. Flippo to address the legal issues presented.

May 18, 2016

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Cc: Damerow, Morgan (ATG); Wang, Albert (ATG); Sheehan, Janetta (ATG); Diane Newman; Labor & Personnel Division; 'Dmitri Iglitzin'; Jennifer Robbins; Jennifer Woodward; Genipher Owens; David Dewhirst; Kirsten Nelsen
Subject: RE: SEIU 775NW v. DSHS & Freedom Foundation, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II)

Received 8/1/16.

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From: James Abernathy [mailto:jabernathy@myfreedomfoundation.com]
Sent: Monday, August 01, 2016 4:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Subject: SEIU 775NW v. DSHS & Freedom Foundation, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II)

Please see attached for filing in *SEIU 775NW v. DSHS & Freedom Foundation*, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II) the following:

1) Respondent Freedom Foundation's Answer to Appellant SEIU's Petition for Discretionary Review by the Supreme Court (and Appendix);
2) Respondent Freedom Foundation's Response to Appellant SEIU's Motion to Allow Additional Evidence on Review; and
3) Respondent Freedom Foundation's Response to Appellant SEIU's Motion for Injunctive Relief Preserving the Status Quo Pending Appeal.

Please contact me immediately if you have trouble with any of the documents.

Thank you!

—
James Abernathy
Litigation Counsel | Freedom Foundation

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"The curious task of economics is to demonstrate to men how little they really know about what they imagine they can design." – F.A. Hayek

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