

Faulk, Camilla

From: Wise, Donna [Donna.Wise@kingcounty.gov]
Sent: Friday, April 29, 2011 4:50 PM
To: Faulk, Camilla
Cc: Larson, Mark; Whisman, Jim; Goodhew, Ian
Subject: Comment on Proposed Amendment to RPC 3.8

I write to express my personal concerns about application of the proposed amendments to RPC 3.8 to prosecutors who respond to personal restraint petitions or petitions for writs of habeas corpus, i.e., collateral attacks on convictions. I have been a prosecutor for more than 25 years and have reviewed many collateral attacks, almost all filed pro se. Almost none of the collateral attacks to which I have responded involved cases in which I handled the original prosecution. Many of them include assertions of facts about the criminal incident and some have purported affidavits attached. The facts asserted may not be relevant to the legal claims in the collateral attack.

It is my concern that under this rule, prosecutors are required to make a judgment about whether factual assertions by a defendant in a collateral attack would constitute "new, credible and material evidence creating a reasonable likelihood" that a defendant is innocent of the offense of which he or she was convicted. A prosecutor who did not handle the original prosecution in most instances will be unable to make that judgment. The prosecutor who is a stranger to the case cannot know the credibility of the witnesses, or the nature of all of the evidence available or presented at trial.

Further, the rule covers cases where the defendant pled guilty to the crime, and a plea of guilty to a particular crime may be based on the defendant's understanding that he or she is likely to be found guilty of a different crime, even if the facts do not support guilt as to the crime to which he or she pleads guilty. It is unclear whether the reference to "innocent of the offense" would apply to these circumstances.

Reinvestigating each case in which a defendant asserts that there is a new bit of evidence or witness statement that is material to the conviction would be impossible. Most prosecutors' offices do not have investigators and do not have the resources to hire them. Many collateral attacks are filed every month. Prosecutors do not have authority to direct police agencies to reinvestigate closed cases.

Finally, I am concerned that the good faith exception in subsection (i) will be inapplicable if the prosecutor has not fully investigated a factual claim made by a defendant making a collateral attack. For reasons I already have mentioned, such an investigation into every factual assertion made in a collateral attack would be impossible.

In conclusion, the rule is overly vague and broad. To the extent it requires the disclosure of exculpatory evidence, it is unnecessary, since prosecutors already are required to do so.

Thank you for considering my comments.

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