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COURT OF APPEALS

No. 33574-3-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Frazer,

Appellant.

Clallam County Superior Court

Cause No. 04-1-00072-5

The Honorable Judges Ken Williams and George Wood

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE APPOINTED COUNSEL BECAUSE MR. FRAZER'S MOTIONS WERE NONFRIVOLOUS UNDER THE TEST SET FORTH IN *IN RE FEETHAM* AND *IN RE CURTIS*.

Under CrR 3.1, the trial court should have granted Mr. Frazer's request for appointed counsel because his CrR 7.8 motions were not frivolous. *State v. Robinson*, 153 Wn.2d 689 at 696 at n. 6, 107 P.3d 90 (2005). Respondent appears to suggest that the right to counsel does not attach unless the defendant's motion compels the trial court to grant relief.¹ Brief of Respondent, p. 1, *citing Robinson*, at 699. This argument is based on a misunderstanding of *Robinson*.

Although the Supreme Court in *Robinson* used the "grounds for relief" language quoted by respondent, the opinion makes clear that a motion establishes "grounds for relief" when it is not frivolous. *Robinson* at 696 at n. 6. A motion is frivolous if there are no debatable issues upon which reasonable minds might differ, and if the motion is so totally devoid of merit that there is no reasonable possibility of success. *In re Recall Charges Against Feetham*, 149 Wn.2d 860 at 872, 72 P.3d 741 (2003); *see*

¹ It is difficult to see any logic behind this interpretation, since a successful movant has little need of counsel.

also In re Marriage of Curtis, 106 Wn.App. 191 at 198, 23 P.3d 13 (2001).

Although Respondent claims that the trial judge determined the motion to be frivolous (*see* section heading A, Brief of Respondent p. 1), Respondent does not suggest that trial court used the standards outlined in *Feetham, supra*, and *Curtis, supra*; nor does Respondent present argument that the motion was frivolous using these standards.

Applying these standards, the motion was not frivolous and counsel should have been appointed. *See* Appellant's Opening Brief at pp. 3-7. The case must be remanded to the trial court for appointment of counsel.

II. MR. FRAZER'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND HIS RIGHT TO COUNSEL WERE VIOLATED WHEN THE TRIAL COURT CONSIDERED STATEMENTS OBTAINED IN VIOLATION OF THOSE RIGHTS.

Appellant stands by the argument made in the opening brief.

III. MR. FRAZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

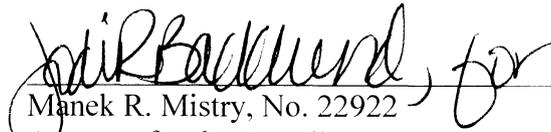
Appellant stands by the argument made in the opening brief.

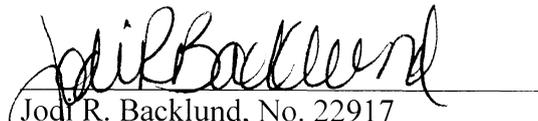
CONCLUSION

For the foregoing reasons, Mr. Frazer's convictions must be reversed and the case remanded to the trial court.

Respectfully submitted on July 10, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Jeffrey Frazer, DOC # 782267
Airway Heights Corrections Center
PO Box 1809
Airway Heights, WA 99001-1809

And to the office of the Clallam County Prosecutor,

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 10, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on July 10, 2006.



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