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AUG 10 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29363-7-III

IN THE COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER DEVLIN,
Appellant.

AMICUS CURIAE MEMORANDUM OF WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE
WASHINGTON DEFENDER ASSOCIATION

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A. AMICUS ASSIGNMENTS OF ERROR

1. Does the State have standing to challenge an order of indigency when it is not an aggrieved party?
2. May this court consider the cost of an appeal to the Office of Public Defense, the state and the court when determining whether an indigent party can proceed at public expense even those are not factors contained set for in RCW 10.101.010?
3. Must this court follow the Supreme Court's decisions regarding the abatement of convictions upon the death of the defendant even if the application of those cases results in substantial costs for few if any benefits?
4. Where the Supreme Court has made it clear that an estate can continue to pursue an appeal after the death of a defendant, does due process require the continued appointment of counsel when the defendant (and his estate) was indigent?

B. AMICUS ARGUMENT

1. *THE STATE LACKS STANDING TO CHALLENGE AN ORDER OF INDIGENCY.*

Only an aggrieved party may seek review by an appellate court.

RAP 3.1; see also, *Breda v. B.P.O. Elks Lake City* 1800 So.620, 120

Wn.App. 351, 90 P.3d 1079(2004)(client not aggrieved by sanction order against their attorney as the couple's propriety, pecuniary, or personal rights were not substantially affected by sanctions against counsel). An "aggrieved party" is one whose personal right or pecuniary interests have been affected. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). When the word "aggrieved" appears in a statute, it refers to "a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation." *State v. A.M.R.*, 147 Wn.2d 91, 95, 51 P.3d 790 (2002), quoting, *Sheets v. Benevolent & Prot. Order of Keglers*, 34 Wn.2d 851, 854-55, 210 P.2d 690 (1949). A party has no standing where the issue does not substantially affect a legally protected interest of the would-be appellant. *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn.App. 753, 189 P.3d 777, review denied, 164 Wn.2d 1033, 197 P.3d 1184 (2008); see also, *State v. Mahone*, 96 Wn.App. 342, 347-48, 979 P.2d 458 (1999). A party "likely lack[s] standing to [appeal where] they are not an aggrieved party under RAP 3.1." *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007).

This analysis is no less true when the prosecutor is seeking review of an issue. In fact, there is a long American tradition disfavoring criminal appeals by the government. See, *State v. Johnson*, 24 Wn. 75, 77, 63 P. 1124 (1901). Prudential concerns and the "humanity of the law" require

legislators to speak in a clear voice when giving the government the right to appeal a criminal case. *State v. A.M.R.*, 147 Wn.2d at 95-96, 51 P.3d 790, citing, *Arizona v. Manypenny*, 451 U.S. 232, 246, 101 S.Ct. 1657 (1981) and *United State v. Sanges*, 144 U.S. 310, 315-16, 12 S.Ct. 609 (1892).

Questions of eligibility for indigent defense counsel are issues that do not involve the prosecutor. See, e.g., *State v. ANJ*, 168 Wn.2d 91, 98-99, 225 P.3d 956 (2010) (Questioning the practice of the state providing “legal advice to county officials on the public defense contracts”). While Washington courts do not appear to have addressed this issue directly, the practice has been questioned by courts reviewing the right to indigent defense counsel. See, *City of Mount Vernon v. Weston*, 68 Wn.App. 411, 416, 844 P.2d 438 (1992) (“we note that it is not apparent how the State has standing to raise this argument in the context of a challenge to the order of indigency.”). In Arizona, where the state sought to limit the right to counsel in post-conviction appeals, the court rejected the right of the prosecutor to challenge an order of indigency. See, *State v. Evans*, 129 Ariz. 153, 629 P.2d 989 (1981). Instead, Arizona courts have recognized that it is only the agency that appoints counsel that might legitimately prohibit a public defender from complying with an appointment and is the

party that would have standing to challenge the appointment. *Smith v. Lewis*, 157 Ariz. 510, 759 P.2d 1314 (1998).

This comports with state and national ethical rules and standards. The Washington State Bar Association Indigent Defense Standards make clear that “city attorneys, county prosecutors, and law enforcement officers should not select the attorneys who will provide indigent defense services.”¹ See Washington State Bar Association Standards for Indigent Defense (Approved by the Board of Governors June 3, 2011), see also, National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Indigent Legal Defense Contracts*, 1984, Standard IV-3. King County Bar Association Indigent Defense Services Task Force, *Guidelines for Accreditation of Defender Agencies*, 1982, Statement of Purpose. While *State v. A.N.J.* did not deal with the issue of standing, it was important to the analysis of the effective assistance of counsel in that matter that the state had been complicit in advising the county on how to award the contracts under which A.N.J.’s attorney practiced. *State v. A.N.J.*, 168 Wn.2d at 98-99, 225 P.3d 956.

Permitting the prosecutor to challenge an order of indigency gives the prosecutor the power “select” appellate counsel. Here, while the

¹ In *State v. ANJ*, the Court held that the WDA Standards for Public Defense Services and the WSBA Standards for Indigent Defense may be considered concerning the effective assistance of counsel. See, *State v. ANJ*, 168 Wn.2d 91, 109-110.

prosecutor has properly responded to the Court's orders, permitting the prosecutor to routinely argue for a reversal of indigency orders appears unfair. The lawyers currently working under contract to OPD are some of the most experienced and successful appellate lawyers in the state. In other cases, appellants and members of the public could perceive such motions by the State as a means of eliminating a skilled adversary and reducing the appellant to representing himself.²

Beyond the ethical implications of allowing a prosecutor to challenge an order of indigency, the court must analyze whether the prosecutor suffers injury when counsel is appointed in this matter. The prosecutor suffers no injury from counsel's appointment in this matter as none of the prosecutor's propriety, pecuniary or personal rights are impacted by the decision to appoint counsel. Appellate services are provided through the Washington State Office of Public Defense ("OPD") and in accord with RAP 15.2. The court shall appoint counsel if the "party seeking public funds is unable by reason of poverty to pay for all or some

² It is even more detrimental in the estate context. The estate is a different entity from the personal representative. Thus, the estate must be represented by a lawyer. If the personal representative is not also a member of the Washington State Bar, he or she cannot represent the estate "pro se." *Cottringer v. State, Dept. of Employment Sec.*, 2011 WL 2998792 (2011)(Pro se exception to the general rule requiring attorneys in court proceedings, under which a layperson may appear and act in any court as his own attorney without threat of sanction for unauthorized practice, is extremely limited and applies only if the layperson is acting solely on his own behalf with respect to his own legal rights and obligations.)

of the expenses for appellate review.” RAP 15.2(a)(1).³ While the fact finder certainly has the authority to deny counsel when it makes a finding that the defendant is not indigent, this is not a question that should have any interest to the prosecutor handling the appeal. As such, amicus would urge the court to find that the state has no standing to challenge an order of indigency for appellate counsel.⁴

2. *THIS COURT CANNOT CONSIDER THE COST OF AN APPEAL TO THE OFFICE OF PUBLIC DEFENSE, THE STATE AND THE COURT WHEN DETERMINING WHETHER AN INDIGENT PARTY CAN PROCEED AT PUBLIC EXPENSE.*

Amicus is particularly concerned that the Commissioner's Ruling in this case focuses not on the question of whether Devlin or his estate is indigent, but rather focuses on the cost of Devlin's appeal to the Court, the State and the Office of Public Defense. This Court should reject the Commissioner's reasoning on this point.

³ RAP 15.2 defines when the state must appoint indigent defense counsel and defines when a “party” may seek review. RAP 15.2 use of the word “party” to describe who is entitled to counsel is an important distinction from the use of the word “defendant” to describe which aggrieved parties may be entitled to publicly funded counsel. RAP 15.2 does not exclude the decedent's estate from appointment of indigent counsel.

⁴ When the Commissioner *sua sponte* raised this issue she identified cost containment concerns. To the extent that the Spokane County Prosecutor has some minimal role in protecting public funds, this Court should note that the per case payment for a appellate counsel for an appeal is a flat rate ranging from \$2300 to \$3500 depending upon the size of the record. In amicus' view, this payment is minimal and, in fact, avoids the additional costs sometimes associated with processing pro se appeals pursued by members of the public who are unfamiliar with this Court's rules and procedures. In other words, when it comes to systemic costs, it is far cheaper to have a skilled appellate lawyer pursuing the appeal in a timely and focused manner.

Indigency is defined by statute. RCW 10.101.010 provides that

(1) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, general assistance, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or

(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

(2) "Indigent and able to contribute" means a person who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.

(3) "Anticipated cost of counsel" means the cost of retaining private counsel for representation on the matter before the court.

(4) "Available funds" means liquid assets and disposable net monthly income calculated after provision is made for bail obligations. For the purpose of determining available funds, the following definitions shall apply:

(a) "Liquid assets" means cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in

real estate, and equity in motor vehicles. A motor vehicle necessary to maintain employment and having a market value not greater than three thousand dollars shall not be considered a liquid asset.

(b) "Income" means salary, wages, interest, dividends, and other earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistance programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is helping to defray the defendant's basic living costs.

(c) "Disposable net monthly income" means the income remaining each month after deducting federal, state, or local income taxes, social security taxes, contributory retirement, union dues, and basic living costs.

(d) "Basic living costs" means the average monthly amount spent by the defendant for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.

As the statute makes clear, when determining indigency, the trial court must take into consideration all of the indigency guidelines described in RCW 10.101.010, as well as the length and complexity of the proceedings, the usual and customary fees of attorneys in the community for similar matters, the availability and convertibility of any personal or real property owned, outstanding debts and liabilities, the person's past and present financial records, earning capacity and living expenses, credit standing in the community, family independence, and any other circumstances which may impair or enhance the ability to advance or

secure such attorney's fees as would ordinarily be required to retain competent counsel.

But the statute does not permit any court to consider the merits of the appeal, the cost to the state or the costs to the appellate court when determining if a party is indigent. The Commissioner's concern about the use of resources, while well meaning, is not relevant to questions of indigency. To the extent that the Commissioner's ruling can be read to approve consideration of these items in the determination of a party's indigency, this Court should reject it.

3. *THIS COURT MUST FOLLOW THE SUPREME COURT'S DECISIONS REGARDING THE ABATEMENT OF CONVICTIONS UPON THE DEATH OF THE DEFENDANT EVEN IF THE APPLICATION OF THOSE CASES RESULTS IN SUBSTANTIAL COSTS FOR FEW IF ANY BENEFITS.*

The Commissioner's ruling can also be read to question the wisdom of proceeding with an appeal where the costs to the system outweigh any benefit to the public or the victims. Amicus shares the Commissioner's concerns. However, our Supreme Court abandoned the most cost effective rule in favor of one that permits these kinds of appeals to proceed – even when the state can no longer punish the defendant and

when there is no hope that court costs or restitution will be recovered from the estate.

The vast majority of jurisdictions apply the “abatement ab initio” rule in cases where the defendant appealed his or her conviction and then died while the appeal was pending. Under that rule, the death of the defendant in a criminal case pending appeal permanently abated the action and all proceedings under the judgment. That being so, the appeal then became moot because the conviction was vacated. For more than 90 years Washington followed this rule without any criticism. *State v. Furth*, 82 Wash. 665, 144 P. 907 (1914); *State v. Banks*, 94 Wash. 237, 161 P. 1189 (1917).

In *State v. Devin*, 158 Wash. 2nd 157, 142 P. 3rd 599 (2006), however the Supreme Court abandoned the rule. The Court held that punishment was not the only rationale for a criminal conviction:

[T]he punishment rationale “does not reflect the compensation purpose served by restitution and victim penalty assessments” under modern law and “Furth is incorrect in stating that the ‘only’ purpose of all criminal punishment is to punish the offender.” *Id.* at 168, 169, 142 P.3d 599. We also rejected the premise that there is a presumption that convicted criminals are innocent pending appeal. *Id.* at 169, 142 P.3d 599. We overruled *Furth*, “to the extent that it automatically abates convictions as well as victim compensation orders upon the death of a defendant during a pending appeal.” *Id.* at 171-72, 142 P.3d 599.

But the Court also said:

In so doing, we do not preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendants' heirs. We also do not preclude courts from deciding a criminal appeal on the merits after the appellant has died, if doing so is warranted. We decline, though, to fashion a new doctrine in place of the *Furth* “ab initio” rule.

Id. at 172.

Shortly after it decided *Devin*, the Court considered *State v. Webb*, 167 Wash. 2nd 470, 219 P. 3rd 695 (2009). In that case the Court held that if a decedent dies during the pendency of his or her appeal, RAP 3.2 permits a party to be substituted on appeal. If no motion for substitution is forthcoming, then the appeal shall be dismissed and the conviction and all financial obligations shall remain in effect. If a party is substituted under RAP 3.2, then the matter shall proceed in accord with the guidelines we have set forth in this opinion.

This case demonstrates that abandoning the abatement ab initio doctrine did nothing to improve the chances that a particular victim will receive restitution and, in fact, increased costs in the appellate courts. *Devin* was indigent and in prison when he died. Under the old rule, his conviction would have been vacated and all appellate proceedings dismissed as moot. There would have been no prejudice to anyone in abating his conviction. His estate has no money to pay court costs or

restitution. The State and this Court would have been spared the costs of any further appellate proceedings and matters would have been concluded rather quickly. But by abandoning the abatement rule the Supreme Court perpetuated the costs to the system when the system can no longer punish the offender or make the victims whole. In amicus' view, this is poor public policy.

But, here the Devlin estate properly followed the procedure outlined in the Supreme Court cases. The indigent estate was substituted for the indigent defendant. And, as Devlin has argued, this Court must, allow the appeal proceed at public expense. Despite the fact that this appears to be a somewhat useless exercise, this Court must follow our State Supreme Courts decisions unless our Supreme Court readopts the abatement ab initio rule.

4. *DUE PROCESS REQUIRES CONTINUED APPOINTMENT OF COUNSEL*

To determine what procedural due process requires in a particular context, the court employs the *Mathews* test, balancing three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893 (1976). U.S.C.A. Const. Amend. 14. Procedural due process “[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *In re Det. of Stout*, 159 Wash.2d 357, 370, 150 P.3d (2007) (citing *Mathews v. Eldridge*, 424 U.S. at 334, 96 S.Ct. 893).

The first question the Court must address is whether there is a private interest affected. In criminal matters, including this case, there is a clear private interest involved. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wash. 2d 516, 524, 29 P.3d 689 (2001)(At the high end is the criminal case where the interests of the defendant are of such magnitude that the beyond-a-reasonable-doubt standard of proof is “designed to exclude as nearly as possible the likelihood of an erroneous judgment.”) When establishing the abatement ab initio rule in *State v. Webb*, the Court acknowledged the important due process requirements were satisfied by substitution of parties, by recognizing that not allowing a remedy to the deceased defendant would

“effectively preclude a convicted defendant from exercising his constitutional rights to a direct review of his criminal conviction. This would be so even if there was a major prejudicial error committed before or during trial or, not inconceivably, it was later shown that the deceased had not committed the crime for which he had been convicted. Such a holding would be violative of the convicted criminal defendant's fundamental rights, even though he be deceased.”

State v. Webb, 167 Wn.2d 470, 476, 219 P.3d 695, citing, *State v. McGettrick*, 31 Ohio St.3d 138, 509 N.E.2d 378 (1987). Beyond the potential financial obligations which may flow from this case, including potential civil actions, the fundamental rights of the deceased person to be able to expose potential errors in his case that may result in a reversal of his conviction or to show his innocence are critical interests that will not be addressed without continuing the appointment of counsel. *Id.*, at 475, see also, e.g., Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. Colo. L.Rev. 943, 945, 960 (Summer 2002) (“[a]n often unstated premise underlies the remedy of abatement ab initio: that appellate review of a conviction is so integral to the array of procedural safeguards due a criminal defendant that incapacity to obtain such review nullifies the jury verdict”; “any theory of punishment, even one that is victim-centered, must demand accuracy from the process used to determine criminal culpability [and] appellate review acts as an essential guarantee of that accuracy”); Tim E. Staggs, *Note, Legacy of a Scandal: How John Geoghan's Death May Serve as an Impetus to Bring Abatement Ab Initio in Line With the Victims' Rights Movement*, 38 Ind. L.Rev. 507, 515-17 (2005).

The second question that the Court must address is whether the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards. Clearly, the risk of erroneous deprivation of the liberty and property interests if counsel is not continued is high. The estate is indigent and there does not appear to be any other source to pay for appellate counsel, as is the case with the majority of criminal defendants prosecuted in Washington.⁵ See, Washington State Office of Public Defense, *2010 Status Report on Public Defense in Washington State* (2011). Without appointed counsel there will be no one who can continue the appeal. The important rights and obligations recognized in *Webb*, including the right to ensure that the conviction was fairly obtained and that restitution and legal financial obligations are fairly imposed, will never be resolved without the continued appointment of counsel. *Webb*, 167 Wn.2d 477, 219 P.3d 695 (permitting substitution of counsel resolves “the risk of an unfair burden falling on the decedent’s heirs”). Denying continuation of counsel may also unfairly impact other cases where, for example, the defendant dies after an appellate court issues a decision and before the Supreme Court

⁵ Washington provided counsel for more than 250,000 indigent persons in the last year. See, Washington State Office of Public Defense, *2010 Status Report on Public Defense in Washington State* (2011), found at: http://www.opd.wa.gov/Reports/TrialLevelServices/2010_PublicDefenseStatusReport.pdf

determines whether to uphold that decision. Such circumstances may result in erroneous decisions that would have been overturned upon greater scrutiny by the Supreme Court.

Third, the court must address the governmental interest, including costs and administrative burdens of additional procedures. While there is no question that the cost of continuing the appeal is significantly higher than the abandonment that will occur if this court denies the continuation of counsel, there does not appear to be any indication from *Webb* that the court ever intended for this unfair balance to occur. *Webb*, 167 Wn.2d at 475, 219 P.3d 659, citing, e.g., *Surland v. State*, 392 Md. 17, 24-25, 895 A.2d 1034 (2006)(recognizing that the right to appeal is a critical aspect of the analysis when the defendant dies while the appeal is pending). Instead, the balance clearly weighs in favor of continued appointment of counsel, so that all of the important issues that can be resolved at this critical stage of the court's analysis can continue.

The final question which should be addressed, but which is not part of the constitutional analysis, is whether the fact that the estate has substituted for the defendant should make a difference with respect to this analysis.⁶ The estate is substituted for the deceased defendant for no other

⁶ It is well settled that a corporation is a 'person' within the meaning of the due process clause of the Fourteenth Amendment. *Olympic Forest Products, Inc. v. Chaussee Corp.*,

reason that to ensure that the procedures under which the conviction was obtained were done so fairly. *Webb*, 167 Wn.2d at 476, 219 P.3d 695. If the court were not concerned that the conviction was lawfully obtained, it would not have created the rule that it did and would have instead simply ruled that there was no remedy when a defendant dies prior to the completion of his appeal. *Id.*

Continuing to provide counsel in cases where the estate has substituted for a deceased defendant ensures that that the concerns raised in *Webb* are addressed. Due process requires that counsel continued to be appointed at this critical stage of the proceedings and amicus urge this Court to find that the continuation of counsel is required to prevent the unfair conclusion to the case that so concerned the court when it crafted the abatement ab initio rule in *Webb*, in that it would leave unresolved the property and liberty interests that would have been at the core of a meaningful appeal. *Id.* at 478.

C. CONCLUSION

For the reasons stated above, this Court must affirm the substitution of the personal representative of Devlin's estate and permit

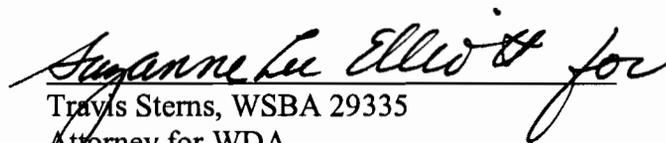
82 Wash. 2d 418, 424, 511 P.2d 1002, 1006 (1973), citing, *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

this case to proceed at public expense including the appointment of counsel.

Respectfully submitted this 8th day of August, 2011.



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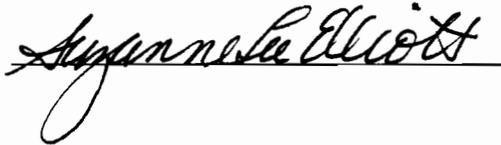
Certificate of Service by Mail

I declare under penalty of perjury that on August 8, 2011, I placed
a copy of this document in the U.S. Mail, postage prepaid, to:

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