

11-2013

Does the Right to Counsel on Appeal End as You Exit the Court of Appeals?

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Nancy P. Collins



Part of the [Administrative Law Commons](#), [Agriculture Law Commons](#), [Arts and Humanities Commons](#), [Banking and Finance Law Commons](#), [Civil Rights and Discrimination Commons](#), [Commercial Law Commons](#), [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Consumer Protection Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Disability and Equity in Education Commons](#), [Disability Law Commons](#), [Educational Leadership Commons](#), [Educational Methods Commons](#), [Energy and Utilities Law Commons](#), [Family Law Commons](#), [Fourteenth Amendment Commons](#), [Health Law and Policy Commons](#), [Housing Law Commons](#), [Human Rights Law Commons](#), [Immigration Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Insurance Law Commons](#), [Intellectual Property Law Commons](#), [International Trade Law Commons](#), [Juvenile Law Commons](#), [Labor and Employment Law Commons](#), [Land Use Law Commons](#), [Law and Gender Commons](#), [Law and Psychology Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal History Commons](#), [Legal Remedies Commons](#), [Legislation Commons](#), [Marketing Law Commons](#), [National Security Law Commons](#), [Natural Resources Law Commons](#), [Other Education Commons](#), [Other Law Commons](#), [Privacy Law Commons](#), [Property Law and Real Estate Commons](#), [Secured Transactions Commons](#), [Securities Law Commons](#), [Sexuality and the Law Commons](#), [Social and Behavioral Sciences Commons](#), [Social and Philosophical Foundations of Education Commons](#), [Social Welfare Law Commons](#), [Transnational Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Collins, Nancy P. (2013) "Does the Right to Counsel on Appeal End as You Exit the Court of Appeals?," *Seattle Journal for Social Justice*: Vol. 11: Iss. 3, Article 7.
Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/7>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

Does the Right to Counsel on Appeal End as You Exit the Court of Appeals?

Nancy P. Collins*

Washington was the first state in the nation to expressly guarantee the right to appeal to all individuals convicted of crimes.¹ The right to appeal is strongly protected in Washington. You can flee the state to escape serving your sentence, yet you do not forfeit your right to appeal.² If you die during your appeal, your estate's representative may pursue the appeal in your name.³ If you lack the money to hire a lawyer, an attorney will be appointed at your request.⁴

The right of appeal is the right to ask the court of appeals to review a criminal conviction.⁵ However, the court of appeals is only one point in the

* Nancy P. Collins represents indigent clients in criminal appeals as an attorney with the Washington Appellate Project. She graduated cum laude from the University of Pennsylvania School of Law in 1994. The views expressed herein are her own.

¹ James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 376 (1985). The Washington State Constitution mandates that any person convicted of a crime has "the right to appeal in all cases." WASH. CONST. art. 1, § 22.

² See *State v. French*, 141 P.3d 54 (Wash. 2006) (defendant did not forfeit right to appeal by fleeing to Mexico upon convictions for multiple counts of child sexual abuse in an effort to escape sentencing).

³ *State v. Webb*, 219 P.3d 695, 698 (Wash. 2009).

⁴ Under Rule of Appellate Procedure (RAP) 15.2(f), a criminal defendant who was found indigent at the trial court level is presumed to remain indigent and entitled to appointed counsel on appeal. WASH. R. APP. P. 15.2(f).

⁵ See WASH. R. APP. P. 2.1(a).

The only methods for seeking review of decisions of the superior court by the Court of Appeals and by the Supreme Court are the two methods provided by these rules. The two methods are:

- (1) Review as a matter of right, called "appeal"; and
- (2) Review by permission of the reviewing court, called "discretionary review." Both "appeal" and "discretionary review" are called "review."

life of an appeal; after the court of appeals, the next stage of the appeal process in Washington State is at the Washington Supreme Court. The supreme court's review of a case is discretionary, and to get to the supreme court, someone must file a petition for review within thirty days of the court of appeals issuing a decision.⁶ There is no specific statute addressing the right to have counsel prepare and file a petition for review, and court-appointed attorneys in Washington are not paid to do so.⁷ The only mandatory obligation for a court-appointed attorney pursuing an appeal is to file a brief in the court of appeals.⁸ Whatever other work attorneys elect to do rests on their own strategic, tactical, or economic decisions. It is some appointed lawyers' practice to simply withdraw as counsel the very day the court of appeals issues its opinion.⁹

Filing a petition for review to the supreme court is important for several reasons. Although it does not accept review of all cases,¹⁰ only the supreme

Id. Because review by the supreme court is discretionary, it is not considered to be part of the appeal "of right." *See* *State v. Koloske*, 676 P.2d 456, 458–59 (Wash. 1984).

⁶ WASH. R. APP. P. 13.4(a); *see also* WASH. R. APP. P. 18.8 (restricting extensions of the thirty-day limit for filing a petition for review to only "extraordinary circumstances").

⁷ *See* WASH. REV. CODE § 10.73.150 (1995) (noting counsel shall be appointed for the appeal of right).

⁸ *See* WASH. R. APP. P. 10.1. This rule lists the briefs that "may" be filed by a party. *Id.* While the RAPs do not require that anyone file a brief, if the appellant does not file a brief, there will not be any issues for the court to review. The RAPs do not require filing a reply brief and RAP 11.4(j) permits a party to waive oral argument. WASH. R. APP. P. 10.1(c); WASH. R. APP. P. 11.4(j).

⁹ This practice is apparent from reviewing case dockets in the court's database ACORDS. The author of this article was assigned to represent two clients in the supreme court in 2012 after the originally appointed appellate attorneys withdrew as counsel immediately after the court of appeals issued decisions. In *State v. Bueno*, 281 P.3d 687 (Wash. 2012), the supreme court granted the appellant's pro se petition for review, although it later decided review was improvidently granted. *State v. Bueno*, 288 P.3d 328 (Wash. 2012). In *State v. Vasquez*, pro bono counsel filed a petition for review that the supreme court granted. *State v. Vasquez*, 269 P.3d 370, *rev. granted*, 282 P.3d 96 (Wash. 2012).

¹⁰ *See* WASH. R. APP. P. 13.4(b) (listing the supreme court's criteria for granting a petition for review from the appellate court).

court can overturn or modify its own precedent.¹¹ It may correct errors in the reasoning, analysis, or result of any court of appeals opinion. Furthermore, it is also the supreme court's role to resolve conflicts between lower courts, correct faulty legal tests employed by the courts of appeals, and decide when public policy requires a change in practice.¹²

Even if the supreme court denies review, filing a petition for review is a critical step for anyone who wants to ask the federal court to review a state court conviction. Criminal defendants must show they have exhausted their state remedies before a federal court will agree to review a federal constitutional error in habeas corpus.¹³ Without a petition for review, a criminal defendant will be considered to have procedurally defaulted on his federal constitutional claims, and the federal court will not consider them, no matter how meritorious they may be.¹⁴

First, this article suggests that in criminal appeals, lawyers should view the right to appeal process as including filing of non-frivolous petitions for review.¹⁵ At a bare minimum, lawyers should be discouraged from

¹¹ A supreme court decision "is binding on all lower courts in the state. When the Court of Appeals fails to follow directly controlling authority by this court, it errs." 1000 Virginia Ltd. P'ship v. Vertecs Corp., 146 P.3d 423, 430 (Wash. 2006) (citation omitted).

¹² The supreme court has shown its willingness to adopt new rules or refine legal tests in order to further policy goals such as fairness and clarity in the law. *See, e.g.*, State v. Sublett, 292 P.3d 715 (Wash. 2012) (rejecting court of appeals' method of analyzing whether a public trial right attaches); State v. Nunez, 285 P.3d 21, 25 (Wash. 2012) (supreme court reversed its own precedent regarding nonunanimous jury verdicts for aggravating factors in criminal cases because prior rule created "unnecessary confusion" and did not "serve the policy considerations that gave rise to it"); State v. Rhone, 229 P.3d 752, 758 (Wash. 2010) (Madsen, J., concurring) (Alexander, J. dissenting) (taking concurrence and dissenting justices' opinions together, majority adopted new rule "going forward" when considering whether a potential juror was excused based on his or her race).

¹³ *See infra* notes 49–50 and accompanying text.

¹⁴ *Id.*

¹⁵ *See* Anders v. California, 386 U.S. 738 (1967) (holding that when legal points are arguable on their merits, an appeal is not frivolous). A similar standard may guide whether arguably viable issues should be pursued throughout an appeal.

withdrawing as counsel as soon as the court of appeals issues its opinion. Second, this article addresses the reasons why lawyers should file petitions for review, both for its procedural and substantive benefits. This article further addresses the harm that may befall a client whose lawyer withdraws from the case as soon as the court of appeals issues a decision. Finally, this article notes the counterarguments put forth by lawyers who do not see their role as including proceedings that occur after the court of appeals issues its opinion, and explains why these concerns should not be elevated above the attorneys' obligation to advocate for their clients.

I. A LAWYER HAS THE ETHICAL OBLIGATION TO VINDICATE A CLIENT'S CAUSE

The client's goals and interests define the lawyer's obligation to initiate an appeal.¹⁶ Similarly, when a client wants to continue the appeal by asking the supreme court to review the court of appeals opinion, the lawyer should pursue the appeal as long as the client's requests are not unreasonable.

An analogous situation arises when the court of appeals uses a mechanism called a "motion on the merits" to decide a direct appeal.¹⁷ When the court of appeals puts an appeal on the "motion on the merits" track, a commissioner decides the direct appeal, and the commissioner's decision to affirm a conviction becomes the final decision that terminates review, unless a party files a motion to modify.¹⁸

When this motion on the merits procedure was introduced, it was challenged as circumventing the constitutional right to appeal because a single, unelected commissioner would decide an appeal rather than three elected judges.¹⁹ The supreme court resolved this challenge by emphasizing

¹⁶ See *State v. Rolax*, 702 P.2d 1185, 1189–90 (Wash. 1985) ("the decision to appeal must be made personally by the defendant.").

¹⁷ WASH. R. APP. P. 18.14.

¹⁸ WASH. R. APP. P. 17.7; WASH. R. APP. P. 18.14(h).

¹⁹ *Rolax*, 702 P.2d at 1188–89.

that counsel must file a motion to modify the commissioner's decision anytime the client asks, which would require three court of appeals judges to review the appeal de novo.²⁰ The supreme court also emphasized the lawyer's role in preserving the client's right to appeal by fully informing the client of his or her right to appeal a commissioner's ruling, as well as the right to pursue an additional appeal after the commissioner's ruling because "a defendant should not be expected to decide whether or not to continue to exercise appellate review without a full understanding of the process and its implications. No presumption favoring waiver of the right to appeal exists in our state."²¹ As the court explained in *Rolax*, the presumption against waiver of the right to appeal means counsel presumes the client wants to press forward in all stages of direct appeal.²²

A lawyer's obligations are also dictated by the rules of professional conduct. A lawyer's duty to "act with reasonable diligence" requires the attorney to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" within the boundaries of professional discretion.²³ A lawyer must explain matters sufficiently to permit the client to make informed decisions.²⁴ The lawyer is obligated to guard the client from suffering from "material adverse consequences."²⁵

Professional norms inform the definition of effective assistance of counsel.²⁶ In the context of a trial proceeding, the lawyer's obligations

²⁰ *Id.*

²¹ *Id.*

²² *Id.*; see also *State v. Sweet*, 581 P.2d 579, 581 (Wash. 1978) (waiving the right to appeal is valid only if there is "intentional relinquishment or abandonment of a known right or privilege").

²³ WASH. RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2006).

²⁴ WASH. RULES OF PROF'L CONDUCT R. 1.4(b) (2006).

²⁵ WASH. RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2006).

²⁶ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.") (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

include promptly presenting and accurately explaining a plea bargain offer.²⁷ A client is denied the right to effective assistance of counsel if he makes the decision to go to trial without an accurate understanding of his option to forgo trial or if he pleads guilty without accurately understanding the risks of rejecting a guilty plea.²⁸ A criminal defendant necessarily relies on the advice of counsel and “cannot be presumed to make critical decisions without counsel’s advice.”²⁹ An attorney’s failure to inform a client about critical information is just as much a deprivation of competent counsel as is an attorney giving actual misadvice to a client.³⁰ These basic rules of consulting with, and fully informing, the client of the available options guide the trial attorney’s role. It is the client who personally suffers the consequences of decisions made in the course of a criminal case. It is the attorney’s job to diligently act in the interest of vindicating the client’s cause or endeavor. Similar rules govern the appellate attorney’s duties to a client.³¹

State v. Harvey illustrates how the right to a meaningful appeal is frustrated if the court of appeals opinion is treated as the final step in the appeal.³² Mr. Harvey believed the trial judge had improperly closed the courtroom to members of the public during jury selection.³³ The court of appeals refused to let him order the transcript of jury selection and, without the record, he could not prove that an error occurred.³⁴ After the court of

²⁷ *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012).

²⁸ *Id.*

²⁹ *Id.* at 1385.

³⁰ *Padilla*, 130 S. Ct. at 1484.

³¹ See e.g., *In re Pers. Restraint of Morris*, 288 P.3d 1140, 1144-45 (2012) (reversing conviction due to appellate attorney’s failure to raise meritorious issue that would have been per se reversible error had it been raised on direct appeal).

³² See *State v. Harvey*, 288 P.3d 1111, 1113 (Wash. 2012).

³³ *Id.* at 1112.

³⁴ *Id.* The court of appeals refused to consider Mr. Harvey’s claim that the court had improperly ordered spectators out of the courtroom during jury selection, because “there is no such ruling in the record,” and it failed to acknowledge that it had refused Mr.

appeals affirmed his convictions, Mr. Harvey filed his own motions for review in the supreme court, protesting the court of appeal's decision after his lawyer withdrew from the case.³⁵ The supreme court ordered that Mr. Harvey was entitled to this transcript for his appeal.³⁶

Reading between the lines of *Harvey* reveals a troubling situation beyond Mr. Harvey's difficulty in obtaining a transcript. Mr. Harvey had court-appointed counsel on appeal.³⁷ His lawyer knew there was a potentially viable appellate issue involving the closure of the courtroom during jury selection but did not pursue this issue.³⁸ As soon as the court of appeals issued an opinion affirming Mr. Harvey's convictions, his attorney withdrew as counsel, leaving Mr. Harvey to pursue his appellate claims alone.³⁹ After his lawyer withdrew, Mr. Harvey asked the court to appoint counsel, showing that he was not voluntarily representing himself in his direct appeal.⁴⁰

Harvey's request for the transcript of jury selection. State v. Harvey, No. 29513-3-III, 2012 WL 1071234, at *6 (Wash. Ct. App. Mar. 29, 2012).

³⁵ Mr. Harvey filed a pro se petition seeking review of the court of appeals opinion Petition for Review. State v. Harvey, 288 P.3d 1111 (Wash. 2012) (No. 87290-2). He also filed a pro se motion for discretionary review challenging the refusal to allow him the transcript he needed of jury selection. Motion for Discretionary Review of a Court of Appeals Decision, State v. Harvey, 288 P.3d 1111 (Wash. 2012) (No. 87357-7).

³⁶ *Id.* at 1113.

³⁷ *Id.* at 1112.

³⁸ See *In re Orange*, 100 P.3d 291 (Wash. 2004). Under existing *Orange* precedent, it constitutes ineffective assistance of counsel for a lawyer to neglect to challenge the closure of the courtroom in a direct appeal. *Id.*; see also *In re Morris*, 288 P.3d 1140, 2012 WL 5870496 (Wash. 2012).

³⁹ See *Harvey*, 288 P.3d 1111; see also Docket, State v. Harvey, 2012 WL 1071234 (Wash. Ct. App. Mar. 29, 2012) (No. 29513-3-III). The court of appeals issued its decision in March 29, 2012, and appellate counsel filed a motion to withdraw as counsel on April 2, 2012. Docket, *Harvey*, No. 29513-3-III; Motion for Withdrawal of Counsel, *Harvey*, No. 29513-3-III.

⁴⁰ *Harvey*, 288 P.3d at 1113 n.2. The supreme court denied his request for counsel, which is puzzling since he had the right to counsel and his appointed lawyer had withdrawn from the case. See *id.* It is possible that the supreme court assumed that the court of appeals would ensure that he had counsel representing him upon remand.

We cannot know the underlying dynamics of Mr. Harvey's relationship with his lawyer, but we do know that Mr. Harvey's lawyer asked to withdraw as counsel two working days after the court of appeals filed its opinion in the direct appeal.⁴¹ His lawyer did not file a reply brief, motion to reconsider, or petition for review, even though Mr. Harvey had been convicted of two counts of murder.⁴² Given the seriousness of the convictions, Mr. Harvey's on-going pursuit to have his rights recognized, and his request for counsel to assist him, it was obvious he wanted to pursue his right to appeal as far as possible.⁴³ Appointed counsel was obligated to provide that assistance.

Withdrawing from a case within a few days of the court of appeals issuing an opinion, like in Mr. Harvey's case, has recently become a topic of conversation among state appellate attorneys due to a recent increase in frequency. At a meeting of appellate attorneys, the then-manager of the appellate program of Washington's Office of Public Defense explained that he had directed appointed attorneys to withdraw as counsel any time they did not want to file petitions for review.⁴⁴ The theory was that the individual could then file a pro se petition for review.⁴⁵

Even if someone like Mr. Harvey can file his own petition for review, when a lawyer withdraws from a case immediately after the court of appeals issues an opinion, the client is unable to consult with his or her attorney

⁴¹ See *supra* note 39 and accompanying text.

⁴² See Docket, *State v. Harvey*, 2012 WL 1071234 (Wash. Ct. App. Mar. 29, 2012) (No. 29513-3-III); *Harvey*, No. 29513-3-III.

⁴³ See Docket, *Harvey*, No. 29513-3-III.

⁴⁴ Sean Flynn, Address at the Office of Public Defense Appellate Continuing Legal Education Class, Seattle, Washington (Nov. 30, 2012). At the time, Sean Flynn was the manager of appellate defense at the Washington Office of Public Defense.

⁴⁵ *Id.* It appears that while this policy directive from the state office of public defense encouraged lawyers to immediately withdraw as counsel after a court of appeals opinion, early withdrawal of counsel was not necessarily the intent of the office of public defense, which is usually a strong advocate for zealous representation of clients at all stages of the appeal.

regarding the nature of the right to further review. The lawyer who withdraws immediately after the opinion is issued does not even know if the opinion reached the client. The lawyer has forfeited any prospect of even a motion for reconsideration.⁴⁶

Harvey is an example of why the court of appeals decision should not be taken as the final ruling in appeal and seen as the end of the lawyer's obligation to pursue the client's right to appeal.⁴⁷ The standards of professional responsibility, and obligation of providing meaningful assistance, demand more from a lawyer.⁴⁸ It is also important to consider the other consequences of withdrawing representation after the court of appeals opinion is issued, as discussed below.

II. IT IS PREMATURE, AND FREQUENTLY HARMFUL TO THE CLIENT, FOR A LAWYER TO WITHDRAW AFTER THE COURT OF APPEALS DECISION

A defendant may suffer substantial adverse consequences if an appeal ends without asking the supreme court to review the court of appeals opinion.

First, an appeal that ends at the court of appeals is unexhausted for federal review, barring the person from obtaining review in federal court to rectify a state court's misapplication of federal law.⁴⁹ In order to obtain

⁴⁶ WASH. R. APP. P. 12.4(b). A motion to reconsider is a vehicle for correcting factual errors and further explaining legal misunderstandings in the opinion and must be filed within twenty days. WASH. R. APP. P. 12.4(c).

⁴⁷ *Harvey*, 288 P.3d at 1113.

⁴⁸ See *supra* pp. 6-7 (discussing RPCs and standards of meaningful assistance of counsel.).

⁴⁹ As explained in *Greene v. Lambert*, 288 F.3d 1081, 1086 (9th Cir. 2002):

Undeniably, a state prisoner must exhaust a federal constitutional claim in state court before a federal court may consider the claim. 28 U.S.C. § 2254(b)(1)(A), (c). Exhaustion typically requires that 'state prisoners must give the state courts one full opportunity to resolve any constitutional issues by

relief by a federal writ of habeas corpus, a state prisoner “must ‘fairly present’ his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.”⁵⁰ There are no equitable exceptions to this rule, even for the pro se defendant.⁵¹

A second adverse consequence is that the appellant who loses in the court of appeals may face a cost bill filed by the prosecution.⁵² The court of appeals will order the appellant to pay the costs of appeal when the state substantially prevails, without any consideration of the person’s indigence.⁵³ If the supreme court reverses the court of appeals, the prosecution will no longer be the prevailing party, and the appellant cannot be ordered to pay the costs of appeal.⁵⁴

Additionally, there are clear benefits to seeking further direct review, not the least of which is that the supreme court may be more likely to be persuaded by policy issues than the court of appeals would be. The supreme court might also recognize legal errors that break with precedent, a position more difficult for a lower court to take. The court of appeals is bound by supreme court rulings even if it disagrees. For example, in *State v. Allen*, the

invoking one complete round of the State’s established appellate review process.”

Id. (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

⁵⁰ *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

⁵¹ *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir. 2003).

⁵² WASH. R. APP. P. 14.3 (describing costs that may be awarded to the prevailing party); WASH. REV. CODE § 4.84.080 (prevailing party allowed up to two hundred dollars in attorneys’ fees). The costs that may be imposed include what the state paid for appointed counsel, for transcripts of the record on appeal, and to copy briefs. WASH. R. APP. P. 14.3. Although the indigence of the appellant would appear to entitle him to appeal at the state’s expense, that argument has been rejected by the supreme court. *State v. Blank*, 930 P.2d 1213, 1220 (Wash. 1997).

⁵³ WASH. R. APP. P. 14.2 (the court “will” award costs to the substantially prevailing party); *Blank*, 930 P.2d at 1220 (defendant’s ability to pay need not be considered at time costs are imposed).

⁵⁴ WASH. R. APP. P. 14.2.

court of appeals considered whether modern research required the court to instruct the jury on the fallibility of cross-racial identification, contrary to earlier case law.⁵⁵ Rather than adopt a new standard, the court of appeals ruled, “it is for the Supreme Court to consider” whether due process merits a different approach.⁵⁶ Two of the three court of appeals judges separately concurred to emphasize their desire for a different result:

[W]e are constrained to affirm. I write separately because we should advise jurors of a fact known to us but contrary to their intuition: that cross-racial identification should be carefully scrutinized. We can draft such an instruction without making a judicial comment on evidence, and I believe it is past time to do so.⁵⁷

The supreme court granted review.⁵⁸ Recognizing that scientific data demonstrates the unreliability of eyewitness identification, cross-racial eyewitness identification in particular, the supreme court adopted a rule explaining that a court may be required to give a cautionary cross-racial identification instruction in certain cases.⁵⁹

In *State v. Monday*, without any objection from defense counsel, the trial prosecutor used racially derogatory arguments such as the claim that “black folk” make untrustworthy witnesses to urge a conviction.⁶⁰ In an

⁵⁵ *State v. Allen*, 255 P.3d 784, 793 (Wash. Ct. App. 2011), *rev. granted*, 262 P.3d 63 (Wash. 2011).

⁵⁶ *Id.*

⁵⁷ *Id.* at 756 (Ellington, J., concurring).

⁵⁸ *State v. Allen*, 262 P.3d 63 (Wash. 2011).

⁵⁹ *State v. Allen*, 293 P.3d 679, 684, 687 (2013). The Court affirmed Allen’s conviction, finding that the identification was based on clothes, hat, and sunglasses, and therefore did not implicate the fallibility of cross-racial identification. *Id.* *Allen* remains an important decision for future cases, because as the dissent recognized, “every member of this court would support giving a cross-racial identification instruction in an appropriate case,” which is what the majority believed it lacked authority to say. *Id.* at 692 (Wiggins, J., dissenting).

⁶⁰ *State v. Monday*, 257 P.3d 551, 555–57 (Wash. 2011).

unpublished decision, the court of appeals condemned the prosecutor's language, but it deemed the impropriety harmless under the lenient standard used for reviewing prosecutorial misconduct, which was not objected to at trial.⁶¹ The supreme court adopted a different test of constitutional harmless error for reviewing race-based misconduct.⁶² Three of the supreme court justices would have gone further and adopted a per se rule that a prosecutor's appeals to race-based decision-making merit reversal as structural error.⁶³ *Monday* shows how the court of appeals may focus narrowly on whether precedent requires reversal, whereas the supreme court sees its role in overseeing the criminal justice system as requiring outcomes that demonstrate the court's commitment to justice. *Monday* and *Allen* illustrate the value in asking the supreme court to review an error or revise the law.

Another potential benefit from filing a petition for review is that it extends the lifespan of the direct appeal, so a change in the law during a direct appeal will apply to the appellant.⁶⁴ If no petition for review is filed,

⁶¹ State v. Monday, No. 60265-9, 2008 WL 5330824, at *8–9 (2008).

⁶² *Monday*, 257 P.3d at 558. In adopting a constitutional harmless error test, the court explained:

Because appeals by a prosecutor to racial bias necessarily seek to single out one racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

Such a test exists: constitutional harmless error.

Id.

⁶³ *Id.* at 685 (“The appeals to racism here by an officer of the court are so repugnant to the fairness, integrity, and justness of the criminal justice system that reversal is required. . . . I would reverse the defendant’s convictions because the integrity of our justice system demands it.”) (Madsen, J., concurring).

⁶⁴ See State v. Robinson, 253 P.3d 84, 89 (Wash. 2011).

any change in the law that occurs, even days after the direct appeal, may not apply to the client.⁶⁵ Being aware of what issues are pending in state and federal courts is critical in deciding whether to file a petition for review.

These practical concerns to the client, such as preserving issues for federal habeas review, or substantive reasons for maintaining a challenge to a court of appeals ruling, should dictate counsel's decision to file a petition for review. Counsel's withdrawal from the case should occur only after direct and explicit conversations with the client about the aspects of the appeal that have not yet been resolved. Even if the lawyer is not going to file a petition for review, he or she can still give the client valuable advice such as how to obtain relief from a cost bill.

Filing a pro se petition for review is not a simple task for the non-lawyer. For one thing, the appellant in a criminal case is usually in prison. Also, a person has thirty days from the date the court of appeals issues its opinion to file the petition,⁶⁶ and the supreme court has strict procedural rules for filing a petition for review.⁶⁷ While a lawyer receives a copy of the decision via e-mail the day it is issued, the appellant has to wait for the lawyer to forward the opinion in the mail. Even assuming it is sent to the correct address and the client can read and understand English, this process takes time. If the appellant is in prison, he usually gets a small pencil for correspondence and no guarantee of access to a law library to prepare and

⁶⁵ A change in the law that occurs during the time an appeal is pending will apply to that case, but once the appeal is over, a new rule of law will not apply retroactively. *See* *Chaidez v. United States*, No. 11-820, 2013 WL 610201, at *4 (U.S. 2013).

⁶⁶ WASH. R. APP. P. 13.4(a).

⁶⁷ WASH. R. APP. P. 13.4.

file his own petition for review.⁶⁸ Legal arguments cannot be incorporated from other briefing.⁶⁹

The lawyer—who has basic tools for writing, such as a computer, which pro se litigants may not have; knowledge of the issues on review; and the requisite legal training—is in a far better position to prepare a petition for review within thirty days of the court of appeals opinion. Given the vast disparity in access to resources, not to mention legal qualifications and experience in appellate practice, passing off to the client the responsibility of filing a petition for review unfairly abandons him or her.

III. FILING A PETITION FOR REVIEW SHOULD BE THE NORM, BUT THERE ARE EXCEPTIONS

This article may beg the question of when it is appropriate for a lawyer to not file a petition for review. RAP 13.4(b) identifies specific criteria that the court will consider when deciding whether to grant review and when a lawyer may reasonably believe the criteria are not met.⁷⁰ This is a legitimate concern, and this article does not take the position that a frivolous petition

⁶⁸ Based on the author's experience, inmates in Washington's prisons have difficulty gaining access to prison law libraries and have limited computer use, and the writing instrument provided to prisoners is a golf-sized pencil.

⁶⁹ *State v. Sublett*, 292 P.3d 715, 719 n.2 (Wash. 2012) (refusing to address issue raised in petition for review where asked to incorporate argument from other brief).

⁷⁰ WASH. R. APP. P. 13.4(b). The rule provides:

- A petition for review will be accepted by the Supreme Court only:
- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
 - (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
 - (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
 - (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Id.

for review must be filed. Appellate counsel should file a petition for review in the supreme court “with the same conscientious examination as other advocacy for a client requires.”⁷¹ When it would be frivolous to file a petition, counsel need not do so.⁷² Issues that may have been important to the appeal initially could become moot, such as an error in the length of the sentence where the sentence has been served. In such scenarios, even a favorable decision by the supreme court may be meaningless to the client. At other times, the court of appeals opinion may offer a benefit that the client wishes to reap as soon as possible so that seeking further review is more harmful than helpful. Whether to press a client’s claims in the supreme court should be a decision made consciously and conscientiously in all cases.

However, given the rules requiring meaningful assistance and zealous advocacy, the decision as to the frivolousness of an issue should be made with a thumb on the scale that favors vindicating the client’s issues and interests.

Sometimes, an attorney cannot locate his or her client within the thirty-day window for filing a petition for review.⁷³ This occurrence is not uncommon, especially when the appellate process is slow and a client does not have a fixed mailing address or telephone number. A lawyer may minimize this risk by conferring with the client at the outset to understand the client’s goals in pursuing the appeal. Even in the absence of express

⁷¹ *State v. Rolax*, 702 P.2d 1185, 1188 (Wash. 1985).

⁷² *See, e.g., Anders v. California*, 386 U.S. 738 (1967). Under *Anders*, when any legal points “are arguable on their merits, an appeal is therefore *not* frivolous, and the court must, prior to decision, afford the indigent assistance of counsel to argue the appeal. Procedure short of what *Anders* requires denies a criminal defendant fair procedure.” *Rolax*, 702 P.2d at 1189.

⁷³ *See* WASH. R. APP. P. 13.4(a) (setting a thirty-day deadline for filing a petition for review); WASH. R. APP. P. 18.8(b) (restricting the opportunity to extend the thirty-day deadline to only “extraordinary circumstances and to prevent a gross miscarriage of justice”).

direction from the client about whether to pursue the appeal beyond the intermediate appellate court, the lawyer may consider the case from the client's perspective based on the issues in the case and reach a reasoned decision as to whether further review should be pursued.

Some clients have filed a Statement of Additional Grounds for Review, raising pro se issues in the court of appeals.⁷⁴ The supreme court does not have any provision for filing multiple petitions for review, so the attorney must either incorporate the client's pro se issues into a petition for review or direct the client to prepare the petition for review on his own. Given the difficulties a client will encounter when preparing a petition for review within the strict deadline and under the precise procedural rules of RAP 13.4, it is preferable for the experienced attorney to aid the client. A client may choose to represent himself at this stage, but this decision should be the product of a knowing and intelligent waiver of counsel and not the result of a surprise or sudden withdrawal of counsel from the case.

It may also be true that a case with better facts would be a better vehicle in making a certain legal challenge, and a lawyer may be reluctant to seek supreme court review when a given case involves an appellant who would not be viewed sympathetically. However, a lawyer's obligation is to his individual client, and the lawyer has to prioritize and pursue that client's best interests.

IV. CONCLUSION

Washington's strongly protected and constitutionally guaranteed right to appeal in all cases should expressly require appointed counsel to represent the client throughout the direct appeal, including the filing of petitions for

⁷⁴ WASH. R. APP. P. 10.10 ("A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.").

review when it would serve the client's cause to do so. The decision to seek further review should be based on a discussion between the client and his/her counsel, and counsel should file a petition for review if reasonably requested by the client. Withdrawing from a case when the lawyer receives the court of appeals opinion leaves a client without the guidance of an attorney even though the appeal has not ended and critical aspects of the appeal, such as whether the cost bill should be contested or whether federal issues should be exhausted, remain unresolved. The right to appeal is not meaningfully provided unless counsel protects the client's interests at all stages of the appeal in the state courts.