

No. 99941-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF
ROBERT L. AYERST,

Petitioner

**MEMORANDUM OF AMICUS CURIAE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON IN SUPPORT OF
REVIEW**

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TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
II.	COURT OF APPEALS DECISION	1
III.	STATEMENT OF THE CASE.....	1
IV.	REASONS WHY REVIEW SHOULD BE GRANTED.....	1
	A. The Court of Appeals decision is contrary to this Court’s decision on the significant constitutional question whether structural constitutional error occurs when a person representing a criminal defendant has not complied with all conditions necessary to legally practice law.	2
	B. This case presents additional issues of public importance regarding this Court’s regulation of those who practice law, particularly those who represent criminal defendants, and the duty of courts of this state to enforce the court rules. ...	4
V.	CONCLUSION	8

TABLE OF AUTHORITIES

Washington State Cases

<i>City of Seattle v. Ratliff</i> , 100 Wn.2d 212, 667 P.2d 630 (1983)	2, 4
<i>Davison v. State of Washington</i> , 196 Wn.2d 285, 298-99, 466 P. 3d 231 (2020).....	6
<i>Personal Restraint Petition of Robert L. Ayerst</i> , 17 Wn. App. 2d 356, 486 P.3d 943 (2021).....	1, 3, 7

Federal Cases

<i>Solina v United States</i> , 709 F.2d 160, (2d Cir. 1983)	3, 4
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Court Rules

CrR 3.1 Stds.....	5
CrR 3.1(d)(4)	6
CrRLJ 3.1(d)(4)	6
JuCR 9.2(d).....	6
RAP 13.4(b).....	1
RAP 13.4(b)(1)	2
RAP 13.4(b)(3)	2
RAP 13.4(b)(4)	2
RAP 13.5A(b).....	1

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of Amicus are set forth in the Motion for Leave to File Memorandum of Amicus Curiae in Support of Review.

II. COURT OF APPEALS DECISION

This memorandum is filed in support of Petitioner Ayerst's Motion for Discretionary Review of the published Court of Appeals decision in *Personal Restraint Petition of Robert L. Ayerst*, 17 Wn. App. 2d 356, 486 P.3d 943 (2021).

III. STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

As this Court knows, the criteria for discretionary review in this case are set forth in RAP 13.4(b), via RAP 13.5A(b). The Court should grant review in this case because it squarely fits most of the criteria for review: it raises a significant constitutional issue, the Court of Appeals decision was contrary to this Court's previous decision on that issue, and it is of substantial public interest for these reasons but also because it implicates this Court's constitutional duty to govern the practice of law

and the duty of the courts to enforce the court rules promulgated by this Court. RAP 13.4(b)(1), (3), and (4).¹

A. The Court of Appeals decision is contrary to this Court's decision on the significant constitutional question whether structural constitutional error occurs when a person representing a criminal defendant has not complied with all conditions necessary to legally practice law.

The petitioner and amicus The Defender Initiative have extensively discussed the important constitutional issue presented here and the related need to grant review because the Court of Appeals misinterpreted this Court's decision in *City of Seattle v. Ratliff*, 100 Wn.2d 212, 667 P.2d 630 (1983). *Amicus* ACLU-WA wishes to add only the following supplemental points.

The Court of Appeals suggested that what happened in *Ratliff* was a more serious denial of counsel than shown by the facts of the present case. But if anything, this case presents a much greater threat to the integrity of the criminal justice system and protection of the right to counsel than did *Ratliff*. An isolated incident in a misdemeanor case spawned *Ratliff*: a municipal court judge prevented a licensed legal intern from contacting a supervisor as was required for the intern to proceed. The

¹ Identical issues are presented in the motion for discretionary review pending before this Court in *In re the Personal Restraint of Justin Lewis*, No. 99939-2.

present case arises in the context of ongoing unauthorized representation of criminal defendants in felony cases by a person knowingly hired by a county to represent indigent defendants even though he was not qualified to practice in Washington and never took the necessary steps to become qualified. It also involves the trial court and prosecutor most likely knowing (and certainly on notice to know) that the person was not qualified to practice in Washington. Contrary to the Court of Appeals' conclusion, this situation did emphatically create the presumptive undermining of the constitutional right to counsel recognized in *Ratliff* and requires a finding of actual denial of counsel without any need to show prejudice.

The Court of Appeals' truncated view of the threat to the right to counsel in the present case also led that court to erroneously find that *Solina v United States*, 709 F.2d 160, (2d Cir. 1983) supported denying Mr. Ayerst's petition. *Ayerst*, 486 P.3d 946 ("The federal court reasoned the concept of prejudice was inapplicable because Mr. Solina's case involved an inherent conflict of interest.") This was incorrect: the *Solina* court, addressing a situation where the person representing the criminal defendant, unknown to the defendant, was actually not a member of any bar but had been to law school, said *if* the standard to be applied was harmless error, it would not be satisfied. 709 F.2d at 164-65. But the court

in *Solina* concluded that it was obligated instead to apply a *per se* rule of outright denial of counsel due to the meaning of “counsel” in the Sixth Amendment as interpreted by Supreme Court authority. *Id.* at 168-69. *Solina* thus supports the claim that this Court should apply here, as it did in *Ratliff*, the *per se* rule.² This Court should grant review and vacate the conviction on this ground.

B. This case presents additional issues of public importance regarding this Court’s regulation of those who practice law, particularly those who represent criminal defendants, and the duty of courts of this state to enforce the court rules.

In *Ratliff*, this Court discussed at length its inherent and plenary constitutional power to determine the conditions under which persons may practice law in this state. 100 Wn.2d at 215-216. Of great importance in the present case, those statements of the Court’s broad powers in this arena were made in the context of a claim that a person who was

² Even if the presence of the considerations of potential conflict that the Court of Appeals drew from *Solina* should determine the outcome, in the present case they would require overturning the conviction. *Solina* made clear that this point was not about the competence of counsel but rather structural constraints on counsel’s performance. In *Solina*, the constraints were found to be theoretical but not real. Here, they were all too real: Mr. Van Idour might well have been committing a crime, and as he was practicing without a Washington license or any recognized exception he was at the mercy of local authorities, including judge and prosecutor, thus creating just the kinds of dangers the Court of Appeals felt were necessary for Mr. Ayerst to be granted relief.

prevented from following the rules for being a properly qualified counsel for an accused person rendered the proceeding essentially void.

Since *Ratliff*, this Court has significantly modified the qualifications for persons representing the accused at public expense. In the exercise of its powers to promulgate mandatory court rules and its corollary powers to regulate the practice of law, the Court has established detailed qualifications that criminal defense counsel must possess and publicly certify they meet. *See* “Standards for Indigent Defense” promulgated “to address certain basic elements of public defense related to the effective assistance of counsel” CrR 3.1 Stds (Preamble). Standard 14 requires that all persons representing criminal defendants at public expense meet “minimum professional qualifications,” and, not surprisingly, the first one listed is: “Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court.” In addition to many other requirements listed in Standard 14 (including familiarity with court rules), counsel covered by these standards must certify quarterly that they meet all of the qualifications this Court has established.

This Court recently discussed duties under the Indigent Defense Standards:

Court rules [...] provide, “Before appointing a lawyer for an indigent person, or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services.” CrR 3.1(d)(4); CrRLJ 3.1(d)(4); JuCR 9.2(d). Our standards for indigent defense apply to any attorney appointed by the court to provide public defense representation.

Davison v. State of Washington, 196 Wn.2d 285, 298-99, 466 P. 3d 231

(2020). As with all court rules, the courts have a role and a duty in implementation and enforcement of these rules and standards.³

The Indigent Defense Standards and the general Admission to Practice Rules show that this Court has acted deliberately to establish clear rules governing not only general qualifications for all who wish to practice law in Washington, but also very specific qualifications—presumably grounded in the perceived need to protect the constitutional right to counsel—for persons representing the accused at public expense. Sadly, the record in this case appears to clearly demonstrate that none of the Court’s relevant rules were complied with. Because the personal restraint petition at issue here involves a criminal prosecution, the facts do raise a significant constitutional issue, as described above and in the motion for

³ And while the Court in *Davison* held that the State Office of Public Defense (OPD) is not empowered to “sweep in and remediate” problems in the provision of trial level public defense, *Id.* at 301, OPD is surely not prohibited from documenting and seeking to remedy local issues through persuasion and other non-coercive means. Thus OPD can and should be an important participant in efforts to implement the standards.

discretionary review and amicus brief of The Defender Initiative. But these facts also pointedly raise the question of enforcement of the Court's rules and the role played by the trial court and prosecutor in this case.

The record strongly suggests that the trial court and prosecutor knew—or at least certainly should have known—that the person purporting to represent Mr. Ayerst was not authorized to practice in Washington and did not meet the most basic of the Indigent Defense Standards. *See Ayerst Petition* (converted to motion for discretionary review) at 2. Neither of these important actors in the justice system, particularly the court, should be free to facilitate this, or even to passively allow it. With all due respect, looking the other way is not in the job description for these public servants; following and enforcing the rules set out by this Court is part of their jobs.

These issues are of public importance due to the Court's role in protecting the integrity of the justice system and also protecting the public, including any members of the public who may be accused of crimes. This Court should accept review to make clear that the Admission to Practice Rules and Indigent Defense Standards are mandatory and that courts and public prosecutors are duty-bound to make sure they are followed.

V. CONCLUSION

For these reasons, *Amicus* asks this Court to grant Petitioner Ayerst's Motion for Discretionary Review.

RESPECTFULLY SUBMITTED this 28th day of July, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of July, 2021, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts' Secure Portal.

Signed this 28th day of July, 2021 at Seattle, WA.

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