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Washington State Supreme Court

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No. 89657-7  
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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

ZAHID AZIZ KHAN,  
Petitioner.

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BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS

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 ORIGINAL

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**I.**  
**ISSUES PRESENTED**

1. May a Chief Judge of the Court of Appeals dismiss a personal restraint petition without making a finding that the petition is frivolous?
2. What standard should this Court apply to a finding that a petition is frivolous?

**II.**  
**STATEMENT OF THE CASE**

WACDL accepts the statement of the case set out in Mr. Khan's motion for discretionary review.

**III.**  
**ARGUMENT**

- A. THE ACTING CHIEF JUDGE OF THE COURT OF APPEALS HAD NO AUTHORITY TO DISMISS MR. KHAN'S PETITION WITHOUT A PROPER FINDING THAT THE APPEAL WAS FRIVOLOUS

The Chief Judge's ruling in this case took place in 2013, before the revised rules for personal restraint petitions went into effect on September 1, 2014.<sup>1</sup> Under either version of the rules the Chief Judge clearly erred.

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<sup>1</sup> As discussed in WACDL's motion for leave to file an amicus brief, undersigned counsel was the spokesman for WACDL's proposed revisions to the personal restraint petition rules, and I participated in the subcommittees that considered and modified those revisions.

Former RAP 16.11(a) states in part:

**(a) Generally.** The Chief Judge will consider the petition promptly after the time has expired to file petitioner's reply brief. The Chief Judge determines at the initial consideration if the petition will be retained or transferred to a superior court for determination on the merits or for a reference hearing . . .

**(b) Determination by Appellate Court.** The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing . . .

In Mr. Khan's case, the Acting Chief Judge (ACJ) dismissed the petition without finding that the petition was frivolous. That, in itself, should be grounds for reversal.

Further, the ACJ could not have found this petition frivolous under any reasonable interpretation of that standard. Mr. Khan suggests the standard for imposing terms in a civil appeal should apply.

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) *an*

*appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.”*

*Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986) (quoting *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)) (emphasis added). As Petitioner has amply demonstrated, he has raised debatable issues and reasonable minds could differ as to the result.

WACDL essentially agrees with that standard when the Court is considering whether the legal analysis is frivolous. The federal courts have used similar language in the context of habeas petitions. *See Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993) (dismissal is appropriate if the legal arguments are “indisputably without merit.”) This phrasing is a bit simpler than that used in *Green River*, and better geared to the postconviction setting.

A personal restraint petition may also be frivolous because of the factual allegations involved. Again, WACDL suggests that the Court apply the standards from federal habeas petitions. In *Blackledge v. Allison*, 431 U.S. 63, 76, 97 S.Ct. 1621, 1630, 52 L.Ed.2d 136 (1977), the federal district court dismissed without an evidentiary hearing a petition alleging breach of a plea bargain. The Supreme Court held that an evidentiary

hearing was appropriate because the factual allegations were not “palpably incredible.”

Although WACDL urges this Court to apply a meaningful standard for frivolousness, it strongly favors provisions that permit the courts to dismiss truly frivolous petitions because they waste judicial resources and hamper the appellate courts’ ability to give serious consideration to potentially meritorious claims. In subcommittee meetings regarding the proposed revisions, WACDL agreed with prosecutors that the opportunities for dismissal of frivolous claims should *increase*. New RAP 16.8.1(a) provides for a preliminary review of the petition. Subsection (b) states that “[t]he appellate court will dismiss the petition without requesting a response if it is clearly frivolous or clearly barred by RCW 10.73.090 or RAP 16.4(d).” These new provisions are designed to summarily eliminate obviously frivolous or procedurally barred petitions at the outset, without the need for further briefing. Petitions that make it past that first hurdle may still face dismissal if “after consideration of the response and any reply, the Chief Judge determines that the issues presented are frivolous.” RAP 16.11(b). These rules contemplate that a petitioner’s initial filing may appear plausible on its face, but that the opposing party’s response may prove otherwise. For example, a seemingly non-frivolous claim that the State breached a plea agreement

might become frivolous once the State submits a copy of the written plea agreement or a transcript of the plea hearing.

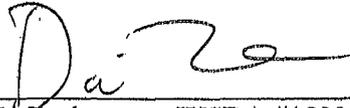
The provisions for dismissal of frivolous petitions benefit the parties and the appellate courts. But this carefully constructed system falls apart if Chief Judges take it upon themselves to dismiss petitions simply because they believe the petitioner should not prevail. If the petition is not frivolous, and cannot be decided on the existing record, the matter must be presented to a panel of judges. This provides the litigants with the improved decision-making that comes with a collegial process. If the petition cannot be decided without resolution of disputed facts, the Court must order a reference hearing. In this case, the ACJ appears to have decided both legal and factual issues on its own. Both the previous and revised rules prohibit such a practice.

#### **IV. CONCLUSION**

WACDL understands that this Court could decide this case without ruling on the propriety of the ACJ's actions. We ask that that the Court address this issue, however, in order to provide guidance to the court of appeals.

DATED 30th day of December, 2014.

Respectfully submitted,



David B. Zuckerman, WSBA #18221  
Attorney for Amicus Curiae

### CERTIFICATE OF SERVICE

I declare under penalty of perjury that on the date listed below I served by email and First Class U.S. Mail, postage prepaid, one copy of the foregoing brief on the following:

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12/30/2014

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## OFFICE RECEPTIONIST, CLERK

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**Subject:** State of Washington v. Zahid Aziz Khan; Supreme Court No. 89657-7

Dear Sir/Madame:

Enclosed for filing with the Washington State Supreme Court in *State of Washington v. Zahid Aziz Khan*, Supreme Court No. 89657-7, is the Brief of *Amicus Curiae*, as well as a Motion of Washington Association of Criminal Defense Attorneys to File *Amicus Curiae* Brief and to File an Untimely Brief.

Feel free to contact me with any questions or concerns.

Thank you for your kind consideration to this matter.

Best,

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