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April 25, 2014

VIA EMAIL
Ronald R. Carpenter
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
denise.foster@courts.wa.gov

Re: Comments to Suggested Amendments to Rules of Appellate Procedure

Dear Clerk Carpenter:

The Proposed Amendments to RAP 16 contain two flaws that will make the courts less efficient and less fair. Only small changes are required to eliminate this waste and unfairness:

1. The Court should ensure that ineffective assistance of counsel claims are fairly considered by requiring that non-frivolous claims: a) are referred to a panel if they can be decided on the record; or b) are referred for a reference hearing if they require factual development. Exhibit A (proposed new subsection (d) to RAP 16.11).

2. This Court should clarify that the standard for frivolous petitions under RAP 16 is consistent throughout the chapter and identical to the long-standing rule the Court reaffirmed in *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

My proposed alterations to the Suggested Amendments to RAP 16.11 are attached as Exhibit A.

A. Non-frivolous ineffective assistance of counsel claims should be decided by a panel or referred for a reference hearing

Washington law prevents evidence outside the trial record from being considered on direct appeal, so a PRP is the first real opportunity to raise an ineffective assistance of counsel

claim. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)(en banc); *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991)(en banc).

Since those raising ineffective assistance of counsel claims have had no prior opportunity for judicial review, IAC claims raised for the first time in a PRP should not have to meet heightened standards of review generally applied in PRPs. That is, a petitioner seeking review of an ineffective assistance of counsel claim for the first time "need show only that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c)." *In re Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004). This Court has already adopted this standard for PRPs raising issues that have not had prior judicial review, and the change to RAP 16.11 attached to this letter would incorporate that standard into the rules for IAC claims that have not had prior judicial review.

B. Frivolous should be defined to comport with the Court's precedent

The proposed revisions to RAP 16.11(b) and RAP 16.13 use, but do not define, the term "frivolous." Proposed RAP 16.8, however, uses the term "clearly frivolous." Since the terms are different, there will likely be confusion among courts and practitioners over the distinction between frivolous and clearly frivolous.

The Court should use the term "frivolous" and should clarify that frivolous under RAP 16 is synonymous with the standard reaffirmed in *Tiffany*, 155 Wn.2d at 241: a petition "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." All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id. See also* RAP 1.2 (requiring rule interpretation to further decisions "on the merits")

Adopting the *Tiffany* standard to PRP practice will help the Chief Judges. Since *Tiffany* pronounces a high standard that is clearly defined, it avoids forcing the Chief Judge to make a merits determination in conjunction with a finding of frivolousness. That is, a lower standard for frivolousness might force the Chief Judge to find or weigh facts in evaluating a petition, violating well-established law that the court of appeals is "constitutionally prohibited from substituting its judgment for that of the trial court in factual matters." *Streater v.White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

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It would be unfair to grant those under restraint—who are likely raising constitutional issues—less protection than civil appellants. This Court should adopt a single definition of "frivolous" for RAP 16, and it should be the same standard this Court announced in *Tiffany*.

Very truly yours,

/s/ Harry Williams IV

Harry Williams IV
hwilliams@kellerrohrback.com

HJW:kas
Attachment

EXHIBIT A

Suggested Amendment to RAP 16.11

RAP 16.11

PERSONAL RESTRAINT PETITION—CONSIDERATION OF PETITION

(a) [Unchanged.]

(b) [Unchanged.]

(c) **Frivolous Defined**. In determining whether the petition is frivolous under Title 16, the Chief Judge shall be guided by the following considerations: (1) a petitioner has a right to petition under RAP 16.4 for an appropriate remedy; (2) all doubts as to whether the petition is frivolous should be resolved in favor of the petitioner; (3) the record should be considered as a whole; (4) a petition is not frivolous merely because the court eventually rejects the arguments it presents; (5) a petition is frivolous if there are no debatable issues upon which reasonable minds might differ and is totally devoid of merit such that there is no reasonable possibility that relief will be granted.

(d) **Review of Ineffective Assistance of Counsel Claims**. If the petition presents ineffective assistance of counsel issues stemming from proceedings in which the right to counsel is guaranteed, the Chief Judge shall take the following actions: (1) where the ineffective assistance of counsel issues in the petition have not received prior judicial review and the petition can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits; (b) if the petition cannot be determined solely on the record, the Chief Judge shall transfer the petition to a superior court for a determination on the merits or for a reference hearing. Petitions will be reviewed in light of RAP 1.2. All doubts as to whether the petition is frivolous should be resolved in favor of the appellant.

(e) **Oral Argument**. Decisions of the Chief Judge will be made without oral argument. If a petition is to be decided on the merits by a panel of judges, the appellate court clerk will set the petition for consideration by the panel of judges, with or without oral argument. If oral argument is directed, the clerk will notify the parties of the date set for oral argument.