From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 29, 2014 8:33 AM
To: [redacted]
Subject: FW: Rule Comment: proposed alternate amendments to RAP 16.7

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From: Wise, Donna [mailto:Donna.Wise@kingcounty.gov]
Sent: Monday, April 28, 2014 5:23 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Rule Comment: proposed alternate amendments to RAP 16.7

Mr. Ronald Carpenter
Clerk, Washington Supreme Court

April 28, 2014

Re: Rule Comment: proposed alternate amendments to RAP 16.7

Dear Mr. Carpenter:

I write to express my personal opposition to the proposed alternate amendments to RAP 16.7, which have been offered by the Washington Association of Criminal Defense Attorneys. I have been a prosecutor for more than 25 years and have responded to a good number of collateral attacks. The amendments in the proposed alternate rule represent a radical expansion of collateral attacks on criminal convictions, contrary to this Court's established rules and contrary to the policy of this Court and of the legislature, recognizing the importance of finality of criminal convictions.

The proposed alternate amendment to RAP 16.7(2) appears to authorize relief from a conviction based on evidence that would not be admissible under the Rules of Evidence. Such a rule is contrary to the existing legal standard adopted by this Court. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886 (1992). This Court held in Rice that courts should be able to "avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact." Id. The Court concluded that "the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." Id. The proponent has offered no compelling reason to expand the basis for relief to include any information or assertion that can be characterized as reliable, but is necessarily less reliable than evidence that would be admissible under the Rules of Evidence.

The proposed alternate amendment to RAP 16.7(4) would apply the rules of discovery that this Court has adopted specifically for persons under sentence of death to every convicted defendant, by incorporating RAP 16.26. The proposed rule's provision for appointed counsel for purposes of discovery is contrary to the statutory limitation in RCW 10.73.150(4), that counsel be appointed only if the appellate court determines that the issues raised in a petition are not frivolous. Notably the Supreme Court cases upon which the proponent of the rule relies specifically hold that a habeas petitioner "is not entitled to discovery as a matter of

course," Bracy v. Gramley, 520 U.S. 899 (1997), and broad-ranging preliminary discovery "is neither necessary nor appropriate in the context of a habeas corpus proceeding." Harris v. Nelson, 394 U.S. 286, 297 (1969). As the judges of the Court of Appeals Rules Committee note, this provision would lead to routine requests for counsel to pursue discovery with the filing of all petitions, creating a substantial burden on the appellate courts.

Thank you for considering my comments.

Donna Wise
Senior Deputy Prosecuting Attorney
King County Prosecutor's Office