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Honorable Ronald Carpenter
Temple of Justice
Post Office Box 40929
Olympia, Washington
98504-0929

April 28, 2014

Re: Suggested Amendment to RAP 16.7

Dear Clerk Carpenter:

The Washington Association of Prosecuting Attorneys (WAPA) supports the adoption of Washington State Board of Governor's proposed version of RAP 16.7. WAPA opposes the alternative proposal offered by the Washington Association of Criminal Defense Attorneys ("WACDL").

WACDL's proposal seeks to overrule a century long line of cases that require an individual who seeks to collaterally attack a judgment or to obtain a new trial based upon new evidence must support his motion with admissible evidence. *See, e.g., In re Rice*, 118 Wn.2d 876, 886 (1992) (a petitioner "must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief"); *State v. Jackman*, 113 Wn.2d 772, 777 (1989) (it is improper for a court to rely on inadmissible hearsay when ruling on a motion for new trial); *McUne v. Fuqua*, 42 Wn.2d 65, 74(1953) ("A new trial should not be granted on the ground of newly discovered evidence where the proposed evidence would be inadmissible."); *Md. Casualty Co. v. Seattle Elec. Co.*, 75 Wash. 430 (1913) (improper to entertain a motion for new trial that is not supported by competent affidavits; stenographic record of hearsay statements not a substitute for competent affidavits).

This Court has long required "a clear showing that an established rule is incorrect and harmful before it is abandoned." *State v. Nuñez*, 174 Wn.2d 707, 713 (2012). WACDL has not demonstrated that the current admissible evidence rule is either incorrect or harmful. The current admissible evidence rule is correct in that it promotes the finality of judgments, a principle that this Court has recognized as important. The current admissible evidence rule "especially important" principle of finality of judgments. *In re Personal Restraint of Haghighi*, 178 Wn.2d 435, 448 (2013). The current admissible evidence rule avoids confusion by applying the same standard for collateral attacks in the appellate courts and in the trial courts. The current admissible evidence rule also acknowledges that the hearsay exceptions codified in ER 803 serve to identify what

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evidence is "reliable."

The discovery provision in WACDL's proposal is breathtaking in scope. The rule, as written, directs the appointment of counsel for discovery in all but second or subsequent PRPs. This is contrary to RCW 10.73.150(4), which limits the statutory right to counsel to those cases in which the petition is not frivolous.

The discovery provision in WACDL's proposal incorporates, through its reference to RAP 16.26, all the discovery mechanisms contained in the civil rules. This scope of discovery is both more sweeping than is currently authorized in the initial criminal case, *compare* CrR 4.6 and CrR 4.7 with CR 26-37, and is less respectful of the rights of crime victims and witnesses. Mandating discovery post-conviction in non-death penalty cases is contrary to existing precedent which does not sanction compelling witnesses to provide evidence post-trial. *See, e.g., State v. Wilson*, 42 Wash. 56 (1906), *aff'd*, 46 Wash. 416 (1907) (A petitioner is not excused from presenting competent evidence in support of a claim merely because necessary individuals will not speak to him).

Although WACDL insinuates that its discovery provision is constitutionally required, the case law does not support WACDL's claim. *See generally Weatherford v. Bursey*, 429 U. S. 545, 559-561 (1977) ("There is no general constitutional right to discovery in a criminal case"); *Harris v. Nelson*, 394 U.S. 286, 295 (1969) (no general right to discovery in habeas corpus cases); *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 390-91 (1999) (no constitutional right to discovery in collateral attacks); *State v. Tyler*, 77 Wn.2d 726, 736 (1970), *vacated in part on other grounds*, 408 U.S. 937 (1972) (no general right to discovery in criminal cases). In fact, an individual does not have a constitutional right to have any court look beyond the face of the judgment and sentence. The sole authority for a court to consider extra-record information in a collateral attack arises from the Legislature's act of grace. *See generally In re Runyan*, 121 Wn.2d 432, 441-42 (1993); RCW 7.36.130. WACDL's desire to further expand the scope of collateral attacks should be addressed by that body.

Thank you for considering WAPA's comments.

Sincerely,



Pamela B. Loginsky
Staff Attorney