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November 19, 2013

Justice Charles Johnson
Chair of Rules Committee
Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, WA 98504

Re: Proposed Revision to RAP 16.7

Dear Justice Johnson:

Justice Wiggins has informed me that the Supreme Court's Rules Committee has agreed to put off consideration of the proposed PRP revisions, in part to permit consideration of WACDL's proposal for RAP 16.7. Justice Wiggins noted that I could provide the committee with additional support for WACDL's position if I wish.

Enclosed is the cover sheet I provided to the WSBA Rules Committee in support of this proposed rule. It includes all of the information I provided to you last month in my letter of October 25, along with some additional points, so there is no need to review the letter when you meet again. For convenience, I have also enclosed another copy of WACDL's proposed rule.

I thank you and the other members of the committee for your consideration of our proposal.

Sincerely,

David B. Zuckerman
WACDL Spokesperson

Enclosure
cc: Chief Justice Barbara Madsen, Justice James Johnson, Justice Charles Wiggins, Justice Susan Owens, Justice Sheryl Gordon McCloud

GR 9 COVER SHEET
WACDL'S SUGGESTED CHANGES TO RAP 16.7

Name of Proponent

The Washington Association of Criminal Defense Lawyers (WACDL)

Spokesperson

David B. Zuckerman, 705 Second Avenue #1300, Seattle, WA 98104 (telephone: 206-623-1595)

Purpose

In 2011, WACDL submitted to the Washington Supreme Court a comprehensive set of proposed changes to the rules for Personal Restraint Petitions (PRPs), RAP 16.3 through 16.27. The Court requested that the WSBA Rules Committee review the proposals. An ad hoc subcommittee chaired by Ann Summers was convened for that purpose. Starting in October , 2012, work on the PRP rules continued as part of the WSBA Rules of Appellate Procedure subcommittee.

The subcommittee reached consensus regarding all of the PRP rules other than certain parts of RAP 16.7. As to that rule, the subcommittee has submitted a proposal that reflects changes on which there was agreement. The following proposed rule includes the subcommittee's changes, with WACDL's additional changes in boldface.

WACDL's proposals are designed to remedy the unfairness of requiring a petitioner – who may often be a pro se prisoner – to meet a high burden of proof at the initial filing stage of his petition. Washington judges have at times interpreted *In re Personal Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992) to require dismissal of a petition unless it is fully supported by evidence that would be admissible under the Rules of Evidence. It is unreasonable to expect a prisoner to obtain such evidence from the confines of his prison cell, especially when he generally has no ability to compel information from anyone.

Washington's current practice is inconsistent with that in most jurisdictions. The federal courts, for example, require only that a federal postconviction petitioner set out his grounds for relief and "state" the facts supporting his claim. See Rule 2, Rules Governing Section 2255 Cases In the United States District Courts. The petitioner may then move for discovery upon a showing of good cause. Rule 6. "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is...entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997), quoting *Harris v.*

Nelson, 394 U.S. 286, 300 (1969). The procedures under the Uniform Post-Conviction Procedure Act are similar.

For example, suppose a prisoner alleges that his trial attorney was ineffective in failing to present the testimony of a highly exculpatory witness. The prisoner supports this with a report from the attorney's investigator explaining what the witness would say and urging the attorney to subpoena the witness. He also alleges that the attorney told him he simply forgot to send the subpoena. Neither the attorney nor the witness will respond to mail from the prisoner. Some Washington appellate judges would dismiss the petition because the claim is not supported by sworn declarations from the witness and the attorney.

WACDL's proposal remedies this problem in two ways. First, proposed RAP 16.7(a)(2) clarifies that the evidence presented with the petition must be "reliable" but need not be "admissible under the Rules of Evidence." For example the statement of a witness contained in a police report or in a memo from a licensed investigator might be considered reliable even though it is hearsay. The petitioner will be held to the Rules of Evidence, however, if he obtains a reference hearing. *See* RAP 16.12. WACDL's change may in some cases favor the prosecution because the State could argue that certain submissions are not reliable even though they are in the form of sworn statements.

Second, proposed RAP 16.7(a)(4) permits the Court to grant discovery prior to granting a reference hearing, when material evidence is not available to a party because it is in the possession of others. For example, if the prisoner presents a substantial reason to believe that the prosecutor withheld an exculpatory document, the Court could order the State to produce it, or to state under oath that it does not exist. This provision will also assist the prosecution, particularly when the prisoner claims ineffective assistance of counsel. If the attorney declines to defend himself, the State currently has no means to compel an interview.

The provision for assistance of counsel in seeking discovery will likely be used very sparingly, but in some cases it could help to resolve a petition without the need for a reference hearing. For example, if the petitioner makes a compelling showing that a particular uncooperative witness would likely exculpate him if required to give a statement, the Court could appoint counsel solely for the purpose of taking a deposition of that witness.

The current PRP rules raise constitutional concerns under Const. Art. I, section 10. "[The] right of access to courts includes the right of discovery authorized by the civil rules. As we have said before, it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (citations and internal quotations omitted). "Requiring medical malpractice plaintiffs to submit a certificate [of merit from a medical expert] prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed." Id. (citation omitted). It follows with greater force that requiring a pro se prisoner to establish a full, prima facie personal restraint claim without discovery violates his right of access to the courts.

RAP 16.7 PERSONAL RESTRAINT PETITION—FORM OF PETITION

(a) Generally. Under the titles indicated, the petition should set forth:

(1) *Status of Petitioner.* The restraint on petitioner; the place where petitioner is held in custody, if confined; the judgment, sentence, or other order or authority upon which petitioners restraint is based, identified by date of entry, court, and cause number; any appeals taken from that judgment, sentence or order; and a statement of each other petition or collateral attack as that term is defined in RCW 10.73.090, whether filed in federal court or state court, filed with regard to the same allegedly unlawful restraint, identified by the date filed, the court, the disposition made by the court, and the date of disposition.

(2) *Grounds for Relief.* A statement of (i) the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations, ~~(ii) why other remedies are inadequate,~~ and (iii) why the petitioners restraint is unlawful for one or more of the reasons specified in rule 16.4(c). **The evidence supporting the claim must be reliable but need not be admissible under the Rules of Evidence.** Legal argument and authorities may be included in the petition, or submitted in a separate brief as provided in rule 16.10(a).

(3) *Citations to Court Documents.* If some of the evidence supporting the factual allegations is contained in the files of the superior court or the Court of Appeals, the petitioner should identify the documents needed for review and the case numbers under which they can be found. The appellate court may order that any court documents identified for review be transferred or transmitted to the court.

(4) *Discovery.* If material evidence supporting or rebutting the petitioner's claims is not available to a party because it is in the possession of others, the party may file a motion for discovery. The procedures and standards of RAP 16.26 (discovery in capital cases) apply, except that the motion may not be filed before the petition has been filed. If the petitioner is indigent, the court may order the appointment of counsel for the limited purpose of pursuing specified discovery, unless prohibited by RCW 10.73.150.

(5) *Statement of Finances.* If petitioner is unable to pay the filing fee or fees of counsel, a request should be included for waiver of the filing fee and for the appointment of counsel at public expense. The request should be supported by a statement of petitioner's total assets and liabilities.

~~(4)~~ (6) *Request for Relief.* The relief petitioner wants.

~~(5)~~ (7) *Oath.* ~~If a notary is available,~~ The petition must be signed by the petitioner or his attorney and verified ~~substantially as follows~~ under penalty of perjury. The verification may be in the following form:

~~After first being duly sown, on oath, I depose and say:~~ I declare under penalty of perjury under the laws of the State of Washington that I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true

or

~~After first being duly sown, on oath, I depose and say:~~ I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

[Signature]

Signed this _____ *[date]* at _____ *[place]*.

~~Subscribed and sworn to before me this ___ [date].~~

~~Notary Public in and for the State of Washington, residing at _____.~~

~~If a notary is not available, the petition must be subscribed by the petitioner or his attorney substantially as follows:~~

~~I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.~~

~~Dated this ___ [date].~~

~~[Signature]~~

If ~~a notary is available and~~ a petition is filed that is not verified, the appellate court will return the petition for ~~verified signature and advise the petitioner's custodian to make a notary available~~ verification.

~~(6)~~ (7) *Verification.* In all cases where the restraint is the result of a criminal proceeding and the petition is prepared by the petitioner's attorney, the petitioner must file with the court no later than 30 days after the petition was received by the court a document that substantially complies with the following form:

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this ___ [date]_____.

[Signature]

If the petitioner has been declared incompetent, the verification may be filed by the guardian ad litem. If a petition has been filed to determine competency, the verification procedure shall be tolled until competency is determined.

(b) **Standard Form.** The clerk of the appellate court will make the standard form of petition available to persons who are confined in state institutions and to others who may request the form.

(c) **Length of Petition.** The petition should not exceed 50 pages.