PERSONAL RESTRAINT PETITION CONSIDERATIONS

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When one looks at the published decisions of the Washington appellate courts, one thing is clear – the vast majority of the cases never reach the substantive claim or, if they do, the error is deemed harmless. My ***personal*** opinion is the remedy of post-conviction relief for our indigent clients is mostly illusory. As a result, punctilious compliance with RAP Title 16, RCW Title 10.73. required. It pays to reread these provisions every time you draft a PRP.

But I do have some suggestions for litigation that can perhaps start to remedy this problem.

1. You have to make sure the entire record that informs your issue is in the appendix to the PRP. If the client has completed a direct appeal, move to transfer the clerk's papers and VRP to the new PRP cause number so you do not have to resubmit matters that are already easily accessible to the appellate court. I have never had a motion to transfer denied.

2. You have to have as much of your investigation completed as is humanly possible ***before*** you file. Pursuant to *In Re Rice*, 118 Wash. 2d 886, 828 P.2d 1086 (1992), a petitioner must state with particularity facts that, if

proved, would entitle the petitioner to relief. “Bald assertions and conclusory allegations” are not sufficient. *Id*. If the evidence is based on knowledge in the possession of others, the petitioner must present their affidavits with admissible statements or other corroborative evidence. *Id*. And only by showing that the petitioner has admissible evidence supporting the facts stated in the petition may the petitioner obtain a reference hearing to resolve factual disputes. *Id*.

And the petitioner’s own declaration of regarding ineffective assistance is not enough. A defendant’s “self-serving affidavit is insufficient to support a claim of ineffective assistance of counsel.” *State v. Osborne*, 102 Wash .2d 87, 97, 4 P.2d 683 (1984).

3. But - there is no mechanism for a client who wishes to file a PRP to use customary discovery rules and procedures when investigating. You do not have subpoena power. You cannot note depositions. With an indigent client, you do not have access to funds for consulting with experts. So, if you cannot complete your investigation under those circumstances, you have to file what you have and ask the Court of Appeals for the funds and permission to use particular discovery tools to complete your investigation. Such a motion should include what you seek to discover and why you cannot get it (e.g. trial attorney will not talk to you, prosecutor will not provide

his/her unredacted file). You also need to ask for the funds for funds for an investigator, and if need be, an expert.

4. *Rice* applies equally to the State and I do not see enough people arguing that the State has not met its burden under *Rice*. "The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State ***must meet the petitioner's evidence with its own competent evidence***. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions." *In re Rice* at 886–87.

5. You must also *always* ask for a remand for an evidentiary hearing in the superior court. Ask for one in every case. If you do not you will never get review in federal court. More on that later.

6. In my view, *In Re Rice*, is wrongly decided on several grounds but in particular on an equal protection basis. In *Rice* the Court made a policy choice. All RAP 16.7 (2) requires is: "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, and (ii) why the petitioners restraint is unlawful for one or more of the reasons specified in rule 16.4(c)."

The Court took the words “the evidence available” and imposed the following policy decision on indigent defendants (keep in mind Rice as a capital case and had appointed counsel):

> As for the evidentiary prerequisite, we view it as enabling courts to avoid the time and expense of a reference hearing when the petition, ***though facially adequate,*** has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner believes will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. he affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

In essence *Rice* requires you to prove your claim – without funds or discovery tools - before you even get an evidentiary hearing. Now imagine you are an indigent defendant in prison with no access to a real law library, perhaps not fluent in English or with intellectual disabilities, and ask yourself if that person has a realistic opportunity to comply with *Rice*. And contrast that to a person in custody who has the funds to hire a lawyer on the outside to work up her claim. You see the problem and we should be asking the court to reexamine *Rice* and the lack of discovery tools available to our clients.

7. Ineffective assistance of counsel claims are particularly problematic and we should be arguing that counsel must be appointed and an investigation funded for every IAC claim. Washington forces almost all IAC claims into post-conviction proceeding because most IAC occurs outside the trial record. *State v. McFarland*, 127 Wash. 2d 322, 338, 899 P.2d 1251, 1258 (1995). And even if the poor performance is on the record, the State or the appellate court will conjure up some basis to call the failures "strategic." So you need evidence to demonstrate that no legitimate strategic decision was made.

Counsel should be arguing that the current PRP system deprive them of their right to appeal under Const. Art. 1, §22.

Where the state has granted a defendant - whether rich or poor – an appeal as a matter of right an indigent appellant is entitled to the appointment of competent counsel. *Douglas v. People of State of Cal.*, 372 U.S. 353, 356, 83 S. Ct. 814, 816, 9 L. Ed. 2d 811 (1963). *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 591, 100 L. Ed. 891 (1956). As a result, indigent criminal defendants in Washington are appointed counsel and provided with trial court record at public expense for

a direct appeal. See also *Draper v. State of Wash.*, 372 U.S. 487, 488, 83 S. Ct. 774, 775, 9 L. Ed. 2d 899 (1963).

But in Washington's post-conviction scheme, petitioners are not appointed counsel unless petitioner requests counsel (and only after the chief judge has determined that the issues raised by the petition are not "frivolous.") RCW 10.73.150(4). By contrast, petitioners with with money hire counsel to draft the initial personal restraint petition. And petitioners with counsel are less likely to find their petitions frivolous. See e.g. *In re Caldellis*, 187 Wash. 2d 127, 135, 385 P.3d 135, 140 (2016)(petitioner represented by counsel demonstrated petition was not frivolous); *In re Khan*, 184 Wash. 2d 679, 685, 363 P.3d 577, 580 (2015)(same).

8. Your client will not get federal review of a federal constitutional claim if you do not investigate, make sure every essential item necessary to your claim is before the state court, if something is missing, explain why your investigation cannot be completed under the current rules and ask for an evidentiary hearing.

The recent decision in *Shinn v. Ramirez* involves the separate cases of Jones and Ramirez, both of whom were convicted and sentenced to death in Arizona. Both men received abysmal legal assistance during their trials. Both of their lawyers failed to raise IAC claims during state post-conviction

proceedings — the time to raise ineffective assistance of counsel claims. Because of this, Jones and Ramirez sought relief in federal court. Under the previous decision in *Martinez v. Ryan,* federal habeas petitioners could argue they were entitled to claim their post-conviction lawyer was IAC in failing to properly raise claims in state court post-conviction and get an evidentiary hearing to flesh out the evidence of IAC.

NO MORE. "A federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on ineffective assistance of state post-conviction counsel," Justice Clarence Thomas wrote for the majority, adding that "serial relitigation of final convictions undermines the finality that 'is essential to both the retributive and deterrent functions of criminal law.'" He also talks a lot about respecting the state court and federalism.

Jones is very likely innocent but will now be put to death.

This is particularly troubling since, as described above, indigent petitioners have very little chance of fulling litigating their claims trial counsel was ineffective.

9. Finally, you have to all of this within one year of any mandate on direct appeal. I include some paragraphs from an unpublished decision about a PRP that was filed ONE day late.

> The mandate in the criminal case against Oakes was issued on January 15, 2016, making the judgment final on that date. RCW 10.73.090(3)(b). That day was a Sunday and the next day was a holiday. Oakes had to file his petition no later than January 17, 2017, to comply with the statutory one-year limit. RAP 18.6(a). Oakes mailed the petition on Tuesday, January 17, 2017. It reached this court and was filed on January 18, 2017, one day after the time limit expired.
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> Oakes contends the time for filing should be extended under RAP 18.8(b). This is not permitted. The one-year time limit of RCW 10.73.090 is a statutory limitation period. Courts do not have the authority to waive statutory limitation periods, as opposed to time limits set down in court rules. State v. Robinson, 104 Wn. App. 657, 665, 17 P.3d 653, review denied, 145 Wn.2d 1002 (2001). The statutory time limit is a mandatory rule that acts as a bar to appellate court consideration of collateral attacks, unless the petitioner shows that an exception under RCW 10.73.100 applies. Robinson, 104 Wn. App. at 662. Oakes' untimely filing does not come within any of the exceptions.
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> Alternatively, Oakes contends the time limit was tolled. The one-year limit in RCW 10.73.090(1) is subject to equitable tolling. In re Pers. Restraint of Bonds, 165 Wn.2d 135, 143, 196 P.3d 672 (2008). Equitable tolling is an exception to a statute of limitations that should be used "sparingly." Bonds, 165 Wn.2d at 141. The predicates for equitable tolling are bad faith, deception, or false assurances, along with the exercise of diligence by the party who seeks to be exempted from the time limit. Bonds, 165 Wn.2d at 141; Robinson, 104 Wn. App. at 667. Equitable tolling should not be applied to a garden variety claim of excusable neglect. Robinson, 104 Wn. App. at 667, 669.

Matter of Oakes, 4 Wash. App. 2d 1010 (2018) unpublished.