

Avoiding PRP Pitfalls

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Learning Objectives

At the end of this CLE you will have a basic knowledge of:

- ▶ PRP Processing
 - ▶ Internal court procedures and PRP timeline
 - ▶ Applicable RAPs
- ▶ Procedural Pitfalls
 - ▶ Identification
 - ▶ Avoidance tools
- ▶ Prison Infractions/Conditions of Confinement
 - ▶ Differences from normal PRPs
 - ▶ Update on current WA Supreme Court standards

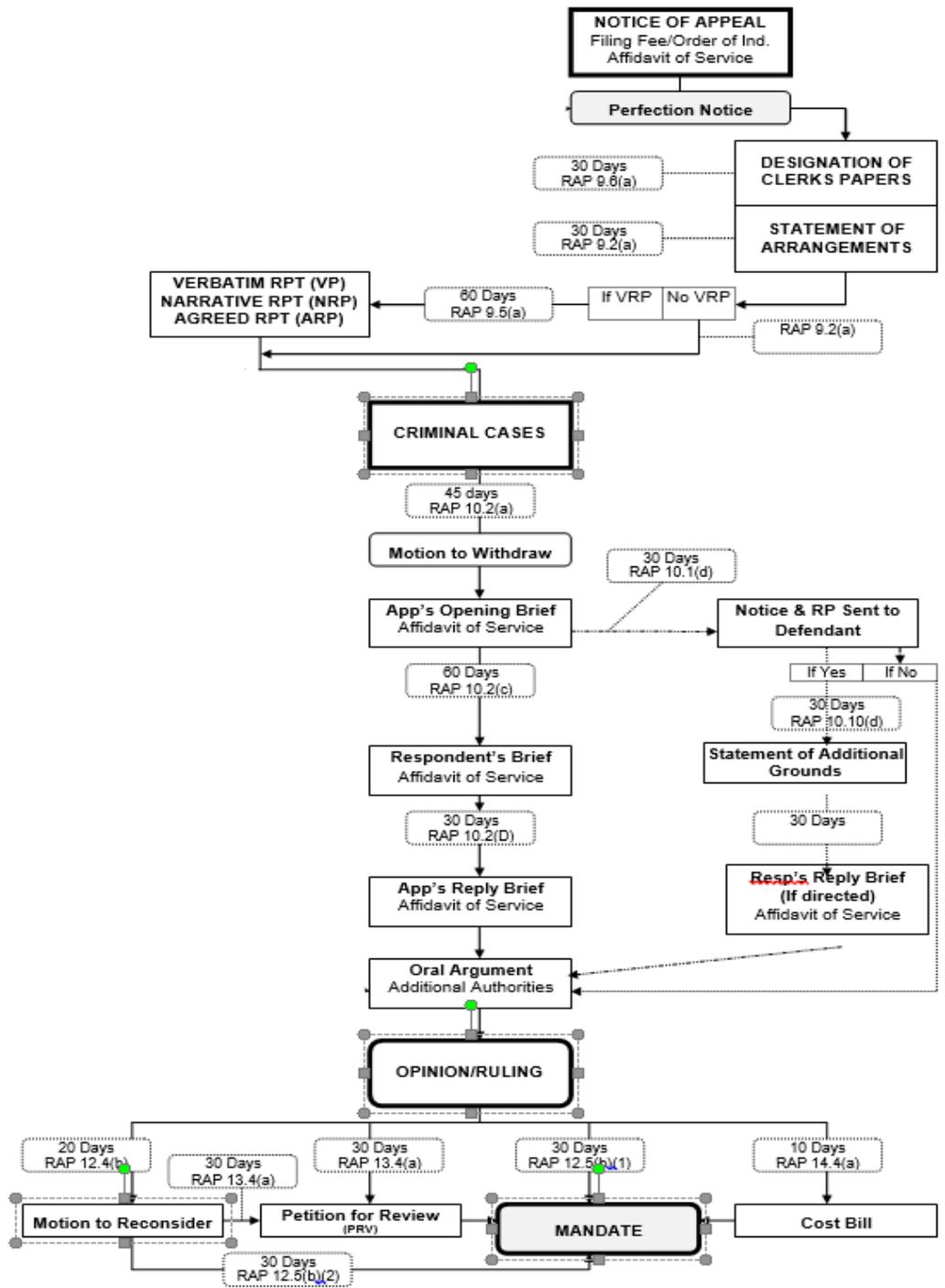
Roadmap

1. Overview of appellate court processes and court rules
2. Statute of limitations and tolling
3. Time-bar exceptions and mixed petitions
4. Frivolousness and prejudice
5. Evidentiary pitfalls
6. How to get a reference hearing
7. Youthfulness: Pending cases
8. Prisoners' rights: standards and statutes
9. Prisoners' rights: constitutional issues

Overview of Appellate Court Processes and Court Rules



Direct Appeal Flowchart



What Is a PRP?

- ▶ Short for personal restraint petition
- ▶ Codified in RAP Title 16 and RCW 10.73.090 - 10.73.140
- ▶ Modern version of the English writs of *audita querela* and *habeas corpus ad subjiciendum*
- ▶ Supersedes and expands upon the old writs
 - ▶ RAP 2.1(b) and 16.3(b), writs superseded.

Why File a PRP?

- ▶ To submit evidence outside the record on appeal
- ▶ To develop a claim of ineffective assistance of trial/appellate counsel
- ▶ To receive the benefit of a new change in law
- ▶ Relief from decision not otherwise subject to judicial review
 - ▶ Prison discipline, prison-based DOSA revocation
 - ▶ Credit calculation/apportionment
 - ▶ Community Custody/ISRB decisions
 - ▶ Post-conviction conditions of confinement

When Not to File a PRP?

- ▶ When the petitioner has other avenues for relief
 - ▶ Pretrial rulings (bail, suppression, speedy trial)
 - ▶ LFO remission/return of funds
 - ▶ Untried felony/misdemeanor; warrant quash
- ▶ When the petitioner is not under “restraint” RAP 16.4(b)
 - ▶ “Restraint” broadly includes any collateral consequence of a conviction
- ▶ When the petitioner has no vested right
 - ▶ Security classification
 - ▶ Prison assignment
- ▶ When the court cannot provide effective relief

Where Can I Find a Form?

- ▶ Forms are available on the courts.wa.gov RAP page:
 - ▶ https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP
- ▶ Use form 17 for PRPs:
 - ▶ https://www.courts.wa.gov/court_rules/pdf/RAP/APP_RAP_FORM17.pdf

How Does a PRP Differ from an Appeal?

| Appeal | PRP |
|---------------------------------------|--------------------------------------|
| Direct action, but not original | Collateral original action |
| Most RAPs apply | Few RAPs apply, see RAP 16.17, 16.15 |
| Record limited to trial court docs | Record is what the pet'r attaches |
| Right to indigent counsel | Limited right to indigent counsel |
| 30 days to file | 1 year to file (mostly) |
| No discovery | Almost no discovery |
| Stricter error preservation standards | Unpreserved errors reviewable |
| Generous prejudice standards | Stricter prejudice standards |

PRP Filing

- ▶ File in the COA Division for the county where the judgment originated
 - ▶ If not in custody, file in the Division where petitioner resides. RAP 16.8(b).
 - ▶ COA will transfer to correct Division
- ▶ Failure to file oath/verification will delay review
- ▶ Failure to file a statement of finances (SOF) will delay review
 - ▶ Division III will usually transfer a recent prior SOF
 - ▶ Other Divisions used to do this (and may still)

PRP Filing

- ▶ Do not file in the Supreme Court. RAP 16.3(c).
 - ▶ SC will transfer to the COA
 - ▶ File in the COA and argue why transfer to the SC is required
- ▶ An erroneous CrR 7.8 transfer is not appealable. *See* RAP 2.2(a)
 - ▶ File in the COA a motion objecting to the transfer

Initial Screening, RAP 16.8.1

- ▶ Staff attorneys (SA) rotate screening duties
- ▶ Screening happens within days of referral to a SA
 - ▶ Triage for cases with likely merit or incorrectly filed
 - ▶ Decision may take longer to write and file
- ▶ Court will call up some documents on its own motion
 - ▶ J&S, plea form, CrR 7.8 pleadings
- ▶ Formatting deficiencies checked (e.g. overlength)
 - ▶ Most pro se formatting errors are overlooked

Calling for a Response

We call for a response if:

- ▶ there is a DOC/ISRB issue;
- ▶ there are records in the State's possession that would help resolve the issues;
or
- ▶ the petition is *not* “clearly frivolous,” “clearly” time-barred, or “clearly” barred by RAP 16.4(d) (other adequate remedies)
 - ▶ No opinion has defined “clearly frivolous”

Consideration of Petition, RAP 16.11

After receiving the response and any reply the court will:

- ▶ Deny the petition as “frivolous”;
- ▶ Refer the petition to a panel; or
- ▶ Transfer to superior court for a reference hearing

Reference Hearing, RAP 16.12

- ▶ COA will issue detailed order explaining the factual disputes to be resolved
- ▶ COA may retain PRP or have superior court retain PRP
- ▶ Written findings of fact required
- ▶ Hearing must be held in front of a new judge
- ▶ ERs and confrontation apply
- ▶ Prosecutor must promptly note up the hearing
- ▶ Discovery at the judge's discretion

Panel Referral

- ▶ Counsel appointed if the petition satisfies RCW 10.73.150
 - ▶ Not frivolous
 - ▶ First PRP
 - ▶ Petitioner requests counsel
- ▶ Supplemental briefing allowed if petitioner was previously pro se and counsel is appointed
- ▶ Supplemental briefing usually not allowed if petitioner remains pro se or counsel has been involved from the start

Supreme Court Review, RAP 13.5A

- ▶ RAP 13.4(b) criteria applies (conflict, significant constitutional question, substantial public interest).
- ▶ RAP 13.5(a) and (c) procedures apply to the motion.

Statute of Limitations and Tolling



RCW 10.73.090(3)

- ▶ Petition must be filed within one year of the last event:
 - ▶ Entry of judgement and sentence
 - ▶ Filing of mandate in COA
 - ▶ Denial of certiorari by U.S. Supreme Court
- ▶ Active debate: whether ministerial correction to J&S following appeal tolls the clock
 - ▶ “Where only corrective changes are made to a judgment and sentence by a trial court on remand” the time-bar begins to run upon issuance of the court of appeals mandate. *In re Pers. Restraint of Sorenson*, 200 Wn. App. 692, 699 (2017).

RCW 4.16.130

In re Pers. Restraint of Heck, 14 Wn. App. 2d 335 (2020), rev'w den. 196 Wn.2d 1047 (2021)

- ▶ Two-year civil catch-all
- ▶ Applies to all PRPs not challenging a judgment & sentence
- ▶ In other words: any PRP where DOC or ISRB would be respondent
 - ▶ Prison infractions
 - ▶ DOC/ISRB-imposed community custody conditions

Equitable Tolling

- ▶ Previously: equitable tolling required “the predicates of bad faith, deception, or false assurances.”
 - ▶ *In re Pers. Restraint of Haghghi*, 178 Wn.2d 435, 448-49 (2013).
- ▶ Now: tolling also available if petitioner “show[s] (1) that they diligently pursued their rights and (2) that an extraordinary circumstance prevented a timely filing.”
 - ▶ *In re Pers. Restraint of Fowler*, 197 Wn.2d 46 (2021).
 - ▶ *Fowler* involved attorney misconduct
 - ▶ Open question: PRA request delay/*Padgett* motions

Time-Bar Exceptions and Mixed Petitions

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RCW 10.73.100 and RCW 10.73.090(1)

1. Newly discovered evidence

PRP of Stenson, 153 Wn.2d 137, 145 (2004); *PRP of Lord*, 123 Wn.2d 296, 320 (1994).

2. Statute is unconstitutional facially or as-applied

PRP of Williams, 18 Wn. App. 2d 707 (2021).

3. Double jeopardy

PRP of Moi, 184 Wn.2d 575, 579 (2015).

4. Insufficient evidence (only applies to trials, not guilty pleas)

PRP of Martinez, 171 Wn.2d 354 (2011).

5. Sentence exceeded the court's jurisdiction

PRP of Vehlewald, 92 Wn. App. 197 (1998).

6. Significant, retroactive, change in the law material to the conviction or sentence

PRP of Colbert, 186 Wn.2d 614 (2016).

7. J&S is “facially invalid”

PRP of Coats, 173 Wn.2d 123 (2011); *PRP of Adams*, 178 Wn.2d 417 (2013).

Mixed Petitions

- ▶ A petition containing time-barred claims and time-bar exempt claims is “mixed”
- ▶ Mixed petitions are dismissed in their entirety
 - ▶ The court will not identify or resolve the otherwise timely claims
 - ▶ *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 703 (2003).
- ▶ Derived from the unique wording of RCW 10.73.100:
 - ▶ “The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based **solely** on one or more of the following grounds:”

Mixed Petitions

- ▶ Except: facial invalidity challenges, RCW 10.73.090(1), will still be resolved
 - ▶ *In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 220 (2003)
- ▶ Most mixed petitions are the result of untimely ineffective assistance claims
 - ▶ *In re Pers. Restraint Stoudmire*, 141 Wn.2d 342, 349 (2000)
 - ▶ *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 426 (2013)

Procedural Pitfalls: Frivolousness

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Khan Standard

In re Pers. Restraint of Khan, 184 Wn.2d 679 (2015)

- ▶ A PRP “is frivolous where it fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle.”
- ▶ “Even if a personal restraint petition raises legal issues that, out of context, are debatable, it still may be frivolous when there are clear independent grounds to dismiss”

Frivolousness Examples

- ▶ Untimeliness
- ▶ Not under “restraint”
- ▶ A “debatable showing of error without making any attempt to show the requisite prejudice.”
- ▶ Failure to show that it is in the “interests of justice” to reexamine an issue resolved on direct appeal
- ▶ Failure “to state with particularity the facts that would give rise to relief”

Frivolousness Examples

- ▶ “In any of these situations, a petition may be properly dismissed as frivolous even if the legal issue, properly raised, might be debatable.” *Khan* at 686.

Frivolousness Examples

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Frivolousness: Lack of Prejudice

- ▶ Petitioner has the burden of proving prejudice
- ▶ “In order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error. The court determines actual prejudice in light of the totality of circumstances. Those circumstances include the jury instructions given, the arguments of counsel, weight of evidence of guilt, and other relevant factors in evaluating whether a particular instruction caused actual prejudice.”
- ▶ Collateral relief is limited because it “undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.”
 - ▶ *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824 (1982)

Frivolousness: Lack of Prejudice

- ▶ Constitutional harmless error does not apply
 - ▶ *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 539 (2013).
- ▶ Exception: ineffective assistance of trial counsel
 - ▶ Normal *Strickland* standard applies
 - ▶ *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538 (2017).

Frivolousness: Lack of Prejudice

- ▶ Structural error does not apply
 - ▶ *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328 (1992)
 - ▶ *In re Pers. Restraint of Coggin*, 182 Wn.2d 115 (2014)
 - ▶ *In re Pers. Restraint of Rhem*, 188 Wn.2d 321, 329-30 (2017)
- ▶ Exception: ineffective assistance of appellate counsel
 - ▶ Direct appeal prejudice standards apply to claims of ineffective assistance of appellate counsel
 - ▶ *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814-15 (2004)

Evidentiary Pitfalls

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Unsworn Statements

- ▶ “[A]ssertions from appellate briefing and argument do not create facts.” *State v. Cruz*, 194 Wn.2d 745, 761 n. 6 (2019)
- ▶ “[S]tatements in motions are not evidence and are therefore not entitled to evidentiary weight.” *Singh v. Immigration & Naturalization Serv.*, 213 F.3d 1050, 1054 n. 8 (9th Cir. 2000)

Conclusory Statements

- ▶ Supporting evidence must be based on “more than speculation, conjecture, or inadmissible hearsay.” *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886 (1992).
- ▶ Establishing a non-hearsay basis of knowledge is the most important piece of any declaration.

Drafting Declarations

- ▶ What went wrong?
- ▶ When did it happen?
- ▶ Where did it happen?
- ▶ Who caused the error to occur?
- ▶ What did this person/s do to cause the error to occur?
- ▶ How have you been harmed by the error and/or how does the error undermine confidence in the conviction?

Self-Serving Statements

- ▶ A defendant's self-serving statement is generally insufficient to overcome the presumption of effective assistance of counsel. *State v. Conley*, 121 Wn. App. 280, 287 (2004)
- ▶ "Accepting such an argument could easily lead to an unchecked flow of easily fabricated claims." *State v. Cox*, 109 Wn. App. 937, 941 (2002)
- ▶ In other contexts, self-serving statements may lead to a reference hearing.

How to Get a Reference Hearing



Standard

- ▶ “[A] hearing is appropriate where the petitioner makes the required prima facie showing but the merits of the contentions cannot be determined solely on the record.” *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18 (2013).
- ▶ A prima facie showing requires three things:
 1. allegation of facts;
 2. that if proven, would legally entitle the petitioner to relief; and
 3. reason to believe evidence exists to prove those facts.

In other words . . .

- ▶ Reference hearings are for when the petitioner would likely prevail if some absent piece of evidence were procured, or where it is necessary to make a credibility determination (e.g. to resolve mutually exclusive declarations)
- ▶ A well-reasoned request, tailored to *Yates*, is a necessity
 - ▶ Reference hearings are not an afterthought, a consolation prize, or a fishing expedition.

Pitfall: particularity

- ▶ A prima facie showing requires:

3. reason to believe evidence exists to prove those facts.

- ▶ “[T]he purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations.” *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886 (1992).
- ▶ If the petitioner's allegations rest on information outside the record, “the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief.” *Id.*
- ▶ “[I]f the evidence is based on knowledge in the possession of others, the petitioner may either present their affidavits or present evidence to corroborate what the petitioner believes they will reveal if subpoenaed.” *Yates* at 18.

What to do

- ▶ Treat it like summary judgment, not pretrial motions in limine
- ▶ Procure all external documents ahead of time
 - ▶ *State v. Padgett*, 4 Wn. App. 2d 851 (2018).
- ▶ Submit witnesses' declarations
- ▶ If declarations cannot be procured, explain what steps were taken to procure them and why it is reasonable to believe those witnesses will testify how the petitioner believes they will.
 - ▶ i.e. what corroborates the petitioner's belief?

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Youthfulness: Advice and Pending Cases

Current State of the Law

- ▶ Error will be present in most petitions. *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 267 (2020)
- ▶ The presence of an error does not, by itself, merit relief. *In re Pers. Restraint of Meippen*, 193 Wn.2d 310 (2019)
- ▶ *Meippen* has not been overruled. See *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 244 (2020) (distinguishing *Meippen*)

Advice

- ▶ Build your mitigation package and present it to the appellate court. *See e.g. State v. O'Dell*, 183 Wn.2d 680 (2015)
- ▶ Rarely will “actual and substantial prejudice” be apparent from the record

Examples

Cases where additional evidence not required:

- ▶ *Domingo-Cornelio*: trial court imposed the low-end of the standard range where State requested a higher sentence
- ▶ *Ali*: Trial counsel requested a downward exceptional sentence, court indicated it was open to such a sentence, but felt it had no ability to impose such a sentence
- ▶ *Houston-Sconiers*: immature nature of the crime (robbing other kids for their Halloween candy) and evidence that one appellant may have been influenced by peer pressure and/or disability

Pending Cases

- ▶ 98031-4 PRP of Rivas and 98340-2 PRP of Davis: Are de facto life sentences unconstitutional for 18-21 y/o? Is a 26 year sentence a de facto life sentence?
- ▶ 98592-8 PRP of Grote: Is the *Miller*-fix statute an adequate remedy for an unconstitutional de facto life sentence such that resentencing is not required?
- ▶ 99748-9 PRP of Kennedy: Are youthfulness PRPs for 18-25 y/o exempt from the time-bar under RCW 10.73.100(1)?

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Prisoners' Rights: Standards and Statutes

Cashaw Standard of Review

- ▶ Where a petitioner has had “no previous or alternative avenue for obtaining state judicial review,” they must show restraint and that the restraint is unlawful.
 - ▶ *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49 (1994); RAP 16.4(a)-(c).
- ▶ “[T]he petitioner need not make the threshold showing of actual prejudice or complete miscarriage of justice.” “It is enough if the petitioner can demonstrate unlawful restraint under RAP 16.4.”
 - ▶ *In re Pers. Restraint of Pierce*, 173 Wn.2d 372, 377 (2011).

Prison Infractions

- ▶ Governed by WAC 137-28
- ▶ Court reviews whether “there is ‘some evidence’ in the record to support the prison disciplinary decision.”
 - ▶ *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 397 n. 7 (1999).
- ▶ Highly deferential: no re-assessing of weight/credibility

Prison Infractions

For procedural challenges to prison infractions:

- ▶ Petitioner must show hearing “was so arbitrary and capricious as to deny them a fundamentally fair proceeding so as to work to the petitioner’s prejudice.”
 - ▶ *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 215, (2010).
- ▶ Hearing is not A&C if petitioner was afforded the minimum due process applicable to prison disciplinary proceedings.
 - ▶ *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 294 (1984).

Potential Issue

- ▶ WAC 137-28-140: “The following rules set forth procedural guidelines. They do not create any procedural or substantive rights in any person, including any liberty interests.”
- ▶ Some doubt cast on its validity in *Kozol v. Dep’t of Corr.*, 185 Wn.2d 405, 410 (2016) (per curiam).

Prison-Based DOSAs

- ▶ Governed by WAC 137-24
- ▶ Preponderance of the evidence applies, not “some evidence” standard. WAC 137-24-030(10).
- ▶ Hearsay is admissible. WAC 137-24-030(11)(d).

Community Custody Violations

- ▶ Governed by WAC 137-104
- ▶ Preponderance standard applies. WAC 137-104-050(6).
- ▶ Rules and procedures are similar to DOSA revocations.

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Prisoners' Rights: Constitutional Issues

PRP of Williams, 197 Wn.2d 1001 (2021)

- ▶ Art. I, § 14, is more protective than the Eighth Amendment both in terms of disproportionate sentencing and in terms of conditions of confinement.
- ▶ Explicitly rejected 8th Amendment “deliberate indifference” standard.
- ▶ Narrow holding: unhygienic prison conditions violate Art. I, § 14.
 - ▶ Lack of adequate restroom access

Williams's Broad Holding

- ▶ “[T]o prevail on a PRP challenging conditions of confinement, a petitioner must demonstrate that (1) those conditions create an objectively significant risk of serious harm or otherwise deprive the petitioner of the basic necessities of human dignity and (2) those conditions are not reasonably necessary to accomplish any legitimate penological goal.”
- ▶ “[T]he State has a nondelegable obligation to provide for the health, safety, and well-being of prisoners under its jurisdiction. This is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty.”
- ▶ “Washington prisons may not cause the deprivation of human dignity by conditions which are so base, inhumane and barbaric they offend the dignity of any human being, whether intentionally or **accidentally.**”

Wiggle Room Remains

- ▶ “[S]ome harsh conditions of confinement that might otherwise be cruel may sometimes be justified by legitimate penological interests, including the health and safety of the prison population as a whole. Nevertheless, when such harsh conditions create an objectively intolerable risk of harm, they can survive constitutional scrutiny under article I, section 14 only when they are reasonably necessary to accomplish legitimate penological goals.”
- ▶ Prediction: *Williams* will result in a highly fact-specific body of case law narrowing the circumstances under which solitary confinement may be used.

Recap

1. Overview of internal court processes and court rules
2. Statute of limitations and tolling
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