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January 11, 2006

Court of Appeals Publication Committee
c/o Wisconsin Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688

RE: State ex rel. Santana v. Endicott, Appeal No. 2005AP332

I am writing, both in my role as Amicus Chair for the Wisconsin Association of Criminal Defense Attorneys and as a concerned appellate litigator with 17½ of appellate experience, to request that the Committee *not* order the publication of this case.

The Court in *Santana* reaffirmed its holding in *Smalley v. Morgan*, 211 Wis.2d 795, 565 N.W.2d 805 (Ct. App. 1997), to the effect that counsel's failure to pursue an appeal must be raised in the Court of Appeals in a *Knight* petition rather than in the circuit court. The Court went on to emphasize, however, that dismissal of Santana' circuit court habeas petition was without prejudice, and that he was still free to file his challenge in a *Knight* petition. In *dicta*, the Court further set forth what it viewed as requirements for such a petition.

I do not object to the holding or most of the language in the decision. I find the Court's attempt to provide guidance to Mr. Santana commendable. However, I object to publication for two reasons.

First, Mr. Santana was not represented by counsel in this matter. I believe as a matter of principle that the Court should be very hesitant to publish decisions in which one or both parties are unrepresented by counsel.

The adversarial system recognizes that even the most conscientious judges cannot be all-knowing and that the correct answer to a legal or factual dispute is best resolved when both sides present their best arguments. Only under those circumstances can the Court be assured (to the degree possible) that the arguments on both sides have been fully marshaled and it is not missing something important.

While litigants have no right to the appointment of counsel in habeas proceedings, that is a different issue from whether a particular decision should be published. An individual no doubt may suffer an injustice should the absence of counsel result in a judgment against him, but that injustice generally is limited to the particular litigant. Should that decision be published, however, it becomes controlling precedent which only the Supreme Court can correct. Any errors in a published decision resulting from the absence of full adversarial testing thus could negatively affect any number of individuals in the period before the error is corrected.

Second, while the result in *Santana* is unassailable under Wisconsin authority, as is the Court's discussion of other procedural avenues available to Mr. Santana, I do not believe that the same is true of the admonitions contained in Paragraph 10 of that decision regarding the perceived requirements for a *Knight* petition. The Court there states that, in addition to the requirements of Wis. Stat. (Rule) 809.51 regarding writs in the Court of Appeals, the petition must comply with the requirements of Wis. Stat. §782.04, including the requirement that a petition be verified.

I believe that the dicta in ¶10 is misplaced and that any published decision on this matter should await full adversarial presentation of the question. Specifically, the requirements for statutory habeas petitions contained in Wis. Stat. §782.04 cannot be applied wholesale to common law habeas petitions such as *Knight* petitions. Moreover, decision regarding which of those provisions should be applied to *Knight* petitions is better left to the Supreme Court as the policy-making branch of the Courts, at least in the absence of pending dispute on the issue before this Court.

As the Committee is aware, there is a difference between statutory and common law habeas corpus. Chapter 782 sets forth the requirements of *statutory* habeas, a primary condition of which is that "[n]o person shall be entitled to prosecute such a writ who shall have been committed or detained by the virtue of the final judgment or order of any competent tribunal of . . . criminal jurisdiction." Wis. Stat. §782.02.

A *Knight* petition, however, is a type of *common law* habeas petition. Because the petitioner in such an action is seeking to challenge the effectiveness of counsel on the appeal from a criminal conviction, he or she necessarily "has been committed or detained by the virtue of the final judgment or order of any competent tribunal of . . . criminal jurisdiction." As such, the person filing a *Knight* petition cannot meet the requirement of §782.04(2) (transposed to the *Knight* context by the *Santana dicta*) that

he or she verify and state "[t]hat such person is not imprisoned by virtue of any judgment, order or execution specified in s. 782.02." Section 782.04, by its terms, thus is not applicable and cannot be applicable to common law habeas petitions, such as *Knight* petitions, challenging one's detention as the result of a criminal conviction.

The question then becomes which, if any, of the other requirements of statutory habeas (and particularly, the verification requirement) should be imposed as well on common law habeas as a matter of judicial prerogative and, if so, who should make that determination and when. As far as I can tell, the issue has not previously been resolved. Although the Court of Appeals did hold in *Maier v. Byrnes*, 121 Wis.2d 258, 358 N.W.2d 833 (Ct. App. 1984), that verification was necessary to a properly filed habeas petition, the petition at issue was a *statutory* petition under Chapter 782, to which the verification requirements of §782.04 directly apply. The Court in *Maier* did not address, and thus did not decide, whether verification was required for common law habeas petitions.

There are, of course, potential benefits to the verification requirement in assuring "'that the statements contained therein are presented with some regard to considerations of truthfulness, accuracy and good faith.'" *Santanta*, ¶10, quoting *Maier v. Byrnes*, 121 Wis.2d 258, 262-63, 358 N.W.2d 833 (Ct. App. 1984). It may be argued, however, that the same benefits already are provided by the requirements in Wis. Stat. §§802.05(1) (requiring that all pleadings be signed) and (2) (the signing and presentation of a pleading constitutes a certification, subject to sanction, that the pleading is factually accurate, warranted by existing law or nonfrivolous argument, and not presented for an improper purpose), so that the addition of a verification requirement in common law habeas is not necessary.

I also note that the majority of *Knight* petitions are filed by *pro se* prison inmates. Few such litigants have any significant understanding of legal procedure, and many have learning disabilities and other educational lacks. To place yet another procedural hurdle between them and the courts by imposing a verification requirement should require more than a desire for formalistic symmetry with the requirements of statutory habeas.

I acknowledge that it may be that the Courts, after reviewing such arguments and any contrary arguments which may be presented, will nonetheless impose a verification requirement on those filing *Knight* petitions. Perhaps they will reject such a

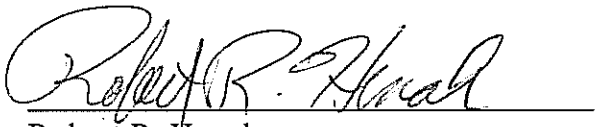
requirement.

My purpose here is not to have the Publication Committee resolve that issue. Rather, my point merely is that the issue is far too important and far-reaching to be decided by way of *dicta*, without briefing by the parties, and with one of the parties unrepresented by counsel.

I accordingly ask that the Committee *not* order the decision in *Santana* to be published unless that decision is amended to delete ¶10. I thank the Committee for considering this request.

Respectfully submitted,

HENAK LAW OFFICE, S.C.



Robert R. Henak

cc: Hon. Richard S. Brown
Hon. Neal P. Nettesheim
Hon. Harry G. Snyder
Mr. Luis Santana
AAG James Freimuth

RRH Attach.1.wpd