IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF xxx

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| STATE OF WASHINGTON,  Plaintiff,  v.  JOHN DOE,  Defendant. |  | **No. xx-x-xxxxx-x**  **MOTION FOR WRIT OF HABEAS CORPUS**  **AD TESTIFICANDUM** |
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**MOTION**

Comes now the defendant, John Doe, by and through his attorney, Kelly Vomacka, and moves this Court for a Writ of Habeas Corpus ad Testificandum. He relies on the Due Process clauses of the state and federal constitutions; RAP 16.12; relevant caselaw; and the records and files herein.

# DECLARATION OF COUNSEL

I, Kelly Vomacka, declare under penalty of perjury pursuant to the laws of the State of Washington that the following is true and correct:

I am counsel of record for the above-named defendant, I am over 18 years of age, and I am competent to testify in a court of law.

Doe is currently confined at the Northwest Detention Center (NWDC), a contract facility that holds detainees for the Department of Homeland Security, Immigration and Customs Enforcement, located at 1623 East J Street, Tacoma, WA 98421. He is identified in that system by his A number: xxx-xxx-xxx. ICE has authority to move him elsewhere in the United States pending final resolution of his immigration case.

Doe has moved for a new trial in this case. (Appendix A, Motion.) On the State’s motion, the Court transferred the case to the Washington State Court of Appeals, under CrR 7.8(c)(2), to be decided as a Personal Restraint Petition. (Appendix B, Transfer Order.) The Court of Appeals conducted a preliminary review, determined that it required additional information, and then ordered this Court to hold a reference hearing. (Appendix C, Court of Appeals order.) The hearing is set in this Court on [date], at [time]. (Note for Calendar attached.) Doe’ presence is required so that he may testify in support of his motion. In addition, he has a right to be present at the hearing and to cross-examine the witnesses against him. RAP 16.12. I believe that anything other than physical presence, such as a telephonic or Skype connection, would significantly prejudice Doe.

I have asked several colleagues how to get Doe transferred from NWDC to this Court, including a federal public defender in Seattle; a criminal and removal defense attorney in Virginia, who routinely presents these writs to transport his clients from immigration detention to Virginia courts; multiple local immigration and criminal defense attorneys; a local criminal defense attorney who attempted to secure a witness’ presence in Bonney Lake Municipal Court while the witness was being held on federal criminal charges; a United States Marshal whose office provides transport under these writs for the federal court and who is familiar with the analogous process for state court and for NWDC; ICE and OCC officials in Tacoma; and a sergeant with the County Sheriff’s Office.

# ARGUMENT

A Writ of Habeas Corpus ad Testificandum requires a third party to produce a witness in court. *Lopez v. Smith,* 146 Colo. 180, 185, 360 P.2d 967, 970 (1961). It roughly translates as “produce the body so it may testify” and is part of the general term “Writ of Habeas Corpus.” *Maurer v. Pitchess,* 530 F. Supp. 77 (C.D. Cal. 1981), *affirmed in part and reversed in part without opinion,* 755 F.2d 936 (9th Cir. 1985). The general term also includes the Writ of Habeas Corpus ad Subjiciendum, which refers to the legality of a detention and is often shortened to “habeas corpus.” Habeas Corpus ad Subjiciendum is the writ that is commonly known and that both the federal and state constitutions protect from suspension. *Toliver v. Olsen,* 109 Wn.2d 607, 609-10, 746 P.2d 809, 811 (1987).

The Writ of Habeas Corpus ad Testificandum is also an ancient writ, which endures to today:

As a general rule, independently of statute, the writ of habeas corpus ad testificandum may be resorted to for the purpose of removing a person confined in jail or prison[[1]](#footnote-1) or in a state hospital[[2]](#footnote-2) to enable him or her to testify as a witness. The issuance of such a writ lies in the sound discretion of the court or any judicial officer having the power to compel the attendance of witnesses.[[3]](#footnote-3)

Nevertheless, the district court erred in denying defendant's request for a writ of habeas corpus ad testificandum to secure the appearance of a witness who would corroborate the defendant's claim that he never requested to clean a prison visiting area where controlled substances were left since it was material to his defense of lack of intent and was likely to change the outcome of the case.[[4]](#footnote-4)

81 Am Jur 2d Witnesses § 5 (footnotes in the original); *see also,* 28 USC §§ 2241 and 1651.

Doe seeks to be produced at court so he may testify in the upcoming reference hearing. He has a right to testify at the hearing, as well as a right to be present and to cross-examine the witnesses against him. RAP 16.12. Division One found, just last month, that “presence” means physical presence, not video conferencing. *In re J.N.,* \_\_\_ Wn. App. \_\_\_ (slip op. 75319-3-I, Aug. 28, 2017) (Appendix E). The context of *J.N.* was different than this case, because J.N.’s hearing was under the Involuntary Treatment Act, RCW 71.05. But the same reasoning applies here.

In *J.N.,* the Court of Appeals noted that J.N. had a statutory right to be present, under RCW 71.05.310,[[5]](#footnote-5) and it undertook statutory analysis to determine whether this right could be satisfied with video conferencing or only with physical presence. It found that the statutory language required physical presence:

But we do not consider the word “present” in a vacuum. Rather, the term is contextualized by the surrounding language and by the legislative understanding of the term at the time that it was used. Notably, the ITA does not require that respondents be present for the proceeding but, rather, that they be “present at such proceeding.” RCW 71.05.310 (emphasis added). Similarly, the legislature did not choose to require that respondents “participate in such proceeding.” Nor did the legislature choose to require that respondents “be represented at such proceeding.” The legislature's choice to guarantee to respondents the right “to be present at such proceeding” is explicit. It constitutes a policy choice made by the legislature. Viewing this phrase “shall be present at such proceeding” in the context of a statute enacted in 1973, we conclude that the ITA unambiguously requires the physical presence of respondents at their civil commitment proceeding. Our conclusion is supported by both the history of civil commitment proceedings in Washington and by the legislature's understanding of the term “present” at the time that the ITA was enacted.

*In re J.N.,* slip op. at 8-9.

This language was in the original ITA, which was enacted in 1973. Laws of 1973, 1st ex.s. ch. 142, sec. 36. It has remained unchanged through five amendments from 1974 to 2012. Laws of 2012, ch. 256, sec. 8; Laws of 2005, ch. 504, sec. 709; Laws of 1987, ch. 439, sec. 9; Laws of 1975 1st ex.s., ch. 199, sec. 8; Laws of 1974 ex.s., ch. 145, sec. 22. Considering that video conferencing did not exist in the 1970s, “The legislators who enacted the ITA in 1973 would not have understood ‘present’ to mean anything other than physical presence. Our role is to give effect to the legislature's intended meaning.” *In re J.N.,* slip op. at 13.

Similarly here, the court rule that guarantees the defendant’s right to be present at a reference hearing uses the same language as the ITA: “The petitioner has the right to be present *at* the hearing.” RAP 16.12 (in pertinent part, emphasis added). This language has existed in the court rule since it was first passed in 1976, through two amendments, in 1977 and 2014. RAP 16.12 (1976) (Appendix F). Like the ITA statute, the court rule can refer only to physical presence, since no other options were possible when the rule was adopted. Therefore, Doe has a right to be physically present and to testify at the reference hearing.

Doe therefore asks this Court to issue a Writ of Habeas Corpus ad Testificandum commanding the Northwest Detention Center to release Doe into the custody of the County Sheriff’s Office in order that the Sheriff’s Office may transport Doe to the xxx County Superior Court Criminal Motions Calendar, on [date], for the hearing at [time], continuing for such time as necessary, and then returning Doe to the Northwest Detention Center as soon as reasonably possible after the hearing.

DATED this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_

Kelly Vomacka, WSBA #20090

Attorney for Defendant

1. Am. Jur. 2d, Habeas Corpus § 6. [↑](#footnote-ref-1)
2. *In re Thaw,* 166 F. 71 (3d Cir. 1908). [↑](#footnote-ref-2)
3. *Rigor v. State,* 101 Md. 465, 61 A. 631 (1905); *Williams v. Martin,* 570 Fed. Appx. 361 (5th Cir. 2014) (“The denial of a state prisoner's motion to issue witness subpoenas and for writs of habeas corpus ad testificandum was not an abuse of discretion, in a 42 U.S.C.A. § 1983 action against prison officials, where the witnesses, who were former prisoners who allegedly had witnessed the underlying fight between a prisoner and a prison official, were no longer incarcerated and could not be located after numerous attempts.”) [↑](#footnote-ref-3)
4. *U.S. v. Cruz-Jiminez,* 977 F.2d 95 (3d Cir. 1992). [↑](#footnote-ref-4)
5. Because it decided the case on statutory grounds, the Court of Appeals declined to address a constitutional Due Process argument that was also raised. [↑](#footnote-ref-5)