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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, APPELLANT

v.

CLARK MANKIN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 08-1-02352-6

Corrected Response Brief of Appellant to Brief of Amicus WADA/WACDL

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A. ISSUES PERTAINING TO THE ISSUES RAISED BY AMICI.

1. Whether a witness's refusal to have an interview tape recorded affects a defendant's due process rights?
2. Whether the generalized concerns of the amici regarding efficiency in criminal proceedings has any legal relevance to the issues on appeal?
3. Whether the Washington Privacy statute is relevant to a witness's refusal to have witness interviews recorded?
4. Whether there is a legal basis for treating law enforcement officers different from any other class of witnesses?

B. STATEMENT OF THE CASE.

1. Procedure

The State incorporates by reference the procedural facts contained in the Brief of Appellant, with a minor addition as listed below.

On November 18, 2009 this court granted the motion of the Washington Defender Association (WDA) and the Washington Association of Criminal Defense Lawyers (WACDL) to file an amicus curiae brief. *See*, 11-18-09 Order Allowing Amicus Brief and Allowing Response. In the order of November 18, the court permitted the parties to file a response to the amicus curiae within ten days of the date of the

order. *See*, 11-18-09 Order Allowing Amicus Brief and Allowing Response. This is the response permitted by that order.

2. Facts

The State incorporates by reference the substantive facts contained in the Brief of Appellant.

C. ARGUMENT.

1. A WITNESS'S REFUSAL TO HAVE AN INTERVIEW TAPE RECORDED DOES NOT IMPLICATE A DEFENDANT'S DUE PROCESS RIGHTS.

The argument of amici is belied by the fact that the due process clause has been a part of American constitutional jurisprudence since the adoption of the Tenth Amendment's Bill of Rights in 1791, and was extended to the States via the Fourteenth Amendment in 1868. On the other hand, the ability to routinely make audio recordings did not become commonplace until some time after the invention of the compact cassette magnetic tape recording system (cassette tape) in 1964. *See*, http://en.wikipedia.org/wiki/Audio_recording (reviewing the history of audio recording). If the argument of amici had merit, virtually every criminal conviction prior to the routine ability to record audio would have lacked due process and therefore have been unconstitutional.

The due process clauses of the federal and state constitutions provide dual protection: procedural and substantive due process. The state constitutional guaranty of due process provides the same scope of protection as its federal counterparts. *Manussier*, 129 Wn.2d at 679-680. Substantive due process protects those rights that are “fundamental,” or “implicit in the concept of ordered liberty,” such as most of those enumerated in the Bill of Rights. *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937); *see also, Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992). When a right merits substantive due process protection it means that the right is protected “against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986))

State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997); Wash. Const. Art. I, §3; U. S. Const. Amend. V and XIV. The essentials of procedural due process comprise notice of the charges and a reasonable chance to meet them. *See Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.

Ct. 893, 47 L. Ed. 2d 18 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

Here, the amici claim that denial of the defense demand to tape record witness interviews denies the defendant his right to a fair trial because it deprives him of effective defense counsel. What the amici are really arguing is the preposterous position that somehow defense counsel are otherwise incompetent and ineffective because of their inherent inability to impeach witnesses, but somehow they will suddenly be made effective and competent by the fact that they obtained an audio recording of the witness interview.

In support of their position the amici rely on only two cases. In the first, *State v. Burri*, the State illegally initiated special inquiry proceedings conducted without the presence of defense counsel for the sole purpose of subpoenaing and interrogating the defendant's alibi witnesses and those witnesses were subsequently instructed that they were prohibited from disclosing their testimony. See Br. Amici, p. 4. (citing *State v. Burri*, 87 Wn.2d 175, 178, 550 P.2d 507 (1976)). The court held that it was an interference with the defendant's witnesses that violated the defendant's right to a fair trial. *Burri*, 87 Wn.2d at 178. The court held that among other things it deprived the defendant of the ability to determine whether the alibi witnesses had changed their testimony and if so for what reasons.

Burri, 87 Wn.2d at 179-180. Where the State intended to use the special inquiry testimony at trial, the court further held that making a copy of the testimony available to the defendant did nothing to obviate the prejudicial effect of interfering with the right of the defense to personally confer with and interview the alibi witnesses as part of the trial preparation. *Burri*, 87 Wn.2d at 179.

It is in this context that the court in *Burri* stated that a defendant is denied his right to counsel if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. *Burri*, 87 Wn.2d at 180. The amici attempt to take this statement from this very limited context where defense was completely denied access to witnesses and inflate it into a proposition that claims that defense counsel is subject to no limits whatsoever on how they are entitled to prepare for trial.

However, as indicated above, the central holding in *Burri* was that the State could not completely deny the defense the ability to interview the witnesses. The court's ruling in *Burri* in no way authorizes defense recordings of witnesses nor in any way holds that defendant's have a right to compel witnesses to submit to an audio recording of the interview. Nor does it support the proposition that the defense is entitled to undertake any action whatsoever they choose under the guise of preparation for trial.

Here, the defendant had every opportunity to interview the witnesses, who were willing to discuss the case with defense, but were unwilling to have that discussion recorded. Moreover, that limitation came from the witnesses themselves, not from any action by the State. For all of these reasons, *Burri* does not support the position of the amici.

The only other case cited by the defense in support of its position is *State v. Yates*, 111 Wn.2d 793, 765 P.2d 291 (1988). See Br. Amici, p. 5. The citation to *Yates* is only for a statement of the principles underlying the discovery rule, CrR 4.7. Aside from the fact that the issues in this case arise under CrR 4.6, not CrR 4.7, in any case the principles behind CrR 4.7 in no way entitle the defense to compel witnesses who are willing to discuss the case with counsel to be compelled to submit to recording.

While the “scope” of discovery is generally within the trial court’s sound discretion, CrR 4.7 guides the trial court in the exercise of its discretion over discovery. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). The only place where CrR 4.7 addresses witness interviews in any way is under CrR 4.7(h)(1) which provides:

Investigations Not To Be Impded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with

opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

CrR 4.7(h)(1) advises that neither party shall advise persons having relevant information to refrain from "discussing" the case with opposing counsel. Thus, like CrR 4.6, CrR 4.7 also contemplates only discussion of the case with opposing counsel and in no way supports a defendant's right to a "recording" of witnesses. CrR 4.7(h)(1) also provides that neither party shall otherwise impede opposing counsel's investigation of the case. However, where the refusal to be recorded comes from the witnesses, without, and even contrary to, the State's preference, the State is not acting to impede the defendant's investigation. Moreover, nothing about the rule creates a right in the defendant to record the interview.

The position of amici is unsupported by citation to relevant authority and for that reason as well the court should disregard that argument. See *Snohomish County v. Rugg*, 115 Wn. App. 218, 226, 61 P.3d 1184 (2002); RAP 10.3(a)(6); RAP 10.3(e). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *State v. Bradshaw*, 152 Wn.2d 528, 539, 98 P.3d 1190 (2004). The argument of amici is without legal authority or merit and should be rejected.

2. THE GENERALIZED CONCERNS OF THE AMICI REGARDING EFFICIENCY IN CRIMINAL PROCEEDINGS HAS NO LEGAL RELEVANCE TO THE ISSUES ON APPEAL.

The amici have argued that the court should vest a right in defendants to record witness interviews, which “should be as free and full as possible” in order to expedite trials. Br. Amici, p. 6 (quoting *Yates*, 111 Wn.2d 797. However, the complete quote from *Yates* is as follows:

The principles underlying CrR 4.7 have been stated as follows:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible *consistent with the protections of persons, effective law enforcement, the adversary system and national security.* [Emphasis added.]

Yates, 111 Wn.2d at 797 (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub’g Co. ed. 1971)).

Ultimately, the court should follow the authority of the court rules, which do not authorize the defense to compel witnesses to be tape recorded. The policy arguments the amici make are not legal arguments and are more appropriate to a committee discussion of whether or not the rules should be changed rather than what the rules permit.

Moreover, recordings do not necessarily further expedite either the discovery process or trial. Recording has no effect on the length of the interview, or when it takes place. Where over 90 percent of criminal cases are resolved without trial, the majority of interviews will never be used at trial. *See* the website for the Administrative Office Of The Courts (AOC), http://www.courts.wa.gov/caseload/?fa=caseload.display_subfolders&folderID=Superior&subFolderID=ann&fileID=dsp_caseload_Superior_ann, for superior court case load statistics including total annual filings and dispositions by county and annual number of trials.

Even among those cases that proceed to trial, no significant discrepancies in testimony exist in the majority of witnesses testifying. Further, recordings can be more cumbersome to admit at trial because they need to be queued to the correct point in the recording and may also need to be redacted where the interviews contain discussion of inadmissible matters. Getting recorded material ready to be admitted can be extremely time consuming and significantly delay trial as compared to having an impeachment witness give testimony, which is generally rather quick. Further, it is generally not possible to prepare the impeachment recording in advance of trial because whether, or which, impeachment material is used depends upon the specific testimony given by the witness.

Finally, recording devices are not infallible. They can fail unnoticed during the course of the interview, or the recording can subsequently be lost for any number of reasons, including media failure, exposure to magnets, moisture, etc. Such a failure would leave defense counsel worse off than if notes had been taken.

While recordings may at times be convenient, they are not inherently so superior to justify the court adopting a new standard not provided for in the court rules.

The court should also note that criminal procedures and the civil procedures on witness interviews differ so significantly for good reason. In criminal cases, investigations are conducted by law enforcement. Under RCW 9A.76.175 it is a gross misdemeanor to make a false or misleading statement to a public servant, including law police officers. Thus, from the beginning, witness statements in criminal cases are less likely to be false because of that criminal exposure.

Additionally, because criminal cases are centered around criminal activity, it is not uncommon for witnesses in cases to also have various types of criminal exposure of their own. Statements made under oath in a deposition provide a memorialized statement that could be admitted in a subsequent prosecution of the witness. Tape recordings can similarly be used at trial. Thus application of these more formal interview processes

can more greatly expose witnesses to jeopardy. Witnesses who have criminal exposure also have the right to remain silent, and the invocation of that right is not uncommon in criminal cases. See *State v. Parker*, 79 Wn.2d 326, 331, 485 P.2d 60 (1971); *State v. Levy*, 156 Wn.2d 709, 731, P.3d 1076 (2006). In this context, having less formal procedures for witness interviews often works to make it easier to obtain witness cooperation and needed information for both parties.

3. THE WASHINGTON PRIVACY STATUTE
APPLIES TO WITNESS INTERVIEWS.

Ultimately, the State's position is that the privacy statute is mostly irrelevant and a distraction to the core issues in this case. Regardless of whether a witness interview is a private conversation under the privacy statute, the fact remains that the defense has no authority to compel the witness to be tape recorded. The witness retains the right to refuse to speak if the conversation is being recorded, but the deposition provision of CrR 4.6 is not triggered so long as the witness remains willing to discuss the case with defense counsel without a recording being made.

The issue of whether the interview is a private conversation arose because of the State's reference to *State v. Hofstetter* which held that the decision of whether an interview is private rests neither with defense counsel nor the prosecutor, but with the witness. See *State v. Hofstetter*,

75 Wn. App. 390, 399, 878 P.2d 474, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994). The defense responded to that reference by relying on the Privacy statute. *See* RCW 9.73.030(1)(b).

As stated in the Brief of Appellant, under controlling precedent the witness interview is a private conversation, so long as the witness determines it to be such. *Hofstetter*, 75 Wn. App. at 399. The State hereby incorporates by reference that argument from the Brief of Appellant, p. 12-13. The primary consequence of that fact a witness determines whether an interview is private is that under the privacy statute defense may not record the interview without the consent of the witness. *See* RCW 9.73.030(1)(b), (3) (stating that private conversations may not be recorded without the consent of the parties). The witness then has the option to refuse to speak if recorded.

However, as stated above, the issue of whether the conversation is private or not is largely a distraction from the core issue of this case, which is whether the defendant has a right or the court has the authority to compel a witness to submit to a tape recorded interview. Notwithstanding the private nature of the conversation, *vel non*, the witness is entitled not to engage in the conversation if it is recorded, and under CrR 4.6(a) defense has no recourse so long as the witness otherwise remains willing to discuss the case with counsel.

4. THERE IS NO LEGAL BASIS FOR TREATING
LAW ENFORCEMENT OFFICERS DIFFERENT
FROM ANY OTHER CLASS OF WITNESSES.

The amici appear to attempt to seek a rule permitting recording of law enforcement officers particularly. This is presumably for either of two reasons. First, the argument seems to presume that the court will be less sympathetic to the refusals of law enforcement officers to be audio recorded. If the amici can persuade the court to authorize a narrow rule applicable to law enforcement officers, they will then presumably use that precedent to expand the rule to permit recordings of all witnesses.

However, CrR 4.6 makes no distinction between types of witnesses and the procedures for when they can be deposed. Nor does CrR 4.7 identify different types of witnesses or provide different discovery procedures on that basis. The State's position is that the language of CrR 4.6 only refers to "witnesses" so that all witnesses should be treated the same and there is no basis under the rule for dividing witnesses into categories and treating different types of witnesses differently.

While there should be a single uniform rule for all types of witnesses, upon reflection it quickly becomes apparent that different witnesses may have much different, but nonetheless equally valid reasons for not wanting to be tape recorded. Undercover officers have concerns that audio recordings could be used to create voice prints that could

compromise their safety in undercover investigations. This becomes a more significant concern with the rapidly increasing presence of portable smart phones capable of running software application programs. Once even one recording makes it into public circulation, it can easily be copied and disseminated widely through electronic media and the internet, and it is unlikely to ever disappear from the internet thereafter. Both criminal informants and law enforcement agents are already subject to tracking efforts for identification purposes at websites such as “Who’s a Rat.” *See* <http://www.whosarat.com/>.

Victims of sexual abuse can have concerns that defendants could use the greater visceral presence of audio recordings of victim interviews to relive the crime to derive additional sexual gratification. They can have concerns that defendants could use the recordings to more greatly publicly humiliate and/or embarrass the victims of these crimes.

Witnesses could also have legitimate concerns that once a recording is made, it could easily be used for other purposes, including being disseminated to the media in a way that could cause the witness embarrassment, or put the witness in danger. 911 recordings are already often obtained by the media via public records requests. Audio recordings entered into evidence might also subsequently be available to the media.

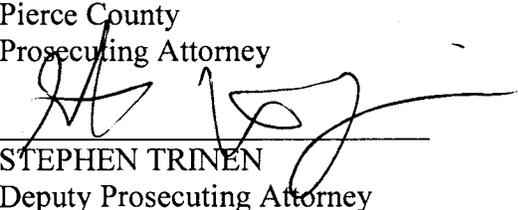
Ultimately, there can be as many different reasons for witness refusal to be recorded as there are witnesses who have objections to being recorded. But all of those concerns are personal to the witness and valid. It is the witness who can best decide the witness's own interests.

D. CONCLUSION

For the foregoing reasons the brief of the amici is without merit and the court should reject those arguments.

DATED: November 25, 2009

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/29/09 
Date Signature

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DIVISION II