WACDL

Washington Association of Criminal Defense Lawyers

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April 29, 2014

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: Proposed CrR 2.2, CrR 2.3 and CrR 3.2.1

Dear Justices of the Washington State Supreme Court:

In a submission offered jointly by the Superior Court Judge's Association (SCJA) and the District & Municipal Court Judge's Association (DMCJA), amendments are proposed to CrR 2.2, CrR 2.3 and CrR 3.2.1, with similar proposals for CrRLJ 2.2, CrRLJ 2.3, and CrRLJ 3.2.1. These proposed amendments would have the effect of changing the long standing practice of requiring a verbatim record of sworn affidavits in support of arrest and search warrants, and replacing it with the allowance of "any reliable" method of memorializing the affiant's testimony. The Washington Association of Criminal Defense Lawyers (WACDL) strongly opposes this fundamental change in the way that Courts memorialize the underlying basis for the government's most intrusive invasion of the rights of Washington citizens.

Washington jurisprudence has always placed a high premium on the literal content of a sworn affidavit required to support search and arrest warrants. Under the "four-corners" doctrine, warrant litigation concerning the sufficiency of probable cause has limited the inquiry to the information contained within the "four corners" of the affidavit in support of the magistrate's decision. *State v. Neth*, 165 Wash.2d 177 (2008). Because of the profound liberty interests at stake, our jurisprudence has wisely and consistently avoided the ambiguity of a "he-said, she-said" record and required a verbatim record in order to determine with unquestioned accuracy what information was available to the magistrate at the time of the decision to issue the warrant.

Current Court Rules achieve compliance with the law by requiring an "electronic" or "stenographic" recording of the affiant's testimony. The one and only thing that these two methods share in common is their ability to produce a verbatim transcript of the testimony taken. This assures the highest degree of accuracy in assessing the information presented to the magistrate. The proposed amendments would effectively eliminate this requirement by allowing any undefined method of

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memorializing the testimony, so long as it is deemed “reliable.” The amendments offer no guidance as to who will make the determination of “reliability” or what criteria would be used, and will have the effect of overruling the “four corners” doctrine while simultaneously inviting a new generation of unnecessary litigation over the actual content of the testimony.

It is hard to imagine a more important and impactful threshold to be crossed than that which determines when the government holds the power to exact the most intrusive invasion of our liberty interests by issuing arrest and search warrants. Court Rules as they exist today articulate what the law demands: a verbatim record of an affiant’s testimony in order to preserve the right to fairly and effectively challenge arbitrary government action. The proposed amendments would gut these protections and would undermine the wisdom of the “four corners” doctrine by replacing it with a poorly defined and ill-conceived substitute that will not promote the stated goal of reflecting technological evolution, but will in fact achieve the opposite effect by diminishing the role of modern recording techniques and taking us backwards into the realm of disputed credibility contests. We strongly urge the Court to reject this attempt.

Sincerely,

Doug Hyldahl
President

Robert Perez
WACDL Court Rules Committee Co-Chair