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CRIMINAL DIVISION - Appellate Unit
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April 24, 2023

Ms. Erin L. Lennon, Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Email: supreme@courts.wa.gov

RE: Proposed Amendment to RAP 10.10

Dear Ms. Lennon:

I write to oppose the proposed amendments to RAP 10.10 that would require that appellants be provided copies of trial exhibits to assist in drafting pro se statements of additional grounds for review (SAG).

Others already have pointed out the significant privacy and logistical concerns raised by the proposal. I share those concerns. Autopsy photos, child interviews, depictions of minors engaged in sexually explicit activity, banking records, driver's licenses, identification cards, passports, medical records, mental health and counseling records, videos of crime scenes, and documents showing the identities of individuals who cooperated with law enforcement (either as informants or witnesses) should not be sent to prison inmates who might circulate such information more broadly.

My chief purpose in writing this letter, however, is to point out that a SAG is "statement," not a brief, so it need not be supported by actual exhibits.

This Court adopted RAP 10.10 in 2002 to consolidate in one rule provisions governing what were formerly known as pro se supplemental briefs. TURNER, ELIZABETH A., 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). Pro se supplemental briefs were originally meant to ameliorate the impact on criminal appellants of Anders v. State of Cal.,¹ by allowing the defendant an opportunity to raise issues when appellate counsel requests permission to withdraw after concluding the appeal lacks merit. 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). When RAP 10.10 was adopted, pro se supplemental briefs were increasingly common in all criminal appeals, not just Anders appeals, causing significant delays in processing criminal appeals and consuming significant staff time. 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.). Recognizing "that the real value of pro se supplemental pleadings on appeal is the identification of issues not addressed by counsel," RAP 10.10 "simply lets defendants/appellants write the court a letter explaining in their own words why the trial was unfair." 3 Wash. Prac., Rules Practice RAP 10.10 (9th ed.).

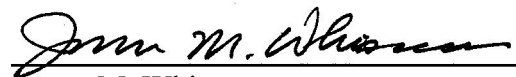
¹ 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Unlike the former supplemental briefs authorized, SAGs are *not* briefs themselves, nor are they supplements, i.e., amendments, to the brief of appellant. Id. The appellate court has “no obligation whatsoever to respond to the statement point-by-point or to review the issues identified.” Id. (drafter’s comments). Moreover, the rule makes plain that “[r]eference to the record and citation to authorities are not necessary or required.” RAP 10.10(c). SAGs simply give the appellant a chance to communicate concerns directly to the court of appeals.

If the court sees potential merit in an issue raised in the SAG, the appellate court can and should direct appellate counsel to file a supplemental brief. RAP 10.10(f). Counsel can elaborate and provide factual and legal support regarding the issue. The appellant may note that exhibits support his argument and may ask that counsel be directed to designate those exhibits.

Given the rule’s purpose and given the continuing ability of the court to direct additional briefing, there is no need to give appellants *direct* access to exhibits. Such access risks dissemination of sensitive material and also would generate a whole new area of litigation over which exhibits should be withheld. Such risks and inefficiencies can easily avoided. An appellant can consult the exhibit list, refer to certain exhibits, then ask the court to order appellate counsel to weigh in with additional briefing and/or ask that counsel be ordered to designate the missing exhibit.

For these reasons, I respectfully ask that the proposed amendment be rejected.

A handwritten signature in black ink, appearing to read "James M. Whisman", is written over a horizontal line.

James M. Whisman
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney’s Office
Appellate Unit Chair

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: Comment to proposed RAP 10.10
Date: Tuesday, April 25, 2023 8:03:40 AM
Attachments: [Comment to proposed RAP 10.10.docx](#)

From: Whisman, Jim <Jim.Whisman@kingcounty.gov>
Sent: Monday, April 24, 2023 9:34 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to proposed RAP 10.10

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Attached is a comment to the proposal to amend RAP 10.10.

Thank you.

Jim Whisman
KCPAO