**From:** OFFICE RECEPTIONIST, CLERK
**To:** Martinez, Jacquelynn
**Subject:** FW: Proposed Amendment to RAP 10.10(e)
**Date:** Friday, April 28, 2023 9:57:58 AM

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**From:** Guthrie, Stephanie <Stephanie.Guthrie@kingcounty.gov>
**Sent:** Friday, April 28, 2023 9:56 AM
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
**Subject:** Proposed Amendment to RAP 10.10(e)



I write to recommend that the proposed amendment to RAP 10.10(3) be rejected.

I concur in and reiterate the concerns expressed by Jim Whisman, Don Raz, and Sara Beigh. Designated exhibits (and in some cases clerk's papers) may include autopsy photos, child interviews (video, audio, or transcript), 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, etc. The proposed changes to RAP 10.10 (e) contain none of the safeguards found in CrR 4.7 to prevent the improper use or dissemination of these materials. It places no obligation on defendants to use the materials only for their intended purpose, no limitation on distributing the materials to others, and no mechanism for imposing negative consequences on defendants who misuse the materials. The rule also does not provide any procedure to address exhibits and clerk's papers that are not allowed into the prisons per Department of Corrections policies. It further does not address the fact that many exhibits are contained on electronic media (CDs, flash drives, etc), how incarcerated individuals will be able to secure access to these materials given DOC policy in regards to accepting electronic media, and what effect greatly increased demand for in-custody access to electronic media may have on DOC operations. I fear that the amendment will lead defendants to assert that they have a right to possess clerk's papers and exhibits in prison despite DOC policies, spawning a lot of additional litigation.

The purpose of the rule is to assist defendants in preparing a Statement of Additional Grounds (SAG). But as noted by Jim Whisman, a SAG is a "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. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), 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.). 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 defense 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.

I respectfully request that the proposed amendment be rejected.

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