Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 1:56 PM
To: Tracy, Mary
Subject: FW: Comments to proposed 3.7, 4.7, and 4.11

From: Lloyd, Stanley [mailto:Stanley.Lloyd@kingcounty.gov]
Sent: Monday, April 29, 2019 1:50 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to proposed 3.7, 4.7, and 4.11

Good Afternoon,

My name is Stanley Lloyd and I would like to comment on the proposed changes to the court rules.

3.7
Proposed CrR 3.7 will impede effective law enforcement because many individuals are reluctant to be recorded. Requiring them to be recorded will decrease cooperation with police, especially with marginalized victims and communities. At the beginning of an investigation, almost everyone is under investigation and requiring audio-visual recording of the questioning of everyone at the scene of a violent crime will obstruct justice, as many will be reluctant to speak when video recorded. The rule does not take into account that a person may first appear to be only a witness but later become a suspect. Further, It is illogical and a violation of the Washington Privacy Act to record the refusal of a person who refuses to be recorded.

As written, the rule encompasses every encounter with a potential suspect, no matter how casual or innocuous, on the scene, on the street, at their home, in a vehicle, or at any other location. This would effectively require universal recording of everyone with whom an investigator speaks/ interacts to avoid errors, violating the privacy rights of citizens and producing a massive amount of recordings that will be subject to public disclosure. This, in turn, imposes an unreasonable burden on law enforcement. Most police agencies in Washington lack the resources to record and preserve the broad range of interactions that would fall within the rule. The additional burden of preserving detailed maintenance records of every recording device used also is unwarranted. The proposed CrR 3.7 would require sweeping changes to police procedure in the investigation of every incident that may constitute a crime. Not only would it obstruct these investigations, it is an unrealistic mandate and unless it is funded by the court, impossible due to lack of equipment that would be required.

In order to admit a statement that is not recorded the rule imposes a burden on the State to prove the defendant's statement is reliable, when the probative value may be in the lies that the defendant is telling.
The remedy for violation of CrR 3.7, exclusion of the statement and all subsequent statements, is extreme and unnecessary. This rule will keep relevant and sometimes critical evidence from the jury when there is no question that a statement was voluntarily given. It is an arbitrary and punitive choice to apply a standard of proof to overcome the presumption of inadmissibility that is a higher standard than applies to alleged constitutional violations.

The proposed amendment to CrR 4.7 requires the State to disclose evidence known to anyone acting on the State's behalf, which arguably includes any State witness, especially with the concluding clause, "including the police." It could be construed to include witnesses testifying pursuant to a plea agreement. It is unreasonable to require the State to disclose evidence of which it is unaware when that evidence is known only to a witness or another civilian. While the Brady obligation extends to evidence known to law enforcement directly involved in an investigation, it certainly does

not extend to civilians who are not State agents. If the proposed amendment is not intended to expand the Brady rule, then it is entirely unnecessary.

4.7

The amendments to section (a), (2-4) require disclosure of all evidence that "tends to impeach" any State witness, without limiting that obligation to material evidence. There is no justification for such a radical expansion of the Brady obligation, which is limited by a materiality requirement. This proposed amendment also completely eliminates any restriction on the obligation of the State to disclose evidence that may be known to anyone. It invites the courts to conclude that the State has the duty to collect all evidence that may be exculpatory, which is the responsibility of the defense, not the State, and is an obligation that would never be satisfied. The overbreadth of the State's obligation to learn of all evidence that "tends to impeach" any State witness regardless of materiality is further exacerbated by the imposition of a duty to learn of such evidence and disclose it until the end of time. The proposed amendment then requires ongoing disclosure after sentencing, but to whom? It implies an obligation to locate an unrepresented defendant even if the conviction is final, the sentence has been served, and the conviction may even have been vacated. This is an unreasonable burden with respect to evidence that is not materially exculpatory. After sentencing, the current RPC 3.8(g) requires a prosecutor to disclose "new, credible and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted." That is a reasonable post-sentencing obligation. The much broader requirements of this proposed rule are unnecessary and impose an unreasonable burden on the State.

Under section (h) of the proposed amendment, defense counsel does not have to provide notice to the State before giving the discovery to the defendant. So, in order to protect the safety and privacy of victims and witnesses, prosecutors will have to review all discovery before providing it to the defense, to be able to move for protective orders preventing release of sensitive information to the defendant. This will delay providing discovery to the defense in most cases, and increase the workload of all parties and the courts as the requests for protective orders are litigated. Additionally, the list of necessary redactions is obviously insufficient. Redactions that currently are required by prosecutors as a general rule also include the following: all contact information for all potential witnesses, including email; schools attended by witnesses; job locations and employers of witnesses; medical records; mental health and counseling records; CPS records; photos or video (including on a digital device, or in an electronic file) with images of any part of any person or animal; and any description or depictions of actual, attempted, or simulated sexual contact. Defense counsel is always permitted to review these items with the defendant but it is obvious that putting copies of this material (including autopsy photos, photos of injured victims, and sexually explicit images) in the hands of the defendant would endanger witnesses or unnecessarily invade their privacy for the prurient interest of the defendant or anyone with whom he shared the material. It has been the experience of prosecutors that defense counsel often do not properly redact discovery that they have submitted to the prosecutor for approval before providing it to the defendant, pursuant to the current rule. It poses unnecessary risks to the safety and privacy of victims and witnesses to eliminate this second set of eyes reviewing the redactions. There will be no incentive for defense counsel to carefully redact the discovery, as there is no penalty for failure to do so. There is no effective remedy if the defendant is provided with incompletely redacted discovery, so eliminating review by the prosecutor is contrary to the community's interest in public safety.

4.11

Section (d) of this new rule invites a court to craft a jury instruction "to examine the statement carefully," inviting a comment on the credibility of a particular witness without giving any real direction to the trial court. Judicial comments on the evidence are unconstitutional in Washington. It is inappropriate to use a person's right to refuse to be recorded against them. It is also inappropriate for a jury in a criminal case to be directed to determine the legitimacy of a person's refusal to be recorded, which is that person's right. There is no demonstrable reason to infer bias from the refusal to be recorded. The jury determines the credibility of witnesses. It is already informed if a witness has refused to be recorded. The jury is instructed to consider any relevant circumstances in judging credibility and the defense may argue that the refusal is relevant. The only additional effect of this rule is to coerce the witness to be recorded and to invite a judicial comment on the witness's credibility – both are improper purposes for a court rule.

Thank you for your consideration,

Stanley Langford Lloyd
Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
Domestic Violence Unit - Seattle
Desk Phone: 206-477-3507 Work Cell: 206-639-8970
Stanley.Lloyd@kingcounty.gov