Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 19, 2019 4:06 PM
To: Tracy, Mary
Subject: FW: Opposition to proposed amendments to CrR 4.7, CrRLJ 4.7; and proposed new rules CrR 3.7, CrR 3.8, CrR 3.9, CrR 4.11, CrRLJ 3.7, CrRLJ 3.8, CrRLJ 3.9, CrRLJ 4.11

For you ☺

From: Thompson, Darren [mailto:Darren.Thompson@kingcounty.gov]
Sent: Friday, April 19, 2019 4:03 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Opposition to proposed amendments to CrR 4.7, CrRLJ 4.7; and proposed new rules CrR 3.7, CrR 3.8, CrR 3.9, CrR 4.11, CrRLJ 3.7, CrRLJ 3.8, CrRLJ 3.9, CrRLJ 4.11

To the Clerk of the Supreme Court:

I oppose the proposed amendments to CrR 4.7 and CrRLJ 4.7 and I oppose proposed new rules CrR 3.7, CrR 3.8, CrR 3.9, CrR 4.11, CrRLJ 3.7, CrRLJ 3.8, CrRLJ 3.9, CrRLJ 4.11. The proposals are confusedly and narrow-mindedly drafted and apparently without any input or review by many of the people and groups they would ultimately affect: judges, law enforcement, prosecutors, crime victims or victim advocates, and the community as a whole (all possible witnesses to crimes). Some examples of the many issues with these proposals include:

- **Proposed CrR 3.7** dictates investigative procedures for all custodial or non-custodial interviews and then limits the admissibility of non-recorded interviews in extreme ways. Proposed CrR 3.7 assumes law enforcement are inherently untrustworthy instead of leaving witness credibility determinations to the judge or jury after hearing all the evidence. Proposed CrR 3.7 would keep highly relevant and sometimes critical evidence from the jury when there is no question that the statement was voluntarily given. The standard for overcoming the presumption of inadmissibility grants to the judge the decision that should be left to the jury – the probative value to be given to these statements. 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.
- **Proposed CrR 3.8** is unnecessary because the rules of evidence along with existing constitutional and common law standards adequately address the issue of admissibility of identification procedures. Proposed CrR 3.8 is confusedly written and contains undefined or vague terms such as "important details," "feasible" and "appropriate case law" that provide little guidance to those required to interpret the rule. Proposed CrR 3.8 invites a court to craft a jury instruction "to be used in evaluating the reliability of the identification," which invites an unconstitutional comment on the evidence without giving any real direction to the trial court. It is the jury's responsibility to determine the weight of the evidence based on the information that is available and any gaps in that evidence.
- **Proposed CrR 3.9** is unnecessary and overly restrictive because determination of whether an in-court identification procedure should be excluded is already adequately covered by case law. Proposed CrR 3.9 is an attempt to codify an unsupported conclusion that all in-court identifications are inherently unreliable and it prevents the jury from hearing relevant evidence. The weight of that evidence is

properly developed through cross-examination and determined by the jury, not an arbitrary bright-line rule. Furthermore, proposed CrR 3.9 apparently would apply to law enforcement witnesses, which would preclude prosecution of most traffic-related crimes (from DUI to vehicular homicide) unless the officer was previously acquainted with the defendant or was presented with a photographic montage. Proposed CrR 3.9 would force an identification procedure in every case, including in cases where there is no question that the correct person has been charged (bloody, weapon-wielding man caught leaving victim's home), or in-court identification would not be permitted. The term "unknown" is unreasonably vague. Must the witness know the perpetrator's name or be socially acquainted? Is an unnamed stalker "unknown"? The lack of a clear standard will force law enforcement to conduct unnecessary identification procedures because of the possibility that the court will interpret the term broadly.

- **Proposed changes to CrR 4.7(a)** place impossible responsibilities on prosecutors and law enforcement. The proposed amendment 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. The courts have defined what is "material" to guilt or punishment in cases applying the rule of Brady v. Maryland, but this rule does not refer to that definition and so invites courts to apply a much broader definition. There is no justification offered for applying a broader definition. The amendment requires 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 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 imposes an obligation on the prosecution to continue to track its (and the investigating police agency, and others acting on the State's behalf) contacts with all witnesses in every case, forever, so that if they ever act in a way which would tend to impeach their testimony, that can be disclosed. The proposed amendment 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, 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.
- **Proposed changes to CrR 4.7(h)** are contrary to the community's interest in public safety by allowing a defendant to receive a copy of discovery that has not been reviewed by the prosecutor or the Court. This discovery, apparently, is allowed to contain photographs of injured victims, autopsy photos, sexually explicit materials, and the like. 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. The proposed amendment poses unnecessary risks to the safety and privacy of victims and witnesses to eliminate this second set of eyes reviewing the redactions. Furthermore, there will be no incentive for defense counsel to carefully redact the discovery, as there is no penalty for failure to do so. The proposed amended rule will simply slow down the entire process by requiring prosecutors to move for protective orders of sensitive discovery, delaying release of discovery to defense counsel.

- **Proposed CrR 4.11** coerces witnesses and victims into agreeing to recording, thus violating their rights under the Washington Constitution and RCW 7.69.010. Proposed CrR 4.11 punishes witnesses and victims who refuse to be recorded by allowing for credibility jury instructions that effectively equal unconstitutional judicial comments on the evidence. The 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.

I urge the Court to reject the proposed new rules and amendments due to the countless practical, constitutional, privacy and evidentiary issues they would raise.

Sincerely,
Darren Thompson
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
Economic Crimes Unit