



Pend Oreille County

PROSECUTING ATTORNEY

Hall of Justice

Dolly N. Hunt
Prosecutor

229 S. Garden, Post Office Box 5070
Newport, Washington 99156-5070

(509) 447-4414

Fax: (509) 447-0235

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Washington State
Supreme Court

Supreme Court of Washington
Office of the Clerk of the Court
PO Box 40929
Olympia, WA 98504-0920

Re: Proposed amendments to state criminal rules for Superior and District Courts

Clerk of the Court:

Thank you for considering our comments as it relates to proposed changes of the criminal rules for the Superior and District Courts in Washington. The amendments proposed by the Washington Association of Criminal Defense Lawyers (WACDL) are unlikely to achieve the goals contemplated by WACDL nor would they provide any further assurance that the interests of justice would be met. In some cases the proposals would present extraordinary challenges for Pend Oreille County and other geographically large rural jurisdictions that have fewer residents and resources. For that reason, Pend Oreille County urges the Court to seriously consider the ramifications of implementing the proposed rules and suggests that the proposals offered by WACDL be rejected for the reasons discussed below.

When considered as a whole, the proposals create a sense that prosecutors routinely bury or hide evidence favorable to those criminally charged. They also seem to suggest that law enforcement not only fails to turn over information but that they also manipulate activities like the identification process to reach an unjust result. It is naïve to believe that those things have never occurred but it is not how we do business in Pend Oreille County and not how fellow prosecutors and law enforcement throughout the state operate. We share a clear understanding of the power we prosecutors have been granted and do not take our duties to uphold justice lightly. Thus, the rules proposed by WACDL are, to a degree, insulting. We suspect that when you review the comments from other prosecutors and law enforcement agencies regarding the proposed rules there was a degree of defensiveness in their submissions. The insinuation that prosecutors and law enforcement do not share the desire to support the integrity of the criminal justice system is foreign to our way of thinking.

Forgotten and ignored within the proposed rules is a measure of compassion and respect for victims and witnesses of crimes. The proposed rules have the capacity to re-victimize those that suffered traumatizing events and episodes. The proposed rules would also subject unwarranted

intrusion on to those who by happenstance become the witness of possible criminal activity. The implementation of the rules could result in persons choosing not to come forward to report criminal activity because of the fear that their image or address could be released. While it is important to safeguard the process for those who are criminally accused, the system should not create more victims under the guise of due process and furthering the interests of justice.

As mentioned above, some of the rule changes proposed by WACDL present significant challenges to Pend Oreille County. Pend Oreille County is a geographically large county, roughly the same size as Pierce or Spokane County but with a substantially smaller population of 13,000 people. The county is shaped in a long, thin rectangle with pockets of residents between its north and south ends, including the Kalispel Tribe. The Pend Oreille County Sheriff's Office is located in Newport, Washington at the south end of the county. Newport, Washington, has its own four (4) officer city police force which was only reinstated in 2016 after a number of years of disbandment and continues to address the growing pains of a newly formed law enforcement entity. The Sheriff's Office cover the remainder of the roughly 90 miles that connect the small communities that span from the Spokane County border to the south to the Canadian border to the north. The Sheriff's Office receives occasional assistance from the Kalispel Tribal Police for incidents that occur near the reservation border. Neither the Sheriff's Office nor the City of Newport have access to body-worn camera (BWC) technology nor do they have in-car audio-video recording capabilities. The physical size and shape of the county stretches the already limited resources of the Pend Oreille County Sheriff's Office. The rule changes proposed by WACDL would add to that struggle and demonstrates WACDL's failure to consider how such changes would affect rural counties and small municipalities that lack the resources of its more populous counterparts.

Proposed changes to CrR 3.7/CrRLJ 3.7

This proposed rule would make most "custodial and non-custodial interrogations of persons under investigation for any crime" inadmissible unless the interrogation is recorded by an "audiovisual recording made by use of an electronic or digital audiovisual device." As you know, an "interrogation" involves express questioning, as well as all words or actions on the part of the police other than those attendant to arrest and custody that are likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987). While audiovisual recording of interrogations for the most serious crimes already occurs, if this rule is implemented audiovisual recording would be required for even investigative or *Terry* stops. This proposed rule requirement is excessive and needless in light of the protections presently available under CrR/CrRLJ 3.5.

Should this rule be imposed it would likely result in one of a couple of options being employed by law enforcement entities in Pend Oreille County. One option would be the purchase and implementation of BWC technology. This option would not only include the purchase and maintenance of the equipment but would require the storage of the data recorded by the technology. An expenditure such as this would be substantial to Pend Oreille County as it would be for other law enforcement entities that already live within constant budget constraints. In a perfect world, all agencies would have access to all the best and desired technology to do their job. That is not reality. The reality is that BWC is expensive to purchase and maintain and would compel other expenditures such as those related to requests for public records. Because a BWC system is cost-prohibitive for some jurisdictions, it might require a county or city to

choose between having more officers out on the streets to protect the public or purchasing a BWC system and hiring additional employees to maintain the system and respond to public records requests. In fact, some jurisdictions have been dropping or eliminating their BWC programs because of the excessive and disproportionate cost associated with maintenance and storage issues. See https://www.washingtonpost.com/national/some-us-police-departments-dump-body-camera-programs-amid-high-costs/2019/01/21/991f0e66-03ad-11e9-b6a9-0aa5c2fcc9e4_story.html?noredirect=on&utm_term=.afca4ad1b6dd. Other departments are phasing out their BWC programs due to privacy concerns for domestic violence victims and those suffering from mental illness that are captured on video during police response calls. *Id.*

Another option that law enforcement could consider if WACDL's proposed rule is implemented would involve transporting all persons sought to be interrogated to the Pend Oreille County Sheriff's Office in Newport where audiovisual recording technology is currently available. This option would result in the nearly one hour drive from the communities like Metaline Falls, Washington or the one and a half hour drive from the Canadian border to the Sheriff's Office in Newport in order for law enforcement to record all custodial and non-custodial questioning. This would not only burden law enforcement but would substantially affect the time of citizens and others who are questioned and/or detained by law enforcement.

The proposal has other flaws. The term "persons under investigation for any crime" is not defined. Again, the proposal seems to suggest that recordings would be required for all *Terry* or investigative stops and all questioning used to exclude suspects. Clearly, such a requirement would intrude on the privacy interests of those who are subsequently cleared of involvement in criminal activity. Recall also that such recordings would need to be retained, and would be available to the public, pursuant to Chapter 42.56 RCW.

Another issue is that the rule would require that all interrogations of class A felonies be preserved for 99 years. In what form are these recordings required? Would the State be required to transfer the recording from one form of recording to another? Audiovisual recording technology has blossomed from Betamax recording a mere 30 years ago to the ever-evolving, cutting-edge technology of the present. What would be the State's obligations under the rule?

Cr 3.8/CrRLJ 3.8

This proposal would make all out-of-court identifications inadmissible unless a record of the identification process is made and urges video-recording of the process when practicable. This proposed rule fails to observe that there is almost always some sort of record created of an out-of-court identification. By urging video-recording the proposed rule fails to take into account religious objections to being photographed or recorded. See *Legal Analysis of Religious Exemptions for Photo Identification Requirements*, Congressional Research Service report for Congress, September 2012. <https://fas.org/sgp/crs/misc/R40515.pdf> Many Christians including some Amish, believe being photographed or recorded violate the Ten Commandments. *Legal Analysis of Religious Exemptions for Photo Identification Requirements*, at 3. Historically, some Native Americans refused to be photographed or recorded. A rule that require individuals to be photographed or photographed without religious head covering may infringe upon these individuals' First Amendment right to exercise their religious beliefs freely, leading to potential legal challenges to determine whether the individuals' First Amendment right must be accommodated. As mentioned above, the audiovisual recording process will present challenges to Pend Oreille County because it does not presently possess BWC technology.

CrR 3.9/CrRLJ 3.9

This rule would make in-court identifications inadmissible where the perpetrator is unknown to the witness and there has been no prior out-of-court eyewitness identification procedure. It is difficult to grasp what problem this rule seeks to remedy. This rule is problematic because the term “unknown” is not defined. A person may be “unknown” to another because he or she does not know the person’s name or little else about the person but may recognize the person because they rode the same bus together every weekday for five years. Should this rule be implemented it will remove the ability of a neutral fact-finder to weigh the credibility of the identification process. Lastly, the rule is unnecessary because any issue related to the lack of an out-of-court identification process could be addressed or challenged in cross-examination by the Defendant.

CrR 4.7/CrRLJ 4.7

This proposed rule would extend the discovery requirements on prosecutors to such a level that it would be impossible to properly comply in all circumstances. Without knowing Defendant’s theory of the case, almost any piece of information that the State becomes aware of could be “favorable” to Defendant and that requirement would continue “even after plea and sentencing.” If the rule is implemented would a prosecutor be obligated to inform a Defendant that a burglary occurred against the same victim or residence one year, three years or five years after Defendant was convicted of burglary against the same victim or residence? Where would the obligation end?

The rule would also allow defense counsel to release materials to a Defendant after redacting a defined list of information. If implemented the rule would remove the ability of the Court and/or the prosecutor to approve of redactions to the material before being released to the Defendant. The manner in which the rule is drafted leaves open a number of questions. One question is whether the Court could enjoin the release of materials should information be in the materials where redaction is not required by the rule but has a strong basis for redaction. For instance, there is no redaction required for medical records of a victim. Quite often medical records contain references to other illness and ailments that are not related to injuries related to a specific crime. Would a victim have the ability to challenge the release of the material that contains information about unrelated medical conditions? The failure to address such simple protections again demonstrates the lack of forethought and consideration by WACDL before submitting these proposed rules.

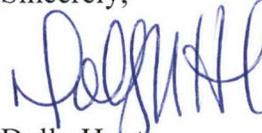
CrRLJ 4.11

This rule allows the “counsel for any party” to record a witness interview but if a witness refuses to be recorded the jury is instructed “to examine the statement carefully in light of any reason for refusal and other circumstances relevant to that witness’s testimony, including but not limited to bias and motive.” There are multiple problems with this proposed rule. First, the term “refuse” is not defined. Does a witness “refuse” to be recorded if he or she is unavailable when and where the requesting party wants to complete the recording? Also, a witness may be favorable to the State or to a Defendant. If a witness favorable to the Defendant refuses to submit to an audio recorded interview, does this shift or saddle Defendant with any type of burden to overcome? The rule is also culturally insensitive to those that oppose being recorded.

One section of the proposed rule limits the dissemination of copies of the recordings and/or transcripts for discovery purposes only. This limitation fails to take into account and demonstrates WACDL's lack of comprehension of the State's obligations under the Public Records Act, Chapter 42.56 RCW. These problems make the case clear that WACDL's proposals should not be implemented or considered unless and until more examination and thought have been given to the problems discussed herein.

Thank you for your time and attention to this matter.

Sincerely,



Dolly Hunt
Prosecuting Attorney
WSBA # 33613

Gregory Hicks
Deputy Prosecuting Attorney
WSBA # 17458

Lori Smith
Deputy Prosecuting Attorney
WSBA # 27961

Ashley Stetson
Deputy Prosecuting Attorney
WSBA # 48294

Brooks Clemmons
Deputy Prosecuting Attorney
WSBA # 22896