Washington State Fraternal Order of Police

April 22, 2019

Susan Carison
Clerk
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Subject: Proposed Amendments to CrR 3.7, 3.8, 3.9 and 4.7 and CrRLJ 3.7, 3.8, 3.9 and 4.7

Greetings,

I am the Executive Director of the Washington Fraternal Order of Police. The Fraternal Order of Police represents thousands of police officers, deputies and investigators across Washington state and more than 350,000 nationwide.

On behalf our officers, I am writing to express deep concerns regarding proposals to modify court rules related to the recording of interviews, identifications and interactions between officers and criminal suspects of crimes. The amendments are unworkable, impractical and don't take into account the real world that law enforcement officers deal with as we try to protect the citizens of the State of Washington.

Instead, we believe the rules put forth by the Washington Criminal Defense Lawyers are designed with the intended purpose of thwarting the efforts of law enforcement officers to protect the citizens of the state, impede the processing of trials and trample the rights, expectations and privacy of the Citizens of the State of Washington.

When looking at disclosure of evidence, it is helpful to remember that there is no Constitutional right to pre-trial discovery, *except* for exculpatory evidence required to be disclosed under *Brady v. Maryland*, 373 US 83 (1963), see *Weatherford v. Bursey*, 429 US 545 (1977), *State v. Clark,* 21 Wn. 2d 774 (1944).

> There is no general Constitutional right to discovery in a criminal case and *Brady* did not create one. As the Court wrote recently "the Due Process Clause had little to say regarding the amount of discovery which the parties must be afforded. . ." *Wardius v. Oregon*, 412 US 470, 474 (1973). Brady is not implicated . . .where the only claim is that the State should have revealed that it would present eyewitness testimony . . . against the defendant at trial.

Weatherford v. Bursey, 429 US 545, 559-60. (1977). With this backdrop, the current rules are considered.

CrR 4.7 and CrRLJ 4.7 – Disclosure of Evidence

This is a proposal in several parts. First, any time a person is charged with a crime, whether it be a misdemeanor or a felony, that the prosecutor is required to turn over evidence which may be favorable to the defense. This practice already exists through the *Brady* line of cases.

Second the proposal to require disclosure of *all* evidence which is material to the *guilt or punishment* that are in the hands of the prosecutor *or* police is unworkable and dangerous to the public and far beyond that required by *Brady* or *Bursey*. Officers and prosecutors do withhold using *incriminating* evidence against a defendant to avoid jeopardizing other investigations, particularly in complex or white-collar crimes where there are multiple criminals. The proposal will harm prosecution of the other cases.

Third, the proposal requires disclosure of impeachment evidence even when the defendant has pleaded guilty and the case closed, but years later a witness commits a crime of dishonesty. This is an impossible task. No law enforcement agency or prosecutor has the ability to track this information.

Fourth, the proposal authorizes defense attorneys to give materials and reports to the defendants. This provision fails to protect the victims of crime and increases the likelihood they will be harassed or harmed. Suppose, for example, the case is a sexual assault. As written the prosecutor would have to seek orders to prevent the release of audio, video or photos taken during sexual assault examinations. Most victims would consider those photos more private than their date of birth, yet the proposal requires redaction of the dates of birth.

Finally, the amendment changes prior case law and requires officers to keep and preserve notes of identifications. The retention of notes has been firmly decided by case law and is not required.
State v. Dictado, 102 Wash.2d 277, 298–99, 687 P.2d 172 (1984), *overruled on other grounds by State v. Harris,* 106 Wash.2d 784, 725 P.2d 975 (1986).

Officers rough notes can easily be misunderstood and taken out of context. Requiring retention and turning over of rough notes is contrary to the best practices of law enforcement which is to fully document the event in an accurate and comprehensive report.

CrR 3.7 and CrRLJ 3.7. Recording of Interrogations

This proposal requires that all interrogations of a person for any crime be audio and video recorded, with very few exceptions. This is both impractical and dangerous.

The proposed rule applies to everyone, whether they work for the government or not. Retail security officer, FBI and federal agencies, school staff and principals, even statements made to a homeowner who detains a burglar would fall under the rule. This is a patently absurd proposition. Even if limited to only Washington investigatory agencies, the rule is unworkable.

Law enforcement officers work in a variety of roles from police patrol officers and detectives, school resource officers, undercover officers, SWAT operators; but they also include Liquor and Cannabis officers, Wildlife officers and investigators for agencies such as for Adult Protective Services, Department of Financial Institutions, DSHS, and many, many more. The financial costs to equip all of these officers with audiovisual recorders is staggering and unnecessary.

Our experience is that requiring formally recorded statements will *discourage* cooperation and candor of the person. As much as officers would like to obtain recorded statements, many people won't cooperate when officers start recording, which doesn't serve justice.

The proposal provides no clarity on when starting the recording is required. Often times officers interview people but only during the interview or afterwards that they realize the person was in fact involved in the crime rather than simply a witness. The rule would complicate trials and hearings by making the court decide when a person became a suspect versus a simply witness to a crime.

CrR 3.9 and CrRLJ 3.9 - Eye Witness Identifications

This rule appears to create a problem rather than a solution. The determination of the validity of an identification is always an issue for a jury. The jury can give weight as they see fit to any identification. The pattern jury instructions, WPIC 6.52, provide ample guidance to the jury to weigh all factors in considering what weight to give an in-court identification.

This proposal fails to address what happens when a legitimate victim sees the offender in court and genuinely reacts upon seeing the offender. How do you prevent that visceral reaction from a rape victim who recognizes the person for the first time "in person" where the identification is based on DNA? And what is the consequence? A mis-trial?

The rule fails to deal with real world realities. Officers don't have the ability to facilitate lineups for everyone arrested, and photo montages are time consuming and often appropriate, current photos to use are extremely difficult to come by.

From our officer's standpoint, this rule places an incredibly difficult burden on law enforcement without a showing of need.

CrR 4.11 and CrRLJ 4.11 - Permits recording of a person during an interview by counsel or investigators.

Our citizens have a right to privacy under the Washington Constitution and under the Privacy Act of RCW 9.73. Victims and witnesses don't "volunteer" to become involved in a criminal act. It is forced upon them. Victims are often interviewed about matters that are not admissible at trial and involve deeply personal issues.

The rule does not protect the confidentiality of the statement. Proposed rule 4.11 prevents disclosure except to comply with CrR 4.7. The proposal to change CrR 4.7 contains an amendment allowing materials to be furnished directly to the defendants. The wording of the two rules does not appear to prevent the attorney from providing the recordings directly to the defendant. The effect of the two rules allows a defense attorney to record a rape victim describing the terror of the incident and then give it to the rapist to play over and over for his gratification. This is a disturbing result.

The only way to prevent such an event is for the victim to refuse to be recorded or for the prosecutor to seek an order prohibiting the release of the recording. We are very aware that the prosecutor is *not* the attorney for the witness and has only a limited role in asserting the rights of the victims and witnesses. Prosecutors already tell us that they are hesitant to stop abusive and inappropriate questions for fear of interfering with the defense investigation in violation of the ethics rules. To impose the burden on the prosecutor to seek protective orders is an unanticipated burden without a showing of need.

Conclusion

As law enforcement officers, we take our role in the criminal justice system seriously. The thousands of officers in the state work hard every day to protect the citizens of the state and the citizens expect no less from us. It is our belief that these proposals do little to aid in the handling of criminal cases, carry enormous financial costs, and they burden the courts, prosecutors, police and citizens of the State of Washington.

On behalf of the thousands of Washington police officers, deputies, and investigators we represent, we ask that you reject the proposed amendments to the criminal rules.

Lynnette Buffington
Executive Director, WAFOP

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 8:06 AM
To: Tracy, Mary
Subject: FW: Court Rules Response
Attachments: WAFOPCourtRulesResponse.pdf

-----Original Message-----
From: lynnetteb@wafop.com [mailto:lynnetteb@wafop.com]
Sent: Monday, April 29, 2019 10:50 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Court Rules Response

Hello,
Please see the attached response for the proposed court rules.

If you have any questions please don't hesitate to contact me.

Thank-you,
Lynnette

Lynnette Buffington
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