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April 29, 2019

Clerk of the Supreme Court of the State of Washington
Supreme Court of Washington
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed CrR and CrRLJ 3.7, 3.8, 3.9, 4.7, 4.11

Dear Clerk of the Supreme Court,

I am writing in opposition to the proposed Criminal Rules and Criminal Rules for Courts of Limited Jurisdiction 3.7, 3.8, 3.9, 4.7 and 4.11. While one of these proposed rules carries a kernel of a reasonable policy related to recording custodial interrogations, that reasonableness is quickly overshadowed by the breadth of the proposal's recording requirement. The remainder of the proposed rules do not contemplate the rights of those who do not wish to be recorded, the impact on crime witnesses and victims, and the impact on law enforcement budgets and investigations.

The proposed rules carry consequences that have not been fully researched, discussed, or debated. Although the court may have the power to adopt such rules, their breadth would significantly rebalance the priorities and budgets of law enforcement agencies. Consideration would therefore be better suited to the legislature. The legislature can better publicize and collect opinions, it can fund research, and it can call on experts to determine the pragmatics of implementation. If this court were to adopt the proposed rule in its current format, the collateral consequences will do more harm than good on balance. I urge the court to decline to adopt the proposed rules for the following reasons.

CrR 3.7—Recording Custodial and Non-custodial Interrogations

The proposed CrR 3.7 and CrRLJ 3.7 seek to require the recording of both custodial and non-custodial interrogations under the threat of a broad exclusionary rule. These proposed rules do not set appropriate boundaries on when recording should occur, who must record, how costs will be borne, or the impact on police practices such

as covert operations. Enacting a rule without sufficient boundaries on when, who, and how recordings are required will create a requirement for nearly-constant recording by police officers. This rule will become, in essence, body-camera legislation enacted as a court rule. It will carry with it many of the problems of body-camera legislation without any of the nuanced policy solutions. It neglects the privacy interests of those being recorded, it ignores CrR 3.5 and the Privacy Act, and it fails to address how such a mandate will be funded. Such a sweeping policy decision is properly researched, debated, and evaluated by the legislature and this court should decline to adopt it.

To be clear, this proposed rule should not be confused with the requirement of recording custodial interrogations. The number of jurisdictions with a requirement pertaining to custodial interrogations has been growing across the nation. As of 2015, 22 states had a policy requiring recording of custodial interrogations.[1] However, even these custodial interrogation policies are typically limited in common-sense ways. They are generally limited to only custodial interrogations that occur either in a place of detention or away from the scene of a crime and when feasible. The currently proposed rule ignores these limits in favor of requiring video recording of nearly every police encounter and potentially even encounters between citizens. Below is a non-exhaustive list of the ways that the proposal is both overbroad and insufficiently planned.

Overbroad: Trigger

The current rule would trigger a recording requirement when a person is "under investigation for any crime" without regard to whether the person is in the officer's custody or not. There is no bright-line definition of when an "investigation" of a person begins. If an officer who is questioning a witness believes a witness is being dishonest, are they now investigating the crime of making a false statement to a public servant? Is a social contact with a citizen on the street an investigation? Is this different than a social contact with a suspicious person in a parked vehicle?

Without clear guidance, law enforcement agencies would likely be forced to record every interaction with every person for fear that a conversation with a witness would later be deemed an "investigation." The lack of a bright line turns the proposed rule into a requirement that each officer be outfitted with a camera capable of capturing every encounter they have. It becomes, in essence, a statewide legislating of officer-worn body cameras. It also would require retraining of every officer in the state on when a person is deemed "under investigation" such that recording must commence.

Limiting a recording requirement to custodial interrogations in a place of detention or away from the scene of a crime provides a bright line and prevents the requirement to record every single interaction. It allows camera equipment to be kept in jails, police departments, prisons and "places of detention" and reduces uncertainty about when recording must begin. Without these limits, the proposed rule is an extreme action and should not be adopted.

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[1] Criminal Procedure-Custodial Interviews—Department of Justice Institutes Presumption That Agents Will Electronically Record Custodial Interviews., 128 Harv. L. Rev. 1552 (2015) (citing Thomas P. Sullivan, Compendium: Electronic Recording of Custodial Interrogations. Accessible at https://perma.cc/CGW9-7YAH).

Overbroad: Interrogator

CrR 3.7 and CrRLJ 3.7 are not limited to only interrogations conducted by law enforcement. As drafted, the rule could require recording in instances where loss prevention officers and store owners are investigating shoplifting or questioning their employees about suspicious behavior. It could include one parent asking another about excessive physical discipline of their child. It could require the video recording of certain courtroom proceedings where questions could result in future charges such as perjury or jury tampering. Whether this is an intentional feature of the proposed rule or an oversight is unclear. Regardless of the drafter's intent, such a requirement is clearly unworkable and excessive.

Overbroad: Remedy

The remedy for any violation of the rule is biased toward exclusion. Despite knowing that exclusion is an extraordinary remedy, this rule severely limits the exceptions to exclusion. As written it will likely cause the suppression of many probative, relevant, and otherwise proper conversations that were not recorded where the State could not show a limited exception such as "spontaneity," proper maintenance of equipment, "substantial exigent circumstances," or most notably, the "reliability" of the offered statements.

The requirement of "reliability" is the most problematic. In a criminal trial, the probative nature of the statement is frequently in its unreliability. Both inconsistent statements and probative false statements would be excluded under the rule as drafted because they are "unreliable." Such an exclusionary rule is too broad. Also caught up in the overbroad exclusionary rule would be instances of an officer's good faith mistake in failing to activate recording equipment or instances where the officer believed he or she had activated the recording device but did not. Such good-faith mistakes would result in the exclusion the questioning and all "statements made by the person during and following" the non-recorded conversation. An accidental non-recording of a co-defendant early in an investigation, could entirely prevent the interviewee from being a witness altogether. The proposed remedy is excessive.

Failed to Consider: Cost of Implementation

Due to the breadth of this proposal many departments would need to immediately expend considerable funds. All Washington state law enforcement agencies would need to fund (1) the purchase of recording equipment, (2) training officers how to operate the equipment and when it must be used, (3) additional salaries and costs related to maintaining the equipment, (4) repeat costs of maintaining and cataloging the enormous volume of video which will be produced, (5) salaries for individuals tasked with complying with Public Records Act requests for recorded videos.

The costs of cataloging and storing the video for compliance should not be understated. Spokane Police Department currently expends approximately $325,000 per year for storage of officer-worn camera video.[2] Beyond mere storage, the State would also need to accurately catalog and identify those who were recorded. Given CrR 4.7's obligation to provide every recorded statement of a defendant in every criminal

[2] https://www.krem.com/article/news/investigations/inside-the-spokane-police-departments-body-camera-program/293-e77671cc-8a24-453b-8598-2d1b66bb6894

case, CrR 4.7(a)(1)(ii), it is unclear how an officer would be able to identify each person they had spoken with in a non-custodial setting without application of facial recognition technology to the recorded video—this is most certainly a debate which should be had by the people of the State of Washington through the legislature about the potential fiscal and privacy costs.

Finally, the costs of attempting to comply with Public Records Act requests for the enormous volume of video will become a cost that will be too large to bear for some agencies.[3]

Failed to Consider: Non-Washington Police Agencies

In its current format, the rule appears to contemplate an exception to interrogations during jail booking procedures but only by non-Washington police agencies. It is illogical that booking procedures would be exempted for outside agencies but not Washington agencies. Assuming this was a drafting error, the rule is still inadequate. It is silent as to outside agencies that are operating either in Washington or outside of it. Current federal policy includes exceptions to the recording of custodial interrogations that may reveal national security secrets or classified information.[4] The police agencies of other states may have their own circumstances mandating recording under different circumstances. Yet this rule would require every outside agency referring a crime for prosecution in Washington to know and comply with court rule requirements of Washington—a considerable expectation. The impact of this rule on federal agencies acting in Washington and foreign agencies investigating in their own jurisdictions appears to not have been considered.

Failed to Consider: Privacy of those recorded

The debate over video from officer-worn body cameras has included much discussion about the regulation of the resulting recordings. CrR 3.7 and CrRLJ 3.7, proposed by the Washington Association of Criminal Defense Lawyers, breaks from the policy suggestions of the National Association of Criminal Defense Lawyers which recommends policies around the use and maintenance of such footage.[5] The proposed CrR and CrRLJ 3.7 include no such consideration for the privacy of those recorded.

Without such consideration or legislation, the well-documented difficulties of Washington's police agencies attempting to comply with the Public Records Act in the context of body cameras would resurface.[6] The court would be legislating a new requirement with the potential for a large impact on the privacy of those being recorded.

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[3] https://www.kiro7.com/news/local/millions-of-dollars-privacy-concerns-surround-seattle-police-department-body-camera-program/692859188; https://www.nytimes.com/2016/10/23/magazine/police-body-cameras.html

[4] *Supra* at note 1 at 1555.

[5] https://www.nacdl.org/uploadedFiles/files/criminal_defense/fourth_amendment/Policing_Body_Cameras_Report_03202017_456.pdf.

[6] https://www.kiro7.com/news/local/millions-of-dollars-privacy-concerns-surround-seattle-police-department-body-camera-program/692859188; https://www.nytimes.com/2016/10/23/magazine/police-body-cameras.html

Failed to Consider: Interaction with Privacy Act

The proposed rule includes no exception for undercover officers. It would require undercover officers to video record all questioning of those they are investigating under threat of suppression of those statements and all future statements. Yet contrarily, the Privacy Act prohibits undercover officers from recording statements.[7]

Beyond undercover police operations, the proposed rule pays very little respect to an individual's right to not be recorded. In fact, even when an officer knows an individual does not want to be recorded the proposed rule mandates that the officer initiate recording to capture a refusal to be recorded. Forcing an officer to record a citizen's refusal when they have just objected to recording is not sound de-escalation policy.

Failed to Consider: CrR 3.5

One of the advantages to those jurisdictions that have implemented recording requirements for custodial interrogations is the reduced need for hearings to determine whether the statements of the defendant were made within the bounds of *Miranda*. However, the drafter of these proposed rules has left the current mandate for hearings in CrR 3.5 untouched. Given the potential pitfalls in the new rule, the proposed rule will likely mean more litigation and court hearings, not fewer.

CrR 3.8 —Recording Eyewitness Identification Procedures

The proposed CrR 3.8 and CrRLJ 3.8 would mandate the recording of eyewitness identification procedures and any "related interviews." Current case law already offers remedies for instances of problematic eyewitness identification procedures.[8] Under current law remedies already include the suppression of suggestive identifications as well as the offering of expert testimony regarding the reliability of eyewitness identifications when appropriate.[9]

Already many criminal cases have eyewitnesses who are hesitant to cooperate with the criminal justice system. A requirement that a person be taped when making an identification combined with the rise of simple methods of video sharing will only create more instances of witnesses reluctant to cooperate. It is not difficult to imagine the impact of a mandatory recording requirement on sexual assault victims, domestic violence victims, or victims of gang violence.

Where an individual refuses to be recorded, the proposed CrR 3.8 does not provide an explicit exception to recording. Although (b) appears to allow officers to document by report only, it allows this only if video recording is not "possible." Yet even if recording is not possible, if the procedure "includes movements" the subsection (c)(4) requires it be video recorded nonetheless.

This proposed rule has also not considered the impact on active crime scenes. It would require an officer to identify any persons present at the scene including officers and bystanders who may be coming and going with frequency. Bystanders may also be

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[7] State v. Salinas, 121 Wn.2d 689, 853 P.2d 439 (1993).
[8] State v. Sanchez, 171 Wn. App. 518, 571–72, 288 P.3d 351 (2012).
[9] State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003).

reluctant to identify themselves and have a right not to. A rule suggesting that a failure to identify these witnesses at a time when other investigative priorities abound could lead to suppression would be an unwarranted rebalancing of investigative priorities.

The remedies subsection (which appears to have been erroneously labeled as a second subsection (c) rather than subsection (d)) would create a hodgepodge of remedies across different courts. The proposed rule authorizes the court to (1) exclude an identification procedure, (2) redact portions of the identification procedure, (3) admit expert testimony, and/or (4) fashion a jury instruction to evaluate the identification. It prompts the trial court to consider a remedy whenever the record "is lacking in important details" but provides no guidance on what is important. It provides no guidance on when to exclude, when to redact, when to admit expert testimony, what type of testimony, or how the jury should be instructed.

Even courts that prefer the remedy of additional jury instructions may not achieve the desired impact. Recent research has shown that introducing a jury instruction advising caution regarding eyewitness identifications does not introduce sensitivity to deliberations but causes jurors to become more suspicious of all eyewitness identifications without regard to the strength of the eyewitness testimony presented.[10] This rule provides no guidance to trial judges on how to craft an effective instruction. The outcome will likely be more comments on evidence and the introduction of suspicion as to all eyewitness identifications, not only those with problematic elements.

This proposed rule also is silent on codifying the best practices of eyewitness identifications such as blind/blinded administration and adequacy of fillers predicated on prior statements of identification.

CrR 3.9 — In-court identifications

The proposed CrR 3.9 attempts to codify the conclusion that every in-court identification is unreliable. This is an unsupported assertion.

Furthermore, this proposal has not considered its impact on the many cases which are built on an identification made by a single law enforcement officer. A significant percentage of DUI and controlled substance cases involve an identification made by a single law enforcement officer and identification is not at issue. This rule would have the impact of suppressing an officer's ability to single-handedly identify the defendant except in situations where he is "known" to the officer or would require a completely superfluous identification procedure of the officer even when he has directly arrested the defendant. And finally, the rule provides no guidance for determining whether or not someone is "known" to the witness.

CrR 4.7 — Discovery

The proposed amendments to CrR 4.7 would substantially increase the discovery obligations of the State to include immaterial evidence well after cases have concluded

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[10] Nat'l Acad. of Sci., Identifying the Culprit: Assessing Eyewitness Identification 107 at 43. (2014); Novel New Jersey Eyewitness Instruction Induces Skepticism but not Sensitivity, accessed at https://doi.org/10.1371/journal.pone.0142695

and reduce the obligations of the defendant even where those obligations protect the private information of victims and witnesses.

The most problematic amendment to CrR 4.7 is subsection (a)(4). This subsection would expand discovery obligations into material held by others. Whereas a State's witness's psychological records which would never be in the State's possession previously, the proposed subsection (a)(4) would now require they be disclosed to the defendant if they may "tend to impeach" the witness even if they are never sought by the defense and only maintained at the witness's doctor's office.

This proposal would also abandon the commonsense limitation that the State be aware of the evidence before triggering a disclosure requirement. It expands the discovery requirement to evidence known by any witness "acting on the State's behalf." To codify a discovery obligation that would compel disclosure of evidence of which a prosecutor's office is unaware would require a complete investigation be performed to find impeachable evidence on every witness that could be deemed to be "acting on the State's behalf." This would mandate a significant expansion of the investigation performed by law enforcement in every case.

The subsection does not set forth a remedy for violations of this discovery obligation. Would an appeal asserting the non-disclosure of immaterial evidence be subject to a harmless error analysis? Or would the court instead remedy the situation by reversing convictions for failure to disclose immaterial evidence? Brady jurisprudence already sets forth a low bar for materiality and an appropriate remedy and it should be maintained.[11]

Lastly, subsection (a)(4) imposes this duty for eternity. As written it will require the State to track down unrepresented defendants until the end of time in order to deliver any information "which tends to impeach" a State's witness without regard to whether the information is material. The current standard for ongoing disclosure mandated by RPC 3.8(g) strikes an appropriate balance of the need to provide ongoing information and the burden placed on prosecutor's offices.

Subsection (h)(3) would allow a defendant to receive and maintain a copy of the discovery including sensitive witness and victim information without having redactions reviewed by a third party. The current rule requires the court or prosecutor to review redactions before a copy is provided to the defendant. An additional set of eyes reviewing for redactions can only be a positive when it comes to such sensitive information. The proposed rule provides no consequence to a defense attorney's failure to redact or good-faith mistake. Without an appropriate incentive to ensure adequate redaction or consequence after the fact, more sensitive information will go unredacted.

The proposed redactions under the amended subsection (h)(3) are not fully adequate either. Only redacting home addresses to the city and state may not be sufficient to protect a victim. Where a victim has fled the area to live with a family member, providing the city and state where they are staying may be all that is needed to find them. The current rule protects victims and witnesses in unique situations where one-size-fits-all redactions may be inadequate.

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[11] State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011).

CrR 4.11 Recording Witness Interviews

This newly proposed rule would explicitly authorize the recording of witness interviews. It is unclear why this rule is needed. It alters no substantive rights related to recording or granting consent to be recorded. The only possible purpose would be to grant interviewers an opportunity to pressure citizens who do not wish to be recorded into recording. An attorney or investigator would likely inform a witness that the attorney has the right to record and if they refuse, the jury will be told they refused and asked to examine the witness's motives in refusing. The proposed rule includes no requirement that an interviewee be told that they have the right to refuse to be recorded. Instead, the proposed rule presumes that there is no legitimate reason why an individual might opt to not be recorded.

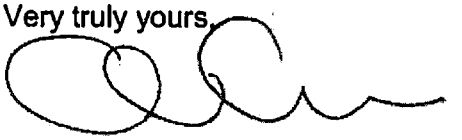
The proposed rule also would unduly restrain the dissemination of interviews in other areas. An interview of a repeat expert witness would not be able to be used in a future trial involving the same witness even where the transcript is provided in discovery. This would create a need to re-interview the witness in preparation for every case or set a hearing upon which to establish that the dissemination is "reasonably necessary" to conduct a party's case. In an era where local governments are being asked to do more with less, introducing less efficiency into the system where it produces no actual benefits should be frowned upon.

The most problematic portion of the proposed CrR 4.11 is the requirement that where a witness or victim chooses to exercise their right to not be recorded, a jury should be instructed to consider the witness's "bias and motive" in opting to not record. Many requests to not be recorded will be predicated on a desire to not talk about an extraordinarily sensitive matter. Where the jury is instructed to consider that motive, it significantly undercuts the witness's exercise of their right as the State will need to put the sensitive subject before the jury to argue the lack of improper "bias and motive." Witnesses and victims should not be punished for exercising their rights.

Conclusion

The proposed rules will significantly rewrite the scope of law enforcement recording in Washington State. They will impose serious financial burdens on police agencies and serious privacy costs on the citizens of Washington. They will disrespect the rights of those who do not wish to be recorded by law enforcement and impose extraordinary burdens on prosecutor's offices throughout Washington. I strongly urge you to reject these proposed rules.

Very truly yours,



ADAM CORNELL
Snohomish County Prosecutor

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 2:11 PM
To: Tracy, Mary
Subject: FW: Comment to Proposed Rules 3.7, 3.8, 3.9, 4.7, 4.11
Attachments: Comment to July 2018 Proposed Rules 3.7, 3.8, 3.9, 4.7, 4.11.pdf

From: Sugg, Nathan [mailto:Nathan.Sugg@co.snohomish.wa.us]
Sent: Monday, April 29, 2019 2:08 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Cornell, Adam <acornell@co.snohomish.wa.us>
Subject: Comment to Proposed Rules 3.7, 3.8, 3.9, 4.7, 4.11

To the Clerk of the Supreme Court,

In July of 2018 the Court published for comment proposed court rules 3.7, 3.8, 3.9, 4.7, and 4.11. Please find Snohomish County Prosecutor Adam Cornell's comment in response attached to this email.

Sincerely,

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