KING COUNTY PROSECUTING ATTORNEY'S OFFICE

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JUSTICE
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April 19, 2019

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

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

Dear Justices of the Supreme Court,

Thank you for seeking comments to the Washington Association of Criminal Defense Lawyers' (WACDL) proposed amendments to the Superior Court Criminal Rules (CrR) and Criminal Rules for Courts of Limited Jurisdiction (CrRLJ).[1] After carefully reviewing them, and in consultation with the victim services community and our law enforcement partners, I strongly urge you to reject them because they are deeply flawed and unwarranted.

A. Proposed CrR 3.7, 3.8, and 4.11

WACDL's stated goal for proposing CrR 3.7, 3.8, and 4.11, is "to improve the reliability" of interrogations, eyewitness identification procedures, and pretrial interviews through recording. In pursuit of this goal, WACDL is proposing far-reaching and fundamental changes to how cases are investigated without having offered any showing that the current rules and case law are inadequate to ensure just trials.

For example, proposed CrR 3.7 requires law enforcement to audiovisually record all interrogations of persons under investigation for "any crime," and to preserve those recordings until the defendant dies (as there is no limit to habeas review), or for 99 years for Class A felonies, even if the defendant later dies and the recording has no value. Setting aside the monumental cost of outfitting law enforcement officers with audiovisual recording devices, and the unending cost to store and publicly disclose such recordings, the mandate that all interrogations be recorded is harmful and will lead to extensive litigation. Because crime scenes are chaotic and rapidly evolving, responding officers will be forced to record everyone until it is clear who is a suspect and what crime, if any, occurred. Many witnesses would rather walk away

[1] Although my comments focus on the proposed changes to the Criminal Rules (CrR), they apply with equal force to the proposed changes to the Criminal Rules of Limited Jurisdiction (CrRLJ), which are identical, and should be considered accordingly.

than be recorded, particularly in domestic violence, gang-related, and violent crime investigations. Further, determining whether the exceptions apply, particularly whether due diligence has been met or whether substantial exigent circumstances existed, will become the object of extensive litigation.

Moreover, the presumption that an unrecorded interrogation is inadmissible substantive evidence reflects extreme distrust in law enforcement, trial courts, and juries. Proposed CrR 3.7 appears to be predicated on a belief that police are inherently untrustworthy and cannot be taken at their word, and equally offensive, that judges cannot screen unreliable evidence and that the jury cannot be trusted to determine an officer's credibility. Recent comments by defense counsel urging proposed CrR 3.7's adoption have focused on the Innocence Project's finding that false confessions account for nearly one third of the 354 people exonerated by DNA evidence since 1989. Millions of people have been convicted of crimes over those 30 years, illustrating that exonerations are truly rare. If preventing false confessions is the primary rationale behind proposed CrR 3.7, then the proposed rule sweeps too broadly by subjecting any citizen who happens to be near a crime scene to being recorded while police determine whether a crime was committed, and who committed it. Further, the recording mandate sets up a clash with the Washington Privacy Act, which requires that all parties to a private conversation consent prior to being recorded. RCW 9.73.030(1)(b).

Proposed CrR 3.8, which renders an out-of-court identification procedure conducted by law enforcement inadmissible without a sufficient record, appears animated by the same distrust of law enforcement and the jury's role as factfinder. The proposed rule's strong preference for video recording identification procedures will intimidate victims and witnesses who will rightly fear retaliation when their attacker obtains access to the recording, either through discovery or public disclosure, and circulates it for purposes of pressuring, or in some cases, terrorizing the witness. The broadly worded "remedy" section of the proposed rule will spur endless litigation over the importance of certain omitted details and the feasibility of obtaining and preserving those details.

WACDL has not provided any showing that existing constitutional and common law standards insufficiently address the admissibility of identification procedures. While recent comments by defense counsel supporting proposed CrR 3.8's adoption highlight the Innocence Project's finding that eyewitness misidentification is the leading cause of wrongful convictions, these comments do not explain how video recording an identification procedure will lead to more accurate identifications, or for example, as required by section (c)(6), how recording the identity of every person witnessing an identification, their location, and whether the witness could see them will improve the reliability of identifications. Even without the fluidity of crime scenes, officers cannot possibly know who a witness can see without first asking the witness to look around and identify every person watching them, thereby further intimidating an already frightened witness. Both the state Legislature and the Washington Pattern Instructions Committee are currently considering how to improve the reliability of eyewitness identification evidence, including the creation of a stakeholder workgroup focused on adopting model guidelines from evidence-based best practices for law enforcement.[2] This Court should reap the benefit of those efforts before fashioning a court rule aimed at achieving the same goal.

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[2] Substitute Senate Bill 5714 unanimously passed the Senate and has passed out of the House Committee on Public Safety with amendment.

The third proposed rule directing recording, proposed CrR 4.11, punishes witnesses who do not consent to recording witness interviews. It seeks to solve a problem that does not exist. The overwhelming majority of witnesses already agree to be recorded, and the rare few who hesitate do so because of the subject matter, such as sexual assault, or their fear of the defendant. Under the current system, juries hear when a witness refuses to be recorded and the defense is permitted to argue that the refusal is relevant. Proposed CrR 4.11 exceeds those permissible bounds and coerces reluctant victims and witnesses into being recorded by allowing an interviewer to assert a "right" to record their interview without first advising those victims and witnesses of their right to refuse.

Further, the proposed rule punishes victims and witnesses who refuse to be recorded with a negative jury instruction suggesting that their refusal should be evaluated in light of their bias and motive. It is hard to imagine how trial courts will be able to craft such an instruction without running afoul of the constitutional prohibition against commenting on the evidence. Art. 4, sec. 16. Nonetheless, if a jury is instructed to consider the reasons for a refusal, then the jury should be able to hear all of the reasons the witness refused, including the defendant's prior threats, intimidation, or other bad acts, as well as the character of the defendant's associates, to evaluate the witness's fear of retaliation. If the witness is not permitted to explain the refusal in full, then an instruction would be patently unfair.

B. Proposed CrR 3.9

Proposed CrR 3.9 excludes in-court identifications where the perpetrator is unknown to the witness and there has been no prior out-of-court eyewitness identification procedure. As currently drafted, this rule would preclude prosecution of most traffic-related crimes, such as driving under the influence and vehicular homicide, unless the officer previously knew the defendant or identified the defendant in a montage, show-up, or some other out-of-court eyewitness identification procedure. In other words, this proposal would force an identification procedure in every case, even if there was no question that the correct person was charged, for example when a defendant is pulled over and arrested behind the wheel for driving under the influence, or when the defendant is the only other person present at a homicide, covered in blood, and carrying the murder weapon. Proposed CrR 3.9 deprives the jury of relevant evidence that is properly tested through cross-examination, without any showing that the current case law is inadequate and that a bright-line, exclusionary rule is necessary.

C. Proposed CrR 4.7 Amendments

WACDL's proposed amendments to CrR 4.7 are particularly concerning. Although the stated purpose for amending a prosecutor's discovery obligations is "to bring the rule into accord" with Brady[3] and its progeny, the proposed amendments far exceed that goal. For example, proposed CrR 4.7(a)(3) and (4) includes an additional obligation requiring prosecutors to disclose any material or information "which tends to impeach a State's witness." A prosecutor's obligation under Brady, however, is limited to *material* impeachment evidence. Giglio v. U.S., 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) ("A finding of materiality of the evidence is required under Brady"). Expanding a prosecutor's obligation to

[3] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

disclose *any* evidence that is, or could be, impeaching – without any reference to materiality – is unprecedented and unwarranted. If adopted, the proposed amendment should explicitly define "material," consistent with the case law, to avoid unnecessary litigation and ensure that Brady's mandate is satisfied. State v. Mullen, 171 Wn.2d 881, 897, 259 P.3d 158 (2011) ("Evidence is 'prejudicial' or 'material' if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.") (internal quotation and citations omitted).

Further, proposed CrR 4.7(a)(4) creates an unlimited, "ongoing" obligation on the prosecution to learn about and disclose material exculpatory evidence and all impeachment evidence, in possession of the prosecution, the police, and "others acting on the State's behalf" forever. This ongoing duty is untethered to the case law, and surpasses the special post-conviction responsibilities imposed on prosecutors by RPC 3.8(g), which requires a prosecutor to promptly disclose "new, credible and material evidence" creating a reasonable likelihood that a defendant is innocent when "a prosecutor knows" of the evidence. The proposed amendments dramatically expand a prosecutor's obligations far beyond these well-established bounds, without any showing that such an expansion is warranted. For decades, prosecutors have understood and carefully upheld their duties under Brady, RPC 3.8, and CrR 4.7, while courts have successfully implemented these standards and ensured prosecutors' compliance with them. The precious few Washington cases discussing, let alone finding, Brady violations evidences why these amendments are unnecessary.

Proposed CrR 4.7(h) also charts new territory by allowing defense counsel to provide redacted discovery to defendants without a court's or prosecutor's knowledge or approval. The proposed list of redactions is profoundly inadequate. To ensure privacy and safety, victims' and witnesses' entire contact information should be redacted, including their school, employment, and email information, as well as their medical records, mental health and counseling records. Further, autopsy photos, sexually explicit images, as well as descriptions and depictions of actual, attempted, or simulated sexual conduct should be redacted. Such redactions are imperative given that there is *no limit* placed on the defendant's use or dissemination of the discovery, no penalty or remedy for the defendant's misuse of discovery, and the reality that information is shared on social media and the internet with alarming ease and frequency.

Moreover, removing the court and prosecutors from regulating redacted discovery runs counter to victims' and witnesses' statutory right to "receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts," and the Legislature's intent that their rights be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." RCW 7.69.010, .030(4). If adopted, proposed CrR 4.7(h) will lead to delays and increased litigation and workload for counsel and the court, as prosecutors are forced to file motions for protective orders before providing discovery to defense counsel to prevent the release of sensitive information.

In sum, the depth and breadth of these proposals is staggering, particularly given the lack of public debate, systematic study, or analysis calling for such sweeping changes. By proposing these amendments, WACDL is seeking to use the court rules process to force law enforcement to adopt certain investigative procedures at an enormous cost to police agencies, while simultaneously undermining the jury system by depriving juries of constitutionally valid and

admissible evidence. The proposals' ambiguous phrasing and exceptions will lead to excessive litigation and monopolize precious court resources. Moreover, WACDL's proposed discovery rule amendments threaten victims' and witnesses' safety.

I respectfully urge you to reject the proposed amendments.

Sincerely,

Dan Satterberg

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