Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 29, 2019 2:33 PM
To: Tracy, Mary
Subject: FW: Comment on proposed CrR 3.7, CrR 3.8, CrR 3.9, and CrR 4.11, amendments to CrR 4.7, and parallel CrRLJ proposals.

From: Wise, Donna [mailto:Donna.Wise@kingcounty.gov]
Sent: Monday, April 29, 2019 2:32 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed CrR 3.7, CrR 3.8, CrR 3.9, and CrR 4.11, amendments to CrR 4.7, and parallel CrRLJ proposals.

Re: Proposed CrR 3.7, CrR 3.8, CrR 3.9, and CrR 4.11, amendments to CrR 4.7, and parallel CrRLJ proposals.

I have been practicing law in Washington for over 30 years, representing the people of the State. I oppose these proposals in the interest of all individuals' right to privacy, the rights of victims and witnesses to respect and to protection from intimidation and retaliation, and the public interest in effective prosecution of violent crime. There is no evidence of systemic problems that will be solved by mandated investigative procedures and exclusion of probative and constitutionally obtained evidence.

Proposed CrR 3.7 requires every "interrogation" of any person "under investigation for any crime" be video recorded. The rule is not limited to law enforcement – it would extend to store security, CPS, and psychological examinations for purposes of evaluating potential mental defenses. Police investigating suspicious circumstances will be obliged to record every individual with whom they speak, because everyone is under investigation until the facts are established. The remedy for failure to record is suppression of this and all future statements, so investigators must record everyone or risk the inability to use any statement of the defendant. Other comments on this rule have addressed the impossible financial burden on law enforcement that would result if all investigatory questioning must be recorded, preserved indefinitely, and made available upon public request.

Proposed CrR 3.7 and 3.8 both are unwarranted steps toward a surveillance state. Each rule violates privacy rights, in making the recording and the mandatory distribution of recordings to the public under the Public Records Act (PRA). The vast majority of recordings will be of individuals just victimized by violent crime, witnesses to crimes, people who have lost a loved one to a death that could be suspicious, and people involved in traffic collisions, or who drive badly and are investigated for DUI. Many recordings will demonstrate police suspicion of persons never charged with a crime. The recordings may occur inside homes. The recordings will include children and other vulnerable persons – because they are victims or simply present when others are recorded. All recordings must be preserved, under the terms of the rules and the PRA, and will be available to anyone upon request. There is no limitation on the use of these video recordings once released. The dangers of such ubiquitous recording are explored in a recent journal article. B. Newell, Collateral Visibility: A Socio-Legal Study of Police Body-Camera Adoption, Privacy, and Public Disclosure in Washington State, 92 Ind. L.J. 1329 (2017). The article notes that when one police agency began using body-cameras, a public records request was immediately filed for all recordings, and when those recordings were provided, all were immediately posted on YouTube. Id. at 1331-32. Some officers then tried to protect civilians' privacy by turning off recordings in sensitive situations where possible, *e.g.*, when responding to a call of an unresponsive infant. Id.

at 1332-34. That would not be possible under the proposed rules, without risking inability to prosecute if it is determined that a crime occurred.

With respect to both proposed CrR 3.7 and CrR3.8, the Court should not accept the simplistic presumption that video recording will be conclusive evidence that will serve the interest of justice. When people realize that everyone at the scene of a crime will be video recorded, that will deter many from calling 911 when a violent crime occurs. Moreover, video recording creates its own problems. Commentators have described problems associated with police recording, such as invasions of privacy, the limitation of the camera's perspective, the temptation to over rely on the recording, and possible distribution of the recording pretrial. *See* R. Meyers, Police-Generated Digital Video: Five Key Questions, Multiple Audiences, and a Range of Answers, 96 N.C. L. Rev. 1237 (2018); A. Gonzalez & D. Cochran, Police-Worn Body Cameras: An Antidote to the "Ferguson Effect"?, 82 Mo. L. Rev. 299, 313-23 (2017); Considering Police Body Cameras, 128 Harv. L. Rev. 1794, 1808-14 (2015).

Proposed CrR 3.8 requires video recording of identification procedures, including show-up identifications, which occur within minutes of a crime. Many victims who face the prospect of being recorded identifying the person who just attacked them will react with fear and decline to make an identification. Domestic violence victims, some of the most vulnerable, are most likely to fear retaliation. Members of immigrant communities also are likely to fear police recording their images in the current political climate. The requirement would endanger every person who is recorded identifying a suspect. Images of witnesses will be available for distribution via the PRA or the defendant (see proposed CrR 4.7(h)). The images will be used by those who want to intimidate witnesses, prevent their testimony, or retaliate. While fear of cooperation with the police and the danger of retaliation always exist, the recording of the witness making a show-up identification will increase both.

Proposed CrR 3.9 is poorly drafted, making its scope unclear. It appears to preclude identification of the defendant as the person contacted by law enforcement and immediately booked, identification by persons who have contact with defendant in custody, and identification by mental health experts who perform evaluations. The proponent's claim that all in-court identification is "unduly prejudicial, burden shifting and improper opinion evidence" is provocative but unsupported by any citation. There is no explanation of why current admissibility standards are insufficient. The reliability of such an identification is a matter for the jury, and this Court should reject the effort to exclude this important evidence.

Proposed CrR 4.11 should be rejected because it coerces witnesses to be recorded during defense interviews by penalizing refusal. Most witnesses already agree to be recorded. There is no justification for coercing the others - some may be reluctant, for example, to provide a recording of the details of a rape when it will be played for the rapist (he may even get a copy). As to subsection (b), there is no reason any party should be prohibited from using a recorded statement in other cases. The remedy provided in subsection (d) (if a witness does not consent) is misdirected. Parties now question witnesses about the reasons for refusing, and the jury is able to evaluate the significance of that refusal. Subsection (d) directs the trial court to improperly comment on the evidence, instructing the jury that a witness is untrustworthy. The mandated instruction directs the jury to examine the witness's reasons for refusing, but a court is extremely unlikely to permit a witness to explain that refusal was motivated by the defendant's (or associates') other violent behavior, violent reputation, or gang affiliation – as a result, the refusal could not be fairly evaluated by the jury. Further, the requirement that a witness reveal fear of persecution by ICE to obtain a fair evaluation of their credibility is an unreasonable burden and contrary to ER 413.

The proposed amendment to CrR 4.7(a) is described as an effort to incorporate the requirements of Brady v. Maryland. There is no need, Brady is a constitutional requirement that must be met regardless of court rule. It is no surprise then that the proposal goes much further than Brady. First, potential impeachment evidence falls within Brady only if it is material, but the proposed rule requires disclosure of evidence that tends to impeach

with no such limitation. Second, the Brady obligation extends only through conviction, but the obligation imposed by the proposed rule continues after sentencing, apparently without end.

The proposed amendment to CrR 4.7(h)(3) must be rejected because it creates an immediate danger to the safety of victims and witnesses. The proponent states that this amendment will "permit defense counsel to provide properly redacted discovery to defendants." That is permitted under the current rule. The proposal eliminates review of redactions by the prosecutor or court, guaranteeing that any mistakes in redaction (like including the victim's address) will not be caught. Mistakes will certainly be made, and this Court should not risk the safety of witnesses by eliminating review before a copy is given to the defendant. The list of matters to be redacted is shockingly inadequate. Additional matters must be redacted: other means of locating witnesses (e.g., school, employer); photographs of victims/ witnesses, which may be distributed or posted on social media for purposes of retaliation; intimate images; autopsy images (victims naked and with gruesome injuries); recordings of descriptions of sexual assault; video recordings of children describing child rape; child pornography; and medical records. The defendant may review and discuss this material with defense counsel (or staff) now; at issue in this rule is whether a copy of all of this material should be put in the defendant's hands, with no limitation as to how it will be used or distributed.

The comments that have been submitted relating to these rule changes demonstrate that they are ill-considered. This Court should reject them.

Respectfully,

Donna Wise
Senior Deputy Prosecuting Attorney
King County Prosecutor's Office