Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, February 8, 2019 11:42 AM
To: Tracy, Mary
Subject: FW: Proposed changes to criminal court rules

From: Vitalich, Andrea [mailto:Andrea.Vitalich@kingcounty.gov]
Sent: Friday, February 8, 2019 11:30 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed changes to criminal court rules

Dear Sir or Madam,

I have been practicing law for over 22 years. I have handled well in excess of 250 felony appeals, many of which involved issues of statutory construction. I have carefully reviewed the proposed changes to the criminal rules, and I am concerned about the consequences—both intended and otherwise—that these changes would have on long-standing principles of law and the rights of victims and witnesses. Each proposed rule will be discussed in turn.

Regarding CrR 3.7: This proposed new rule will impede investigations and result in the unwarranted suppression of evidence that has been obtained in compliance with the state and federal constitutions. Many people are reluctant to be recorded at all, and requiring law enforcement to record a person's refusal to be recorded is, quite frankly, absurd. Further, forcing a person to be recorded in order to record a refusal to be recorded violates the plain language of the Privacy Act. This rule presumes that any statement that is not recorded is presumptively unreliable, and it further presumes that police are inherently untrustworthy; among other obvious problems, the rule invades the province of the jury and undermines the truth-seeking function of the trial. Lastly, the rule is not explicitly limited to police; it may also apply to CPS workers, DOC employees, and any others who may speak with persons who may or may not eventually be charged with a crime. This is a broader policy issue best left to the Legislature.

Regarding CrR 3.8: This proposed new rule will result in the intimidation of victims and witnesses, and in decreased cooperation in criminal investigations—particularly among marginalized populations, including victims and witnesses who may be concerned about their immigration status (which is already a serious problem). Moreover, in conjunction with other proposed rules, victims and witnesses will fear—accurately—that these recordings will be made available to the defendant, who may then circulate the recording. Also, key terms in this rule are not defined, including "exact words" (how many?) and "important details" (who determines what is important?). The rule invites the trial court to give a jury instruction regarding the reliability of an identification, but it is difficult to envision how such an instruction be crafted so as to avoid commenting on the evidence in violation of the state constitution.

Regarding CrR 3.9: Well-settled law already governs when in-court identifications should be excluded; there is no need for a new, restrictive rule such as this one. This proposed new rule also contains no exception for law enforcement personnel; thus, a police officer who made an arrest or a detective who interviewed a suspect may be precluded from making an in-court identification of the defendant if he or she has not shown him- or

herself a photo montage or lineup. The term "unknown to the witness" is impermissibly vague; it appears possible that the rule would preclude an in-court identification by a victim who was held hostage by the defendant for several hours, but did not know the defendant beforehand. It would certainly exclude an identification by a victim or witness who viewed a defendant for a shorter period of time, but the defendant is especially distinctive-looking (*e.g.,* unique facial tattoos). And again, this rule would result in the suppression of competent evidence with no constitutional justification and in violation of the province of the jury.

Regarding proposed amendments to CrR 4.7(a): This amendment appears to extend the reach of the Brady doctrine to civilians, and it certainly creates an obligation for the prosecutor to follow all activities of anyone "acting on the State's behalf" in perpetuity to see if they may do something in the future that could be impeaching. This is simply impossible. A prosecutor's obligations already include RPC 3.8(g), which requires disclosure of new evidence of innocence, and, of course, Brady. In my experience, prosecutors take these obligations very seriously. Creating new and impossible standards is unwarranted.

Regarding proposed amendments to CrR 4.7(h): Allowing disclosure of all discovery to criminal defendants without notice to the prosecutor or the court would be, quite simply, unconscionable. Medical records, counseling records, autopsy photos, reports from sexual assault nurses, CPS records, explicit descriptions of sexual abuse, and other sensitive information could be provided to the defendant without knowledge or input from the prosecutor, and consequently, without notice to the victim or his/her surviving family members. To avoid such a catastrophic violation of privacy, prosecutors would be forced to redact all discovery and seek preemptive protection orders *before* providing any discovery to defense counsel, causing further delays in court proceedings. The increased workload for both parties, without any increase in funding, is untenable. The proposed redactions are not sufficient; email addresses, schools attended, workplaces, and other information would be provided freely. In my experience, defense attorneys do not always redact discovery to the extent necessary in accordance with the existing rule; the amended rule provides no incentive for careful redaction and no penalty for the failure to redact. Lastly, I have worked on serious cases where sensitive discovery was distributed among the defendant's family members, resulting in victim intimidation. Such instances would become more common if the current rule were to be adopted.

Regarding CrR 4.11: This proposed new rule appears to violate both Article I, Section 35 of the Washington Constitution and RCW 7.69.010 by not requiring that victims and witnesses be informed of their right to refuse to be recorded. In addition, limiting the dissemination of recordings violates the Public Records Act, and limiting the use of recordings to the specific case at issue would disallow impeachment of any witness, including the defendant, in any other case—which is inconsistent with the rules of evidence and basic fundamentals of cross-examination. On the other hand, under the proposed changes to CrR 4.7(h), the defendant him- or herself would have unfettered access to recordings and transcripts without regard to a victim's or witness's safety. Lastly, at least in my experience, this rule is a solution in search of a problem; most victims, witnesses, and law enforcement officers already agree to be recorded, so long as they are provided their own copy of the recording and/or transcript.

The above remarks are just a sampling of some of the more obvious problems with the proposed rule changes. I strongly recommend that these proposals be rejected.

Sincerely,
Andrea R. Vitalich
Senior Deputy Prosecuting Attorney, King County
WSBA #25535