EVERETT
WASHINGTON

CITY OF EVERETT
City Attorney's Office – Criminal Division

April 26, 2019

Supreme Court of Washington
Office of the Clerk of the Court
PO Box 40929
Olympia, WA 98504-0920

By this letter, the City of Everett Police Department and the City of Everett Prosecutor's Office respectfully object to the proposed rules suggested in Order 25700- A-1236, dated July 11, 2018 and asks the Supreme Court not adopt them.

The reasons are numerous and the following summarizes some of those concerns.

Recording Interrogations, Proposed changes to CrR 3.7 and CrRLJ 3.7:

First, what is an interrogation? Police officers exercising their community caretaking duties will often ask "are you OK? Do you need any help?" and these questions may eventually lead to the development of probable cause and an arrest or citation. But they most often do not, and a citizen in need or a casual conversation on the street between citizen and officer which is always being recorded will interfere with the goals of community policing making the community less safe. Citizens will be less likely to ask for help knowing that every contact with a police officer will potentially be on the internet.

Even if an "interrogation" is limited to suspects only, the police would be forced to arrive on the scene with a pre-conceived idea of who the suspect is or risk not recording a suspect developed by the investigation. This is over burdensome and interferes with criminal investigations, and is wrong.

This rule is an attempt to force every police officer in every situation to wear a body camera, but in addition to the above issues, such a mandate without financial support is a practical impossibility. Under current rules which do not require the recording of every "interrogation," the annual cost of simply maintaining and accessing the recorded files of 100 body cameras can be $500,000. If every encounter with a suspect was recorded this cost would rise.

And this annual cost does not include the additional staffing costs all prosecutors would face. The Supreme Court has mandated that defendants receive representation from an attorney handling no more than 400 cases per year. There has been no corresponding mandate for the citizens protected from crime, resulting in a prosecuting attorney handling three to four times the number of cases as a public defender. And a prosecutor does so while meeting, and in most every case surpassing, standards of professional conduct (the RPCs) and court and discovery rules which are more stringent for the state and municipality attorneys than those mandated for defense attorneys.

Recording Eyewitness Identification Procedure, Proposed changes to CrR 3.8 and CrRLJ 3.8

This proposed rule change is over burdensome and impractical. To enforce this rule, police departments would have to resort to having camera-only cars to follow patrol vehicles to show ups on the street. Without large expense, how does an officer record the suspect and the eye-witness using a car camera and body camera? The rule calls for police to employ camera crews. And the only result is less protection for the community.

Proposed paragraph 3.8(b) presumes that courts are allowing and juries are hearing only the most shoddy of eyewitness identifications. That is an insult to our courts. Defendants are already protected by rules of evidence and, hopefully, by defense counsel doing their jobs in examining and cross-examining witnesses.

And, as in the proposed rule changes to CrR 3.7 and CrRLJ 3.7, the privacy rights of ordinary citizens who are trying to help police protect their communities are at stake.

The overreaching in these proposed rules is astonishing. Take just the practical impact of 3.8(b)(7): If an aerospace worker in our community sees an impaired driver crash and get out of the driver's seat of the car before police arrive, identifies the driver for police and then tells a couple of dozen of her workers what she saw and did, this rule would obligate the police to track down all those "private actors" or risk not having the in-person identification admitted at trial.

In-Court Eyewitness Identification, Proposed changes to CrR 3.9 and CrRLJ 3.9

To require victims of crimes to know their perpetrators before identifying the person they know harmed them makes no sense. Example: Mr. Homeowner hears someone outside his home, sees through the window a person prowling inside his car, calls 911 and never takes his eyes off the suspect. He watched the suspect break into his neighbor's car and then sees police arrest the same person. He doesn't know the suspect at all, but does know the police arrested the person he never took his eyes off. But by a strict reading of this rule, this identification is inadmissible. This proposal makes no sense.

Proposed changes to Discovery rule CrR 4.7 and CrRLJ 4.7

Extending *Brady* requirements to all information, beyond the *Brady* requirement of materiality, is unwarranted.

The state and municipalities already have an ongoing obligation based on current rules and *Brady* to provide exculpatory evidence, but to extend that obligation to "others acting on behalf" of the government creates an uncertainty impossible to comply with. How intrusive is the government to become with civilian witnesses "or another civilian" to satisfy this rule?

The changes proposed to Rule 4.7(h) opens the door to re-victimizing victims. Review by the prosecutor is essential to protect the public. It is our experience that even with good effort, there are always some items Defense counsel has missed in their initial attempts to redact. Our review protects our citizens.

Proposed changes to Recording Witness Interview, CrR4.11 and CrRLJ 4.11

This proposed rule change runs counter to the Legislature's promulgation that victims and witnesses in criminal cases be treated with the dignity, respect, courtesy and sensitivity, and 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.

The proposed jury instruction invites judicial comment on the credibility of a witness and is thus unconstitutional. If the jury is to be instructed to consider the bias of someone refusing to be recorded, the door must be thrown open to consider all that created that bias, including prior bad acts, threats and acts of intimidation the witness believes to have occurred.

Adoption of these proposed rule changes would burden police and prosecutors, would threaten the privacy of ordinary citizens, would inhibit those ordinary citizens from helping to protect their own communities and would be financially costly.

We respectfully request that the Court not adopt any of these proposals.

Sincerely,

Jackie Hogan, Jackie Hogan Administrative Secretary on behalf of Leslie Tidball

Leslie A. Tidball
Lead Prosecutor
City of Everett