

# Pierce County

Office of Prosecuting Attorney

REPLY TO:  
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April 29, 2019

Susan L. Carlson  
Washington State Supreme Court Clerk  
P.O. Box 40929  
Olympia, WA 98504-0929  
Email: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

RE: Proposed Amendments to Criminal Rules

Dear Ms. Carlson:

This letter is to express concern over the proposed amendments to the court rules by the Washington Association of Criminal Defense Lawyers (WACDL). The proposed rules ignore Washington laws protecting victims, violate the Washington Privacy Act, and have far reaching implications that go well beyond the purpose of court rules and discovery and interfere with long-standing principles of law. The Pierce County Prosecutor's Office is opposed to the amendments of the court rules as proposed by WACDL.

### **CrR 3.7 / CrRLJ 3.7:**

The proposed amendment would require drastic changes to internal police procedures of every person and every incident that may be related to a crime. During the beginning stages of an investigation, nearly everyone is under investigation. An individual may initially be considered a witness, but become a suspect through ongoing investigation. The rule fails to take this into consideration. Requiring audiovisual recordings of everyone at any location (on the street, at a crime scene, in someone's home, or in various public locations) places an unreasonable burden on law enforcement. Many people are reluctant to answer questions while being video recorded or are simply unwilling to make statements while being recorded. Also, it is a violation of Washington Privacy Act to record a person's refusal to be recorded. It is also unlikely that a person who refuses to be recorded would allow a recording of that refusal.

The proposed rule places an unwarranted and nearly impossible burden on law enforcement that only serves to obstruct justice. Most police agencies lack the funding and resources to record the broad range of encounters with individuals that the proposed rule would require. The rule places an unrealistic mandate on police agencies. There are monumental costs involved not only with providing audiovisual recording devices for anyone conducting these investigations, but also with

storing, preserving, and disclosing such recordings until the defendant is deceased (there is no limit to habeas review).

The rule also presumes that law enforcement officers are unreliable and untrustworthy and that any statement that fails to comply with the rule is untrustworthy and presumed inadmissible. This is an extreme and unnecessary remedy that would exclude relevant and material evidence from the jury's consideration, even under circumstances where the statements were clearly voluntary. The rule invades the province of the jury, which has long been tasked with making credibility determinations. Presumed inadmissibility and suppression of a statement without any showing that the statement was coerced or made involuntarily is an extreme remedy that cuts against the current case law involving when a statement is properly suppressed. The lack of any recording goes to the weight of the statement at issue, not its admissibility .

The rule would open up endless and extensive litigation into numerous areas, including: (1) Who does the rule apply to? The rule does not refer to "law enforcement" officers. (2) What is "due diligence" in maintaining equipment? (3) What are "substantial exigent circumstances?" (4) The rule applies to anyone "under investigation for any crime." That has very broad implications, as a witness could turn into a suspect during questioning. The proposed rule will drastically impede investigations and result in unnecessary suppression of evidence that was obtained in accordance with constitutional law. It undermines the justice system by suppressing evidence not captured on video and ignores long-standing principles of law and rules of evidence.

#### **CrR 3.8 / CrRLJ 3.8:**

This proposed rule will needlessly result in the intimidation of victims and witnesses who may fear retaliation and lead to decreased cooperation in criminal investigations. It also provides vague standards. What does "when practicable" mean? What is the meaning of "possible" when the rule references "if neither video- nor audio-recording is possible?" What if the victim/witness refuses to be recorded, but law enforcement has the ability to make a recording. Does that mean the recording "is possible?" What are "important details?" Who determines what is important? Further, the remedy provision will lead to endless litigation over the importance of certain omitted details and whether it was feasible to obtain and/or preserve those details. Existing constitutional and common law standards adequately address the admissibility of identification procedures.

#### **CrR 3.9 / CrRLJ 3.9:**

Well-settled law governs when in-court identifications should be excluded and there is no need for this restrictive rule. The rule does not contain an exception for law enforcement officers. The proposed rule would prohibit law enforcement officers from making an in-court identification of a defendant. This would make some crimes nearly impossible to prosecute without the officer identifying the person arrested (ie: Driving Under the Influence, Driving While License Suspended, Unlawful Possession of a Firearm, Unlawful Possession of a Controlled Substance). Further, the phrase "unknown to the witness" is vague.

#### **CrR 4.7 / CrRLJ 4.7:**

This proposed rule places an impractical and unreasonable burden on the State by requiring it to disclose any information that "tends to impeach" any State witness, without limiting that obligation to material evidence. The State's requirements pursuant to *Brady* are limited to material evidence. There is no justification for such an extreme expansion of *Brady*. Expanding the State's obligation to disclose *any* evidence that could be impeaching, without any reference to materiality,

is unreasonable. And based on the language indicating that the duty is “ongoing” even after sentencing, the State would be required to continually monitor witnesses...forever...to determine if any information has arisen that should be disclosed. And who is the State expected to disclose this information to? If the State discovers this information years after a defendant has been convicted and served his sentence, is the State expected to use resources to attempt to locate the now unrepresented defendant? The proposed rule places an unnecessary and unreasonable burden on the State without any showing that such an expansion is warranted.

**CrR 4.11 / CrRLJ 4.11:**

This proposed rule coerces witnesses and victims into being recorded by calling into question their credibility if they exercise their right not to be recorded. Requiring a jury instruction as to their credibility in such a situation is an improper and unconstitutional comment on the evidence. Witnesses and victims may not want to be recorded for a variety of reasons, including fear of retaliation. An instruction that the choice not to be recorded calls into question their credibility is improper. Further, the proposed rule would allow witness/victim interviews to be recorded without consent as it indicates that counsel “may” record the interview and includes no requirement that they be informed of their right to refuse.

In conclusion, the proposed rules are unnecessary and serve no legitimate purpose. They are designed to negatively impact both law enforcement and prosecutions. The effect of these proposed rules on victims, witnesses, law enforcement investigations, and subsequent prosecutions would be extreme and devastating to the justice system. For the reasons outlined above, the Pierce County Prosecutor’s Office respectfully requests that the Court reject the proposed amendments.

Sincerely,



Kristie Barham  
Deputy Prosecuting Attorney

## Tracy, Mary

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, April 29, 2019 10:23 AM  
**To:** Tracy, Mary  
**Subject:** FW: Proposed amendments to criminal court rules  
**Attachments:** Comments-ProposedRuleChanges.pdf

**From:** Kristie Barham [mailto:kristie.barham@piercescountywa.gov]  
**Sent:** Monday, April 29, 2019 10:22 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Proposed amendments to criminal court rules

Attached are comments on the proposed amendments to the criminal court rules.

Thank you,  
Kristie Barham