Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, February 28, 2019 3:28 PM
To: Tracy, Mary
Subject: FW: Comments to proposed Rules 3.7, 3.8, 3.9, 4.7, and 4.11

From: McCoy, Adrienne [mailto:Adrienne.McCoy@kingcounty.gov]
Sent: Thursday, February 28, 2019 3:27 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to proposed Rules 3.7, 3.8, 3.9, 4.7, and 4.11

The fact finder is the sole judge of credibility. These proposed rules/rule changes show a fundamental mistrust of juries, specifically jurors' ability to evaluate the credibility of evidence. This is an affront to our entire criminal justice system. The Court should refuse to make rules that usurp the role of the jury.

Proposed CrR 3.7 and 3.8 propose something extraordinary: the suppression of constitutionally valid evidence that a jury may still find credible. CrR 3.7 and 3.8 presuppose that police lack credibility and therefore having an officer say what a defendant said (3.7) or say that a witness identified someone (3.8) are so inherently unreliable that they should be inadmissible, unless there is video proof. In essence CrR 3.7 and 3.8 say that police, because they are police, cannot satisfy hearsay exceptions (party opponent, statement of identification). This undermines the fundamental nature of our fact finding system: allowing the jury to determine credibility.

In 20 years of criminal trial practice, I have observed that the police record suspects and witnesses whenever possible. Prosecutors encourage recorded statements, and both police and prosecutors prefer recorded statements. However, if the suspect or witness refuses or the recording equipment is not available, admissible evidence would be arbitrarily excluded. This is unnecessary and would compromise the safety of victims, witnesses, and the community.

The identification procedures proposed in 3.8 are unworkable and unreasonable. A jury is capable of evaluating the reliability of an identification based upon the available evidence.

Regarding 3.9: Determination of whether an in-court identification procedure should be excluded is already adequately covered by case law – a more restrictive rule is unnecessary.

The argument that already is made is that in-court identification should be precluded if there <u>has</u> been a prior identification procedure. This rule sets up a Catch-22 for the prosecution, resulting in exclusion of all in-court identifications. It again mistrusts a jury's ability to consider what weight to give a constitutionally valid identification.

4.7 amendments allowing defendant's discovery without notice to the state places witnesses and victims at extreme risk. The additional discovery obligation for information that "tends to impeach a witness" exceeds the settled Brady requirements and places impossible discovery obligations on prosecutors to know the unknowable.

Proposed amendment to 4.11 violates RCW 7.69.10. The people of this State intend that victims and witnesses in criminal cases be "treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are 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. This proposed rule effectively allows attorneys to mislead or intimidate witnesses who are reluctant to be recorded, which is inconsistent with this most basic principle of justice. Instructing the jury to consider a witness' refusal to be recorded in a particular way is an unconstitutional comment on the evidence.

Adrienne McCoy
Senior Deputy Prosecuting Attorney
206-477-1933