

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, March 12, 2019 3:03 PM
To: Tracy, Mary
Subject: FW: Comment on Proposed Court Rule Changes to 3.7, 3.8, 4.7, and 4.11

From: Froh, Amanda [mailto:Amanda.Froh@kingcounty.gov]
Sent: Tuesday, March 12, 2019 3:01 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Court Rule Changes to 3.7, 3.8, 4.7, and 4.11

Clerk of the Supreme Court,

As an elder abuse prosecutor (and prosecutor of all types of crime for the past 16 years) who has frequent contact with vulnerable victims who have suffered abuse, neglect and financial exploitation, I feel the need to speak out loudly and clearly against the criminal rule changes to CrR 3.7, 3.8, 4.7, and 4.11 proposed by the defense bar that are being considered by the Supreme Court. These proposed rules endanger and demean victims of crime, would have the effect of intimidating victims of crime from cooperating in a police investigation, and are an attack on otherwise admissible evidence that presents a critical threat to the pursuit of justice. Here are my primary concerns:

As to Proposed CrR 3.7 (Recording Interrogations):

- **Proposed CrR 3.7 will impede effective law enforcement because many individuals are reluctant to be recorded.** Requiring them to be recorded will decrease cooperation with police. It is illogical and a violation of the Washington Privacy Act to record the refusal of a person who refuses to be recorded.
- **The rule encompasses every encounter with a potential suspect, no matter how casual or innocuous, on the scene, on the street, at their home, in a vehicle, or at any other location.** It imposes an unreasonable burden on law enforcement.
- **Proposed CrR 3.7 appears to be predicated on a belief that police are inherently untrustworthy and cannot be taken at their word.** The credibility of witnesses is a matter for the judge or jury to decide after hearing all of the evidence.
- **The rule is impractical – most police agencies in Washington lack the resources to record and preserve the broad range of interactions that would fall within the rule.** The additional burden of preserving detailed maintenance records of every recording device used also is unwarranted, and there appears to be no funding (for preservation, training, etc.) attached to the enactment of such a rule. Proposed CrR 3.7 imposes an impossible burden. It would require universal recording of everyone with whom an investigator speaks/ interacts to avoid errors, violating the privacy rights of citizens and producing a massive amount of recordings that will be subject to public disclosure
- **Proposed CrR 3.7 is not limited to interrogations by law enforcement.** Does it apply to retail security? Child/ Adult Protective Service employees? DFI investigators? This comes into play when there are regulatory agencies involved in matters that are later determined to be criminal, which is very concerning.
- **The remedy for violation of CrR 3.7, exclusion of the statement and all subsequent statements, is extreme and unnecessary.** Under State and Federal law, exclusion is always an extreme remedy, and should remain so.
- **This rule will keep relevant and sometimes critical evidence from the jury when there is no question that a statement was voluntarily given.**

- In order to admit a statement that is not recorded the rule imposes a burden on the State to prove the defendant's statement is reliable, when the probative value may be in the lies that the defendant is telling.

As to Proposed Rule CrR 3.8 (Recording Eyewitness Identification Procedure):

- Proposed CrR 3.8 will impede effective law enforcement, because many individuals are reluctant to be recorded. With respect to vulnerable victims (such as the elderly who may likely be victims of stranger scams), DV victims, human trafficking victims, and any victim of a violent crime or gang-related violence, they will fear retaliation because they will anticipate (accurately) that their assailant will have access to the recording and their image may be circulated to associates of the defendant for purposes of retaliation.
- Existing constitutional and common law standards adequately address the issue of admissibility of identification procedures.

As to Proposed Rule 4.7 (Discovery)

- It is unreasonable to require the State to disclose evidence of which it is unaware when that evidence is known only to a witness or another civilian. While the Brady obligation extends to evidence known to law enforcement directly involved in an investigation, it certainly does not extend to civilians who are not State agents. If the proposed amendment is not intended to expand the Brady rule, then it is entirely unnecessary.
- The amendment to regulation of discovery (subsection (h)) fails to preserve and protect victim and witness rights to keep their personal information private. In my experience (in the current system where defense provides a copy of the redacted discovery for review by the DPA before providing it to the defendant), the redactions are almost always inadequately done. The defense has no incentive to properly redact discovery for their client, and there is no accountability to do so under the auspices of the new proposed rule. This could lead to endangering witnesses or unnecessarily invading the privacy of victims and witnesses. The list of redactions is obviously insufficient given the sensitive information found in a criminal case, including personal location information (such as employer information, addresses, etc.), PHI, sexually explicit images, financial records, mental health and counseling records, autopsy records, etc.

As to Proposed Rule 4.11 (Recording Witness Interview):

- This rule coerces victims and witnesses to agree to recording and misleads them about their rights, which is contrary to our mandate 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; Article I, Section 35, Wa. Const.
- This rule is unnecessary as the vast majority of witnesses agree to be recorded.

Thank you for providing the opportunity to comment on these rules.

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