Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, April 30, 2019 12:09 PM
To: Tracy, Mary
Subject: FW: issues with proposed rule changes

From: Gauen, Benjamin [mailto:Benjamin.Gauen@kingcounty.gov]
Sent: Tuesday, April 30, 2019 12:07 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: issues with proposed rule changes

Good Afternoon:

I foresee the following problems with these proposed rule changes:

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.
- **At the beginning of an investigation, almost everyone is under investigation and requiring audio-visual recording of the questioning of everyone at the scene of a violent crime will obstruct justice, as many will be reluctant to speak when video recorded.** The rule does not take into account that a person may first appear to be only a witness but later become a suspect.
- **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.

CrR 3.8 – Recording Eyewitness ID Procedure

- Proposed CrR 3.8 will impede effective law enforcement, because many individuals are reluctant to be recorded. With respect to 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.
- The rule will result in intimidation of victims (and witnesses) of violent crimes when recordings of them making an identification are circulated by the defendant. The recordings will be available under the Public Records Act upon the filing of charges.
- How does it further justice to bar evidence of identification procedures rather than allow the jury to determine the weight of the evidence, which is tested by cross-examination?

- The rule is impractical – most police agencies in Washington lack the resources to record and preserve all identification procedures. The rule would encompass identifications at the scene of traffic accidents as well as ongoing violent crimes.
- Existing constitutional and common law standards adequately address the issue of admissibility of identification procedures.

CrR 4.7 – Discovery

In particular: This **includes favorable evidence known to others acting on the State's behalf in the case,** including the police. The prosecuting authority's duty under this rule not conditioned on a defense request for such material. **Such duty is ongoing, even after plea or sentencing.**

- The proposed amendment to CrR 4.7 requires the State to disclose evidence known to anyone acting on the State's behalf, which arguably includes any State witness, especially with the concluding clause, "including the police." It could be construed to include witnesses testifying pursuant to a plea agreement. 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 courts have defined what is "material" to guilt or punishment in cases applying the rule of Brady v. Maryland, but this rule does not refer to that definition and so invites courts to apply a much broader definition. There is no justification offered for applying a broader definition. If the proposed amendment is not intended to expand the Brady rule, then it is unnecessary.
- The amendment requires disclosure of all evidence that "tends to impeach" any State witness, without limiting that obligation to material evidence. There is no justification for such a radical expansion of the Brady obligation, which is limited by a materiality requirement.
- This proposed amendment completely eliminates any restriction on the obligation of the State to disclose evidence that may be known to anyone. It invites the courts to conclude that the State has the duty to collect all evidence that may be exculpatory, which is the responsibility of the defense, not the State, and is an obligation that would never be satisfied.
- The overbreadth of the State's obligation to learn of all evidence that "tends to impeach" any State witness regardless of materiality is further exacerbated by the imposition of a duty to learn of such evidence and disclose it until the end of time.
- The proposed amendment imposes an obligation on the prosecution to continue to track its (and the investigating police agency, and others acting on the State's behalf) contacts with all witnesses in every case, forever, so that if they ever act in a way which would tend to impeach their testimony, that can be disclosed.
- The proposed amendment requires ongoing disclosure after sentencing, but to whom? It implies an obligation to locate an unrepresented defendant even if the conviction is final, the sentence has been served, and the conviction may even have been vacated. This is an unreasonable burden with respect to evidence that is not materially exculpatory.
- After sentencing, RPC 3.8(g) requires a prosecutor to disclose "new, credible and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted." That is a reasonable post-sentencing obligation. The much broader requirements of this proposed rule are unnecessary and impose an unreasonable burden on the State.

Another section: (h) **Regulation of discovery**. Defense counsel may provide discovery to the defendant without a prosecutor's or court knowledge or approval.

- Under this amendment, defense counsel does not have to provide notice to the State before giving the discovery to the defendant. So, in order to protect the safety and privacy of victims and witnesses, prosecutors will have to review all discovery before providing it to the defense, to be able to move for protective orders preventing release of sensitive information to the defendant. This will delay providing discovery to the defense in most cases, and increase the workload of all parties and the courts as the requests for protective orders are litigated.
- The list of necessary redactions is obviously insufficient. Redactions that currently are required by prosecutors as a general rule also include the following: all contact information for all potential witnesses, including email; schools attended by witnesses; job locations and employers of witnesses; medical records; mental health and counseling records; CPS records; photos or video (including on a digital device, or in an electronic file) with images of any part of any person or animal; and any description or depictions of actual, attempted, or simulated sexual contact. Defense counsel is always permitted to review these items with the defendant but it is obvious that putting copies of this material (including autopsy photos, photos of injured victims, and sexually explicit images) in the hands of the defendant would endanger witnesses or unnecessarily invade their privacy for the prurient interest of the defendant or anyone with whom he shared the material.
- It has been the experience of prosecutors that defense counsel often do not properly redact discovery that they have submitted to the prosecutor for approval before providing it to the defendant, pursuant to the current rule. It poses unnecessary risks to the safety and privacy of victims and witnesses to eliminate this second set of eyes reviewing the redactions.
- There will be no incentive for defense counsel to carefully redact the discovery, as there is no penalty for failure to do so.
- There is no effective remedy if the defendant is provided with incompletely redacted discovery, so eliminating review by the prosecutor is contrary to the community's interest in public safety.

CrR 4.11 – Recording Witness Interview

Counsel for any party (or an employee or agent of counsel's office) **may** conduct witness interviews by openly using an audio recording device or other means of verbatim audio recording, including a court reporter.

- 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.
- Because the rule coerces victims and witnesses to agree to recording, it violates Article I, Section 35 of the Washington Constitution which requires that crime victims be afforded due dignity and respect.
- The vast majority of witnesses already agree to recording of interviews by the parties. In the rare instances when a witness is reluctant to be recorded, there are likely to be good reasons for that related to the subject matter (e.g. sexual assault) or because of their fear of the

defendant. Coercing such a witness to be interviewed (by a negative jury instruction if they refuse) is simply offensive.

- The proposed rule coerces the witness to agree to recording, by failing to inform them of the right to refuse and by punishing refusal. It is likely to result in some witnesses refusing to further cooperate with prosecution, defeating the interests of justice and reducing community safety.
- The rule does not address the necessity to obtain consent to recording by all others present.

Witness Consent. A witness **may refuse** to be recorded.

- **The rule invites a court to craft a jury instruction "to examine the statement carefully," inviting a comment on the credibility of a particular witness without giving any real direction to the trial court. Judicial comments on the evidence are unconstitutional in Washington.**
- It is inappropriate to use a person's right to refuse to be recorded against them.
- It is inappropriate for a jury in a criminal case to be directed to determine the legitimacy of a person's refusal to be recorded, which is that person's right.
- If a jury is to be instructed to consider the reasons for the refusal, which it must be in order to evaluate its legitimacy, it must be permitted to hear of the prior bad acts (including threats and intimidation) of the defendant and the character of his or her associates to evaluate the witness's fear of retaliation. The witness's subjective fears, even if not based on verifiable facts, also should be considered by the jury in order to fairly evaluate the reason for the refusal. The rule should specify that if the victim is not permitted to explain the refusal in full, no instruction should be given.
- There is no reason to infer bias from the refusal to be recorded.
- The reference to motive is nonsensical.
- The jury determines the credibility of witnesses. It is already informed if a witness has refused to be recorded. The jury is instructed to consider any relevant circumstances in judging credibility and the defense may argue that the refusal is relevant. The only additional effect of this rule is to coerce the witness to be recorded and to invite a judicial comment on the witness's credibility – both are improper purposes for a court rule.

Thank you,

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